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SC Court of Appeals

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

Appeal from Spartanburg County
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Cases No. 2019-CP-42-03708 and 2019-CP-42-03709

Appellate Case No. 2022-001059

Kenneth Pace,
Individually and as Personal Representative of
the Estate of Earl E. Pace,

Respondent,

v.

Lake Emory Post Acute Care; THI of South Carolina at Camp
Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.;
Fundamental Administrative Services, LLC; Fundamental
Clinical and Operational Services, LLC; Fundamental Clinical
Consulting, LLC; Fundamental Long Term Care Holdings, LLC;
and Kerry L. Wheeler, DO,

Defendants,

Of which Lake Emory Post Acute Care; THI of South Carolina at
Camp Care, LLC; THI of South Carolina, LLC; THI of
Baltimore, Inc.; Fundamental Administrative Services, LLC;
Fundamental Clinical and Operational Services, LLC; and
Fundamental Long Term Care Holdings, LLC, are

Appellants.

**RECORD ON APPEAL
VOLUME II
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¹ “3708” refers to Circuit Court Case No. 2019-CP-42-03708.

² “3709” refers to Circuit Court Case No. 2019-CP-42-03709.

³ The “Facility” refers to both the Defendant/Appellant identified as Lake Emory Post Acute Care (“LEPAC”) and Defendant/Appellant THI of South Carolina at Camp Care, LLC (“Camp Care LLC”), collectively. (Note: LEPAC and Camp Care LLC are misidentified in the caption as separate entities, which they are not. Rather, LEPAC is the name under which Camp Care LLC does business.)

⁴ “FAS” refers to Defendant/Appellant Fundamental Administrative Services, LLC.

⁵ “FCOS” refers to Defendant/Appellant Fundamental Clinical and Operational Services, LLC.

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⁶ “HVH” refers to Defendant/Appellant Hunt Valley Holdings, LLC f/k/a Fundamental Long Term Care Holdings, LLC.

⁷ “THIB” refers to Defendant/Appellant THI of Baltimore, Inc.

⁸ “THISC” refers to Defendant/Appellant THI of South Carolina, LLC.

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STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Kenneth Pace, Individually and as Personal
Representative of the Estate of Earl E.
Pace,

Plaintiff,

v.

Lake Emory Post Acute Care; THI of South
Carolina at Camp Care, LLC; THI of South
Carolina, LLC; THI of Baltimore, Inc.;
Fundamental Administrative Services, LLC;
Fundamental Clinical and Operational
Services, LLC; Fundamental Clinical
Consulting, LLC; Fundamental Long Term
Care Holdings, LLC, and Kerry L. Wheeler,
DO,

Defendants.

IN THE COURT OF COMMON PLEAS

2019-CP-42-03709

2019-CP-42-03708

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO THE MOTION
DISMISS, TO COMPEL ARBITRATION,
AND TO STAY THE STATE COURT
PROCEEDING**

The Plaintiff Kenneth Pace, Individually and as the Personal Representative of the Estate of Earl E. Pace", respectfully submits this Memorandum in Opposition to the Motion to Dismiss, Compel Arbitration, and Stay the State Court Proceeding, (hereafter "Motion to Dismiss"), filed by the Defendants in the above referenced cases. For the reasons set forth below, the Plaintiff respectfully requests that this Court deny the Defendants' Motion to Dismiss and allow these matters to proceed to a trial by jury.

I. BACKGROUND FACTS

In 2014, Mr. Pace was living in his home with help from local family members. See Complaint for Adult Protective Services attached as Exhibit A.

Department of Social Services, (hereafter “DSS”), investigated complaints against certain caregivers of Mr. Pace and ultimately Mr. Pace was taken into protective custody on or about July 10, 2014. *See id.* DSS petitioned the court for custody of Mr. Pace and temporary custody was granted on or about July 14, 2014; Joanne Metcalf was appointed as the Guardian *ad Litem*, (hereafter “GAL”), for Mr. Pace; and Kimberly Brooks, Esq. was appointed as attorney for the Guardian. *See* Order dated July 16, 2014 attached as Exhibit B. Chad Mitchell, Esq. was appointed as attorney for Mr. Pace. *See id.* DSS subsequently petitioned the court to be relieved of custody and recommended that Lake Emory designate the Plaintiff as Mr. Pace’s representative. *See* Correspondence and Order dated May 29, 2015 and April 24, 2015 respectively attached as Exhibit C.

Mr. Pace was admitted to Lake Emory Post Acute, (hereafter “Lake Emory”), for care and supervision on or about January 30, 2015. (*See* Plaintiff’s Complaints for Survival Action and Wrongful Death for all factual allegations). Mr. Pace was admitted to Lake Emory from Spartanburg Regional Medical Center. Upon admission, Mr. Pace took no medication to manage his blood sugars. Mr. Pace was sent back to be admitted to the hospital on or about April 9, 2017 when he experienced some delirium. During that hospitalization, Mr. Pace was treated for a UTI and adjusted his psychiatric medications. Mr. Pace was hospitalized until April 20, 2017 when he was returned to Lake Emory. Upon return to Lake Emory, nursing staff and Dr. Wheeler ordered Levemir 47 units two times a day as well as Tradjenta 5 mg once a day – despite that prior to being sent to the

hospital, Mr. Pace was not receiving any medication to control blood sugar. Neither of these medications were given to Mr. Pace during his hospitalization. Defendants administered medications to Mr. Pace to control blood sugar that he did not need and ultimately caused him to experience extreme hypoglycemia with a blood sugar of 14, on or about April 27, 2017.

Mr. Pace was transferred back to Spartanburg Regional Medical Center on or about April 27, 2017 where he was diagnosed with hypoglycemic encephalopathy. Mr. Pace's prognosis was poor and the recommendation was made to keep him comfortable and to provide hospice services. Mr. Pace was transferred to the Hospice House in Clinton where he passed away.

The Plaintiff in this action is Kenneth Pace, the son of the Decedent. Plaintiff filed his Summons and Complaints alleging a Survival Action and a Wrongful Death Action on or about October 21, 2019. The Defendants filed their Motion to Dismiss on or about April 13, 2020. At the time Mr. Pace was admitted to the Defendant Lake Emory, he was under the custody of DSS. Despite having a GAL and a court appointed attorney, a DSS employee by the name of "Calvin Hill" executed Mr. Pace's admission paperwork. The contract with Lake Emory, (hereafter "Admission Agreement") is attached as Exhibit D and the separate arbitration agreement executed by Mr. Hill and that the Defendants are attempting to enforce against the Plaintiff is attached as Exhibit E, (hereafter "Arbitration Agreement").

II. LAW/ANALYSIS

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *See New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (S.C. Ct. App. 2008). The Arbitration Agreement presented by the Defendants is not enforceable for the following reasons: (1) the Arbitration Agreement was not executed by someone with legal authority to act for Mr. Pace; and (2) the Arbitration Agreement cannot be enforced against Plaintiff Kenneth Pace as a non-signer because (i) the Admission Agreement and Arbitration Agreement are not merged and (ii) the doctrine of equitable estoppel does not apply to the facts of this case.

In order to compel arbitration pursuant to the Federal Arbitration Act, a litigant must demonstrate a valid arbitration agreement that purports to cover the dispute. *See Aiken v. World Finance Corp. of S.C.*, 373 SC 144, 149, 644 SE2d 705, 708 (2007). Where one party denies the existence of a valid arbitration agreement, a court must immediately determine whether the agreement exists in the first place. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 SC 14, 644 SE2d 663, 667 (2007). If no agreement is found to exist, the court must deny the request to arbitrate. *See id.* Whether a valid arbitration agreement exists is a matter for judicial determination. *See York v. Dodgeland of Columbia, Inc.*, 406 SC 67, 749 SE2d 139, 144 (Ct. App. 2013).

A. THE ARBITRATION AGREEMENT IS NOT ENFORCEABLE BECAUSE IT WAS NOT EXECUTED BY SOMEONE WITH AUTHORITY TO EXECUTE ON BEHALF OF MR. PACE.

The Arbitration Agreement in this case was executed by Calvin Hill, an employee of DSS. Mr. Hill documented that he was signing as the “DSS Representative.” Because Mr. Pace did not execute the Arbitration Agreement himself, Calvin Hill must have had the appropriate legal authority to execute the Arbitration Agreement for it to be enforceable. At the time of admission to Lake Emory, Mr. Pace had both a GAL, Ms. Metcalf, and a court appointed attorney, Mr. Mitchell. Plaintiff would concede that Mr. Mitchell would arguably have had the requisite legal authority under South Carolina law to execute an arbitration agreement for Mr. Pace.¹ However, Mr. Hill would have no legal authority to execute an arbitration agreement for Mr. Pace. There is no support for the contention that an arbitrary employee of DSS has authority to bind a vulnerable adult to arbitration. Nor is there a statute that would authorize such execution of an arbitration agreement.

The South Carolina Health Care Consent Act, (hereafter “SCHCA”), codified at South Carolina Code Ann. § 44-66-10 *et seq.* provides that in the event an adult is unable to provide consent regarding proposed healthcare, the SCHCA creates

¹ South Carolina Code §43-35-220 provides for the responsibilities of the Guardian *ad Litem*. Plaintiff can find no authority in South Carolina for the proposition that the GAL has authority to bind the vulnerable adult to arbitration and waive the constitutional right to a jury trial. *See also CL SNF, LLC v. Fountain*, 355 Ga. App 176 (Ga. Ct. App. 2020) (wherein the court determined that the court appointed guardian did not have authority to execute an arbitration agreement when the arbitration agreement was not part of the admission agreement and was not reasonably necessary to provide for the incapacitated individual’s support, care, education, health, or welfare). Attached as Exhibit F.

a priority list of those able to consent on his behalf. It is clear from that section that Ms. Metcalf and Mr. Mitchell were the first and second health care surrogates thereunder. A careful reading of the section suggests that Mr. Hill would have authority under the SCHCA to admit Mr. Pace to the facility under §44-66-30(A)(10). However, while courts have routinely held that healthcare surrogates may make healthcare related decisions under the Act, including admission to a nursing home, the SCHCA does not give authority for those surrogates to waive the constitutionally protected right to a trial by jury.

The South Carolina Supreme Court has expressly ruled that a health care surrogate does not have authority under the SCHCA to execute an arbitration agreement. *See Scott v. Heritage Healthcare of Estill, LLC*, 2014 S.C. App. Unpub. LEXIS 403 (S.C. Ct. App. Aug. 6, 2014) (attached as Exhibit G). *Scott* involved a case in which the personal representative of the estate of a patient who died at a nursing home brought suit and the defendants sought to compel arbitration. *Id.* The patient's sister had signed an arbitration agreement on behalf of the patient when admitting her to the facility. *Id.* The sister did not possess a health care power of attorney to sign either contract on her behalf. *Id.* The court held that the arbitration agreement was not enforceable because the SCHCA did not give authority for a surrogate to execute an arbitration agreement.

The *Scott* unpublished opinion was discussed in detail in the case of *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018). The Court determined that a nursing home could not compel the

plaintiff to arbitration when the competent resident had not executed the arbitration agreement. *Id.* The arbitration agreement was executed by the patient's husband who did not have a power of attorney for his wife. *Id.* The Court determined that the SCHCA did not provide the husband with authority and the arbitration agreement was not enforceable. *See also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346 (S.C. 2014); *Thompson v. Pruitt Corp.*, 2016 S.C. App. LEXIS 24 (S.C. Ct. App. 2016).

In *Thompson*, the court determined "the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial." *Id.* at 55, 784 S.E.2d at 686. Like *Scott* and *Hodge supra*, *Thompson* involved a nursing home facility seeking to compel arbitration. A woman's children had their mother transferred from a hospital to a nursing home facility. *Id.* The son signed an admission agreement, an arbitration agreement, and several other documents on behalf of his mother, who suffered from dementia. *Id.* The mother was not present at the time as she was in the process of being transported to the facility. *Id.* After the mother's death, the daughter brought suit, individually and as personal representative, and the facility and its owners filed a motion to compel arbitration. *Id.* The circuit court denied the motion to compel, finding the son did not have authority to execute the arbitration agreement on his mother's behalf under either common law agency principles or the SCAHCA. *Id.*

Coleman addressed an arbitration agreement that was wholly separate from the admissions agreement executed by the sister of the patient. Although the signatory did have the requisite authority to make healthcare decisions – because admission to the nursing home was not contingent on the execution of the arbitration agreement, the court held that the signatory did not have authority to bind the patient to the separate voluntary arbitration agreement. *See id.* The court concluded that the arbitration agreement was not enforceable. *See id.*

Calvin Hill did not have the legal authority to execute the Arbitration Agreement for Mr. Pace. Furthermore, Calvin Hill lacked common law agency authority to execute an arbitration agreement for Mr. Pace. Agency is a fiduciary relationship that results when one person consents to be subject to the control of the other and to act on his behalf. *See R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 540 S.E.2d 113 (S.C. Ct. App. 2000). Mr. Pace was diagnosed with dementia, was incompetent, and unable to provide consent or acquiesce to Mr. Hill's actions. *See Thompson, supra.* Furthermore, even if authority had been given to Mr. Hill, which is expressly denied, the *Thompson* court recognized the principle that the authority conveyed to an agent does not encompass executing an agreement to resolve legal claims through arbitration. *See id.*

The Arbitration Agreement presented by the Defendants in this case was executed by a person without any authority to bind Mr. Pace to arbitration or

waive his right to a jury trial. Accordingly, the Arbitration Agreement cannot be enforced.²

B. THE ARBITRATION AGREEMENT CANNOT BE ENFORCED AGAINST PLAINTIFF KENNETH PACE AS A NON-SIGNER.

Although there is public policy favoring arbitration – it is applied only as an aid in interpreting the scope and enforcement of validly entered arbitration agreements. *See Weaver v. Brookdale Senior Living, Inc.*, 847 S.E.2d 268 (Ct. App. 2020). The FAA does not give the party seeking arbitration a “leg up in the threshold determination of whether a valid arbitration agreement exists.” *Id* at 269. The “first principle that underscores all [] arbitration decisions is that [a]rbitration is strictly a matter of consent.” *Id* quoting *Lamps Plus, Inc., v. Varela*, 139 S.Ct. 1407, 1415 (2019).

State law controls when a party is attempting to enforce an arbitration agreement against someone who has not signed it. *Id*. It is undisputed that neither Mr. Earl Pace nor his son, the Plaintiff Kenneth Pace, executed the arbitration agreement in this case.

i. THE ADMISSION AGREEMENT AND ARBITRATION AGREEMENT

² Another South Carolina Court has concluded that an arbitration agreement cannot be enforced against a decedent’s wrongful death beneficiaries as the wrongful death claims are independent of the survival claims and are not derivative. *See Wilson v. NHC Healthcare/Mauldin*, Order dated June 21, 2018, Greenville County Common Pleas, judge Michael Nettles. Attached as Exhibit H.

ARE NOT MERGED.

Because Mr. Hill lacked the authority to execute the arbitration agreement on behalf of Mr. Pace, it is anticipated that Defendants will argue that Kenneth Pace should be equitably estopped from denying the arbitration agreement.³ The Arbitration Agreement here is a completely separate contract under which Mr. Pace derived **no** benefits. As such, the court must determine that the Admission Agreement and Arbitration Agreement be construed as one document under which Mr. Pace derived benefits as a patient of the Defendants.⁴ In order for equitable estoppel to apply to the case at hand, there must have been a merger of the Admission Agreement and the Arbitration Agreement.

When documents are executed at the same time and regarding the same transaction, courts will generally construe them together *unless* there is evidence of a contrary intention by the parties. *See Klutts Resort Realty, Inc., v. Down Round Dev. Corp.*, 268 SC 80, 88, 232 SE2d 20, 24 (1977). If the language of the admission agreement created an ambiguity as to merger, the law is clear that any ambiguity shall be construed against the facility. *See Coleman* at 355-56.

In this case, it is clear from a plain reading of the documents, that the Admission Agreement and the Arbitration Agreement were wholly independent and should not be construed together.

³ Because Defendants have not provided the legal bases for their Motion, Plaintiff is speculating about what arguments the Defendants are likely to assert in support of their motion.

⁴ *See Thompson, supra* at 60, in which the court expressly stated that “any possible benefit emanating from the arbitration agreement alone is offset by the arbitration agreement’s requirement that [the patient] waive her right to access to the courts and her right to a jury trial.”

Coleman, supra, addressed an arbitration agreement that was wholly separate from the admissions agreement executed by the sister of the patient. The *Coleman* admissions agreement did not reference the execution of the arbitration agreement – it was freestanding and voluntary. Declining to find that the sister had authority to execute the arbitration agreement, *Coleman* considered whether the two agreements should be considered “merged” in order to conclude that the sister was equitably estopped from denying applicability of the arbitration agreement. *Id.* The court considered the admission agreement’s merger clause and determined that the two contracts were indeed separate. *See id.* “By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply.” *Id.* at 455. Because the arbitration agreement was separate from the admission contract under which the patient had received care and treatment, the doctrine of equitable estoppel was inapplicable *See id.* The court noted that the plaintiff was not suing for a breach of the admission agreement and not attempting to enforce the same. *See id.* As such, equitable estoppel did not bar the plaintiff’s claims. *See id.; see also Hodge, supra.* *Hodge* declined to apply the doctrine of equitable estoppel to enforce an arbitration agreement because the arbitration agreement was wholly separate from the admission agreement and the documents were not merged. *See id. See also Thompson, supra.*

When an arbitration agreement that is separate from the admission agreement concerns “neither healthcare nor payment, but instead provided an

option method for dispute resolution between [the facility] and [the patient] should issues arise in the future” the South Carolina Supreme Court has declined to find a merger has occurred. *Coleman supra*.

In this case, the Admission Agreement and the Arbitration Agreement are wholly separate documents. *See* Exhibits D and E respectively. There is no reference whatsoever within the 12 pages of the Admission Agreement regarding arbitration. The Admission Agreement does refer to a “Grievance Procedure” that is included in the Admission Handbook and is incorporated by reference. The signer is asked to acknowledge that he/she has received the Admission Handbook and that it is incorporated by reference in the Admission Agreement. *See* Admission Agreement pp. 4 and 12. There is no reference to arbitration and the Admission Agreement does not state anywhere that admission is contingent upon execution of an arbitration agreement.

The Admission Agreement provides expressly that it will be governed by the laws of the State in which “Facility” is located – South Carolina. *See id* at p. 10. Finally, the Admission Agreement provides an “Entire Agreement” or merger clause. *See id* at p.12. The merger clause provides:

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...

Id.

In contrast, the Arbitration Agreement is governed by federal law and the

Federal Arbitration Act.⁵ *See* Arbitration Agreement. Moreover, the Arbitration Agreement, on its face, is separate from the Admission Agreement. “This [arbitration] 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.” *See id* (emphasis added). Finally, there is no language in the Arbitration Agreement that execution of the same was required for admission to Defendants’ facility.

As in *Thompson, Coleman, and Hodge* discussed above, the Arbitration Agreement signed by Calvin Hill was wholly separate from the Admission Agreement. The terms of the two separate contracts make clear that they were independent of each other and that admission to the facility was not contingent upon the execution of arbitration. The Admission Agreement and Arbitration Agreement should not be construed as one document.⁶

Plaintiff expects that the Defendants may rely on an order entered in a case heard by the Honorable Bruce Howe Hendricks. *See THI of South Carolina at Magnolia Manor - Inman, LLC v. Gilbert*, Order and Opinion March 19, 2015 attached as Exhibit I.⁷ In that case, a DSS representative apparently executed an arbitration agreement that purported to bind a vulnerable adult to arbitration for

⁵ *See Hodge, supra* wherein the Court found that the admission agreement and arbitration provisions were not merged, in part because state law governed the admission agreement and federal law the arbitration agreement. The *Hodge* court determined that plaintiff would not be equitably estopped from denying arbitration noting that “...even if the Admission Agreement and Arbitration Agreement [were] merged, because [plaintiffs] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement. *See id.*”

⁶ Any ambiguity should be construed against the Defendants.

⁷ The facts of the case of *Gilbert* are distinguishable from the instant case. Nevertheless, it is worth nothing that this Order is not precedent and is not controlling in this matter.

claims arising out of a nursing home residency. The court expressly stated that the issue of whether a DSS representative could bind the vulnerable adult was not relevant and did not reach a decision of that issue. *See id.* The court declined to determine whether there was authority to bind under those facts. *See id.* Judge Howe went on to distinguish the facts before her from the *Coleman* and *Dean* cases, in that the arbitration agreement was contained *within* the admission agreement and not a “separate non-essential legal waiver.”

On the contrary, this case involves an arbitration agreement that was wholly separate from the admission documents. Our facts are *not* distinguishable from *Coleman* and *Dean* in that the Arbitration Agreement is, on its face, a “separate non-essential legal waiver.” *See Gilbert, supra.* Should the Court be inclined to rely on the *Gilbert* decision, it is distinguishable from the case before the Court. Here, there were two separate contracts, no merger of the documents occurred, and *Gilbert* offers no basis for finding that Calvin Hill had the requisite authority to execute an arbitration agreement. *See id.*

ii. **THE DOCTRINE OF EQUITABLE ESTOPPEL DOES NOT APPLY TO THE FACTS OF THIS CASE.**

Equitable estoppel is a theory by which a party attempts to enforce an arbitration agreement against a non-signer when (1) the non-signer’s claim arises from the contractual relationship; (2) the non-signer has “exploited” other parts of the contract by taking advantage of its benefits; and (3) the claim relies solely on the contract terms to impose liability. *See Weaver, supra.* In the recent case

of *Weaver*, the Court of Appeals considered whether “direct benefits estoppel” or “equitable estoppel” applied to the enforcement of an arbitration agreement with respect to a granddaughter’s claims against a nursing facility wherein the grandmother had eloped undetected from the facility and wandered into an alligator pond, resulting in her death. *See id.* The court concluded that Weaver was not bound by the arbitration provision. *See id.* Brookdale argued that Weaver’s claims were funneled to arbitration because her ability to sue stemmed from the residency agreement containing the arbitration agreement.⁸ *See id.* The court determined that this argument was “easily scotched.” *Id.*

Equitable estoppel is not implicated simply because a claim relates to or would not have arisen but for the contract’s existence. *See id.* The court reasoned that Weaver’s claims rely on general tort duties owed by NHC to its patients – and did not flow from any provision of the residency agreement. *See id.* The duty to provide care consistent with the applicable nursing standards of care does not flow directly from the residency agreement. *See id.* A benefit is “direct” if it flows “directly from the [contract]” but is indirect if the claim relates generally to the contractual relationship of the parties but does not “exploit” the agreement itself. *See id.* The court went on to opine that Weaver had not exploited or sought to enforce or benefit from the residency agreement “any more than a pedestrian run over by a truck has benefited from the contract for the purchase of the truck.” *Id.* Weaver had not attempted to procure a direct

⁸ The arbitration agreement in the case at hand is **not** contained within the residency agreement.

benefit from the residency agreement while trying to avoid the arbitration agreement. *See id.*

In a similar analysis, the *Hodge* court considered whether the plaintiff had received a direct benefit and expressly held that “[t]he only agreement from which [plaintiffs] even arguably received a benefit was the admission agreement because [patient] was admitted to the facility as a result of it. However, because the facility allegedly caused [the patient]’s injuries that later led to her death, we find it difficult to find she benefited even from being admitted.” *Hodge, supra*. Equitable estoppel is a theory to prevent *injustice* and it should be used sparingly. *See Weaver, supra*.

The Court in *Thompson* declined to apply equitable estoppel to the arbitration agreement under both the federal caselaw (described above in *Weaver*) and pursuant to South Carolina law. *See id.* at 43. The court determined that the arbitration agreement was not incorporated into the admission agreement and the two agreements were independent of one another. *See id.* In finding no merger, the court concluded that equitable estoppel had no application to the present case under the federal substantive law. *See id.* The court went on to consider the doctrine of equitable estoppel under South Carolina law. The elements that must be proven as to the non-signer are as follows:

- (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the

party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (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. *Id* at 60.

The court concluded that because the patient had dementia prior to her admission, her incapacity prevented her from forming the intent to mislead the nursing home or assent to the arbitration terms. *See id.* The court found that equitable estoppel was inapplicable. *See id.*

In the present case, as set forth above, the Admission Agreement is a separate contract from the Arbitration Agreement. But even assuming *arguendo*, that the Court were to find the documents to be merged, equitable estoppel is inapplicable. Plaintiff is not attempting to enforce any provision of the Admission Agreement and at the same time deny an arbitration agreement contained within. There has been no exploitation of the contracts' provisions by the Plaintiff, no benefit was derived under the contracts by Mr. Pace⁹, and the Plaintiff's claims flow from alleged breaches in general tort law and not from the Admission Agreement or Arbitration Agreements. *See Weaver, supra.* Because Plaintiff is not attempting to enforce any agreement and no claim flows therefrom he is not equitably estopped from denying the arbitration agreement.

⁹ *See Weaver, supra*, wherein the court expressed difficulty in finding that the admission agreement resulted in benefit to the decedent as her death was the result of negligence on the part of the facility.

See e.g. Hodge, supra “...even if the Admission Agreement and Arbitration Agreement [were] merged, because [plaintiffs] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement.”

The Defendants have not shown that any of the factors set forth in the *Thompson* decision exist in this case. There is not even any allegation of a false representation, any expectation of reliance on a false representation, nor any detrimental reliance. Equitable estoppel does not apply under any federal or state theory to the Plaintiff in the case before the Court.¹⁰

III. Conclusion

The Arbitration Agreement presented by the Defendants is not enforceable for foregoing reasons: (1) the Arbitration Agreement was not executed by someone with legal authority to act for Mr. Pace; and (2) the Arbitration Agreement cannot be enforced against Plaintiff Kenneth Pace as a non-signer because (i) the Admission Agreement and Arbitration Agreement are not merged and (ii) the doctrine of equitable estoppel does not apply to the facts of this case. For all of these reasons, the Plaintiff respectfully requests that the Defendants’ Motion to Dismiss be denied and the parties be permitted to proceed to a jury

¹⁰ To the extent that Defendants would attempt to argue a third-party beneficiary argument applies to claims asserted by Mr. Pace’s Estate, Plaintiff asserts that the foregoing argument regarding equitable estoppel is similarly applicable. Unless the third-party beneficiary assents to an arbitration agreement, the contracting party has waived the right to a jury trial without her consent. *See Thompson, supra*. Without a valid contract, there can be no third-party beneficiary. *Id.* Mr. Pace was unable to consent as a result of his diagnosis of dementia.

trial.

s/ Jennifer Spragins Burnett

Jennifer Spragins Burnett (SC Bar 69617)
Harbin & Burnett, LLP
2124 Highway 81 North
P.O. Box 35
Anderson, SC 29621
(864) 622-7801
(864) 964-0930 (Facsimile)
Attorneys for the Plaintiff

November 30, 2020
Anderson, South Carolina

STATE OF SOUTH CAROLINA)

IN THE FAMILY COURT
EIGHTH JUDICIAL CIRCUIT

COUNTY OF LAURENS)

SC Department of Social Services

LAURENS COUNTY
CLERK OF COURT

Plaintiff,)

FAMILY COURT COVERSHEET

vs.

2014 JUL 11 P 3:33

Earl Pace

Defendant:) Docket No. 2014-DR-30- 444

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for docketing purposes for the Clerk of Court and must be signed and dated, and filled out completely. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

Submitted by: Laura Bardsley Houck

SC Bar # 13484

Address: Post Office Box 409

Telephone # 864-833-0100

Laurens, SC 29360

Fax # 864-833-2706

Email: _____

Other: _____

DOCKETING INFORMATION (Check one box below if filing in a Mandatory Mediation County)

- ☐ This case is subject to MEDIATION pursuant to the Family Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

**Nature of Action Codes
(Check One)****Marital Dissolution**

- ☐ Divorce (110)
☐ Annulment (120)
☐ Separate Support and Maintenance (130)
☐ Registration of Foreign Divorce Decree – without support/custody (190)
☐ Registration of Foreign Divorce Decree – with support/custody (191)
☐ Marital Dissolution – Other (199) _____

Abuse and Neglect

- ☐ Abuse and Neglect – Child (210)
☒ Abuse and Neglect – Adult (220)
☐ Abuse and Neglect – Other (299) _____

Juvenile Delinquency

- ☐ Truancy (311)
☐ Incurable (312)
☐ Runaway (313)
☐ Criminal Offense (320)
☐ Juvenile Delinquency – Other (399) _____

Protection from Domestic Abuse

- ☐ Domestic Abuse – Intimate Partner (410)
☐ Domestic Abuse – Minor (420)
☐ Registration of Foreign Order of Protection (490)
☐ Domestic Abuse – Other (499) _____

Support

- ☐ Child Support – Private (501)
☐ Child Support – Administrative Process (502)
☐ Child Support – Judicial Process (503)
☐ Registration of Foreign Order of Support (504)
☐ UIFSA – Outgoing (505)
☐ UIFSA – Incoming (506)
☐ Modification of Child Support – Private (507)
☐ Modification of Child Support – DSS (508)
☐ Modification of Alimony (525)
☐ College Expenses (530)
☐ Support – Other (599) _____

Custody/Visitation

- ☐ Child Custody/Visitation (610)
☐ Modification of Custody/Visitation (615)
☐ Registration of Foreign Child Custody Order (690)
☐ Custody/Visitation – Other (699) _____

Miscellaneous Actions

- ☐ Name Change (710)
☐ Correction/Birth Record (720)
☐ Judicial Bypass (730)
☐ Adoption (740)
☐ Foreign Adoption (741)
☐ Post Dissolution Equitable Distribution (750)
☐ Paternity – Private (761)
☐ Paternity – DSS (762)
☐ Termination of Parental Rights – Private (771)
☐ Termination of Parental Rights – DSS (772)
☐ Miscellaneous Actions – Others (799) _____

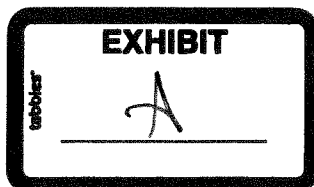
Submitting Party Signature: _____

Date: 7/11/14

Custodial Parent (if applicable): _____

Note: Frivolous civil proceedings are subject to sanctions pursuant to Rule 11, SCRCP and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 et seq.

SCCA 467 (06/2010)



PACE Family Court File 0001

ROA 259

STATE OF SOUTH CAROLINA)

COUNTY OF LAURENS)

South Carolina Department of
Social Services,)Plaintiff,
vs.)

Defendant.)

In the interests of:)

Earl Pace (age 86))

A vulnerable adult.)

IN THE FAMILY COURT

EIGHTH JUDICIAL CIRCUIT

2014-DR-30-444

SUMMONS, NOTICE OF HEARING,

Explanation of the RIGHT TO AN

ATTORNEY

[Removal]

[Adult Protective Services]

LAURENS COUNTY
CLERK OF COURT

2014 JUL 11 P 3:33

L. W. LANCASTER

TO: DEFENDANTS, ATTORNEYS, AND GAL.

YOU ARE HEREBY SUMMONED and served with the complaint in this action. You are not required to answer the complaint, but if you do, you should serve a copy of your answer upon plaintiff through its attorney at Post Office Box 409, Laurens, South Carolina 29360.

YOU ARE FURTHER NOTIFIED AND SUMMONED TO APPEAR as follows:

1. For a **72-hour probable cause** hearing to be held at the Laurens County Family Court, 100 Hillcrest Square, Laurens, South Carolina on **July 14, 2014 at 9:15 a.m.**
2. For a **full hearing on the merits** to be held at the Laurens County Family Court, 100 Hillcrest Square, Laurens, South Carolina on **August 7, 2014 at 1:30 p.m.**

PLEASE TAKE FURTHER NOTICE on all pleadings in this section.

S.C. DEPARTMENT OF SOCIAL SERVICES


 Laura Bardsley Houck

Attorney for Plaintiff

S.C. Department of Social Services

Post Office Box 409

Laurens, SC 29360-0409

(864) 833-0100 / Fax (864) 833-2706

Bar No. 13484

July 11, 2014

Laurens, South Carolina.

STATE OF SOUTH CAROLINA)

IN THE FAMILY COURT)

COUNTY OF LAURENS)

EIGHTH JUDICIAL CIRCUIT 2014 JUL 11 P 3:33
2013-DR-30- 444South Carolina Department
of Social Services,)**COMPLAINT**

[§43-35-55 (EPC)]

(Adult Protective Services)

Plaintiff,)

vs.)

Defendant.)

In the interests of:)

Earl Pace (age 86))

A vulnerable adult.)

Plaintiff alleges as follows:

1. Plaintiff is the agency charged with the duty of providing for the protection of vulnerable adults, as defined in S.C. Code Ann. § 43-35-10, et seq.

2. The adult is a resident and citizen of this county and is in need of protective services and/or protective custody as follows: the agency has an open APS treatment case with Earl Pace. Earl Pace was living with his son, Ricky Pace and Ricky's girlfriend, April Nicely, at 6025 Neeley Ferry Road Laurens, SC. Ricky Page was his father's caregiver but he was recently convicted of lewd act/child under 16 and sentenced to 10 years in prison. Ricky Pace left Earl Pace with April Nicely to be his caregiver. Earl Pace has multiple medical conditions (early stage of dementia, diabetes, COPD, and depression).

On June 7, 2014 case manager was informed that Laurens County Sheriff Office Sgt. Jim Johnson was at Earl Pace's residence due to allegations that April Nicely had given away 10 of Mr. Pace's Hydrocodone pills. April admitted to the allegations but allegedly got the

Complaint - Adult Protective Services
Case Number: 2014-DR-30-

pills back. On June 12, 2104 April Nicely submitted to a drug at the request of Laurens County DSS and tested positive for THC.

Mr. Pace's family had concerns about April providing care for Mr. Pace. Case manager was working with the family to seek nursing home placement for Mr. Pace.

On July 7, 2014 Earl Pace was seen by Dr. Karla A. Hirshorn of Laurens Family Practice. Dr. Hirshorn's assessment of Mr. Pace is that his memory is poor and he does not have decision making ability at this time.

On July 10, 2014 Earl Pace was given a drug screen at Laurens Memorial Hospital and the test results showed that Mr. Pace was not getting any of his prescribed controlled substances. Dr. R. Patel evaluated Mr. Pace for anemia, dementia and nursing home placement. Dr. Patel's report recommended that Mr. Pace be placed in a nursing home as discussed with the family. Mr. Pace was also given a TB test as part of prescreening for placement/admission into a nursing home facility. Mr. Pace was released from the hospital to April Nicely.

Subsequently, upon information and belief, April Nicely called a family member and told him to come and pick up both her and Earl Pace in Laurens. Laurens County Sheriff's Office was notified and a request was made for a welfare check on Earl Pace. Lt. M. Crain of LCSO went to the residence but there wasn't anyone home.

Allegedly a Facebook post to Ricky Pace's page at 1:39am 7/10/14 stated "Well I left with your dad I'm keeping my promise to you and him as long as I can fight, I'm going to keep that promise to you and we love and we miss you much."

A diligent search for Earl Pace was conducted by Laurens County Sheriff Office around 1:30pm on July 10, 2014. Earl Pace was located at 719 North main Street Cross Hill, SC

Complaint - Adult Protective Services
Case Number: 2014-DR-30-

by Deputy S. Patterson. Earl Pace was transported to LCSO and placed into emergency protective custody.

3. Plaintiff is informed and believes that the adult is a vulnerable adult as defined by S.C. Code Ann. § 43-35-10 (11) as outlined in paragraph 2 above and Mr. Pace is in substantial danger of abuse, neglect, or exploitation.

4. By reason of abuse, neglect, or exploitation, there is a substantial risk to this vulnerable adult's life or physical safety, and the vulnerable adult is unable to protect him/herself. Consent cannot be obtained to provide protective services or placement, and protective services are necessary to protect the vulnerable adult from substantial risk of abuse, neglect or exploitation.

5. Plaintiff requests the right to provide for and to authorize such routine and/or emergency medical care as may be required, should protective services be ordered and/or custody be granted to the plaintiff.

6. Plaintiff asks to be granted access to any and all records concerning the vulnerable adult as may be necessary, supplemental to those already authorized by S.C. Code § 43-35-20.

WHEREFORE, plaintiff prays that this court inquire into those matters alleged in this complaint and issue an order, finding as follows:

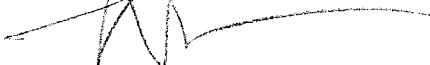
A. The adult is a vulnerable adult and by reason of abuse, neglect, or exploitation, there exists substantial risk to the vulnerable adult, and protective services and/or custody are necessary, pursuant to S.C. Code Ann. § 43-35-55 (*EPC*).

B. SCDSS is authorized to provide protective services and protective custody of the adult should be granted to the South Carolina Department of Social Services.

Complaint - Adult Protective Services
Case Number: 2014-DR-30-

- C. Plaintiff has the right to provide such protection, assistance, and placement as may be required, and plaintiff should have access to all necessary records.
- D. Plaintiff has the right to seek payment for services by and from the financial resources of Mr. Earl Pace.
- E. A hearing on the merits shall be held within forty days of the filing of this complaint with the court.
- F. Any further relief the court may deem just and proper.

S.C. DEPARTMENT OF SOCIAL SERVICES



Laura Bardsley Houck
Attorney for Plaintiff
S.C. Department of Social Services
Post Office Box 409
Laurens, SC 29360-0409
(864) 833-0100 / Fax (864) 833-0118
Bar No. 13484

July 11, 2014
Laurens, South Carolina.

STATE OF SOUTH CAROLINA)

COUNTY OF LAURENS)

South Carolina Department
of Social Services,)

Plaintiff,
vs.)

Defendant(s),)

IN THE INTEREST OF:)

Earl Pace (Age 86))
A vulnerable adult.)

LAURENS COUNTY
IN THE FAMILY COURT OF THE
EIGHTH JUDICIAL CIRCUIT

2014-DR-30-444

2014 JUL 16 P 12:25

LYNN W. LANCASTER

72 HOUR HEARING ORDER
[Adult Protective Services]

DATE OF HEARING: July 14, 2014

PRESIDING JUDGE: Honorable Joseph W. McGowan, III

ATTORNEY FOR PLAINTIFF: Laura Bardsley Houck

LAURENS COUNTY DSS: Calvin Hill

COURT REPORTER: Lisa G. Amick

This matter came before me for a hearing pursuant to a complaint submitted under S.C. Code Ann. § 43-35-55 by which the adult was placed into emergency protective custody by law enforcement.

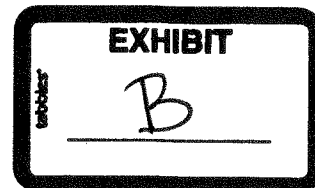
The above-listed persons were present; also present was Deputy Paul Page, Laurens County Sheriff's Office. This court has jurisdiction over the parties and the subject matter.

Based on the evidence presented and a review of the file, I make the following findings of fact and conclusions of law:

1. This proceeding is proper, and this court has jurisdiction over the parties

72 Hour Order
2014-DR-30-440

1



PACE Family Court File 0007

ROA 265

and over the subject matter.

2. The adult was in a life threatening situation because: Earl Pace has multiple medical conditions (early stages of dementia; diabetes; COPD; depression). His previous caregiver, his son Ricky Dale Pace, was recently sentenced to 10 years in prison. Ricky's girlfriend admitted to giving away some of Earl Pace's hydrocodone medication; a recent drug screen indicated that Earl Pace was not getting any of his prescribed controlled medication; Earl Pace could not be located on July 10, 2014 because he had been transported to another part of the state by Ricky's girlfriend; Earl Pace was located in Cross Hill, SC and placed into emergency protective custody.

3. There was probable cause for law enforcement to believe that by reason of abuse, neglect, or exploitation, there existed imminent danger to the vulnerable adult's life or physical safety. Law enforcement acted properly in taking protective custody of this adult.

THEREFORE, IT IS ORDERED that:

1. DSS shall retain custody of Earl Pace.
2. A hearing on the merits will be held on August 7, 2014.
3. Plaintiff may request assistance from any and all law enforcement officers and agencies, which assistance shall then be provided to aid plaintiff in providing such services.
4. SCDSS shall have the right to provide such routine and emergency medical care as may be required, right of access to all necessary records, and for such



other and further relief as the court may deem just and proper.

5. Any funds received by or on behalf of Earl Pace shall be redirected to the facility in which he is placed.

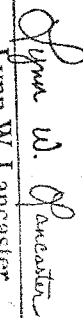
6. A guardian ad litem and an attorney shall be appointed for the adult.

IT IS SO ORDERED.



JOSEPH W. MCGOWAN, III
PRESIDING FAMILY COURT JUDGE
EIGHTH JUDICIAL CIRCUIT

July 16, 2014
Laurens, South Carolina.

A TRUE COPY OF ORIGINAL

Lynn W. Lancaster
Laurens County CCCP & GS

DSS

Serving Children and Families

V. SUSAN ALFORD
STATE DIRECTOR

NIKKI R. HALEY
GOVERNOR

May 29, 2015

Talia Byrd
Director of Social Services
Lake Emory Post-Acute Care
59 Blackstock road
Inman, South Carolina 29349

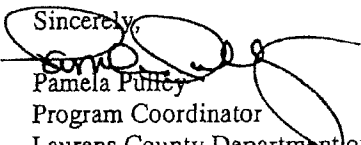
Re: Earl Pace

Dear Ms. Byrd:

This letter is to inform you in writing that Laurens County Department of Social Services has been relieved of custody of Earl Pace and has closed its case.

The agency recommends that Mr. Kenneth Pace be your contact person regarding Mr. Earl Pace.

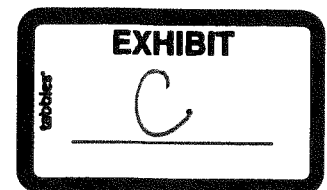
I am including the final order for Earl Pace by consent for your records.

Sincerely,

Pamela Pince
Program Coordinator
Laurens County Department of Social Services
Post Office Box 409
Laurens, South Carolina 29360
864-547-8080 (o)

Copy of: Earl Pace's Final Court Order

Cc: Laura Houck, Laurens County DSS Attorney

LAURENS COUNTY DEPARTMENT OF SOCIAL SERVICES, P.O. BOX 409, LAURENS, SC 29360
TELEPHONE: (864) 833-0100 • FAX: (864) 833-2706



PACE DSS File 0002

ROA 268

ELECTRONICALLY FILED - 2020 Nov 30 11:55 AM - SPARTANBURG - COMMON PLEAS - CASE#2019CP4203708

LAURENS COUNTY
CITY OF COURT
STATE OF SOUTH CAROLINA
COUNTY OF LAURENS

South Carolina Department
of Social Services,

Plaintiff,

vs.

Defendant(s),

IN THE INTEREST OF:

Earl Pace (12/24/1927)
A vulnerable adult.

IN THE FAMILY COURT OF THE
EIGHTH JUDICIAL CIRCUIT
2014-DR-30-444

FINAL ORDER

[Adult Protective Services]
BY CONSENT

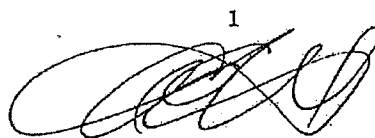
The matter is before me pursuant to a complaint submitted under S.C. Code Ann. §43-35-45 wherein the plaintiff sought court-ordered protective services/custody of the vulnerable adult. At the hearing held August 28, 2015, the Court ordered that the adult remain in the custody of the agency, the agency was to monitor the matter, and the matter could be closed by consent, if appropriate.

Now, on motion by the Plaintiff that DSS be relieved of custody and the case be closed, by and with the consent of his court-appointed attorney, his court-appointed guardian ad litem, and the court-appointed attorney for the guardian ad litem,

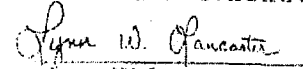
IT IS ORDERED that:

1. DSS is relieved of custody of Earl Pace.
2. SCDSS shall close its case.
3. All appointed attorneys and the Guardian ad Litem are relieved of their respective appointments.

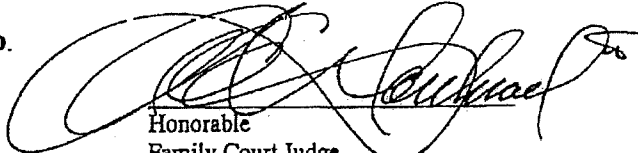
Final Order
2014-DR-30-444

1


A TRUE COPY OF ORIGINAL


Lynn W. Lancaster
CLERK OF COURT

IT IS SO ORDERED.

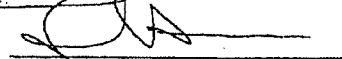


Honorable
Family Court Judge
EIGHTH Judicial Circuit

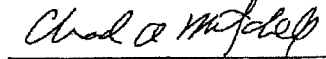
April 23, 2015
Greenville South Carolina.

South Carolina Department of
Social Services

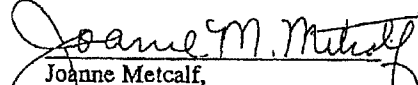
I CONSENT:


Laura Bardsley Houck
Attorney for SCDSS

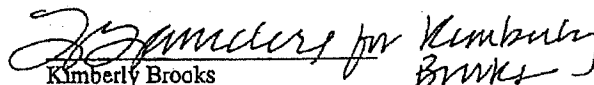
I CONSENT:


Chad A. Mitchell
Attorney for Earl Pace

I CONSENT:


Joanne Metcalf,
Guardian ad Litem for ~~Earl Pace~~
Earl Pace

I CONSENT:


Kimberly Brooks
Attorney for Guardian ad Litem

ADMISSION AGREEMENT – SOUTH CAROLINA

RESIDENT NAME:

Earl Pace

RESIDENT NUMBER:

300774

DATE OF ADMISSION:

1-30-15

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among Lake Mary Post Acute ("Facility"), Earl Pace ("Resident") and/or Calvin Hill ("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.

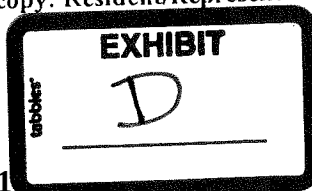
2. **Personal Property:** It is understood that Facility is not responsible for either damage to or theft/loss of Resident's valuables, monies or clothing unless the item(s) are held in trust by Facility and the damage, theft, loss was caused by the negligent or willful conduct of Facility personnel. 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 \$ 15.50 per day, payable one month in advance. In the event Resident is unable or unwilling to receive any of the services included in the room and board charge, such as meals, laundry, etc., no adjustment will be made to the daily rate. Payment for all invoices is due upon receipt. In the event public aid funds are denied for services for which coverage has been expected, Resident and/or Representative will be responsible for payment and will pay such charges upon receipt of invoice. Resident and/or Representative agree(s) to pay any rate change charged to Resident so long as each party to this Agreement is given at least thirty (30) days written notice of the new rate, including any increases or adjustments in Resident's liability by any financial third party or regulatory agency. Additional notice may be provided under applicable state regulations.

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

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

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

Original: Business File • Photocopy: Resident/Representative

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

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

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

IV. TERMINATION

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

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

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

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

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

V. MEDICAID BENEFICIARIES

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

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

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

3. **Non-Covered Services.**

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

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

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

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

VI. MEDICARE BENEFICIARIES

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

Original: Business File • Photocopy: Resident/Representative

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

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

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

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

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

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

VII. PRIVATE PAY/INSURANCE

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

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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:

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:

Calvin Hill
P.O. Box 409
Lancaster, S.C
29360

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

Original: Business File • Photocopy: Resident/Representative

IX. GOVERNING LAW

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

X. SEVERABILITY

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

XI. CAPTIONS

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

XII. MODIFICATIONS

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

XIII. WAIVER

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

XIV. RESIDENT

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

XV. ASSIGNABILITY

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

Original: Business File • Photocopy: Resident/Representative

XVI. INFORMATION RELEASE/BILLING AUTHORIZATION

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

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

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

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

XVII. MISCELLANEOUS

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

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

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

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

Original: Business File • Photocopy: Resident/Representative

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

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

XVIII. ENTIRE AGREEMENT

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

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

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

Signature of Resident Date

Printed Name of Resident

Resident Social Security Number

Witness Signature Date

Printed Name of Witness

OR

Calvin Hill DSS Representative 1-29-15
Signature of Representative Date

Calvin Hill
Printed Name of Representative

Witness Signature Date

Printed Name of Witness

Representative Social Security No. (Voluntary Info.)

Kimberly Martin
Signature of Facility Official

Kimberly Martin AD
Printed Name of Facility Official & Title

1-29-15
Date

Original: Business File • Photocopy: Resident/Representative

CL SNF, LLC v. Fountain

Court of Appeals of Georgia

May 19, 2020, Decided

A20A0773.

Reporter

355 Ga. App. 176 *; 843 S.E.2d 605 **; 2020 Ga. App. LEXIS 282 ***

CL SNF, LLC et al. v. FOUNTAIN.

Outcome

Judgment affirmed.

Subsequent History: Cert. applied for.**LexisNexis® Headnotes****Prior History:** Arbitration. Cobb State Court. Before Judge Manning.**Disposition:** Judgment affirmed.Business & Corporate Compliance > ... > Alternative
Dispute Resolution > Arbitration > ArbitrabilityCivil Procedure > Appeals > Standards of Review > De
Novo ReviewBusiness & Corporate Compliance > ... > Contracts
Law > Contract Conditions & Provisions > Arbitration
Clauses**Case Summary****Overview**

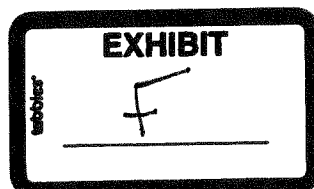
HOLDINGS: [1]-The trial court did not err by denying the guardian's motion to compel arbitration in an action she filed on behalf of the resident of a nursing facility because the guardian did not have the authority to sign the arbitration agreement on the resident's behalf under O.C.G.A. § 29-4-23 (a)(1) or (2), as the guardian's consent to the voluntary arbitration agreement, the signing of which was not a requirement for admission to the facility or the receipt of services, did not serve the purpose of establishing a place for the resident to live or provide consent for medical or other care or treatment. In addition, the record did not reflect that signing the arbitration agreement was otherwise reasonably necessary to provide for the resident's support, care, education, health, or welfare under § 29-4-23 (a)(4).

HNI[] Arbitration, Arbitrability

Whether a valid and enforceable arbitration agreement exists is a question of law for the court, and an appellate court therefore reviews a trial court's order granting or denying a motion to compel arbitration de novo. O.C.G.A. § 13-2-1. The party seeking arbitration bears the burden of proving the existence of a valid and enforceable agreement to arbitrate. And the validity of an arbitration agreement is generally governed by state law principles of contract formation.

Business & Corporate Compliance > ... > Contract
Formation > Contracts Law > Contract Formation

Family Law > Guardians > Appointment

Business & Corporate Compliance > ... > Contract
Formation > Capacity of Parties > Mental Capacity

355 Ga. App. 176, *176; 843 S.E.2d 605, **605; 2020 Ga. App. LEXIS 282, ***282

HN2[📄] Contracts, Contract Formation

To constitute a valid contract, there must be parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate. O.C.G.A. § 13-3-1. Where a guardian is appointed for an incapacitated adult, the ward loses the power to make a contract, unless the court's order specifies that the power will be retained. O.C.G.A. § 29-4-21 (a) (2).

Business & Corporate Compliance > ... > Contracts
Law > Contract Conditions & Provisions > Arbitration
Clauses

Contracts Law > Third Parties

HN3[📄] Contract Conditions & Provisions, Arbitration Clauses

Traditional principles of agency law may bind a nonsignatory to an arbitration agreement. (2). The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf. O.C.G.A. § 10-6-1.

Governments > Legislation > Interpretation

HN4[📄] Legislation, Interpretation

When considering the meaning of a statute, a court must presume that the General Assembly meant what it said and said what it meant. To that end, the court must afford the statutory text its plain and ordinary meaning, it must view the statutory text in the context in which it appears, and it must read the statutory text in its most natural and reasonable way. For context, the court may look to the other provisions of the same statute, the structure and history of the whole statute, and the other law—constitutional, statutory, and common law alike—that forms the legal background of the statutory provision in question.

Family Law > Guardians > Duties & Rights

HN5[📄] Guardians, Duties & Rights

Those subsections (1) and (2) of OCGA § 29-4-23 (a) empower a guardian to establish a place of dwelling and provide any necessary consents or approvals for medical or

other professional care, counsel, treatment, or service.

Family Law > Guardians > Duties & Rights

HN6[📄] Guardians, Duties & Rights

Subsection (3) of OCGA § 29-4-23 (a) gives a guardian the power to bring, defend, or participate in legal, equitable, or administrative proceedings, including alternative dispute resolution, if they are appropriate for the support, care, education, health, or welfare of the ward. To "bring an action" has a settled customary meaning at law, and refers to the initiation of legal proceedings in a suit. "Defend" means to contest and endeavor to defeat a claim or demand. And "participate" in this context means to take part.

Family Law > Guardians > Duties & Rights

HN7[📄] Guardians, Duties & Rights

The type of proceedings that a guardian can initiate or participate in must be appropriate for the support, care, education, health, or welfare of the ward.

Family Law > Guardians > Duties & Rights

HN8[📄] Guardians, Duties & Rights

The general duties of a guardian to at all times act as a fiduciary in the ward's best interest and exercise reasonable care, diligence, and prudence. O.C.G.A. § 29-4-22 (a).

Family Law > Guardians > Duties & Rights

HN9[📄] Guardians, Duties & Rights

Subsection (4) of O.C.G.A. § 29-4-23 allows a guardian to exercise those other powers reasonably necessary to provide adequately for the support, care, education, health, and welfare of the ward. These additional powers must be reasonably necessary to provide for the listed needs.

Civil Procedure > Appeals > Standards of Review

HN10[📄] Appeals, Standards of Review

355 Ga. App. 176, *176; 843 S.E.2d 605, **605; 2020 Ga. App. LEXIS 282, ***282

An appellate court will affirm a judgment that is right for any reason.

Judges: [***1] RICKMAN, Judge. Dillard, P. J., and Brown, J., concur.

Headnotes/Summary

Headnotes

Georgia Advance Headnotes

GA(1)[] (1)

Family Law. > Guardians & Conservators.

Trial court did not err by denying the guardian's motion to compel arbitration in an action the guardian filed on behalf of the resident of a nursing facility because the guardian did not have the authority to sign the arbitration agreement on the resident's behalf under OCGA § 29-4-23 (a) (1) or (2), as the guardian's consent to the voluntary arbitration agreement, the signing of which was not a requirement for admission to the facility or the receipt of services, did not serve the purpose of establishing a place for the resident to live or provide consent for medical or other care or treatment.

GA(2)[] (2)

Family Law. > Guardians & Conservators.

Because signing the arbitration agreement was optional, and not a precondition to admission, expedited admission, or the furnishing of services to the resident, the record did not reflect that the guardian's signing the arbitration agreement was otherwise reasonably necessary to provide for the resident's support, care, education, health, or welfare under OCGA § 29-4-23 (a) (4).

Counsel: *Quirk & Quirk, Kevin E. Quirk, Kellie T. Holt; Huff Powell & Bailey, Karen L. Smiley*, for appellants.

Bondurant Mixson & Elmore, Michael B. Terry, Jennifer L. Peterson; Schneider Law, Bethany L. Schneider; Wagner Hughes, Gretchen H. Wagner, Katherine G. Hughes, for

Opinion by: RICKMAN

Opinion

[**608] [*176] RICKMAN, Judge.

Following the grant of their application for interlocutory appeal, CL SNF, LLC d/b/a Clinch Healthcare Center; RWC Healthcare, LLC; PWW Healthcare, LLC; and Beacon Health Management, LLC (collectively, "Clinch") appeal the trial court's order denying their motion to compel arbitration in an action filed by Minnie Fountain on behalf of her nephew Leroy Wiggins. Clinch contends that the trial court erred in finding the arbitration agreement at issue to be unconscionable and denying their motion to compel arbitration. For reasons that follow, we affirm the trial court's order because Wiggins's guardian did not have authority to sign the arbitration agreement on his behalf.

Wiggins is a mentally incapacitated adult. Fountain was appointed his guardian, and in November 2006, Letters of Guardianship of Adult Ward were issued by the Probate Court of Clinch County. In March 2014, Wiggins was admitted to Clinch Healthcare Center, a [*177] skilled nursing facility located in Homerville, Georgia. In connection with Wiggins's admission, Fountain signed a Facility Admission Agreement, which contained an arbitration clause, and a [***2] separate Arbitration Agreement. The parties to the Arbitration Agreement were Clinch Healthcare, referred to as the Facility, and Fountain, referred to as the Resident or Resident's Representative. Wiggins did not sign the Arbitration Agreement, and when Fountain signed it, she did not complete the portion of the form asking her to indicate the capacity in which she had signed.

Pursuant to the Arbitration Agreement,

any and all claims or controversies arising out of or in any way relating to this Agreement or the Resident's Admission Agreement, including the interpretation of either, or the Resident's stay at, or the care or services

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provided by, the Facility, or any acts or omissions in connection with such care or services ... , whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages, and whether sounding in breach of contract, tort, or breach of statutory or regulatory duties (including, without limitation, any claim based on an alleged violation of the state bill of rights for residents of long-term care facilities or federal resident's rights, any claim based on negligence, any claim for damages resulting [***3] from death or injury to any person arising out of care or service rendered by the Facility or by any officer, agent, or employee thereof acting within the scope of his or her employment, any claim based on any other departure from accepted standards of health care or safety, or any claim for unpaid nursing home charges), irrespective of the basis for the duty or of the legal theories upon which the claim is asserted, shall be submitted for arbitration.

In addition, the Arbitration Agreement provided that the Resident has the right to seek legal counsel concerning this Agreement; [t]he signing of the Agreement is not a precondition to admission, expedited admission, or the furnishing of services to the Resident by the Facility; and [t]his Agreement may be revoked by written notice to the Facility from the Resident within thirty (30) days of signature.

Fountain, however, submitted an affidavit in which she averred that she was told that all of the documents she was given had to be [*178] signed in order for Wiggins to be admitted to the facility, that no one explained any of the documents to her, and that she was not informed that she had the right to contact an [**609] attorney if she had questions [***4] about any of the documents. She also averred that she did not discuss the document with Wiggins or seek his permission to sign it.

According to the complaint filed by Fountain, in 2017, while Wiggins was a resident of Clinch Healthcare Center, he was sexually battered and assaulted on multiple occasions by his roommate and Clinch failed to address the roommate's pattern of behavior, which extended to sexual assaults against at least five other residents. The complaint alleged numerous causes of action against Clinch based on alleged negligence in Clinch's care of Wiggins. In response, Clinch answered and filed a motion to compel arbitration and stay proceedings. The trial court denied the motion to compel based on its conclusion that the Arbitration Agreement was unconscionable and its determination that the arbitration clause in the Facility Admission Agreement was unenforceable because it did not state that acceptance of arbitration was not a precondition to admission.

On appeal, Clinch contends that the trial court erred in determining that the Arbitration Agreement was unconscionable and also addresses other issues regarding the validity of the Arbitration Agreement that were raised [***5] by Fountain and rejected by the trial court.¹ Those issues include Fountain's authority to sign the Arbitration Agreement for Wiggins, the applicability of the Federal Arbitration Act, the existence of consideration for the Arbitration Agreement, whether the Arbitration Agreement precludes vindication of Wiggins's rights under the Bill of Rights for Residents of Long-Term Care Facilities, the impact of Medicaid regulations, and whether questions of standing or privity remain.

1. We first address whether Fountain had the authority to sign the Arbitration Agreement on behalf of Wiggins. Fountain raised this issue in response to Clinch's motion to compel arbitration, and the trial court determined that the powers granted under the Guardianship Code, specifically those powers found in OCGA § 29-4-23 (a) (3), were sufficient to authorize Fountain to bind Wiggins to the agreement.

HNI[¶] Whether a valid and enforceable arbitration agreement exists is a question of law for the court, and we therefore review a trial court's order granting or denying a motion to compel arbitration de novo. [*179] OCGA § 13-2-1; *McKean v. GGNSC Atlanta*, 329 Ga. App. 507, 509 (1) (765 SE2d 681) (2014). As the party seeking arbitration, Clinch bears the burden of proving the existence of a valid and enforceable agreement to arbitrate. *Ashburn Health Care Center v. Poole*, 286 Ga. App. 24, 25 (648 SE2d 430) (2007). And the [***6] validity of an arbitration agreement is "generally governed by state law principles of contract formation." *Triad Health Mgmt. of Ga., III v. Johnson*, 298 Ga. App. 204, 206 (2) (679 SE2d 785) (2009); see also *Lynn v. Lowndes County Health Svcs.*, 354 Ga. App. 242, 245 (2), n.3 (840 SE2d 623) (2020) ("This principle still applies in cases ... where the arbitration agreement states that the agreement is to be governed by the Federal Arbitration Act.").

HN2[¶] "To constitute a valid contract, there must be parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate." OCGA § 13-3-1. Where, as here, a guardian is appointed for an incapacitated adult, the ward loses the power to make a contract, unless the court's order specifies that the power will be retained. OCGA § 29-4-21 (a) (2). The record does not show that Wiggins

¹ Clinch does not enumerate as error the trial court's determination that the arbitration clause in the Facility Admission Agreement was unenforceable, and we therefore limit our analysis to the validity of the Arbitration Agreement.

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retained this power. The Arbitration Agreement contemplates execution by the Resident and the Resident Representative and has a space for the Resident Representative to indicate the capacity of his or her representation, with examples including “guardian, attorney-in-fact, agent under Durable Power of Attorney for Healthcare, spouse, son, daughter, etc.” As previously noted, Wiggins did not sign the agreement, and Fountain did not indicate [***7] the capacity of her representation. But the Arbitration Agreement also provides that the term “Resident [***610]” includes “the Resident, his or her guardian, attorney-in-fact, agent, sponsor, representative, or any person whose claim is derived through or on behalf of Resident,” and that if the agreement is signed “by the Resident's representative[,] that individual represents that he or she is authorized and has no reason to believe that the Resident would not have signed this Agreement if he or she were competent and able to do so.” Despite this language, which contemplates that Wiggins be bound by the Arbitration Agreement and that Fountain was acting in a representative capacity, “whether [Fountain] had the authority to bind [her nephew] is a separate issue.” See *Triad Health Mgmt.*, 298 Ga. App. at 207 (2).

HN3[7] “Traditional principles of agency law may bind a nonsignatory to an arbitration agreement.” (Citation and punctuation omitted.) *Triad Health Mgmt.*, 298 Ga. App. at 206 (2). “The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of [*180] another in his behalf.” OCGA § 10-6-1. Clinch does not contend that Wiggins expressly or implicitly authorized Fountain to act for him or that he later ratified her act of signing [***8] the Arbitration Agreement but contends that the Letters of Guardianship issued by the probate court gave Fountain authority to sign the Arbitration Agreement on his behalf.

Despite the implicit concession that traditional rules of agency do not apply here, Clinch nonetheless argues that *Triad Health Mgmt.*, 298 Ga. App. 204, is “strikingly similar” to this case. In *Triad*, a son filed a negligence action against a nursing home where his incapacitated father was a patient. Id. at 204-205. As part of his father's admission to the facility, the son signed an “Admission Contract,” which stated that any dispute arising out of the health care services Triad provided would be resolved by arbitration. Id. at 205. At the time the son signed the Admission Contract, he held a general power of attorney that designated him as his father's attorney ““with full power and authority to do and perform all and every act ... necessary, requisite or proper to be done, as fully ... as I might or could do if personally present,” and without specific limitation.” Id. at 207 (2). This Court held that

involved [the father's] admission into a treatment facility while incapacitated, [the son's] execution of the Admission Contract [***9] on behalf of his father was “necessary, requisite or proper,” within the scope of the agency contemplated by the power of attorney, and [the father] was bound thereby.

Id. at 207-208 (2).

Triad is distinguishable, however, because the son in that case held a general power of attorney that gave him the authority to perform any and all necessary acts that his father could perform if personally present, and Fountain did not hold a power of attorney or any other instrument in which Wiggins granted her power to act on his behalf.² Instead, Fountain's duties as guardian are set forth in the [*181] Letters of Guardianship, which provide that, as guardian, Fountain had the general duty “to protect and maintain the person of the ward” and more specifically, “to see that [Wiggins] is adequately fed, clothed, sheltered and cared for, and that [Wiggins] receives all necessary medical [***611] attention.” In addition, the Letters of Guardianship provide that Fountain's “authority to act pursuant to these Letters is subject to applicable statutes and to any special orders entered in this case.”

The applicable statutes referred to in the Letters of Guardianship would include the Guardianship Code, which provides that “[e]xcept [***10] as otherwise provided by law or by the court, a guardian shall make decisions regarding the ward's support, care, education, health, and welfare,” and shall “[a]rrange for the support, care, education, health, and welfare of the ward, considering the ward's needs and

² This distinction should not be construed as a determination that any power of attorney is sufficient to grant its holder authority to sign an agreement to arbitrate on behalf of the grantor. The importance of the specific language used in the granting instrument is illustrated in *Kindred Nursing Centers Ltd. Partnership v. Clark*, ___ U. S. ___ (137 SCt 1421, 197 LEd2d 806) (2017), where the United States Supreme Court recognized that the language of a particular power of attorney may be insufficiently broad to give its holder the authority to execute an arbitration agreement for her husband. Id. at ___ (III). And in an earlier decision of this Court, we held that the plain language of a health care power of attorney awarding its recipient the power “to make any and all decisions for me concerning my personal care, medical treatment, hospitalization, and health care and to require, withhold, or withdraw any type of medical treatment or procedure, even though my death may ensue” did not include the authority to bind her mother “to arbitration of any and all claims arising out of her care at Life Care.” *Life Care Centers of America v. Smith*, 298 Ga. App. 739, 740, 744 (1) (681 SE2d 182) (2009). The court in *Smith* distinguished foreign authority that held otherwise based on the specific language of the health care power of attorney.

[u]nder the circumstances of the transaction, which

based on the specific language of the health care power of attorney. Id. at 742 (1).

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available resources.” OCGA §§ 29-4-22 (a), (b) (6). Certain powers are automatically vested in the guardian upon appointment:

Unless inconsistent with the terms of any court order relating to the guardianship, a guardian may: (1) Take custody of the person of the ward and establish the ward's place of dwelling within this state; (2) Subject to Chapters 9, 20, and 36 of Title 31 and any other pertinent law, give any consents or approvals that may be necessary for medical or other professional care, counsel, treatment, or service for the ward; (3) Bring, defend, or participate in legal, equitable, or administrative proceedings, including alternative dispute resolution, as are appropriate for the support, care, education, health, or welfare of the ward in the name of or on behalf of the ward; and (4) Exercise those other powers reasonably necessary to provide adequately for the support, care, education, health, and welfare of the ward.

OCGA § 29-4-23 (a). Additional [***11] powers may be granted to the guardian by the court, as set forth in OCGA § 29-4-23 (b), but no such powers were awarded to Fountain.

We must consider whether the powers granted to Fountain as guardian are sufficient to allow her to bind Wiggins to the voluntary pre-dispute Arbitration Agreement, which will require us to construe the terms of OCGA § 29-4-23 (a). *HN4* [¶] When considering the meaning of a [***182] statute, “we must presume that the General Assembly meant what it said and said what it meant.” (Citation and punctuation omitted.) *Deal v. Coleman*, 294 Ga. 170, 172 (1) (a) (751 SE2d 337) (2013). “To that end, we must afford the statutory text its plain and ordinary meaning, we must view the statutory text in the context in which it appears, and we must read the statutory text in its most natural and reasonable way.” (Citations and punctuation omitted.) Id. “For context, we may look to the other provisions of the same statute, the structure and history of the whole statute, and the other law — constitutional, statutory, and common law alike — that forms the legal background of the statutory provision in question.” (Citation and punctuation omitted.) *Tibbles v. Teachers Retirement System of Ga.*, 297 Ga. 557, 558 (1) (775 SE2d 527) (2015).

GA(I) [¶] (1) Here, the plain language of paragraphs (1) and (2) of OCGA § 29-4-23 (a) does not provide Fountain authority to sign the Arbitration Agreement. *HN5* [¶] Those paragraphs [***12] empower a guardian to establish a place of dwelling and provide any necessary consents or approvals for “medical or other professional care, counsel, treatment, or service.” Fountain's consent to the voluntary Arbitration

under either of those powers as it did not serve the purpose of establishing a place for him to live or provide consent for medical or other care or treatment. See generally *Coleman v. United Health Svcs. of Ga.*, 344 Ga. App. 682, 683 (1) (a) (812 SE2d 24) (2018) (where the arbitration agreement was voluntary and “not a precondition to admission, expedited admission, or the furnishing of services,” decision to execute the arbitration agreement by holder of advance directive for health care cannot be viewed as a health care decision); *Life Care Centers of America v. Smith*, 298 Ga. App. 739, 742 (1) (681 SE2d 182) (2009) (daughter holding health care power of attorney lacked authority to sign agreement to arbitrate that was not required for her mother to be admitted to Life Care facility).³

HN6 [¶] Paragraph (3) of OCGA § 29-4-23 (a) [***612] gives a guardian the power to “[b]ring, defend, or participate” in legal, equitable, or administrative proceedings, including alternative dispute resolution, if they are “appropriate for the support, care, education, [***13] health, or welfare of the ward.” To “bring” an action “has a settled customary meaning at law, and refers to the initiation of legal proceedings in a suit.” [***183] Black's Law Dictionary (6th ed. 1990); see also Merriam-Webster Online Dictionary (2020) (“bring” defined as “to cause to exist or occur,” such as to institute or to bring a legal action). “Defend” means “to contest and endeavor to defeat a claim or demand.” Black's Law Dictionary (6th ed. 1990). And “participate” in this context means “to take part.” Merriam-Webster Online Dictionary (2020). Fountain's action in signing the pre-dispute Arbitration Agreement is not the equivalent of initiating, contesting, or taking part in any type of proceeding, including alternative dispute resolution. *HN7* [¶] In addition, the type of proceedings that a guardian can initiate or participate in must be appropriate for the support, care, education, health, or welfare of the ward. Although the statutory language would allow Fountain to bring, defend, or participate in a proceeding for those purposes and later determine that those purposes would also be served by engaging in alternative dispute resolution with respect to the claims asserted or defended, the same [***14] cannot be said for signing the pre-dispute Arbitration Agreement that waives the right to a jury trial for any potential claim that may arise in the future where such signature was not necessary for Wiggins to be admitted to the facility or to obtain services therefrom, and thus was not applicable to the support, care, education, health, or welfare of the ward.⁴ Based on the plain

³For the same reasons, the designation of Fountain's duties in the Letters of Guardianship to feed, clothe, shelter and care for Wiggins and to ensure that Wiggins received all necessary medical attention

Agreement, the signing of which was not a requirement for admission to the facility or the receipt of services, did not fall

did not authorize her to sign the Arbitration Agreement.

⁴ OCGA § 29-4-23 (a) (3) would also authorize the guardian to

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language of this paragraph of the statute, Fountain's power to bring, defend, or participate in legal, equitable, or administrative proceedings, including alternative dispute resolution, did not extend to signing the voluntary pre-dispute Arbitration Agreement on behalf of Wiggins.

HN8 [¶] Our conclusion in this regard is consistent with the general duties of a guardian to “at all times act as a fiduciary in the ward's best interest and exercise reasonable care, diligence, and prudence.” OCGA § 29-4-22 (a). The record does not reflect that Fountain's execution of the Arbitration Agreement when Wiggins was admitted to the facility was a decision made in the best interest of the ward, with reasonable care, diligence, and prudence, because signing it was not a condition of admission to the facility and the claims that were bound to arbitration [***15] had not yet arisen, making it impossible for her to determine at that time whether waiving Wiggins's right to a jury trial would be in his best interest.

We note that prior versions of this statute authorized guardians to compromise all contested or doubtful claims for or against the [*184] wards they represented and allowed them to submit such matters to arbitration. See former OCGA § 29-2-16 (2004); Code of 1933, § 49-219. The current statute lacks the language authorizing a guardian to “submit” claims to arbitration and, to the extent the prior language would have authorized a guardian to execute a pre-dispute arbitration agreement covering any claims of the ward, the existing language does not.

HN9 [¶] We next address paragraph (4) of OCGA § 29-4-23 (a), which allows a guardian to exercise “those other powers reasonably necessary to provide adequately for the support, care, education, health, and welfare of the ward.” These additional powers must be “reasonably necessary” to provide for the listed needs. As we have previously stated, **GA(2)** [¶] (2) signing the Arbitration Agreement was optional and not a “precondition to admission, expedited admission, or the furnishing of services to [Wiggins].” In addition, the record does not reflect that [***16] signing the Arbitration Agreement was otherwise reasonably necessary to provide for Wiggins's support, care, [**613] education, health, or welfare. Because signing the Arbitration Agreement was not reasonably necessary to provide for Wiggins, paragraph (4) does not provide Fountain the authority to do so on Wiggins's behalf. See generally *Coleman*, 344 Ga. App. at 683 (1); *Smith*, 298 Ga. App. at 742 (1).

Clinch has failed to establish that Fountain had the authority

to sign the Arbitration Agreement on behalf of Wiggins. Accordingly, the Arbitration Agreement is not enforceable against Wiggins, and the trial court properly denied the motion to compel arbitration. See generally *Coleman*, 344 Ga. App. at 683-686 (1); *United Health Svcs. of Ga. v. Alexander*, 342 Ga. App. 1, 5 (2) (b) (802 SE2d 314) (2017); *Poole*, 286 Ga. App. at 27. **HN10** [¶] Although the trial court found the agreement to be invalid on other grounds, we will affirm a judgment that is right for any reason. See *Poole*, 286 Ga. App. at 27.

2. Given our holding in Division 1, we need not address any other potential issues related to the enforcement of the Arbitration Agreement.

Judgment affirmed. Dillard, P. J., and Brown, J., concur.

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participate in alternative dispute resolution on the ward's behalf if ordered by the court during an authorized proceeding or if the ward had agreed to do so before becoming incapacitated.

Appellate Case No. 2012-207308
STATE OF SOUTH CAROLINA In The Court of Appeals

Scott v. Heritage Healthcare of Estill, LLC

Decided Aug 6, 2014

Appellate Case No. 2012-207308 Unpublished Opinion No. 2014-UP-317

08-06-2014

Cherry Scott, as Personal Representative of the Estate of Elizabeth Jones, Respondent, v. Heritage Healthcare of Estill, LLC, d/b/a Heritage of the Lowcountry and/or Uni-Health Post Acute Network of the Lowcountry, United Clinical Services, Inc., United Rehab, Inc., and UHS-Pruitt Corporation, Appellants.

Monteith Powell Todd, John Michael Montgomery, and Robert E. Horner, all of Sowell Gray Stepp & Laffitte, LLC, of Columbia; and Jason Edward Bring, W. Jerad Rissler, and Tyler Lawrence Arnold, all of Arnall Golden Gregory, LLP, of Atlanta, Georgia, for Appellants. Lee Deer Cope, of Peters Murdaugh Parker Eltzroth & Detrick, PA, of Hampton; Charles McCutchen, of Lanier & Burroughs, LLC, of Orangeburg; Matthew Vernon Creech, of Peters Murdaugh Parker Eltzroth & Detrick, PA, of Ridgeland; and Margie Bright Matthews, of Bright Matthews Law Firm, LLC, of Walterboro, for Respondent.

PER CURIAM

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

Appeal From Hampton County
Carmen T. Mullen, Circuit Court Judge

AFFIRMED

Monteith Powell Todd, John Michael Montgomery, and Robert E. Horner, all of Sowell Gray Stepp & Laffitte, LLC, of Columbia; and Jason Edward Bring, W. Jerad Rissler, and Tyler Lawrence Arnold, all of Arnall Golden Gregory, LLP, of Atlanta, Georgia, for Appellants. *2 Lee Deer Cope, of Peters Murdaugh Parker Eltzroth & Detrick, PA, of Hampton; Charles McCutchen, of Lanier & Burroughs, LLC, of Orangeburg; Matthew Vernon Creech, of Peters Murdaugh Parker Eltzroth & Detrick, PA, of Ridgeland; and Margie Bright Matthews, of Bright Matthews Law Firm, LLC, of Walterboro, for Respondent. **PER CURIAM:** In this wrongful death and survival action alleging nursing home negligence, Heritage Healthcare of Estill, LLC, d/b/a Heritage of the Lowcountry and/or Uni-Health Post Acute Network of the Lowcountry, United Clinical Services, Inc., United Rehab, Inc., and UHS-Pruitt Corporation (collectively, "Heritage") appeal from the trial court's denial of its motion to compel arbitration. Heritage argues the trial court erred in (1) concluding the arbitration agreement was not governed by the Federal Arbitration Act (FAA) when the transaction between the parties involved interstate commerce and (2) refusing to enforce the parties' Arbitration Agreement in accordance with its plain terms. We affirm. 1. We affirm as to whether Ellen Jenkins had authority to sign the Arbitration Agreement on Elizabeth Jones' behalf when Jones was competent at the time she was admitted to



Heritage, and Jenkins did not possess a health care power of attorney to sign either contract on Jones' behalf.¹ We find the evidence reasonably supports the trial court's findings that Jenkins lacked authority to enter into the Arbitration Agreement on Jones' behalf because Jones was competent at the time of her admission, and Sally Dobson, the admissions director for Heritage, agreed it would have been more appropriate for Jones to sign the contract herself because she was competent, and Dobson did not know if Jenkins had a power of attorney. Therefore, we find the Arbitration Agreement is not enforceable against Respondent. *See New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008) (stating an "[a]ppeal from the denial of a motion to compel arbitration is subject to de novo review"); *id.* ("Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings."); *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145, 425 S.E.2d 764, 773 (Ct. App. 1992) ("Agency is a fiduciary relationship which results from the manifestation of consent by one person to another to be subject to the control of the other and to act on his behalf."); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 434, 540 S.E.2d 113, 118 (Ct. App. 2000) ("Agency may be implied or inferred and may be proved circumstantially by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal."); *id.* at 433, 540 S.E.2d at 118 ("An agency may not be established solely by the declarations and conduct of an alleged agent."); *McCall v. Finley*, 294 S.C. 1, 6, 362 S.E.2d 26, 29 (Ct. App. 1987) ("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."); *Justus v. Universal Credit Co.*, 189 S.C. 487, 495, 1 S.E.2d 508, 511 (1939) ("[I]t is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority . . .") (internal quotation marks and citation omitted); *cf. Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 353-54, 755 S.E.2d 450, 454 (2014) (finding that under the Adult Health Care Consent Act, a sister who lacked a power of attorney did not have the capacity to bind the decedent to the voluntary arbitration agreement because the scope of the sister's authority to consent to decisions concerning the decedent's health care extended only to the admission agreement, which was the basis upon which the facility agreed to provide health care and the sister agreed to pay for it, and because the separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution between the facility and the decedent or the sister should issues arise in the future); *Life Care Ctrs. of Am. v. Smith*, 681 S.E.2d 182, 185 (Ga. Ct. App. 2009) (finding "the plain language of the health care power of attorney did not give [the daughter] the power to sign away her mother's or her mother's legal representative's right to a jury trial"). 2. We decline to address Heritage's remaining arguments because we find this issue is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (concluding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal). Accordingly, the decision of the trial court is

¹ Jones was admitted to Heritage by Jenkins, her sister, who executed the paperwork for her admission.

AFFIRMED.

FEW, C.J., and SHORT and GEATHERS, JJ., concur.

Wilson v. Nhc Healthcare/Mauldin

Court of Common Pleas of South Carolina, Greenville County, Thirteenth Judicial Circuit

June 21, 2018, Decided; June 21, 2018, Filed

C.A. No.: 2018-CP-23-00119 & 2018-CP-23-00120

Reporter

2018 S.C. C.P. LEXIS 421 *

Marlene Wilson, Individually and as Personal Representative of the Estate of Kenneth Wilson, Plaintiff, v. NHC Healthcare/Mauldin, LLC, National Healthcare Corporation, NHC/OP, LP, Bon Secours St. Francis Health System, Inc., Bon Secours Health System, Inc., Defendant(s).

Judges: [*1] Michael Nettles, JUDGE.

Opinion by: Michael Nettles

Opinion

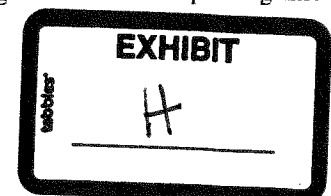
ORDER

This matter came before the Court on Defendants National Healthcare Corporation' and NHC/OP, LP's (hereinafter "Nursing Home Defendants") Motion to Dismiss and to Compel Arbitration. Having listened to oral arguments from counsel and having reviewed the parties' legal memoranda for the reasons more fully set forth below, the Court hereby denies the Defendants' Motion to Dismiss and to Compel Arbitration.

BACKGROUND

This matter arises out of two civil actions - a survival action and a wrongful death action. Both actions involve allegations of nursing home negligence and corporate negligence resulting in the death of Kenneth Wilson (hereinafter "Decedent"). Marlene Wilson (hereinafter "Daughter") was Decedent's daughter and serves as Personal Representative of Decedent's estate. On April 6, 2015, Decedent was admitted to NHC Mauldin for short-term rehabilitation after undergoing a hip arthroplasty at St. Francis Hospital. Plaintiff alleges that as a result of Nursing Home Defendants' negligence, Decedent developed necrotic and infected bedsores, became dehydrated, suffered from nutritional compromise, and developed multiple infections which went [*2] untreated, all of which Plaintiff alleges caused Decedent's injuries and death.

At the time of admission, Daughter signed an Agreement to Arbitrate and Waive Jury Trial ("Arbitration Agreement"). The Arbitration Agreement was signed by Jennifer Balon for "The Center" and by Daughter for "The Patient". The Arbitration Agreement provides that the parties agree to follow the dispute resolution procedures set forth in the Arbitration Agreement which include the waiver of a jury trial and the requirement that the parties submit to binding arbitration all disputes against each other which exceed an amount in controversy over \$7,500.00.



Plaintiff filed the Notice of Intent to File Suit on September 14, 2017. The parties engaged in the mandatory pre-suit mediation on December 28, 2017. Plaintiff then filed the Summons and Complaint on January 5, 2018 and served same. Nursing Home Defendants filed this Motion to Dismiss and to Compel Arbitration on February 28, 2018. Nursing Home Defendants contend that this Arbitration Agreement requires that this Court order that this case be dismissed and that the claims be submitted to binding arbitration in accordance with the Arbitration Agreement. Plaintiff [*3] contends that the Arbitration Agreement is unenforceable under state contract law and this Court agrees for the various reasons set forth hereinbelow.

LEGAL ANALYSIS AND CONCLUSIONS

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application to arbitrate. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (S.C. 2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013). Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

I. Daughter had No Authority to Sign the Arbitration Agreement for Decedent

Because Decedent did not sign the Arbitration Agreement, Daughter was required to have authority to execute the Arbitration Agreement for the Arbitration Agreement to be enforceable. Daughter [*4] had no such authority. The legal consequences of an agent's actions can only be attributed to the principal when the agent has actual or apparent authority. Charleston Registry v. Young Clement, 598 S.E.2d 717, 359 S.C. 635, 642 (Ct. App. 2004). In the present case, neither actual or apparent authority exists for Daughter.

A. No Actual Agency/Authority

While it is true that Daughter held a "Power of Attorney" on behalf of Decedent, this Power of Attorney did not confer the necessary authority to execute an arbitration agreement on Decedent's behalf. This document is titled "Power of Attorney" and is not identified a "General Durable Power of Attorney." More importantly, the document does not confer sufficient authority to enter into contracts generally, to enter into releases on behalf of Decedent, to waive the constitutional right to a jury trial, nor does it include the "catch all provision giving the attorney-in-fact the authority 'to sign any and all releases or consent required.'" Sovereign Healthcare of Tampa v. Schmitt, 195 So. 3d, 1175 (Fla. Dist. Ct. App. 2016).

The powers and authorities which Daughter held were specifically delineated in the Power of Attorney. These powers granted to Daughter the authority to make decisions regarding financial matters and decisions regarding healthcare.

This analysis is akin to that [*5] in Hodge v. UniHealth Post-Acute Care of Bamberg, 2018 S.C. App. LEXIS 13. As noted in Hodge, "This limited range of acts performed on the [decedent]'s behalf suggest, at most, [he] may have conferred on [the personal representative] the authority to make health care and financial decisions on his behalf, but no more than that." Id. at 29 quoting Dickerson v. Longoria, 95 A.2d 721, 743, 414 Md. 419 (2010). The Hodge court further noted that the authority to sign healthcare documents does not include the authority to sign an arbitration agreement. Hodge at 40. Our courts have held a healthcare power of attorney does not provide authority to sign an arbitration agreement. Hodge v. UniHealth Post-Acute Care of Bamberg, 2018 S.C. App. LEXIS 13; Thompson v. Pruitt Corp., 784 S.E.2d, 679, 416 S.C. 43, 55 (Ct. App. 2016), *cert. denied*, S.C. Sup. Ct. Order dated Dec. 2, 2016.

Furthermore, the South Carolina Supreme Court has held that "The authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial." Hodge at 37 quoting Thompson at 55, 784 S.E.2d at 686. As previously indicated, this Power of Attorney did not have the "catch all" language of many general powers of

attorney and does not encompass the executing of an agreement to resolve legal claims by arbitration and waiving a jury trial, but rather, deals with the limited [*6] circumstances enumerated therein of making financial or healthcare decisions for Decedent. Therefore, no actual authority existed for Daughter to sign the Arbitration Agreement.

B. No Apparent Agency/Authority NAAA

Daughter did not have apparent authority/agency to execute the Arbitration Agreement on behalf of the Decedent. Apparent authority is based on "representations made by the principal to the third party and reliance by the third party on those representations". Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649, S.E.2d 488, 491 (2007). Apparent authority exists when the principal is bound by the acts of its agent after the principal has placed the agent in such a position that a person of ordinary prudence, reasonably familiar with business usages and custom is led to believe the agent has certain authority and in turn, deals with the agent based on the assumption. Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. 137, 399 S.E.2d 430 (Ct. App. 1990), *rev'd on other grounds*.

South Carolina law requires that to prove apparent authority, the Defendants must show "... (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent [*7] authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists.

Nursing Home Defendants have presented no evidence that Decedent represented, implicitly or explicitly, to the Nursing Home Defendants that Daughter had the authority to enter into the Arbitration Agreement on his behalf. The Affidavit presented by Plaintiff reflects that Decedent was not present when Daughter signed the Arbitration Agreement as he was still in the hospital. The Affidavit further reflects that Decedent was never aware that Daughter had signed the Arbitration Agreement and never authorized Daughter to sign such contracts or agreements. Further, based upon the Affidavit of Daughter and the records submitted as exhibits at the hearing, Decedent was confused from the effects of the anesthesia and had "moderate" mental impairment.

It should further be noted that despite [*8] the fact that Decedent's mental impairment improved to "cognitively intact", according to Nursing Home Defendants' own records during his admission, Defendants never requested that Decedent sign the Arbitration Agreement personally. Further, the Arbitration Agreement does not reflect any authority which Daughter had to execute such agreement despite the Arbitration Agreement's own requirement that any such authority be delineated.

Nursing Home Defendants must also show a detrimental change of position. It should also be noted that the Arbitration Agreement is separate from the Admissions Agreement. The facility cannot show that it changed its position for the worse as required to prove any apparent authority/agency as reflected in Hodge.

Because Decedent did not consciously or impliedly represent that Daughter was his agent and because there was no change of position by the Nursing Home Defendants, Nursing Home Defendants cannot show that Daughter had apparent authority/agency to execute the Arbitration Agreement on behalf of Decedent.

II. The Arbitration Agreement is Unenforceable Against the Decedent's Wrongful Death Statutory Beneficiaries

It is the conclusion and order of this Court [*9] that the Arbitration Agreement is unenforceable for the above-stated reasons. However, even if Daughter had actual or apparent authority/agency to sign the Arbitration Agreement on behalf of Decedent, the Arbitration Agreement is unenforceable against the Decedent's wrongful death statutory beneficiaries under South Carolina contract law defenses. The Arbitration Agreement neither covers the wrongful death statutory beneficiaries' claims within the scope of the agreement nor was the Arbitration Agreement signed by an individual who had authority to bind the statutory beneficiaries.

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South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914). The alleged Arbitration Agreement by its own terms is an agreement between "Kenneth Wilson ('patient') and "NHC Healthcare/Mauldin, LLC ('center')". While at some point during Decedent's admission to the facility, he might have had the authority to bind himself and his claims to arbitration but was never given the chance. However, even if Decedent had agreed to arbitration, he did not have the legal authority to bind his [*10] statutory beneficiaries who are not parties to the Arbitration Agreement. The signatories to the agreement are Daughter on behalf of Decedent and NHC Healthcare/Mauldin, LLC. No other persons are parties to this agreement. The scope of the agreement does not include the statutory beneficiaries' claims.

However, even if the Arbitration Agreement did contemplate the wrongful death statutory beneficiaries' claims, Decedent and/or Daughter had no authority to waive the statutory beneficiaries' claims. Daughter signed the Arbitration Agreement in her *individual capacity*. However, as the Hodge court noted, actions taken by Daughter in her *individual capacity* will not be held against the estate as the estate has other beneficiaries and may have other creditors. Daughter's Affidavit reflects that other statutory beneficiaries exist in this case.

Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, a Federal District Court in South Carolina has analyzed this issue under the South Carolina Non-Economic Awards Act of 2005. Diane Boyle as Personal Representative of the Estate of John Francis Boyle v. United States of America, 944 F.Supp.2d 577 (D.S.C. 2012). In Boyle, the Court concluded that the wrongful death beneficiaries' claims were separate and distinct claims for purposes [*11] of stacking damage caps and for purposes of being individual claimants. This analysis supports the contention that the wrongful death claimants have separate and distinct claims apart from that of the survival action.

Many other states have come to this same conclusion, Daniels v. Sunrise Senior Living, Inc., 212 Cal.App 4th 674, 151 Cal.Rptr.3d 273 (Cal.App.4 Dist, 2013) (Wrongful Death claims not bound to arbitration), Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (Wrongful Death claimants not bound by arbitration agreement.) As previously discussed, the only parties executing this Agreement were Daughter purportedly on behalf of Decedent and employee as an Agent for NHC Mauldin. NHC Mauldin would contend that this agreement is binding on the non-signatory statutory beneficiaries simply because it contends the Arbitration Agreement says so.

However, as the Supreme Court of Kentucky said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises, Inc.:

[A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is [*12] one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third-party are appropriately subjected the contract's arbitration provisions, at least where the tort and contract are significantly intertwined. See, In re Weekley Homes, L.P., 180 S.W. 3d 127 (Tex. 2005) (negligent repair claim by homeowner's daughter against contractor was subject to repair contract's arbitration clause because daughter, although a non-party, was direct and principal beneficiary under the contract). It is something else entirely, however, to say that incidental beneficiaries of a contract-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants. This is what Beverly purports to do. Arbitration is a matter of contract, however, it is something the contracting parties, or their proxies, must agree to. It is [*13] not something that one party may simply impose upon another. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed.2d 491 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit", Citation and internal quotation marks omitted.) Since Beverly's theory would allow just that, i.e., would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a "third party beneficiary" of the arbitration agreement, we reject it out of hand.

Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 599-600 (KY 2012).

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Likewise, NHC-Mauldin's mentioning of "employees, agents, representatives, affiliates, fiduciaries, medical directors, officers, directors, governing bodies, management companies, insurers, attorneys, predecessors, successors, assigns, third party beneficiaries, heirs, executors, administrators, or any of them, and all persons, entities or corporations with whom any of the former have been, are now, or may be affiliated, arising out of or in any way related or connected to the patient's stay and the care provided at the Center", as being bound by the Arbitration Agreement does not make it so. It is no more than an *ipse elixir* which Defendants [*14] expect this Court to embrace. The law simply does not permit a party to cut off the rights of a non-signatory to an agreement who receives no benefit thereunder.

The wrongful death claims are separate claims apart from the Decedent's claims. According to South Carolina's Wrongful Death Act:

"Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued shall be liable to an action for damages."

South Carolina Code Annotated §15-51-10 (1977)

The wrongful death beneficiaries are as follows:

"Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs or the person whose death shall have been so caused."

South Carolina Code Annotated §15-51-20 (Supp. 2001)

The general element of damages recoverable are pecuniary loss, mental shock and suffering, wounded feelings, grief [*15] and sorrow, loss of companionship, and deprivation of the use and comfort of the Decedent, society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries. Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d. 713, 714 S.C. (Ct. App. 1989).

The wrongful death claim is a separate claim from the claims a decedent might bring on his own behalf under the survival statute. In Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914), the Supreme Court held that wrongful death and survival actions are different claims for different injuries. The Court stated "necessarily, therefore, there must be separate verdicts and separate judgments, there should be separate actions." Id. at 31. See also Strickland v. Southern Ry Co., 111 S.C. 248, 97 S.E. 695 (1918) (Supreme Court Affirmed Appeal from Circuit Court's ruling noting that survival claims are independent of wrongful death claims), Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539 (1928) (discussing the difference between survival and wrongful death claims as being independent of each other).

The Pennsylvania Superior Court in Pisano v. Extended Homes, Inc., operating under the fictitious name Belaire Health 84 Rehabilitation Center, 2013 PA Super 232, 77 A.3d 651, 662 (PA 2013) affirmed the trial court decision that the nursing home arbitration agreement did not apply to the statutory beneficiaries' wrongful death claim. The Court noted the wrongful death and survival actions are not derivative [*16] of each other but are flowing from the same underlining tortious conduct. Like the South Carolina statute, Pennsylvania's wrongful death statute provides that the right of action exists only for the benefit of the spouse, children, parents, or parents of the deceased. Id. at 656. The Pennsylvania Court further held that since the wrongful death claim is independent of the survival action and because the wrongful death statute does not characterize the wrongful death claim as that of a third-party beneficiary, that the trial court properly refused to compel arbitration to the non-signatory wrongful death beneficiaries who were not parties to the arbitration agreement.

Likewise, in Bybee v. Abdulla, M.D., 189 P.3d 40, 2008 UT 35 (Utah, 2008), the Supreme Court of Utah held that an agreement to arbitrate that was signed by the decedent cannot extend to the statutory beneficiaries of a wrongful death claim. The Utah Supreme Court noted that certain defenses from the decedent's personal injury action may be raised against the heirs of a wrongful death action such as comparative negligence and statutes of limitations as key common characteristics. However, as the Supreme Court of Utah noted, both of these defenses go to [*17] the viability of the underlying personal injury action. The Court further stated that "by contract, an agreement to bind heirs to arbitrate disputes does not implicate the viability of underlying claims." Id. at 47, citing Horwich v. Superior Court, 21 Cal. 4th 272, 87 Cal. Rptr. 2d 222, 980 P. 2d 927, 935

(1999). The Utah Supreme Court went on to note that "we have never intended to suggest, however, that because Decedent is

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the master of his claim he may by contract expose his unwilling heirs to any imaginable defense." Bybee v. Abdulla, M.D., at 46. The Utah Supreme Court further held that the defenses against the decedent's claim which are less likely to be found enforceable against the heirs' claims in a wrongful death action "are contract provisions that purport to affect the rights of heirs that do not affect the existence of the decedent's personal injury claim during his lifetime. The arbitration agreement...falls squarely within this category and is, therefore, unenforceable against the heir." Id. at 47.

The Court of Appeals in Washington in Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn. App. 919, 231 P. 3d 1252 (Wash. App. Div. 1 2010) held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit." Id. quoting Satomi Owners Association v. Satomi, LLC, 167 Wash. 2d 781, 225 P.3d 213 (2009). The Washington Court of Appeals further noted that the wrongful death [*18] claims asserted in that case were not on behalf of the estate just as South Carolina's wrongful death claims are not on behalf of the estate. The Washington Court of Appeals further discussed the Supreme Court of Ohio's ruling in Peters v. Columbus Steel Casting Co., 115 Ohio St.3d 134, 873 N.E.2d 1258 (2007), wherein the Supreme Court of Ohio held that the wrongful death claim of a spouse who was Administrator of her husband's estate was not subject to the Decedent's arbitration agreement. The Washington Court of Appeals in discussing Peters, stated "In sum, the decedent's agreement was an agreement 'to arbitrate his claims against the company,' and thus the provision in the agreement binding the decedent's heirs applied to a survival action. But the decedent could not 'restrict his beneficiaries to arbitration of their wrongful death claims because he held no right to those claims.'" Woodall v. Avalon Care Center - Federal Way, LLC at 929. In the Washington Court of Appeals' analysis, the Court concluded that the wrongful death beneficiaries could not be bound to the arbitration agreement which they did not sign.

Therefore, even if Daughter had actual or apparent authority/agency to execute the Arbitration Agreement, the Arbitration Agreement did not include the [*19] wrongful death statutory beneficiaries' claims within the scope of the Arbitration Agreement, nor did Decedent and/or Daughter have authority to bind the wrongful death statutory beneficiaries' claims to the Arbitration Agreement. As a result, the Arbitration Agreement cannot reach the claims of the wrongful death statutory beneficiaries.

WHEREFORE, for the reasons stated herein, the Court denies Defendants' Motion to Dismiss and Motion to Compel Arbitration.

IT IS SO ORDERED.

The Honorable Michael G. Nettles

Presiding Judge

Greenville, South Carolina

Date: __

So Ordered

Michael Nettles

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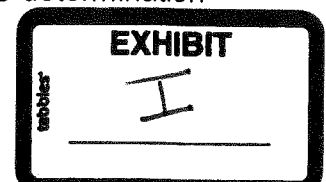
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA

THI of South Carolina at Magnolia	)	Civil Action No.: 7:13-2929-BHH
Manor-Inman, LLC d/b/a Magnolia	)	
Manor-Inman,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER AND OPINION
	)	
Eddie M. Gilbert Individually and as	)	
Personal Representative of the Estate	)	
of Gertrude F. Gilbert,	)	
	)	
Defendant.	)	
_____	)	

This matter is before the Court on the Report and Recommendation of Magistrate Judge Kevin F. McDonald (ECF No. 65). In accordance with 28 U.S.C. § 636, Local Civil Rule 73.02(B)(1) D.S.C., and an order of reference issued by the undersigned, the plaintiff's motion to compel arbitration and stay court proceedings (ECF No. 17) was referred to Magistrate Judge McDonald for a Report and Recommendation. On October 10, 2014, Magistrate Judge McDonald issued a Report and Recommendation recommending that the court order the defendant to arbitration and dismiss the case. (ECF No. 65.) On November 26, 2014, the plaintiff filed objections to the Report and Recommendation (ECF No. 71), and the defendant filed a reply (ECF No. 75), on December 29, 2014.

STANDARD OF REVIEW

The magistrate judge makes only a recommendation to the court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with the court. *Mathews v. Weber*, 423 U.S. 261, 270–71, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976). The court is charged with making a *de novo* determination



of those portions of the Report and Recommendation (the "Report") to which specific objection is made, and the court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter with instructions. 28 U.S.C. § 636(b)(1). However, the court need not conduct a *de novo* review when a party makes only "general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir.1982). In the absence of a timely filed, specific objection, the magistrate judge's conclusions are reviewed only for clear error. See *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir.2005).

DISCUSSION

The magistrate judge prepared an extensive and detailed Report recommending the plaintiff's motion be granted in part and denied in part. (ECF No. 65.) The magistrate judge concluded that the defendant should be ordered to arbitrate its dispute against the plaintiff, but that the underlying state court action could not be stayed.

The defendant has made numerous objections, some of them fresh while others renewed from its original response. The Court says only what is necessary to address such objections against the already meaningful backdrop of a thorough Report of the magistrate judge, incorporated entirely by specific reference, herein, to the degree not inconsistent. Exhaustive recitation of law and fact exists there.

The defendant has raised the applicability of recent South Carolina decisional law to argue against the conclusion that the South Carolina Department of Social Services ("DSS") representative, Phebe Crosland, could have ever bound Gertrude Gilbert or her estate by the arbitration provision at issue in this case. See *Coleman v. Mariner Health Care, Inc.*, 755 S.E.2d 450 (S.C. 2013); *Dean v. Heritage Healthcare of Ridgeway*, 759

S.E.2d 727, 731 n.4 & 736 n.13 (S.C. 2014). The Court has spent considerable time with those decisions out of a real concern that a person without capacity could ever be said to bind the forum of future litigation and dispute resolution. The offered decisions are simply distinguishable from this case in a way that does not disturb the magistrate judge's recommendation.

First, as the defendant counters and the magistrate judge found, the issue of whether Crosland was authorized to sign on Gilbert's behalf is simply not relevant. Gilbert (and now her Estate) was independently bound by the terms of the arbitration provision, at issue, pursuant to the third-party beneficiary doctrine and equitable estoppel. (ECF No. 65 at 5 n.3); *THI of S.C. at Columbia, LLC v. Wiggins*, C/A No. 3:11-888-CMC, 2011 WL 4089435, at *6 n.13 (D.S.C. Sept. 13, 2011) (declining to consider whether a nursing-home resident's family member had statutory or apparent authority to bind the resident to the same Arbitration Provision for the same reason). Accordingly, the matter of binding authority need not be resolved.

Second, *Coleman* and *Dean*, relied upon by the defendant, are inapposite. The arbitration agreement, in *Coleman*, was separate from the admissions agreement. *Coleman*, 755 S.E.2d at 454. And, admission to the nursing facility, in that case, was not contingent on assent to the freestanding arbitration agreement. *Id.* Execution of the arbitration agreement was voluntary. *Id.* The signatory for the nursing-home admittee had authority to bind for healthcare decisions,¹ but because admission to the nursing home for

¹ Gilbert was in Department of Social Services' legal custody because a family court had deemed her a "vulnerable adult" under the South Carolina Omnibus Adult Protection Act ("APA"). (Buckner Decl., Ex. E.) The defendant does not dispute that the APA empowered Crosland to execute the Admission Contract to admit Gilbert to the facility. (See ECF No. 36 at 6 & n.4 (quoting ECF No. 36-1, Ex. D).)

health related needs was not contingent upon execution of the arbitration agreement, it could not be said that the signatory had any authority to bind the admittee as to the separate, voluntary arbitration agreement. *Id.*

In this case, the admission agreement *contained* the arbitration provision. So the distinction identified by the South Carolina Supreme Court, in a signatory's authority to execute some separate non-essential legal waiver, is simply not implicated by the facts here, such that *Coleman* governs.

Likewise, *Coleman's* "rejection" of an estoppel argument was related to whether the two agreements, admissions and arbitration, should be considered as merged under such a theory. That is not how the doctrine was applied by the magistrate judge here or in cases like *Wiggins*, 2011 WL 4089435, at *6. Rather, the magistrate judge recognized that the benefits of admission should operate to stop the defendant from rejecting arbitration now; merger was not at issue.

Any objection the defendant has to the magistrate judge's reliance on *McCutcheon v. THI of S.C. at Charleston*, LLC, No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011), is also unfounded. The Court has reviewed the entire decision and the objections of the plaintiff and the magistrate judge properly applied third-party beneficiary and equitable estoppel law. The magistrate judge also recognized the obligation to, and did, apply South Carolina law. It just so happens the South Carolina authority relied upon by the defendant is inapplicable.

The remainder of the defendant's objections have sufficiently been treated in the recommendation, adopted fully herein. The Court would say briefly a little more concerning some of them, however.

The defendant also objects that the arbitration provision in this case can apply to

a wrongful death claim brought by individuals who were not “parties” to the admission agreement. (Dkt. No. 71 at 10-14.) As far as the Court can tell (see ECF No. 1-2 (State Court Complaint), however, the plaintiff has not brought a wrongful death action, pursuant to S.C. Code §§ 15–51–10, 15–51–20, for the benefit of individuals heirs; the claims are on behalf of the estate. See *Dickey v. Clarke Nursing Home*, 2007 WL 8325995, at *2 (S.C. Ct. App. Feb. 23, 2007) (citing *Lester v. McFaddon*, 415 F.2d 1101, 1103 (4th Cir.1969)). Accordingly, any argument against the applicability of the arbitration provision based on the presence of a wrongful death action is ineffective.

Additionally, the South Carolina Supreme Court made clear in *Dean* that, under South Carolina law, an arbitral agreement is still indeed binding on a decedent's estate for a claim in wrongful death. See *Dean*, 759 S.E.2d at 731 n.3. (“We note that courts may not refuse to compel arbitration simply because a wrongful death claim is involved.” (citing *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203-04 (2012) (per curiam))).

The plaintiff's objections related to unconscionability and the procedural machinations of the execution of the agreement were properly considered by the magistrate judge and otherwise without any additional merit as presented on objection.

CONCLUSION

After a careful review of the record, the applicable law, and the objections of the defendant, the Report and Recommendation is adopted and incorporated herein by specific reference. The plaintiffs' motion for to compel arbitration and stay the case (ECF No. 17) is GRANTED in part and DENIED in part. Specifically, the Court would ORDER arbitration, in accord with the binding provision at issue in this case, but would not order any stay of the underlying state court proceeding.² The case is hereby dismissed.

IT IS SO ORDERED.

/s/Bruce Howe Hendricks
United States District Judge

March 19, 2015
Greenville, South Carolina

² The plaintiff has not objected to the magistrate judge's recommendation in this respect that the underlying action cannot be enjoined.

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Kenneth Pace, Individually and as Personal
Representative of the Estate of Earl E.
Pace,

Plaintiff,

v.

Lake Emory Post Acute Care; THI of South
Carolina at Camp Care, LLC; THI of South
Carolina, LLC; THI of Baltimore, Inc.;
Fundamental Administrative Services, LLC;
Fundamental Clinical and Operational
Services, LLC; Fundamental Clinical
Consulting, LLC; Fundamental Long Term
Care Holdings, LLC, and Kerry L. Wheeler,
DO,

Defendants.

IN THE COURT OF COMMON PLEAS

2019-CP-42-03709

2019-CP-42-03708

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO THE MOTION
DISMISS, TO COMPEL ARBITRATION,
AND TO STAY THE STATE COURT
PROCEEDING**

The Plaintiff Kenneth Pace, Individually and as the Personal Representative of the Estate of Earl E. Pace", respectfully submits this Memorandum in Opposition to the Motion to Dismiss, Compel Arbitration, and Stay the State Court Proceeding, (hereafter "Motion to Dismiss"), filed by the Defendants in the above referenced cases. For the reasons set forth below, the Plaintiff respectfully requests that this Court deny the Defendants' Motion to Dismiss and allow these matters to proceed to a trial by jury.

I. BACKGROUND FACTS

In 2014, Mr. Pace was living in his home with help from local family members. See Complaint for Adult Protective Services attached as Exhibit A.

Department of Social Services, (hereafter “DSS”), investigated complaints against certain caregivers of Mr. Pace and ultimately Mr. Pace was taken into protective custody on or about July 10, 2014. *See id.* DSS petitioned the court for custody of Mr. Pace and temporary custody was granted on or about July 14, 2014; Joanne Metcalf was appointed as the Guardian *ad Litem*, (hereafter “GAL”), for Mr. Pace; and Kimberly Brooks, Esq. was appointed as attorney for the Guardian. *See* Order dated July 16, 2014 attached as Exhibit B. Chad Mitchell, Esq. was appointed as attorney for Mr. Pace. *See id.* DSS subsequently petitioned the court to be relieved of custody and recommended that Lake Emory designate the Plaintiff as Mr. Pace’s representative. *See* Correspondence and Order dated May 29, 2015 and April 24, 2015 respectively attached as Exhibit C.

Mr. Pace was admitted to Lake Emory Post Acute, (hereafter “Lake Emory”), for care and supervision on or about January 30, 2015. (*See* Plaintiff’s Complaints for Survival Action and Wrongful Death for all factual allegations). Mr. Pace was admitted to Lake Emory from Spartanburg Regional Medical Center. Upon admission, Mr. Pace took no medication to manage his blood sugars. Mr. Pace was sent back to be admitted to the hospital on or about April 9, 2017 when he experienced some delirium. During that hospitalization, Mr. Pace was treated for a UTI and adjusted his psychiatric medications. Mr. Pace was hospitalized until April 20, 2017 when he was returned to Lake Emory. Upon return to Lake Emory, nursing staff and Dr. Wheeler ordered Levemir 47 units two times a day as well as Tradjenta 5 mg once a day – despite that prior to being sent to the

hospital, Mr. Pace was not receiving any medication to control blood sugar. Neither of these medications were given to Mr. Pace during his hospitalization. Defendants administered medications to Mr. Pace to control blood sugar that he did not need and ultimately caused him to experience extreme hypoglycemia with a blood sugar of 14, on or about April 27, 2017.

Mr. Pace was transferred back to Spartanburg Regional Medical Center on or about April 27, 2017 where he was diagnosed with hypoglycemic encephalopathy. Mr. Pace's prognosis was poor and the recommendation was made to keep him comfortable and to provide hospice services. Mr. Pace was transferred to the Hospice House in Clinton where he passed away.

The Plaintiff in this action is Kenneth Pace, the son of the Decedent. Plaintiff filed his Summons and Complaints alleging a Survival Action and a Wrongful Death Action on or about October 21, 2019. The Defendants filed their Motion to Dismiss on or about April 13, 2020. At the time Mr. Pace was admitted to the Defendant Lake Emory, he was under the custody of DSS. Despite having a GAL and a court appointed attorney, a DSS employee by the name of "Calvin Hill" executed Mr. Pace's admission paperwork. The contract with Lake Emory, (hereafter "Admission Agreement") is attached as Exhibit D and the separate arbitration agreement executed by Mr. Hill and that the Defendants are attempting to enforce against the Plaintiff is attached as Exhibit E, (hereafter "Arbitration Agreement").

II. LAW/ANALYSIS

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *See New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (S.C. Ct. App. 2008). The Arbitration Agreement presented by the Defendants is not enforceable for the following reasons: (1) the Arbitration Agreement was not executed by someone with legal authority to act for Mr. Pace; and (2) the Arbitration Agreement cannot be enforced against Plaintiff Kenneth Pace as a non-signer because (i) the Admission Agreement and Arbitration Agreement are not merged and (ii) the doctrine of equitable estoppel does not apply to the facts of this case.

In order to compel arbitration pursuant to the Federal Arbitration Act, a litigant must demonstrate a valid arbitration agreement that purports to cover the dispute. *See Aiken v. World Finance Corp. of S.C.*, 373 SC 144, 149, 644 SE2d 705, 708 (2007). Where one party denies the existence of a valid arbitration agreement, a court must immediately determine whether the agreement exists in the first place. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 SC 14, 644 SE2d 663, 667 (2007). If no agreement is found to exist, the court must deny the request to arbitrate. *See id.* Whether a valid arbitration agreement exists is a matter for judicial determination. *See York v. Dodgeland of Columbia, Inc.*, 406 SC 67, 749 SE2d 139, 144 (Ct. App. 2013).

A. THE ARBITRATION AGREEMENT IS NOT ENFORCEABLE BECAUSE IT WAS NOT EXECUTED BY SOMEONE WITH AUTHORITY TO EXECUTE ON BEHALF OF MR. PACE.

The Arbitration Agreement in this case was executed by Calvin Hill, an employee of DSS. Mr. Hill documented that he was signing as the “DSS Representative.” Because Mr. Pace did not execute the Arbitration Agreement himself, Calvin Hill must have had the appropriate legal authority to execute the Arbitration Agreement for it to be enforceable. At the time of admission to Lake Emory, Mr. Pace had both a GAL, Ms. Metcalf, and a court appointed attorney, Mr. Mitchell. Plaintiff would concede that Mr. Mitchell would arguably have had the requisite legal authority under South Carolina law to execute an arbitration agreement for Mr. Pace.¹ However, Mr. Hill would have no legal authority to execute an arbitration agreement for Mr. Pace. There is no support for the contention that an arbitrary employee of DSS has authority to bind a vulnerable adult to arbitration. Nor is there a statute that would authorize such execution of an arbitration agreement.

The South Carolina Health Care Consent Act, (hereafter “SCHCA”), codified at South Carolina Code Ann. § 44-66-10 *et seq.* provides that in the event an adult is unable to provide consent regarding proposed healthcare, the SCHCA creates

¹ South Carolina Code §43-35-220 provides for the responsibilities of the Guardian *ad Litem*. Plaintiff can find no authority in South Carolina for the proposition that the GAL has authority to bind the vulnerable adult to arbitration and waive the constitutional right to a jury trial. *See also CL SNF, LLC v. Fountain*, 355 Ga. App 176 (Ga. Ct. App. 2020) (wherein the court determined that the court appointed guardian did not have authority to execute an arbitration agreement when the arbitration agreement was not part of the admission agreement and was not reasonably necessary to provide for the incapacitated individual’s support, care, education, health, or welfare). Attached as Exhibit F.

a priority list of those able to consent on his behalf. It is clear from that section that Ms. Metcalf and Mr. Mitchell were the first and second health care surrogates thereunder. A careful reading of the section suggests that Mr. Hill would have authority under the SCHCA to admit Mr. Pace to the facility under §44-66-30(A)(10). However, while courts have routinely held that healthcare surrogates may make healthcare related decisions under the Act, including admission to a nursing home, the SCHCA does not give authority for those surrogates to waive the constitutionally protected right to a trial by jury.

The South Carolina Supreme Court has expressly ruled that a health care surrogate does not have authority under the SCHCA to execute an arbitration agreement. *See Scott v. Heritage Healthcare of Estill, LLC*, 2014 S.C. App. Unpub. LEXIS 403 (S.C. Ct. App. Aug. 6, 2014) (attached as Exhibit G). *Scott* involved a case in which the personal representative of the estate of a patient who died at a nursing home brought suit and the defendants sought to compel arbitration. *Id.* The patient's sister had signed an arbitration agreement on behalf of the patient when admitting her to the facility. *Id.* The sister did not possess a health care power of attorney to sign either contract on her behalf. *Id.* The court held that the arbitration agreement was not enforceable because the SCHCA did not give authority for a surrogate to execute an arbitration agreement.

The *Scott* unpublished opinion was discussed in detail in the case of *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018). The Court determined that a nursing home could not compel the

plaintiff to arbitration when the competent resident had not executed the arbitration agreement. *Id.* The arbitration agreement was executed by the patient's husband who did not have a power of attorney for his wife. *Id.* The Court determined that the SCHCA did not provide the husband with authority and the arbitration agreement was not enforceable. *See also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346 (S.C. 2014); *Thompson v. Pruitt Corp.*, 2016 S.C. App. LEXIS 24 (S.C. Ct. App. 2016).

In *Thompson*, the court determined "the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial." *Id.* at 55, 784 S.E.2d at 686. Like *Scott* and *Hodge supra*, *Thompson* involved a nursing home facility seeking to compel arbitration. A woman's children had their mother transferred from a hospital to a nursing home facility. *Id.* The son signed an admission agreement, an arbitration agreement, and several other documents on behalf of his mother, who suffered from dementia. *Id.* The mother was not present at the time as she was in the process of being transported to the facility. *Id.* After the mother's death, the daughter brought suit, individually and as personal representative, and the facility and its owners filed a motion to compel arbitration. *Id.* The circuit court denied the motion to compel, finding the son did not have authority to execute the arbitration agreement on his mother's behalf under either common law agency principles or the SCAHCA. *Id.*

Coleman addressed an arbitration agreement that was wholly separate from the admissions agreement executed by the sister of the patient. Although the signatory did have the requisite authority to make healthcare decisions – because admission to the nursing home was not contingent on the execution of the arbitration agreement, the court held that the signatory did not have authority to bind the patient to the separate voluntary arbitration agreement. *See id.* The court concluded that the arbitration agreement was not enforceable. *See id.*

Calvin Hill did not have the legal authority to execute the Arbitration Agreement for Mr. Pace. Furthermore, Calvin Hill lacked common law agency authority to execute an arbitration agreement for Mr. Pace. Agency is a fiduciary relationship that results when one person consents to be subject to the control of the other and to act on his behalf. *See R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 540 S.E.2d 113 (S.C. Ct. App. 2000). Mr. Pace was diagnosed with dementia, was incompetent, and unable to provide consent or acquiesce to Mr. Hill's actions. *See Thompson, supra.* Furthermore, even if authority had been given to Mr. Hill, which is expressly denied, the *Thompson* court recognized the principle that the authority conveyed to an agent does not encompass executing an agreement to resolve legal claims through arbitration. *See id.*

The Arbitration Agreement presented by the Defendants in this case was executed by a person without any authority to bind Mr. Pace to arbitration or

waive his right to a jury trial. Accordingly, the Arbitration Agreement cannot be enforced.²

B. THE ARBITRATION AGREEMENT CANNOT BE ENFORCED AGAINST PLAINTIFF KENNETH PACE AS A NON-SIGNER.

Although there is public policy favoring arbitration – it is applied only as an aid in interpreting the scope and enforcement of validly entered arbitration agreements. *See Weaver v. Brookdale Senior Living, Inc.*, 847 S.E.2d 268 (Ct. App. 2020). The FAA does not give the party seeking arbitration a “leg up in the threshold determination of whether a valid arbitration agreement exists.” *Id* at 269. The “first principle that underscores all [] arbitration decisions is that [a]rbitration is strictly a matter of consent.” *Id* quoting *Lamps Plus, Inc., v. Varela*, 139 S.Ct. 1407, 1415 (2019).

State law controls when a party is attempting to enforce an arbitration agreement against someone who has not signed it. *Id*. It is undisputed that neither Mr. Earl Pace nor his son, the Plaintiff Kenneth Pace, executed the arbitration agreement in this case.

i. THE ADMISSION AGREEMENT AND ARBITRATION AGREEMENT

² Another South Carolina Court has concluded that an arbitration agreement cannot be enforced against a decedent’s wrongful death beneficiaries as the wrongful death claims are independent of the survival claims and are not derivative. *See Wilson v. NHC Healthcare/Mauldin*, Order dated June 21, 2018, Greenville County Common Pleas, judge Michael Nettles. Attached as Exhibit H.

ARE NOT MERGED.

Because Mr. Hill lacked the authority to execute the arbitration agreement on behalf of Mr. Pace, it is anticipated that Defendants will argue that Kenneth Pace should be equitably estopped from denying the arbitration agreement.³ The Arbitration Agreement here is a completely separate contract under which Mr. Pace derived **no** benefits. As such, the court must determine that the Admission Agreement and Arbitration Agreement be construed as one document under which Mr. Pace derived benefits as a patient of the Defendants.⁴ In order for equitable estoppel to apply to the case at hand, there must have been a merger of the Admission Agreement and the Arbitration Agreement.

When documents are executed at the same time and regarding the same transaction, courts will generally construe them together *unless* there is evidence of a contrary intention by the parties. *See Klutts Resort Realty, Inc., v. Down Round Dev. Corp.*, 268 SC 80, 88, 232 SE2d 20, 24 (1977). If the language of the admission agreement created an ambiguity as to merger, the law is clear that any ambiguity shall be construed against the facility. *See Coleman* at 355-56.

In this case, it is clear from a plain reading of the documents, that the Admission Agreement and the Arbitration Agreement were wholly independent and should not be construed together.

³ Because Defendants have not provided the legal bases for their Motion, Plaintiff is speculating about what arguments the Defendants are likely to assert in support of their motion.

⁴ *See Thompson, supra* at 60, in which the court expressly stated that “any possible benefit emanating from the arbitration agreement alone is offset by the arbitration agreement’s requirement that [the patient] waive her right to access to the courts and her right to a jury trial.”

Coleman, supra, addressed an arbitration agreement that was wholly separate from the admissions agreement executed by the sister of the patient. The *Coleman* admissions agreement did not reference the execution of the arbitration agreement – it was freestanding and voluntary. Declining to find that the sister had authority to execute the arbitration agreement, *Coleman* considered whether the two agreements should be considered “merged” in order to conclude that the sister was equitably estopped from denying applicability of the arbitration agreement. *Id.* The court considered the admission agreement’s merger clause and determined that the two contracts were indeed separate. *See id.* “By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply.” *Id.* at 455. Because the arbitration agreement was separate from the admission contract under which the patient had received care and treatment, the doctrine of equitable estoppel was inapplicable *See id.* The court noted that the plaintiff was not suing for a breach of the admission agreement and not attempting to enforce the same. *See id.* As such, equitable estoppel did not bar the plaintiff’s claims. *See id.; see also Hodge, supra.* *Hodge* declined to apply the doctrine of equitable estoppel to enforce an arbitration agreement because the arbitration agreement was wholly separate from the admission agreement and the documents were not merged. *See id. See also Thompson, supra.*

When an arbitration agreement that is separate from the admission agreement concerns “neither healthcare nor payment, but instead provided an

option method for dispute resolution between [the facility] and [the patient] should issues arise in the future” the South Carolina Supreme Court has declined to find a merger has occurred. *Coleman supra*.

In this case, the Admission Agreement and the Arbitration Agreement are wholly separate documents. *See* Exhibits D and E respectively. There is no reference whatsoever within the 12 pages of the Admission Agreement regarding arbitration. The Admission Agreement does refer to a “Grievance Procedure” that is included in the Admission Handbook and is incorporated by reference. The signer is asked to acknowledge that he/she has received the Admission Handbook and that it is incorporated by reference in the Admission Agreement. *See* Admission Agreement pp. 4 and 12. There is no reference to arbitration and the Admission Agreement does not state anywhere that admission is contingent upon execution of an arbitration agreement.

The Admission Agreement provides expressly that it will be governed by the laws of the State in which “Facility” is located – South Carolina. *See id* at p. 10. Finally, the Admission Agreement provides an “Entire Agreement” or merger clause. *See id* at p.12. The merger clause provides:

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...

Id.

In contrast, the Arbitration Agreement is governed by federal law and the

Federal Arbitration Act.⁵ *See* Arbitration Agreement. Moreover, the Arbitration Agreement, on its face, is separate from the Admission Agreement. “This [arbitration] 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.” *See id* (emphasis added). Finally, there is no language in the Arbitration Agreement that execution of the same was required for admission to Defendants’ facility.

As in *Thompson, Coleman, and Hodge* discussed above, the Arbitration Agreement signed by Calvin Hill was wholly separate from the Admission Agreement. The terms of the two separate contracts make clear that they were independent of each other and that admission to the facility was not contingent upon the execution of arbitration. The Admission Agreement and Arbitration Agreement should not be construed as one document.⁶

Plaintiff expects that the Defendants may rely on an order entered in a case heard by the Honorable Bruce Howe Hendricks. *See THI of South Carolina at Magnolia Manor - Inman, LLC v. Gilbert*, Order and Opinion March 19, 2015 attached as Exhibit I.⁷ In that case, a DSS representative apparently executed an arbitration agreement that purported to bind a vulnerable adult to arbitration for

⁵ *See Hodge, supra* wherein the Court found that the admission agreement and arbitration provisions were not merged, in part because state law governed the admission agreement and federal law the arbitration agreement. The *Hodge* court determined that plaintiff would not be equitably estopped from denying arbitration noting that “...even if the Admission Agreement and Arbitration Agreement [were] merged, because [plaintiffs] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement. *See id.*”

⁶ Any ambiguity should be construed against the Defendants.

⁷ The facts of the case of *Gilbert* are distinguishable from the instant case. Nevertheless, it is worth nothing that this Order is not precedent and is not controlling in this matter.

claims arising out of a nursing home residency. The court expressly stated that the issue of whether a DSS representative could bind the vulnerable adult was not relevant and did not reach a decision of that issue. *See id.* The court declined to determine whether there was authority to bind under those facts. *See id.* Judge Howe went on to distinguish the facts before her from the *Coleman* and *Dean* cases, in that the arbitration agreement was contained *within* the admission agreement and not a “separate non-essential legal waiver.”

On the contrary, this case involves an arbitration agreement that was wholly separate from the admission documents. Our facts are *not* distinguishable from *Coleman* and *Dean* in that the Arbitration Agreement is, on its face, a “separate non-essential legal waiver.” *See Gilbert, supra.* Should the Court be inclined to rely on the *Gilbert* decision, it is distinguishable from the case before the Court. Here, there were two separate contracts, no merger of the documents occurred, and *Gilbert* offers no basis for finding that Calvin Hill had the requisite authority to execute an arbitration agreement. *See id.*

ii. **THE DOCTRINE OF EQUITABLE ESTOPPEL DOES NOT APPLY TO THE FACTS OF THIS CASE.**

Equitable estoppel is a theory by which a party attempts to enforce an arbitration agreement against a non-signer when (1) the non-signer’s claim arises from the contractual relationship; (2) the non-signer has “exploited” other parts of the contract by taking advantage of its benefits; and (3) the claim relies solely on the contract terms to impose liability. *See Weaver, supra.* In the recent case

of *Weaver*, the Court of Appeals considered whether “direct benefits estoppel” or “equitable estoppel” applied to the enforcement of an arbitration agreement with respect to a granddaughter’s claims against a nursing facility wherein the grandmother had eloped undetected from the facility and wandered into an alligator pond, resulting in her death. *See id.* The court concluded that Weaver was not bound by the arbitration provision. *See id.* Brookdale argued that Weaver’s claims were funneled to arbitration because her ability to sue stemmed from the residency agreement containing the arbitration agreement.⁸ *See id.* The court determined that this argument was “easily scotched.” *Id.*

Equitable estoppel is not implicated simply because a claim relates to or would not have arisen but for the contract’s existence. *See id.* The court reasoned that Weaver’s claims rely on general tort duties owed by NHC to its patients – and did not flow from any provision of the residency agreement. *See id.* The duty to provide care consistent with the applicable nursing standards of care does not flow directly from the residency agreement. *See id.* A benefit is “direct” if it flows “directly from the [contract]” but is indirect if the claim relates generally to the contractual relationship of the parties but does not “exploit” the agreement itself. *See id.* The court went on to opine that Weaver had not exploited or sought to enforce or benefit from the residency agreement “any more than a pedestrian run over by a truck has benefited from the contract for the purchase of the truck.” *Id.* Weaver had not attempted to procure a direct

⁸ The arbitration agreement in the case at hand is **not** contained within the residency agreement.

benefit from the residency agreement while trying to avoid the arbitration agreement. *See id.*

In a similar analysis, the *Hodge* court considered whether the plaintiff had received a direct benefit and expressly held that “[t]he only agreement from which [plaintiffs] even arguably received a benefit was the admission agreement because [patient] was admitted to the facility as a result of it. However, because the facility allegedly caused [the patient]’s injuries that later led to her death, we find it difficult to find she benefited even from being admitted.” *Hodge, supra*. Equitable estoppel is a theory to prevent *injustice* and it should be used sparingly. *See Weaver, supra*.

The Court in *Thompson* declined to apply equitable estoppel to the arbitration agreement under both the federal caselaw (described above in *Weaver*) and pursuant to South Carolina law. *See id* at 43. The court determined that the arbitration agreement was not incorporated into the admission agreement and the two agreements were independent of one another. *See id.* In finding no merger, the court concluded that equitable estoppel had no application to the present case under the federal substantive law. *See id.* The court went on to consider the doctrine of equitable estoppel under South Carolina law. The elements that must be proven as to the non-signer are as follows:

- (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the

party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (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. *Id* at 60.

The court concluded that because the patient had dementia prior to her admission, her incapacity prevented her from forming the intent to mislead the nursing home or assent to the arbitration terms. *See id.* The court found that equitable estoppel was inapplicable. *See id.*

In the present case, as set forth above, the Admission Agreement is a separate contract from the Arbitration Agreement. But even assuming *arguendo*, that the Court were to find the documents to be merged, equitable estoppel is inapplicable. Plaintiff is not attempting to enforce any provision of the Admission Agreement and at the same time deny an arbitration agreement contained within. There has been no exploitation of the contracts' provisions by the Plaintiff, no benefit was derived under the contracts by Mr. Pace⁹, and the Plaintiff's claims flow from alleged breaches in general tort law and not from the Admission Agreement or Arbitration Agreements. *See Weaver, supra.* Because Plaintiff is not attempting to enforce any agreement and no claim flows therefrom he is not equitably estopped from denying the arbitration agreement.

⁹ *See Weaver, supra*, wherein the court expressed difficulty in finding that the admission agreement resulted in benefit to the decedent as her death was the result of negligence on the part of the facility.

See e.g. Hodge, supra “...even if the Admission Agreement and Arbitration Agreement [were] merged, because [plaintiffs] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement.”

The Defendants have not shown that any of the factors set forth in the *Thompson* decision exist in this case. There is not even any allegation of a false representation, any expectation of reliance on a false representation, nor any detrimental reliance. Equitable estoppel does not apply under any federal or state theory to the Plaintiff in the case before the Court.¹⁰

III. Conclusion

The Arbitration Agreement presented by the Defendants is not enforceable for foregoing reasons: (1) the Arbitration Agreement was not executed by someone with legal authority to act for Mr. Pace; and (2) the Arbitration Agreement cannot be enforced against Plaintiff Kenneth Pace as a non-signer because (i) the Admission Agreement and Arbitration Agreement are not merged and (ii) the doctrine of equitable estoppel does not apply to the facts of this case. For all of these reasons, the Plaintiff respectfully requests that the Defendants’ Motion to Dismiss be denied and the parties be permitted to proceed to a jury

¹⁰ To the extent that Defendants would attempt to argue a third-party beneficiary argument applies to claims asserted by Mr. Pace’s Estate, Plaintiff asserts that the foregoing argument regarding equitable estoppel is similarly applicable. Unless the third-party beneficiary assents to an arbitration agreement, the contracting party has waived the right to a jury trial without her consent. *See Thompson, supra*. Without a valid contract, there can be no third-party beneficiary. *Id.* Mr. Pace was unable to consent as a result of his diagnosis of dementia.

trial.

s/ Jennifer Spragins Burnett

Jennifer Spragins Burnett (SC Bar 69617)
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November 30, 2020
Anderson, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
KENNETH PACE, INDIVIDUALLY	)	CASE NO. 2019-CP-42-03708
AND AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF EARL E. PACE,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
LAKE EMORY POST ACUTE CARE;	)	THI OF SOUTH CAROLINA AT CAMP
THI OF SOUTH CAROLINA AT CAMP	)	CARE, LLC D/B/A LAKE EMORY POST-
CARE, LLC; THI OF SOUTH	)	ACUTE CARE'S MEMORANDUM OF
CAROLINA, LLC; THI OF	)	LAW IN SUPPORT OF MOTION TO
BALTIMORE, INC; FUNDAMENTAL	)	DISMISS PLAINTIFF'S COMPLAINT,
ADMINISTRATIVE SERVICES, LLC;	)	COMPEL ARBITRATION AND STAY
FUNDAMENTAL CLINICAL AND	)	STATE COURT PROCEEDINGS
OPERATIONAL SERVICES, LLC;	)	(SURVIVAL ACTION)
FUNDAMENTAL CLINICAL	)	
CONSULTING, LLC; FUNDAMENTAL	)	
LONG TERM CARE HOLDINGS, LLC	)	
AND KERRY L. WHEELER, DO ,	)	
	)	
DEFENDANTS.	)	

COMES NOW Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care (hereinafter referred to as “Defendant” or “Lake Emory” or the “Facility”), by and through its undersigned counsel, and submits this Memorandum in Support of its Motion to Dismiss Plaintiff’s Complaint, Compel Arbitration, and Stay State court Proceedings, pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16.

INTRODUCTION

Plaintiff has sued the Facility in tort based upon allegations which arise solely out of and concern the residency, care and treatment of Plaintiff’s decedent, Mr. Earl Pace, at Defendant’s

skilled nursing facility. However, Plaintiff's claims are subject to a valid and binding Arbitration Agreement, as discussed more fully herein, and this matter should be compelled to arbitration.

On January 29, 2015, Plaintiff's decedent, Mr. Pace, entered into a valid, binding Admissions Agreement and Facility-Resident/Representative Arbitration Agreement ("Arbitration Agreement") with the Facility concerning his residency, care and treatment there, by and through his legal custodian, the South Carolina Department of Social Services ("DSS"). See Exhibit A – Laurens County Family Court Order dated August 28, 2014; See also Exhibit B – Admission Agreement; See also Exhibit C - Arbitration Agreement. The Family Court of the Eighth Judicial Circuit, Laurens County, had placed Mr. Pace under the custody of Adult Protective Services (APS) as of August 28, 2014. See Ex. A – Family Court Order. The DSS representative who executed these agreements on Mr. Pace's behalf, Mr. Calvin Hill, acted pursuant to Court-ordered powers and pursuant to the actual authority provided to DSS by the Adult Protection Act. See S.C. Code Ann § 43-35-10 et seq. In addition, as a representative of DSS with protective custody of Mr. Pace, Calvin Hill represented to the Facility that he was authorized to enter into these agreements, including the Arbitration Agreement, and therefore, the Facility relied upon his apparent authority in this regard.

The Arbitration Agreement entered into by Mr. Pace and the Facility covers all allegations raised by Plaintiff in the Complaint and, according to its express terms, requires that the Plaintiff and the Facility submit this matter to arbitration. See Ex. C. Further, the Arbitration Agreement explicitly binds not only the parties to the Agreement, but also binds "their successors, assigns, heirs, **personal representatives**, guardians or any persons deriving their claims through or on behalf of Resident." See Ex. C. (emphasis added).

There is absolutely no evidence that the Arbitration Agreement was entered into under duress. Further, the Arbitration Agreement is not substantively or procedurally unconscionable by its terms. Therefore, as discussed further herein, Defendant respectfully requests that that the Court compel arbitration of Plaintiff's claims pursuant to the valid and binding contract between the parties and, accordingly, dismiss or stay Plaintiff's Complaint pending completion of arbitration.

FACTUAL BACKGROUND

Records from the Family Court for Laurens County provided by Plaintiff indicate that DSS first came into contact with Mr. Pace and his family in June 2014 as a result of law enforcement contacting DSS due to concerns that he was a vulnerable adult and was being exploited by his care provider – who was the girlfriend of Plaintiff's brother and Mr. Pace's son, Ricky. See Exhibit D - Laurens Family Court Complaint dated July 11, 2014. Mr. Pace's family had concerns about the current care providers for him and a DSS case manager was working with the Pace family at that time to seek a nursing home placement. See Id. In connection with these efforts, Mr. Pace was evaluated by a physician, Dr. Karla A. Hirshorn, on July 7, 2014 and he was found "not to having decision making ability" at that time. See Id. Further medical evaluation on July 10th indicated that Mr. Pace was not getting his prescribed controlled substances (including hydrocodone), and that he suffered from dementia. Ultimately, due to concerns that Mr. Pace was subject to "abuse, neglect or exploitation", Mr. Pace was taken into protective custody on a emergency basis by law enforcement on July 10, 2014 due to the absence of an alternative safe care provider for Mr. Pace. See Id. This emergent protective custody was approved by the Family Court on July 11, 2014 pursuant to §43-35-55 of South Carolina's Adult Protection Act (the "Adult Protection Act"). See Id. Shortly thereafter, it appears that Mr. Pace was admitted to Woodruff Manor in Woodruff, South Carolina - a nursing home different than the Facility.

Ultimately, Mr. Pace was assigned an attorney and a Guardian Ad Litem to advocate on his behalf. See Exhibit A. On August 28, 2014, the GAL submitted a report to the Court without objection by the parties and both counsel for Mr. Pace, the GAL and DSS reached an agreement and presented recommendations to the Judge Sinclair regarding the custody of Mr. Pace. Accordingly, the Family Court entered a Merits Order finding that Mr. Pace was a “vulnerable adult”, that Mr. Pace should remain in the custody of DSS and that he should remain in his placement at the nursing home. See Exhibit A. This August 28th Order instructed that Mr. Pace’s case would be reassessed in six months, but that Mr. Pace was to remain in DSS custody pursuant to Section 43-35-45 of the Adult Protection Act until such time. **There is no evidence in the record indicating that Plaintiff or any other members Mr. Pace’s family were involved with Mr. Pace during this period of time – otherwise DSS would not have needed to obtain and maintain custody of him under Section 43-35-45 of the Adult Protection Act.**

On October 31, 2014, Mr. Pace was discharged from Woodruff Manor and admitted to Spartanburg Regional Medical Center (“SRMC”) due to “agitation.” See Exhibit E – SRMC Medical Records. Mr. Pace was admitted to SRMC for observation and management of psychiatric issues. At that time, it appears that the staff at Woodruff Manor informed SRMC that Mr. Pace was not allowed back at their facility. See Exhibit E – SRMC Medical Records.

Ultimately, DSS made the decision to seek placement of Mr. Pace at this Defendant’s facility, Lake Emory. On January 29, 2015, Lake Emory notified DSS representative Calvin Hill, who was Mr. Pace’s case manager, that it could accept Mr. Pace as a resident of the Facility on that date. Mr. Hill notified the Facility that he could complete admissions paperwork at the time that Mr. Pace arrived at the Facility for admission. See Exhibit F – Calvin Hill Case Dictation dated January 29, 2015. Indeed, DSS representative Calvin Hill signed various agreements and

documents in connection with Mr. Pace's admission and residency, care and treatment at Lake Emory on behalf of Mr. Pace. See Exhibit B and Exhibit C.

Following Mr. Earl Pace's death, Plaintiff Mr. Kenneth Pace – who is Mr. Pace's son - commenced this lawsuit by filing a Summons and Complaint on October 21, 2019. Plaintiff has asserted medical negligence causes of action against this Defendant in this survival action. These causes of action arise from and pertain to the care and treatment provided to Mr. Pace while he was a resident of Lake Emory. As described more fully below, all of these claims are subject to the valid and binding Arbitration Agreement and, therefore, Plaintiff's claims should be submitted to arbitration.

The Arbitration Agreement at issue defines Lake Emory Post Acute as the "Facility," Earl Pace as the "Resident," and Calvin Hill as the "Representative." The relevant provisions of the Arbitration Agreement state the following:

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

The Arbitration Agreement further provides:

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

Regarding DSS representative Calvin Hill's authority to sign on behalf of Mr. Pace, Mr. Hill made the following representation to the Facility through this statement contained in the Arbitration 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. See Ex. C.

The Arbitration Agreement was executed by Calvin Hill as the "Representative" of Mr. Pace and counter-signed by Kim Martin, the Admissions Director for the Facility. Mr. Hill was indeed Mr. Pace's representative as his case manager for DSS, which had legal custody pursuant to the Family Court Order dated August 28, 2014 and authority under the Adult Protection Act to enter into the Admission Agreement, the Arbitration Agreement and the other admissions-related documents on January 29, 2015. See Ex. A. Because the acts complained of by the Plaintiff fall within the scope of the valid and binding Arbitration Agreement, the Court should stay these proceedings, and compel this matter to arbitration. See 9 U.S.C. § 3.

ARGUMENT AND CITATION TO AUTHORITY

I. POLICY IN FAVOR OF ARBITRATION

As a general matter, there is a strong presumption in favor of the validity of arbitration agreements because of strong policy considerations favoring arbitration. O'Neil v. Hilton Head Hosp., 115 F.3d 272, 273 (4th Cir. 1997). Indeed, both federal and state policy favors arbitrating disputes. Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) ("The policy of the United States and this State is to favor arbitration of disputes."). "The federal policy favoring arbitration, as expressed in the [Federal Arbitration Act], is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements." Zabinski v. Bright Acres, 346 S.C. 580, 590, 553 S.E.2d 110 (S. Ct. 2001). Further, arbitration agreements are presumed valid, and "[t]he party resisting arbitration bears the burden of proving that the

claims at issue are unsuitable for arbitration.” Green Tree Fin. Corp.- Ala. v. Randolph, 531 U.S. 79, 91 (2000).

II. THE FEDERAL ARBITRATION ACT GOVERNS THE ARBITRATION AGREEMENT AND MANDATES THAT THE CLAIMS ASSERTED BY THE PLAINTIFF IN THE COMPLAINT BE COMPELLED TO ARBITRATION

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

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

9 U.S.C. § 4 (emphasis added).

“By its terms, the (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.” *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). While a court a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not invalidate an arbitration agreement on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement

to arbitrate is at issue.” See Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1423, 197 L. Ed. 2d 806 (2017)(citing AT & T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742).

Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving interstate commerce. 9 U.S.C. § 2. As discussed and further described herein, such a binding and enforceable written agreement to arbitrate disputes exists in this case and Plaintiff’s claims should be compelled to arbitration.

III. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE

A. Mr. Hill Possessed Actual Authority to Bind Mr. Pace to the Arbitration Agreement.

As a DSS employee and Mr. Pace’s case manager, Calvin Hill had actual authority to bind Mr. Pace to the Arbitration Agreement because Mr. Pace was under the *legal custody* of DSS in January 2015 when he was admitted to the Facility. See Ex. A. Mr. Pace had been judicially declared in need of South Carolina’s “adult protective services” due to his incapacity, his inability to care for himself independently and the apparent lack of any family member or other person to undertake such custody. See Ex. A.; See also S.C. Code Ann. § 43-35-45(E). The Facility therefore acted appropriately in presenting the various agreements and documents related to Mr. Pace’s residency, care and treatment at the Facility to Mr. Hill. Likewise, Mr. Hill executed his duties as the DSS case manager for Mr. Pace by making decisions on behalf of Mr. Pace that he was authorized to make.

Pursuant to S.C. Code Ann. § 43-35-10(9), DSS had comprehensive and express authority to utilize “protective services” and act on Mr. Pace’s behalf at the time he entered into the Arbitration Agreement and the Admissions Agreement on January 29, 2015, as Mr. Pace was

in DSS's "protective custody" at that time. See Ex. A. By statute, the "adult protective services" that DSS was directed to provide to or secure for Mr. Pace services to "include, **but [were] not limited to**, evaluating the need for protective services, securing and coordinating existing services, **arranging for living quarters**, obtaining financial benefits to which a vulnerable adult is entitled, **and securing medical services**, supplies, and **legal services.**" See S.C. Code Ann. § 43-35-10(9)(emphasis added).

Pursuant to terms of the Adult Protection Act and the type of protective and custodial services the Family Court imbued in DSS (See Exhibit A), no other agency or individual possessed the power to admit Mr. Pace into a skilled nursing facility, obtain other medical services, make financial decisions and make legal decisions on behalf of Mr. Pace.¹ See Id. Indeed, DSS had a Court-imposed duty to ensure such health and legal decisions were made in the best interest of Mr. Pace. DSS was the only party with these decision-making powers with regard to Mr. Pace. In light of this role as **sole custodian**, and pursuant to the Adult Protection Act, DSS had broad express powers to act on behalf of Mr. Pace pursuant to the Adult Protection Act to include the power to enter into the Admission Agreement and to enter into the Arbitration Agreement.

Although S.C. Code Ann. § 43-35-45(C) requires the appointment of a Guardian Ad Litem and an attorney for a vulnerable adult, nothing in the entire Adult Protection Act implies or suggests that a vulnerable adult's guardian ad litem or attorney has any authority whatsoever to dictate the facility where a vulnerable adult will be admitted or that no services can be procured without their consent. Further, according to the terms of the August 28, 2014 Family Court Order (See Exhibit A), Mr. Pace's lawyer and his GAL were in agreement that DSS should

¹ Under S.C. Code Ann. § 43-35-45(F), DSS even retains the authority to pursue commitment proceedings of a vulnerable adult, such as Mr. Pace.

have protective custody of Mr. Pace and that he should be subject to their protective services. Quite clearly, DSS, **and DSS only**, possessed authority to take any action necessary for the care and treatment of Mr. Pace.

DSS, by and through its authorized representative Calvin Hill, elected (1) to admit Mr. Pace to Lake Emory Post Acute Care and (2) determined that entering into an agreement for alternative dispute resolution in regards to matters concerning the residency, care and treatment of Mr. Pace at the Facility (i.e. the Arbitration Agreement) was in Mr. Pace's best interests. During Mr. Pace's over two (2) years of residency at the Facility, none of Plaintiff, Mr. Pace or any other individual, ever once contested the validity of DSS's authority to act on behalf of Mr. Pace in these ways. Indeed, to date, Plaintiff does not dispute that DSS had authority to admit Mr. Pace to the Facility and to sign the Admission Agreement on his behalf. See generally Plf Memorandum in Opposition.

B. DSS Possessed Apparent and Inherent Authority to Bind Mr. Pace to the Arbitration Agreement.

i. Agency Relationship - Apparent Agency Authority

In the alternative, assuming *arguendo* that Mr. Hill, on behalf of DSS, lacked actual authority to enter into the terms of the Arbitration Agreement, he still possessed sufficient apparent and/or 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 law follows from one of the cardinal principles of agency law: that third parties, such as Lake Emory, should not be disadvantaged because they dealt with an agent rather than a principal. As set forth above, there can be no uncertainty that Mr. Hill was authorized to admit Mr. Pace to a skilled nursing facility such as Lake Emory Post Acute Care. Plaintiff does not dispute that DSS had authority to admit Mr. Pace to Lake Emory. See generally Plf Memorandum in Opposition.

The Facility, likewise, knew of this ability (and notwithstanding the Facility's position that DSS also had *actual authority* to enter into the Arbitration Agreement), it is clearly reasonable for the Facility to have believed that Calvin Hill, as an employee of DSS which was the *sole custodian* with exclusive authority for Mr. Pace, possessed the apparent and inherent authority to bind Mr. Pace under the Arbitration Agreement. To the extent Plaintiff takes issue with DSS's authority to bind Mr. Pace to the Arbitration Agreement and the specific terms therein, such actions merely accompanied and were incidental to DSS's (and Mr. Hill's) undisputed authority to admit Mr. Pace to Lake Emory. Furthermore, as stated above, Lake Emory's Admission Director, Kim Martin, called Mr. Hill, who informed her that he was able to

sign the admission paperwork on behalf of Mr. Pace. The Defendant should not be disadvantaged for acting in accordance with the express representations of Mr. Hill regarding his authority.

C. Mr. Earl Pace was the Intended Third-Party Beneficiary of the Valid Arbitration Agreement.

In addition, Plaintiff is required to arbitrate the claims he has asserted against Lake Emory Post Acute Care on behalf of Mr. Earl Pace's estate because Mr. Earl Pace was an intended third-party beneficiary of both the Admission Agreement and the Arbitration Agreement. Under South Carolina law, "[a] third-party beneficiary is a party that the contracting parties intend to directly benefit." See Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485, 488 (S.C. 2005). The court has applied the third-party beneficiary doctrine in factually similar arbitration disputes where the contract was signed by a DSS Representative. See generally THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, No. 7:13-CV-2929-BHH, 2014 WL 6863550 (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) (also attached as Exhibit G).

In Gilbert, like the case at bar, Ms. Gilbert was under legal custody of DSS based on a Court order which determined her to be a "vulnerable adult" pursuant to S.C. Code Ann. § 43–35–10(11). See Id. The DSS Representative in Gilbert signed the admissions paperwork on behalf of Ms. Gilbert. See Id. After Ms. Gilbert's death, the personal representative of her estate filed suit against the skilled nursing facility, and the skilled nursing facility sought to compel arbitration on the grounds that Ms. Gilbert was the third-party beneficiary of the Contract signed by the DSS Representative and the skilled nursing facility. See Id. The court found that "there is no question that Ms. Gilbert was the intended third-party beneficiary . . . as she was specifically identified as the resident to be admitted to the facility." See Id. at *3. Therefore, the Court in Gilbert granted the nursing facility's motion to compel arbitration. See Id.

In this case, like in Gilbert, Mr. Earl Pace is specifically identified as the “resident” to be admitted to the facility. See Exhibits B and C. Therefore, Mr. Pace was clearly the intended third-party beneficiary of the Admission Agreement and Arbitration Agreement. See Gilbert at *3. The sound judgment and reasoning of the court in Gilbert should be followed and the Court should grant Defendant’s motion to compel arbitration in this case under the well-established doctrine of third-party beneficiaries.

Furthermore, in recent arbitration enforcement cases, the courts have applied the third-party beneficiary doctrine and compelled estate representatives, like Mr. Kenneth Pace, to arbitrate wrongful death and related tort claims because their decedents were third-party beneficiaries of nursing home contracts with arbitration clauses. See McCutcheon v. THI of S.C. at Charleston, LLC, No. 2:11-CV-02861, 2011 WL 6318575, at *3 (D.S.C. Dec. 15, 2011) (Norton, C.J.) (attached hereto as Exhibit H); 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) (Currie, J.) (attached hereto as Exhibit I). The rationale of these decisions compels the same outcome here, and Mr. Kenneth Pace should be compelled to arbitrate his claims against Lake Emory.

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

i. Merger

Further, as additional grounds to compel arbitration, Plaintiff does not dispute that DSS possessed actual authority under the Adult Protection Act to admit Mr. Pace to the Facility and, it follows, to enter into the Admission Agreement. See generally Plf Memorandum in Opposition. Therefore, the Admissions Agreement and Arbitration Agreement should be construed together and Plaintiff should be required to arbitrate his claims against the Facility. The Arbitration

Agreement and Admission Agreement were both executed by DSS representative Calvin Hill on behalf of Plaintiff's father, Mr. Earl Pace. The validity of these agreements, including the Arbitration Agreement, must be determined in accordance with the general principles of contract law and agency law that would apply to any other contract. Herron v. Century BMW, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010).

The Arbitration Agreement provides that "any controversy or dispute between the parties *arising out of or relating to Facility's Admission Agreement . . . or relating in any way to Resident's stay at Facility*" shall be resolved by arbitration pursuant to the terms of the Arbitration Agreement. See Ex. C – Arbitration Agreement (emphasis added). As previously described, the Arbitration Agreement and the Admissions Agreement were both signed by DSS representative Calvin Hill on behalf Mr. Pace on the same day, at the same time, and in connection with the same subject matter and transaction - Mr. Pace's residency at Calhoun Convalescent Center and receipt of skilled nursing care there.

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).

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 Exhibit H). Indeed, this Court has cited to McCutcheon on numerous occasions in holding that a nursing home arbitration agreement merged with the admission agreement for purposes of equitable estoppel under precisely the same circumstances. See Abrams v. Fundamental Long-term Care Holdings, LLC, et al, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); Campsen v. Fundamental Long-Term Care Holdings, LLC et al, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012). See Abrams and Campsen attached hereto as Exhibit J and Exhibit K, respectively.

Moreover, in November of 2020, in the case of Jeffery White, as personal representative for the Estate of Lizzie White v. St. Matthews Healthcare, LLC, Case No. 2019-CP-09-0220, which involved this *very same Arbitration Agreement* and *the very same Admissions Agreement* as in this case, this Court found that the Admissions Agreement and the Arbitration Agreement *merged* and the plaintiff in that case was *equitably estopped* from accepting the benefits of the Admissions Agreement but denying the validity of the Arbitration Agreement. See Exhibit L-White Order dated November 24, 2020.

Accordingly, Mr. Pace, by and through the acts of his legal custodian DSS, and the Facility, both contemplated that the terms of the agreement to admit Mr. Pace were contained in the Admissions Agreement and Arbitration Agreement. DSS representative Calvin Hill executed the Arbitration Agreement and the Admissions Agreement at the same time – on January 29, 2015; the Arbitration Agreement and the Admissions Agreement both covered the same subject matter and transaction – Mr. Pace’s residency at the Facility and receipt of residential and skilled nursing services; the Arbitration Agreement and Admissions Agreement were executed by the same parties; the Arbitration Agreement specifically makes citation to and incorporates the Admission Agreement; and thus the Arbitration Agreement and Admission Agreement should be construed as part and parcel of the same agreement between the parties.

ii. Equitable Estoppel of Merged Agreement

“Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.” Int’l Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). “A nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause.’” Id. (quoting Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999)); *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 v. Willis, 426 S.C. 326, 339–345, 827 S.E.2d 167, 174–177 (2019) (discussing direct benefits test).

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)).²

Plaintiff, as Mr. Pace's son, embraced all aspects of DSS's decision to admit Mr. Pace to the Facility and to enter into the Admission Agreement with the Facility. Plaintiff does not dispute the validity of the Admission Agreement or his father's admission to the Facility. He never removed Mr. Pace from the Facility and, by all accounts, approved of presence at the Facility/did not seek his discharge. *Indeed, it is unfortunately also fair to state that Plaintiff had an opportunity to seek custody of his father, but accepted all benefits of DSS being his father's legal custodian as of January 29, 2015.*

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

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

In Gilbert, Judge McDonald applied, and Judge Hendricks adopted, estoppel principles to compel arbitration in the same exact setting where a DSS Representative signed on behalf of a “vulnerable adult,” ruling:

“[H]ere, having obtained for Ms. Gilbert the benefits of admission and treatment at Magnolia Manor–Inman pursuant to the Admission Contract, the defendant is estopped from denying the enforceability of the Arbitration Provision.”

2014 WL 6863550, at *4; report and recommendation adopted, 2015 WL 1268185 (See Exhibit G).

By repudiating the Arbitration Agreement, Mr. Pace attempts to take inconsistent positions regarding the same, single contract. DSS as the sole legal custodian for Mr. Pace, by and through its representative Calvin Hill, represented to Lake Emory Post Acute Care that it was authorized to sign the Admission Contract on behalf of Mr. Pace because DSS possessed legal custody over him. Having obtained for Mr. Pace the benefits of admission and treatment at the Lake Emory Post Acute Care pursuant to the Admission Contract, the Plaintiff is estopped from repudiating that very same authority to dispute the validity of its contents. Cf. International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) (“To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the [FAA].” (internal quotation marks omitted)).

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 this Defendant 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 agreement, where a non-signatory

receives the benefits of the contract, which Plaintiff certainly did here, Plaintiff must be prevented from refusing to comply with the Arbitration Agreement merely because he did not sign it. See Exhibit L - White Order dated November 24, 2020. For over 2 years, the validity of the Admissions Contract was acknowledged or acquiesced to by Plaintiff whereby payments have been made pursuant to its terms and treatment and care has been provided as set forth therein. Now, suddenly, Plaintiff seeks to invalidate this very same contract's enforceability. Such a result would be blatantly unfair. Accordingly, Mr. Pace is required to submit his claims against the Defendant to arbitration rather than in a judicial forum.

iii. Coleman, Thompson, and Hodge are Distinguishable

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

First, unlike Hodge, Coleman and Thompson, the resident in this instance – Mr. Pace – was rendered incapable of making his own decisions and placed into the legal custody of DSS. See Exhibit A. Plaintiff does not dispute that DSS admitted his father to the Facility pursuant to its rights and obligations under the Adult Protection Act. See generally Plf Memorandum in Opposition. The Adult Healthcare Consent Act is not the statutory mechanism under which DSS admitted Mr. Pace to the Facility. DSS admitted Mr. Pace to the Facility pursuant to authority granted to it by the Family Court on August 28, 2014 and found under Section 43-35-45 of the Adult Protection Act, the existence of which would be rendered unnecessary and superfluous if it were treated as equivalent to the authority conferred under the Adult Healthcare Consent Act.

Therefore, Hodge, Coleman and Thompson should not be followed as it relates to the doctrine of merger.

Second, these cases are distinguishable as it relates to the issue of “separateness” and the doctrine of merger, as described further below.

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

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

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

Instead, in the present case, the agreements “were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction” and, therefore, the documents merged. Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (citing Klutts, *supra*, 268 S.C. at 88, 232 S.E.2d at 24).³ Specifically, the Admission and Arbitration Agreements were signed by DSS as the ***sole and exclusive legal custodian***, on Plaintiff’s father’s behalf, and the Facility on January 29, 2015. The documents were signed by the exact same people: Calvin Hill, DSS representative as custodian for Mr. Pace and by the Admissions Director for the Facility. The documents were signed for the same purpose and transaction of establishing Mr. Pace’s residency at the skilled nursing facility.

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). Moreover, the Arbitration Agreement at issue contains no disclaimer provision, unlike Coleman, Thompson, and Hodge. Also, absent here is the type of discrepancy the Hodge Court pointed out with

³ 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).

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 ¶ IX. (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”).)

Further still, it must be remembered that 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,”⁴ as indeed the admission and arbitration agreements were here, there is evidence to upset the *default presumption* that the contracting parties intended the instruments to be construed together as effectively one contract. As a practical matter, if this presumption is to mean anything, upsetting it must require actual evidence of sufficient probity that, notwithstanding the concurrence of all the circumstances that must come together for the presumption of merger to even arise in the first place—i.e., same time, parties, purpose, and transaction—a reasonable, non-speculative inference can be drawn that the parties’ possessed a contrary intention. 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

⁴ Coleman, 407 S.C. at 355, 755 S.E.2d at 455.

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.

Even though, as noted above, the Arbitration Agreement was not a precondition to admission, this does not mean that the two instruments did not work hand-in-hand once the arbitration agreement came into existence (i.e., once it was in fact entered into). While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true; the Admission Agreement is indeed necessary to the Arbitration Agreement. In other words, yes, the Admission Agreement *could* have stood on its own, without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with; but that is not what happened. **The Arbitration Agreement was in fact executed, of course, and it was executed under circumstances giving rise to a presumption of merger—again, same time, parties, purpose, and transaction.** Unlike the Admission Agreement, however, which is capable of making sense either standing alone or, alternatively, together with the Arbitration Agreement, the Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitration Agreement's) sole reason for being.

It matters not whether the Arbitration Agreement was a condition of admission, only that it was in fact agreed to in conjunction with admission; and, here, there can be no question that the Arbitration Agreement—once agreed upon—was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument,

governing various interrelated aspects of Ms. White's relationship with Defendant. Indeed, this conclusion finds direct support in the Admission Agreement's "Entire Agreement" provision, which states, "[t]he undersigned further acknowledges that he/she has received and read the Admission Handbook and other Admissions materials and understand that these documents are made a part of this Agreement by reference herein." See Ex. B, p. 12 (emphasis added). Had the Arbitration Agreement not been executed, it would not constitute admissions material, but, of course, it was executed, and it does constitute admissions material; most respectfully, to conclude otherwise simply does not make sense.

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

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

a. Merger

In the alternative, and as additional grounds to compel arbitration, there is no dispute that Mr. Hill possessed actual authority under the Adult Protection Act to admit Mr. Pace to the Facility and, it follows, to enter into the Admission Agreement. By statute, the "adult protective services" that DSS was directed to provide to Mr. Pace "include, ***but [were] not limited to***, evaluating the need for protective services, securing and coordinating existing services, ***arranging for living quarters***, obtaining financial benefits to which a vulnerable adult is entitled, ***and securing medical services***, supplies, and legal services." See S.C. Code Ann. 43-35-10(9) (emphasis added). The Arbitration Agreement and Admission Agreement were executed by Mr. Hill on behalf of Mr. Earl Pace. The validity of these agreements, including the Arbitration

Agreement, must be determined in accordance with the general principles of contract law and agency law that would apply to any other contract. See 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. C (emphasis added). As previously described, the Arbitration Agreement and the Admissions Agreement were both signed by Mr. Hill on the same day, at the same time, and in connection with the same subject matter and transaction - Mr. Pace’s residency at Lake Emory and receipt of skilled nursing care there.

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. See 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. See 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).

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

Mr. Hill executed the Arbitration Agreement and the Admissions Agreement at the same time – on January 29, 2015; the Arbitration Agreement and the Admissions Agreement both covered the same subject matter and transaction - Mr. Pace’s residency at the Facility and receipt of residential and skilled nursing services; the Arbitration Agreement and Admissions Agreement were executed by the same parties, Mr. Hill and Ms. Kim Martin; the Arbitration Agreement specifically makes citation to and incorporates the Admission Agreement; and thus the Arbitration Agreement and Admission Agreement should be construed as part and parcel of the same agreement between the parties.

E. The Arbitration Agreement is Not Unconscionable

“In analyzing claims of unconscionability of arbitration agreements, . . . [courts should] focus generally on whether the arbitration clause is geared towards achieving an unbiased

decision by a neutral decision-maker.” One Belle Hall Prop. Owners Ass’n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 60, 791 S.E.2d 291 (Ct. App. 2016)(internal quotations omitted).

Should Plaintiff contend in any supplemental briefing that this Arbitration Agreement is unenforceable because it is unconscionable, the law and facts surrounding Mr. Hill entering into this Arbitration Agreement and the clear language of the Agreement demonstrates this is clearly not the case. As an initial matter, both state and federal courts in South Carolina have consistently ruled that arbitration agreements identical to the one *sub judice* are not unconscionable. See McCutcheon v. THI of S.C. at Charleston, LLC, *supra*, at 6* - *8; Benson v. THI of S.C. at Charleston, LLC, No. C.A. No. 7:11-CV-2613-HMH (D.S.C. Nov. 30, 2011)(attached hereto as Exhibit H); Abrams v. Fundamental Long-term Care Holdings, LLC, et al, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012)(attached hereto as Exhibit J; Campsen v. Fundamental Long-Term Care Holdings, LLC et al, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012) (attached hereto as Exhibit K).

Further, in the case of Arredondo, the Court found that an arbitration agreement separate from the admission agreement “. . . is conducive to greater freedom of choice for the consumer. It also better protects the nursing home from a contention that the arbitration contract is unconscionable.” 2019 WL 3814725, *2 (S.C. Ct. App. August 14, 2019)(quoting J. Toal dissent in Coleman, 407 S.C. 346, 357).

Anyone who enters into a written contract has a duty to read the contract which she or he signs. Maw v. McAlister, 252 S.C. 280, 284-285, 166 S.E.2d 203, 204 (1969). Anyone who is capable of reading and understanding, but fails to read a contract before signing, is bound by the terms thereof. Sims v. Tyler, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Furthermore,

arbitration clauses are not unconscionable and will be enforced if a person who can read fails to read the contract, regardless of whether he was advised of the arbitration terms by the contracting party. Munoz v. Green Tree Financial Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding the plaintiff's failure to read an arbitration provision did not render it unconscionable even though the plaintiffs claimed they were not advised of those terms). Additionally, "inequality of bargaining power alone will not invalidate an arbitration agreement." *Id.*

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

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

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. C (emphasis in original).

Since Mr. Pace's *sole and exclusive legal custodian*, DSS – by and through its employee and the case manager for Mr. Pace – Calvin Hill, had a duty to read and understand the documents he was signing on Mr. Pace's behalf and did so under proper authority, Plaintiff simply has not offered any basis that DSS – the state agency which the Family Court *ordered* and imbued in it authority and duties in regards to Mr. Pace - was unaware of the terms of the Arbitration Agreement that DSS voluntarily entered into on behalf of Mr. Pace.

CONCLUSION

Defendant submits that Mr. Calvin Hill had actual statutory authority to enter into the Arbitration Agreement under the terms of the South Carolina Adult Protection Act. See S.C. Code Ann. 43-35-5 *et seq.*

Alternatively, because there is no dispute that Mr. Hill had actual authority to enter into the Admission Agreement on behalf of Mr. Pace, he had inherent authority to enter into the accompanying Arbitration Agreement.

Further, since Mr. Pace was identified as the “resident” on the agreements, he was clearly the third-party beneficiary of the Contract signed by Mr. Hill and the Facility, and therefore arbitration is binding on him. This argument is supported by factually similar case law in Gilbert.

Finally, the doctrine of merger as between the Admission Agreement and the Arbitration Agreement should operate such that Plaintiff is equitably estopped from denying that the Arbitration Agreement is valid and binding as to Mr. Pace’s residency, care and treatment at Lake Emory. These documents were executed on the same date, by the same parties and with respect to the same transaction – the provision of nursing and other health care to Mr. Earl Pace at the Facility. Therefore, Plaintiff should be estopped from denying the validity of the Arbitration Agreement and his claims must be compelled to arbitration in accordance with the Federal Arbitration Act.

Therefore, Defendant respectfully requests that this Court enter an Order compelling arbitration and dismissing (or staying) the pending action until completion of arbitration proceedings.

[SIGNATURE BLOCK ON THE FOLLOWING PAGE]

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Care

Charleston, South Carolina

Dated: December 1, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
KENNETH PACE, INDIVIDUALLY	)	CASE NO. 2019-CP-42-03708
AND AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF EARL E. PACE,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
LAKE EMORY POST ACUTE CARE;	)	
THI OF SOUTH CAROLINA AT CAMP	)	DEFENDANT FUNDAMENTAL
CARE, LLC; THI OF SOUTH	)	ADMINISTRATIVE SERVICES, LLC’S
CAROLINA, LLC; THI OF	)	MEMORANDUM IN SUPPORT OF ITS
BALTIMORE, INC; FUNDAMENTAL	)	MOTION TO STAY
ADMINISTRATIVE SERVICES, LLC;	)	(SURVIVAL ACTION)
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC;	)	
FUNDAMENTAL CLINICAL	)	
CONSULTING, LLC; FUNDAMENTAL	)	
LONG TERM CARE HOLDINGS, LLC	)	
AND KERRY L. WHEELER, DO ,	)	
	)	
DEFENDANTS.	)	
	)	

COMES NOW, Defendant Fundamental Administrative Services, LLC (hereinafter “this Defendant”), by and through its undersigned attorneys, and submits this Memorandum in Support of its Motion to Stay this action.

BACKGROUND FACTS

Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care (misidentified in Plaintiff’s Complaint as “Lake Emory Post Acute Care” and “THI of South Carolina at Camp Care, LLC” as separate parties and hereinafter referred to as “Facility Defendant” or “Lake Emory”), entered into a valid Arbitration Agreement with Plaintiff’s decedent, Earl Pace (the “Arbitration Agreement”), around the time of Mr. Pace’s admission to

Lake Emory. See **Exhibit A – Arbitration Agreement**. Per the Arbitration Agreement, Mr. Pace and Lake Emory agreed that the South Carolina Uniform Arbitration Act, S.C. Code §15-48-10, et seq., would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, 9 U.S.C. §1, et seq. (the “FAA”), because the services and reimbursement thereof to be provided to Mr. Pace upon his admission to the facility affected and involved interstate commerce. See **Ex. A**.

As set forth herein, Facility Defendant has filed a Motion with this Court to enforce the Arbitration Agreement against the Plaintiff. See **Exhibit B - Motion to Dismiss and Compel Arbitration**. Per this Court’s inherent power to manage its own docket and the statutory mandates of the FAA, this Defendant respectfully requests that this matter must be stayed as to this Defendant until such time as the Court has made a final decision regarding Lake Emory’s pending Motion to Compel Arbitration, the arbitration process is complete, and the appellate process, if any, has been exhausted. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, a stay would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

ARGUMENT

The FAA, 9 U.S.C. § 3, entitled “Stay of proceedings where issue therein referable to arbitration,” states the following:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, **the court** in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, **shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement**, providing the applicant for the stay is not in default in proceeding with such arbitration.

(Emphasis added.)¹

Citing this statutory provision, the South Carolina Court of Appeals held the “FAA clearly requires a court stay ‘any suit or proceeding’ pending the arbitration of ‘any issue referable to arbitration under an agreement in writing for such arbitration’ upon the application of one of the parties.” *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002).

Both federal and state policy favor arbitration of disputes. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Even when, as is the case here, a party to the lawsuit is not a party to the arbitration agreement, it “may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21, 103 S. Ct. 927, 939 (1983). This Court also possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court’s discretion. *Id.* See also *Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936)(“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.”).

The Court’s decision on whether to stay the pending action against this Defendant “should be motivated by the court’s ‘concern that litigation against a party not bound by an arbitration provision may impair an arbitrator’s consideration of claims against a party that is

¹ The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. See S.C. Code Ann. § 15-48-20(d)(“Any action or proceeding involving an issue subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section...” (emphasis added)

compelled to arbitrate.’” *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999), citing *Kroll v. Doctor's Associates, Inc.*, 3 F.3d 1167, 1171 (7th Cir. 1993).

In the instant matter, the Plaintiff’s claims against this Defendant arise out of the exact same factual underpinnings as his claims against Lake Emory, a party to the Arbitration Agreement. To be sure, the claims against both this Defendant and the Facility Defendant are solely concerned with Mr. Pace’s stay at Lake Emory and the provision of care and treatment provided to him. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration between Plaintiff and Lake Emory. Without the issuance of a stay, disposition of the Plaintiff’s claims against this Defendant may affect the disposition of the matter against Lake Emory, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

Generally, Plaintiff’s allegations of liability in the Complaint make very little distinction between this Defendant and Lake Emory. Rather, Plaintiff repeatedly alleges that the “Defendants” are liable to Plaintiff under the various causes of action set forth in the Complaint. See Pltf.’s Complaint at ¶¶ 23 – 47. In no uncertain terms, Plaintiff alleges and seeks to prove that this Defendant and Lake Emory should be viewed as one in the same by this Court. See Pltf.’s Complaint at ¶¶ 1-47. If this Defendant is forced to continue with this litigation, the arbitration proceedings against Lake Emory could become redundant and meaningless because of the substantial overlap in factual and legal underpinnings of the cases against this Defendant and Lake Emory. Should discovery and the trial of this matter continue against this Defendant in this Court, the right to arbitration of Lake Emory would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir. 2000)(Stay granted to defendant non-signatory to arbitration agreement because

continuing with litigation would adversely affect signatory's right to arbitrate.). Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

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Administrative Services, LLC

Charleston, South Carolina

Dated: December 1, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
KENNETH PACE, INDIVIDUALLY	)	CASE NO. 2019-CP-42-03708
AND AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF EARL E. PACE,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
LAKE EMORY POST ACUTE CARE;	)	
THI OF SOUTH CAROLINA AT CAMP	)	DEFENDANT FUNDAMENTAL
CARE, LLC; THI OF SOUTH	)	CLINICAL AND OPERATIONAL
CAROLINA, LLC; THI OF	)	SERVICES, LLC’S MEMORANDUM IN
BALTIMORE, INC; FUNDAMENTAL	)	SUPPORT OF ITS MOTION TO STAY
ADMINISTRATIVE SERVICES, LLC;	)	(SURVIVAL ACTION)
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC;	)	
FUNDAMENTAL CLINICAL	)	
CONSULTING, LLC; FUNDAMENTAL	)	
LONG TERM CARE HOLDINGS, LLC	)	
AND KERRY L. WHEELER, DO ,	)	
	)	
DEFENDANTS.	)	
	)	

COMES NOW, Defendant Fundamental Clinical and Operational Services, LLC (hereinafter “this Defendant”), by and through its undersigned attorneys, and submits this Memorandum in Support of its Motion to Stay this action.

BACKGROUND FACTS

Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care (misidentified in Plaintiff’s Complaint as “Lake Emory Post Acute Care” and “THI of South Carolina at Camp Care, LLC” as separate parties and hereinafter referred to as “Facility Defendant” or “Lake Emory”), entered into a valid Arbitration Agreement with Plaintiff’s decedent, Earl Pace (the “Arbitration Agreement”), around the time of Mr. Pace’s admission to

Lake Emory. See **Exhibit A – Arbitration Agreement**. Per the Arbitration Agreement, Mr. Pace and Lake Emory agreed that the South Carolina Uniform Arbitration Act, S.C. Code §15-48-10, et seq., would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, 9 U.S.C. §1, et seq. (the “FAA”), because the services and reimbursement thereof to be provided to Mr. Pace upon his admission to the facility affected and involved interstate commerce. See **Ex. A**.

As set forth herein, Facility Defendant has filed a Motion with this Court to enforce the Arbitration Agreement against the Plaintiff. See **Exhibit B - Motion to Dismiss and Compel Arbitration**. Per this Court’s inherent power to manage its own docket and the statutory mandates of the FAA, this Defendant respectfully requests that this matter must be stayed as to this Defendant until such time as the Court has made a final decision regarding Lake Emory’s pending Motion to Compel Arbitration, the arbitration process is complete, and the appellate process, if any, has been exhausted. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, a stay would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

ARGUMENT

The FAA, 9 U.S.C. § 3, entitled “Stay of proceedings where issue therein referable to arbitration,” states the following:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, **the court** in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, **shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement**, providing the applicant for the stay is not in default in proceeding with such arbitration.

(Emphasis added.)¹

Citing this statutory provision, the South Carolina Court of Appeals held the “FAA clearly requires a court stay ‘any suit or proceeding’ pending the arbitration of ‘any issue referable to arbitration under an agreement in writing for such arbitration’ upon the application of one of the parties.” *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002).

Both federal and state policy favor arbitration of disputes. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Even when, as is the case here, a party to the lawsuit is not a party to the arbitration agreement, it “may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21, 103 S. Ct. 927, 939 (1983). This Court also possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court’s discretion. *Id.* See also *Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936)(“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.”).

The Court’s decision on whether to stay the pending action against this Defendant “should be motivated by the court’s ‘concern that litigation against a party not bound by an arbitration provision may impair an arbitrator’s consideration of claims against a party that is

¹ The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. See S.C. Code Ann. § 15-48-20(d)(“Any action or proceeding involving an issue subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section...” (emphasis added)

compelled to arbitrate.’” *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999), citing *Kroll v. Doctor's Associates, Inc.*, 3 F.3d 1167, 1171 (7th Cir. 1993).

In the instant matter, the Plaintiff’s claims against this Defendant arise out of the exact same factual underpinnings as his claims against Lake Emory, a party to the Arbitration Agreement. To be sure, the claims against both this Defendant and the Facility Defendant are solely concerned with Mr. Pace’s stay at Lake Emory and the provision of care and treatment provided to him. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration between Plaintiff and Lake Emory. Without the issuance of a stay, disposition of the Plaintiff’s claims against this Defendant may affect the disposition of the matter against Lake Emory, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

Generally, Plaintiff’s allegations of liability in the Complaint make very little distinction between this Defendant and Lake Emory. Rather, Plaintiff repeatedly alleges that the “Defendants” are liable to Plaintiff under the various causes of action set forth in the Complaint. See Pltf.’s Complaint at ¶¶ 23 – 47. In no uncertain terms, Plaintiff alleges and seeks to prove that this Defendant and Lake Emory should be viewed as one in the same by this Court. See Pltf.’s Complaint at ¶¶ 1-47. If this Defendant is forced to continue with this litigation, the arbitration proceedings against Lake Emory could become redundant and meaningless because of the substantial overlap in factual and legal underpinnings of the cases against this Defendant and Lake Emory. Should discovery and the trial of this matter continue against this Defendant in this Court, the right to arbitration of Lake Emory would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir. 2000)(Stay granted to defendant non-signatory to arbitration agreement because

continuing with litigation would adversely affect signatory's right to arbitrate.). Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

YOUNG CLEMENT RIVERS, LLP

By: s/ Kate C. Mettler

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Attorneys for the Defendant Fundamental Clinical
and Operational Services, LLC

Charleston, South Carolina

Dated: December 1, 2020

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PLAINTIFF,	)	
	)	
vs.	)	
	)	
LAKE EMORY POST ACUTE CARE;	)	
THI OF SOUTH CAROLINA AT CAMP	)	DEFENDANT HUNT VALLEY
CARE, LLC; THI OF SOUTH	)	HOLDINGS, LLC F/K/A FUNDAMENTAL
CAROLINA, LLC; THI OF	)	LONG TERM CARE HOLDINGS, LLC'S
BALTIMORE, INC; FUNDAMENTAL	)	MEMORANDUM IN SUPPORT OF ITS
ADMINISTRATIVE SERVICES, LLC;	)	MOTION TO STAY
FUNDAMENTAL CLINICAL AND	)	(SURVIVAL ACTION)
OPERATIONAL SERVICES, LLC;	)	
FUNDAMENTAL CLINICAL	)	
CONSULTING, LLC; FUNDAMENTAL	)	
LONG TERM CARE HOLDINGS, LLC	)	
AND KERRY L. WHEELER, DO ,	)	
	)	
DEFENDANTS.	)	
	)	

COMES NOW, Defendant Hunt Valley Holdings, LLC f/k/a Fundamental Long Term Care Holdings, LLC (misidentified in Plaintiff's Complaint as "Fundamental Long Term Care Holdings, LLC" and hereinafter referred to as "this Defendant"), by and through its undersigned attorneys, and submits this Memorandum in Support of its Motion to Stay this action.

BACKGROUND FACTS

Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care (misidentified in Plaintiff's Complaint as "Lake Emory Post Acute Care" and "THI of South Carolina at Camp Care, LLC" as separate parties and hereinafter referred to as "Facility Defendant" or "Lake Emory"), entered into a valid Arbitration Agreement with Plaintiff's

decedent, Earl Pace (the “Arbitration Agreement”), around the time of Mr. Pace’s admission to Lake Emory. *See Exhibit A – Arbitration Agreement.* Per the Arbitration Agreement, Mr. Pace and Lake Emory agreed that the South Carolina Uniform Arbitration Act, S.C. Code §15-48-10, *et seq.*, would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* (the “FAA”), because the services and reimbursement thereof to be provided to Mr. Pace upon his admission to the facility affected and involved interstate commerce. *See Ex. A.*

As set forth herein, Facility Defendant has filed a Motion with this Court to enforce the Arbitration Agreement against the Plaintiff. *See Exhibit B - Motion to Dismiss and Compel Arbitration.* Per this Court’s inherent power to manage its own docket and the statutory mandates of the FAA, this Defendant respectfully requests that this matter must be stayed as to this Defendant until such time as the Court has made a final decision regarding Lake Emory’s pending Motion to Compel Arbitration, the arbitration process is complete, and the appellate process, if any, has been exhausted. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, a stay would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

ARGUMENT

The FAA, 9 U.S.C. § 3, entitled “Stay of proceedings where issue therein referable to arbitration,” states the following:

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agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(Emphasis added.)¹

Citing this statutory provision, the South Carolina Court of Appeals held the “FAA clearly requires a court stay ‘any suit or proceeding’ pending the arbitration of ‘any issue referable to arbitration under an agreement in writing for such arbitration’ upon the application of one of the parties.” *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002).

Both federal and state policy favor arbitration of disputes. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Even when, as is the case here, a party to the lawsuit is not a party to the arbitration agreement, it “may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration.” *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21, 103 S. Ct. 927, 939 (1983). This Court also possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court’s discretion. *Id.* See also *Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936)(“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.”).

The Court’s decision on whether to stay the pending action against this Defendant “should be motivated by the court’s ‘concern that litigation against a party not bound by an arbitration provision may impair an arbitrator’s consideration of claims against a party that is

¹ The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. See S.C. Code Ann. § 15-48-20(d)(“Any action or proceeding involving an issue subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section...” (emphasis added)

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In the instant matter, the Plaintiff’s claims against this Defendant arise out of the exact same factual underpinnings as his claims against Lake Emory, a party to the Arbitration Agreement. To be sure, the claims against both this Defendant and the Facility Defendant are solely concerned with Mr. Pace’s stay at Lake Emory and the provision of care and treatment provided to him. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration between Plaintiff and Lake Emory. Without the issuance of a stay, disposition of the Plaintiff’s claims against this Defendant may affect the disposition of the matter against Lake Emory, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

Generally, Plaintiff’s allegations of liability in the Complaint make very little distinction between this Defendant and Lake Emory. Rather, Plaintiff repeatedly alleges that the “Defendants” are liable to Plaintiff under the various causes of action set forth in the Complaint. See Pltf.’s Complaint at ¶¶ 23 – 47. In no uncertain terms, Plaintiff alleges and seeks to prove that this Defendant and Lake Emory should be viewed as one in the same by this Court. See Pltf.’s Complaint at ¶¶ 1-47. If this Defendant is forced to continue with this litigation, the arbitration proceedings against Lake Emory could become redundant and meaningless because of the substantial overlap in factual and legal underpinnings of the cases against this Defendant and Lake Emory. Should discovery and the trial of this matter continue against this Defendant in this Court, the right to arbitration of Lake Emory would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir. 2000)(Stay granted to defendant non-signatory to arbitration agreement because

continuing with litigation would adversely affect signatory's right to arbitrate.). Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

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Attorneys for the Defendant Hunt Valley Holdings,

LLC f/k/a Fundamental Long Term Care Holdings,

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Charleston, South Carolina

Dated: December 1, 2020

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CAROLINA, LLC; THI OF	)	
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LONG TERM CARE HOLDINGS, LLC	)	
AND KERRY L. WHEELER, DO ,	)	
	)	
DEFENDANTS.	)	
	)	

**DEFENDANT THI OF BALTIMORE,
INC.'S MEMORANDUM IN SUPPORT OF
ITS AMENDED MOTION TO STAY
(SURVIVAL ACTION)**

COMES NOW, Defendant THI of Baltimore, Inc. (improperly referred to as “THI of Baltimore, LLC” and hereinafter referred to as “this Defendant”), by and through its undersigned attorneys, and submits this Memorandum in Support of its Amended Motion to Stay this action.

BACKGROUND FACTS

Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care (misidentified in Plaintiff’s Complaint as “Lake Emory Post Acute Care” and “THI of South Carolina at Camp Care, LLC” as separate parties and hereinafter referred to as “Facility Defendant” or “Lake Emory”), entered into a valid Arbitration Agreement with Plaintiff’s decedent, Earl Pace (the “Arbitration Agreement”), around the time of Mr. Pace’s admission to

Lake Emory. See **Exhibit A – Arbitration Agreement**. Per the Arbitration Agreement, Mr. Pace and Lake Emory agreed that the South Carolina Uniform Arbitration Act, S.C. Code §15-48-10, et seq., would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, 9 U.S.C. §1, et seq. (the “FAA”), because the services and reimbursement thereof to be provided to Mr. Pace upon his admission to the facility affected and involved interstate commerce. See **Ex. A**.

As set forth herein, Facility Defendant has filed a Motion with this Court to enforce the Arbitration Agreement against the Plaintiff. See **Exhibit B - Motion to Dismiss and Compel Arbitration**. Per this Court’s inherent power to manage its own docket and the statutory mandates of the FAA, this Defendant respectfully requests that this matter must be stayed as to this Defendant until such time as the Court has made a final decision regarding Lake Emory’s pending Motion to Compel Arbitration, the arbitration process is complete, and the appellate process, if any, has been exhausted. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, a stay would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

ARGUMENT

The FAA, 9 U.S.C. § 3, entitled “Stay of proceedings where issue therein referable to arbitration,” states the following:

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In the instant matter, the Plaintiff’s claims against this Defendant arise out of the exact same factual underpinnings as his claims against Lake Emory, a party to the Arbitration Agreement. To be sure, the claims against both this Defendant and the Facility Defendant are solely concerned with Mr. Pace’s stay at Lake Emory and the provision of care and treatment provided to him. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration between Plaintiff and Lake Emory. Without the issuance of a stay, disposition of the Plaintiff’s claims against this Defendant may affect the disposition of the matter against Lake Emory, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

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For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

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**DEFENDANT THI OF SOUTH
CAROLINA, LLC’S MEMORANDUM IN
SUPPORT OF ITS MOTION TO STAY
(SURVIVAL ACTION)**

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Both federal and state policy favor arbitration of disputes. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Even when, as is the case here, a party to the lawsuit is not a party to the arbitration agreement, it “may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21, 103 S. Ct. 927, 939 (1983). This Court also possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court’s discretion. *Id.* See also *Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936)(“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.”).

The Court’s decision on whether to stay the pending action against this Defendant “should be motivated by the court’s ‘concern that litigation against a party not bound by an arbitration provision may impair an arbitrator’s consideration of claims against a party that is

¹ The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. See S.C. Code Ann. § 15-48-20(d)(“Any action or proceeding involving an issue subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section...” (emphasis added)

compelled to arbitrate.’” *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999), citing *Kroll v. Doctor's Associates, Inc.*, 3 F.3d 1167, 1171 (7th Cir. 1993).

In the instant matter, the Plaintiff’s claims against this Defendant arise out of the exact same factual underpinnings as his claims against Lake Emory, a party to the Arbitration Agreement. To be sure, the claims against both this Defendant and the Facility Defendant are solely concerned with Mr. Pace’s stay at Lake Emory and the provision of care and treatment provided to him. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration between Plaintiff and Lake Emory. Without the issuance of a stay, disposition of the Plaintiff’s claims against this Defendant may affect the disposition of the matter against Lake Emory, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

Generally, Plaintiff’s allegations of liability in the Complaint make very little distinction between this Defendant and Lake Emory. Rather, Plaintiff repeatedly alleges that the “Defendants” are liable to Plaintiff under the various causes of action set forth in the Complaint. See Pltf.’s Complaint at ¶¶ 23 – 47. In no uncertain terms, Plaintiff alleges and seeks to prove that this Defendant and Lake Emory should be viewed as one in the same by this Court. See Pltf.’s Complaint at ¶¶ 1-47. If this Defendant is forced to continue with this litigation, the arbitration proceedings against Lake Emory could become redundant and meaningless because of the substantial overlap in factual and legal underpinnings of the cases against this Defendant and Lake Emory. Should discovery and the trial of this matter continue against this Defendant in this Court, the right to arbitration of Lake Emory would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir. 2000)(Stay granted to defendant non-signatory to arbitration agreement because

continuing with litigation would adversely affect signatory's right to arbitrate.). Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

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LLC

Charleston, South Carolina

Dated: December 1, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
KENNETH PACE, INDIVIDUALLY	)	CASE NO. 2019-CP-42-03709
AND AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF EARL E. PACE,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
LAKE EMORY POST ACUTE CARE;	)	THI OF SOUTH CAROLINA AT CAMP
THI OF SOUTH CAROLINA AT CAMP	)	CARE, LLC D/B/A LAKE EMORY POST-
CARE, LLC; THI OF SOUTH	)	ACUTE CARE'S MEMORANDUM OF
CAROLINA, LLC; THI OF	)	LAW IN SUPPORT OF MOTION TO
BALTIMORE, INC; FUNDAMENTAL	)	DISMISS PLAINTIFF'S COMPLAINT,
ADMINISTRATIVE SERVICES, LLC;	)	COMPEL ARBITRATION AND STAY
FUNDAMENTAL CLINICAL AND	)	STATE COURT PROCEEDINGS
OPERATIONAL SERVICES, LLC;	)	(WRONGFUL DEATH)
FUNDAMENTAL CLINICAL	)	
CONSULTING, LLC; FUNDAMENTAL	)	
LONG TERM CARE HOLDINGS, LLC	)	
AND KERRY L. WHEELER, DO ,	)	
	)	
DEFENDANTS.	)	
	)	

COMES NOW Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care (hereinafter referred to as "Defendant" or "Lake Emory" or the "Facility"), by and through its undersigned counsel, and submits this Memorandum in Support of its Motion to Dismiss Plaintiff's Complaint, Compel Arbitration, and Stay State court Proceedings, pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16.

INTRODUCTION

Plaintiff has sued the Facility in tort based upon allegations which arise solely out of and concern the residency, care and treatment of Plaintiff's decedent, Mr. Earl Pace, at Defendant's

skilled nursing facility. However, Plaintiff's claims are subject to a valid and binding Arbitration Agreement, as discussed more fully herein, and this matter should be compelled to arbitration.

On January 29, 2015, Plaintiff's decedent, Mr. Pace, entered into a valid, binding Admissions Agreement and Facility-Resident/Representative Arbitration Agreement ("Arbitration Agreement") with the Facility concerning his residency, care and treatment there, by and through his legal custodian, the South Carolina Department of Social Services ("DSS"). See Exhibit A – Laurens County Family Court Order dated August 28, 2014; See also Exhibit B – Admission Agreement; See also Exhibit C - Arbitration Agreement. The Family Court of the Eighth Judicial Circuit, Laurens County, had placed Mr. Pace under the custody of Adult Protective Services (APS) as of August 28, 2014. See Ex. A – Family Court Order. The DSS representative who executed these agreements on Mr. Pace's behalf, Mr. Calvin Hill, acted pursuant to Court-ordered powers and pursuant to the actual authority provided to DSS by the Adult Protection Act. See S.C. Code Ann § 43-35-10 et seq. In addition, as a representative of DSS with protective custody of Mr. Pace, Calvin Hill represented to the Facility that he was authorized to enter into these agreements, including the Arbitration Agreement, and therefore, the Facility relied upon his apparent authority in this regard.

The Arbitration Agreement entered into by Mr. Pace and the Facility covers all allegations raised by Plaintiff in the Complaint and, according to its express terms, requires that the Plaintiff and the Facility submit this matter to arbitration. See Ex. C. Further, the Arbitration Agreement explicitly binds not only the parties to the Agreement, but also binds "their successors, assigns, heirs, **personal representatives**, guardians or any persons deriving their claims through or on behalf of Resident." See Ex. C. (emphasis added).

There is absolutely no evidence that the Arbitration Agreement was entered into under duress. Further, the Arbitration Agreement is not substantively or procedurally unconscionable by its terms. Therefore, as discussed further herein, Defendant respectfully requests that that the Court compel arbitration of Plaintiff's claims pursuant to the valid and binding contract between the parties and, accordingly, dismiss or stay Plaintiff's Complaint pending completion of arbitration.

FACTUAL BACKGROUND

Records from the Family Court for Laurens County provided by Plaintiff indicate that DSS first came into contact with Mr. Pace and his family in June 2014 as a result of law enforcement contacting DSS due to concerns that he was a vulnerable adult and was being exploited by his care provider – who was the girlfriend of Plaintiff's brother and Mr. Pace's son, Ricky. See Exhibit D - Laurens Family Court Complaint dated July 11, 2014. Mr. Pace's family had concerns about the current care providers for him and a DSS case manager was working with the Pace family at that time to seek a nursing home placement. See Id. In connection with these efforts, Mr. Pace was evaluated by a physician, Dr. Karla A. Hirshorn, on July 7, 2014 and he was found "not to having decision making ability" at that time. See Id. Further medical evaluation on July 10th indicated that Mr. Pace was not getting his prescribed controlled substances (including hydrocodone), and that he suffered from dementia. Ultimately, due to concerns that Mr. Pace was subject to "abuse, neglect or exploitation", Mr. Pace was taken into protective custody on a emergency basis by law enforcement on July 10, 2014 due to the absence of an alternative safe care provider for Mr. Pace. See Id. This emergent protective custody was approved by the Family Court on July 11, 2014 pursuant to §43-35-55 of South Carolina's Adult Protection Act (the "Adult Protection Act"). See Id. Shortly thereafter, it appears that Mr. Pace was admitted to Woodruff Manor in Woodruff, South Carolina - a nursing home different than the Facility.

Ultimately, Mr. Pace was assigned an attorney and a Guardian Ad Litem to advocate on his behalf. See Exhibit A. On August 28, 2014, the GAL submitted a report to the Court without objection by the parties and both counsel for Mr. Pace, the GAL and DSS reached an agreement and presented recommendations to the Judge Sinclair regarding the custody of Mr. Pace. Accordingly, the Family Court entered a Merits Order finding that Mr. Pace was a “vulnerable adult”, that Mr. Pace should remain in the custody of DSS and that he should remain in his placement at the nursing home. See Exhibit A. This August 28th Order instructed that Mr. Pace’s case would be reassessed in six months, but that Mr. Pace was to remain in DSS custody pursuant to Section 43-35-45 of the Adult Protection Act until such time. **There is no evidence in the record indicating that Plaintiff or any other members Mr. Pace’s family were involved with Mr. Pace during this period of time – otherwise DSS would not have needed to obtain and maintain custody of him under Section 43-35-45 of the Adult Protection Act.**

On October 31, 2014, Mr. Pace was discharged from Woodruff Manor and admitted to Spartanburg Regional Medical Center (“SRMC”) due to “agitation.” See Exhibit E – SRMC Medical Records. Mr. Pace was admitted to SRMC for observation and management of psychiatric issues. At that time, it appears that the staff at Woodruff Manor informed SRMC that Mr. Pace was not allowed back at their facility. See Exhibit E – SRMC Medical Records.

Ultimately, DSS made the decision to seek placement of Mr. Pace at this Defendant’s facility, Lake Emory. On January 29, 2015, Lake Emory notified DSS representative Calvin Hill, who was Mr. Pace’s case manager, that it could accept Mr. Pace as a resident of the Facility on that date. Mr. Hill notified the Facility that he could complete admissions paperwork at the time that Mr. Pace arrived at the Facility for admission. See Exhibit F – Calvin Hill Case Dictation dated January 29, 2015. Indeed, DSS representative Calvin Hill signed various agreements and

documents in connection with Mr. Pace's admission and residency, care and treatment at Lake Emory on behalf of Mr. Pace. See Exhibit B and Exhibit C.

Following Mr. Earl Pace's death, Plaintiff Mr. Kenneth Pace – who is Mr. Pace's son - commenced this lawsuit by filing a Summons and Complaint on October 21, 2019. Plaintiff has asserted medical negligence causes of action against this Defendant in this wrongful death action. These causes of action arise from and pertain to the care and treatment provided to Mr. Pace while he was a resident of Lake Emory. As described more fully below, all of these claims are subject to the valid and binding Arbitration Agreement and, therefore, Plaintiff's claims should be submitted to arbitration.

The Arbitration Agreement at issue defines Lake Emory Post Acute as the "Facility," Earl Pace as the "Resident," and Calvin Hill as the "Representative." The relevant provisions of the Arbitration Agreement state the following:

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

The Arbitration Agreement further provides:

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

Regarding DSS representative Calvin Hill's authority to sign on behalf of Mr. Pace, Mr. Hill made the following representation to the Facility through this statement contained in the Arbitration 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. See Ex. C.

The Arbitration Agreement was executed by Calvin Hill as the "Representative" of Mr. Pace and counter-signed by Kim Martin, the Admissions Director for the Facility. Mr. Hill was indeed Mr. Pace's representative as his case manager for DSS, which had legal custody pursuant to the Family Court Order dated August 28, 2014 and authority under the Adult Protection Act to enter into the Admission Agreement, the Arbitration Agreement and the other admissions-related documents on January 29, 2015. See Ex. A. Because the acts complained of by the Plaintiff fall within the scope of the valid and binding Arbitration Agreement, the Court should stay these proceedings, and compel this matter to arbitration. See 9 U.S.C. § 3.

ARGUMENT AND CITATION TO AUTHORITY

I. POLICY IN FAVOR OF ARBITRATION

As a general matter, there is a strong presumption in favor of the validity of arbitration agreements because of strong policy considerations favoring arbitration. O'Neil v. Hilton Head Hosp., 115 F.3d 272, 273 (4th Cir. 1997). Indeed, both federal and state policy favors arbitrating disputes. Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) ("The policy of the United States and this State is to favor arbitration of disputes."). "The federal policy favoring arbitration, as expressed in the [Federal Arbitration Act], is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements." Zabinski v. Bright Acres, 346 S.C. 580, 590, 553 S.E.2d 110 (S. Ct. 2001). Further, arbitration agreements are presumed valid, and "[t]he party resisting arbitration bears the burden of proving that the

claims at issue are unsuitable for arbitration.” Green Tree Fin. Corp.- Ala. v. Randolph, 531 U.S. 79, 91 (2000).

II. THE FEDERAL ARBITRATION ACT GOVERNS THE ARBITRATION AGREEMENT AND MANDATES THAT THE CLAIMS ASSERTED BY THE PLAINTIFF IN THE COMPLAINT BE COMPELLED TO ARBITRATION

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

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

9 U.S.C. § 4 (emphasis added).

“By its terms, the (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.” *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). While a court a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not invalidate an arbitration agreement on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement

to arbitrate is at issue.” See Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1423, 197 L. Ed. 2d 806 (2017)(citing AT & T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742).

Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving interstate commerce. 9 U.S.C. § 2. As discussed and further described herein, such a binding and enforceable written agreement to arbitrate disputes exists in this case and Plaintiff’s claims should be compelled to arbitration.

III. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE

A. Mr. Hill Possessed Actual Authority to Bind Mr. Pace to the Arbitration Agreement.

As a DSS employee and Mr. Pace’s case manager, Calvin Hill had actual authority to bind Mr. Pace to the Arbitration Agreement because Mr. Pace was under the *legal custody* of DSS in January 2015 when he was admitted to the Facility. See Ex. A. Mr. Pace had been judicially declared in need of South Carolina’s “adult protective services” due to his incapacity, his inability to care for himself independently and the apparent lack of any family member or other person to undertake such custody. See Ex. A.; See also S.C. Code Ann. § 43-35-45(E). The Facility therefore acted appropriately in presenting the various agreements and documents related to Mr. Pace’s residency, care and treatment at the Facility to Mr. Hill. Likewise, Mr. Hill executed his duties as the DSS case manager for Mr. Pace by making decisions on behalf of Mr. Pace that he was authorized to make.

Pursuant to S.C. Code Ann. § 43-35-10(9), DSS had comprehensive and express authority to utilize “protective services” and act on Mr. Pace’s behalf at the time he entered into the Arbitration Agreement and the Admissions Agreement on January 29, 2015, as Mr. Pace was

in DSS's "protective custody" at that time. See Ex. A. By statute, the "adult protective services" that DSS was directed to provide to or secure for Mr. Pace services to "include, **but [were] not limited to**, evaluating the need for protective services, securing and coordinating existing services, **arranging for living quarters**, obtaining financial benefits to which a vulnerable adult is entitled, **and securing medical services**, supplies, and **legal services.**" See S.C. Code Ann. § 43-35-10(9)(emphasis added).

Pursuant to terms of the Adult Protection Act and the type of protective and custodial services the Family Court imbued in DSS (See Exhibit A), no other agency or individual possessed the power to admit Mr. Pace into a skilled nursing facility, obtain other medical services, make financial decisions and make legal decisions on behalf of Mr. Pace.¹ See Id. Indeed, DSS had a Court-imposed duty to ensure such health and legal decisions were made in the best interest of Mr. Pace. DSS was the only party with these decision-making powers with regard to Mr. Pace. In light of this role as **sole custodian**, and pursuant to the Adult Protection Act, DSS had broad express powers to act on behalf of Mr. Pace pursuant to the Adult Protection Act to include the power to enter into the Admission Agreement and to enter into the Arbitration Agreement.

Although S.C. Code Ann. § 43-35-45(C) requires the appointment of a Guardian Ad Litem and an attorney for a vulnerable adult, nothing in the entire Adult Protection Act implies or suggests that a vulnerable adult's guardian ad litem or attorney has any authority whatsoever to dictate the facility where a vulnerable adult will be admitted or that no services can be procured without their consent. Further, according to the terms of the August 28, 2014 Family Court Order (See Exhibit A), Mr. Pace's lawyer and his GAL were in agreement that DSS should

¹ Under S.C. Code Ann. § 43-35-45(F), DSS even retains the authority to pursue commitment proceedings of a vulnerable adult, such as Mr. Pace.

have protective custody of Mr. Pace and that he should be subject to their protective services. Quite clearly, DSS, **and DSS only**, possessed authority to take any action necessary for the care and treatment of Mr. Pace.

DSS, by and through its authorized representative Calvin Hill, elected (1) to admit Mr. Pace to Lake Emory Post Acute Care and (2) determined that entering into an agreement for alternative dispute resolution in regards to matters concerning the residency, care and treatment of Mr. Pace at the Facility (i.e. the Arbitration Agreement) was in Mr. Pace's best interests. During Mr. Pace's over two (2) years of residency at the Facility, none of Plaintiff, Mr. Pace or any other individual, ever once contested the validity of DSS's authority to act on behalf of Mr. Pace in these ways. Indeed, to date, Plaintiff does not dispute that DSS had authority to admit Mr. Pace to the Facility and to sign the Admission Agreement on his behalf. See generally Plf Memorandum in Opposition.

B. DSS Possessed Apparent and Inherent Authority to Bind Mr. Pace to the Arbitration Agreement.

i. Agency Relationship - Apparent Agency Authority

In the alternative, assuming *arguendo* that Mr. Hill, on behalf of DSS, lacked actual authority to enter into the terms of the Arbitration Agreement, he still possessed sufficient apparent and/or 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 law follows from one of the cardinal principles of agency law: that third parties, such as Lake Emory, should not be disadvantaged because they dealt with an agent rather than a principal. As set forth above, there can be no uncertainty that Mr. Hill was authorized to admit Mr. Pace to a skilled nursing facility such as Lake Emory Post Acute Care. Plaintiff does not dispute that DSS had authority to admit Mr. Pace to Lake Emory. See generally Plf Memorandum in Opposition.

The Facility, likewise, knew of this ability (and notwithstanding the Facility's position that DSS also had *actual authority* to enter into the Arbitration Agreement), it is clearly reasonable for the Facility to have believed that Calvin Hill, as an employee of DSS which was the *sole custodian* with exclusive authority for Mr. Pace, possessed the apparent and inherent authority to bind Mr. Pace under the Arbitration Agreement. To the extent Plaintiff takes issue with DSS's authority to bind Mr. Pace to the Arbitration Agreement and the specific terms therein, such actions merely accompanied and were incidental to DSS's (and Mr. Hill's) undisputed authority to admit Mr. Pace to Lake Emory. Furthermore, as stated above, Lake Emory's Admission Director, Kim Martin, called Mr. Hill, who informed her that he was able to

sign the admission paperwork on behalf of Mr. Pace. The Defendant should not be disadvantaged for acting in accordance with the express representations of Mr. Hill regarding his authority.

C. Mr. Earl Pace was the Intended Third-Party Beneficiary of the Valid Arbitration Agreement.

In addition, Plaintiff is required to arbitrate the claims he has asserted against Lake Emory Post Acute Care on behalf of Mr. Earl Pace's estate because Mr. Earl Pace was an intended third-party beneficiary of both the Admission Agreement and the Arbitration Agreement. Under South Carolina law, "[a] third-party beneficiary is a party that the contracting parties intend to directly benefit." See Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485, 488 (S.C. 2005). The court has applied the third-party beneficiary doctrine in factually similar arbitration disputes where the contract was signed by a DSS Representative. See generally THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, No. 7:13-CV-2929-BHH, 2014 WL 6863550 (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) (also attached as Exhibit G).

In Gilbert, like the case at bar, Ms. Gilbert was under legal custody of DSS based on a Court order which determined her to be a "vulnerable adult" pursuant to S.C. Code Ann. § 43–35–10(11). See Id. The DSS Representative in Gilbert signed the admissions paperwork on behalf of Ms. Gilbert. See Id. After Ms. Gilbert's death, the personal representative of her estate filed suit against the skilled nursing facility, and the skilled nursing facility sought to compel arbitration on the grounds that Ms. Gilbert was the third-party beneficiary of the Contract signed by the DSS Representative and the skilled nursing facility. See Id. The court found that "there is no question that Ms. Gilbert was the intended third-party beneficiary . . . as she was specifically identified as the resident to be admitted to the facility." See Id. at *3. Therefore, the Court in Gilbert granted the nursing facility's motion to compel arbitration. See Id.

In this case, like in Gilbert, Mr. Earl Pace is specifically identified as the “resident” to be admitted to the facility. See Exhibits B and C. Therefore, Mr. Pace was clearly the intended third-party beneficiary of the Admission Agreement and Arbitration Agreement. See Gilbert at *3. The sound judgment and reasoning of the court in Gilbert should be followed and the Court should grant Defendant’s motion to compel arbitration in this case under the well-established doctrine of third-party beneficiaries.

Furthermore, in recent arbitration enforcement cases, the courts have applied the third-party beneficiary doctrine and compelled estate representatives, like Mr. Kenneth Pace, to arbitrate wrongful death and related tort claims because their decedents were third-party beneficiaries of nursing home contracts with arbitration clauses. See McCutcheon v. THI of S.C. at Charleston, LLC, No. 2:11-CV-02861, 2011 WL 6318575, at *3 (D.S.C. Dec. 15, 2011) (Norton, C.J.) (attached hereto as Exhibit H); 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) (Currie, J.) (attached hereto as Exhibit I). The rationale of these decisions compels the same outcome here, and Mr. Kenneth Pace should be compelled to arbitrate his claims against Lake Emory.

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

i. Merger

Further, as additional grounds to compel arbitration, Plaintiff does not dispute that DSS possessed actual authority under the Adult Protection Act to admit Mr. Pace to the Facility and, it follows, to enter into the Admission Agreement. See generally Plf Memorandum in Opposition. Therefore, the Admissions Agreement and Arbitration Agreement should be construed together and Plaintiff should be required to arbitrate his claims against the Facility. The Arbitration

Agreement and Admission Agreement were both executed by DSS representative Calvin Hill on behalf of Plaintiff's father, Mr. Earl Pace. The validity of these agreements, including the Arbitration Agreement, must be determined in accordance with the general principles of contract law and agency law that would apply to any other contract. Herron v. Century BMW, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010).

The Arbitration Agreement provides that "any controversy or dispute between the parties *arising out of or relating to Facility's Admission Agreement . . . or relating in any way to Resident's stay at Facility*" shall be resolved by arbitration pursuant to the terms of the Arbitration Agreement. See Ex. C – Arbitration Agreement (emphasis added). As previously described, the Arbitration Agreement and the Admissions Agreement were both signed by DSS representative Calvin Hill on behalf Mr. Pace on the same day, at the same time, and in connection with the same subject matter and transaction - Mr. Pace's residency at Calhoun Convalescent Center and receipt of skilled nursing care there.

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).

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 Exhibit H). Indeed, this Court has cited to McCutcheon on numerous occasions in holding that a nursing home arbitration agreement merged with the admission agreement for purposes of equitable estoppel under precisely the same circumstances. See Abrams v. Fundamental Long-term Care Holdings, LLC, et al, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); Campsen v. Fundamental Long-Term Care Holdings, LLC et al, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012). See Abrams and Campsen attached hereto as Exhibit J and Exhibit K, respectively.

Moreover, in November of 2020, in the case of Jeffery White, as personal representative for the Estate of Lizzie White v. St. Matthews Healthcare, LLC, Case No. 2019-CP-09-0220, which involved this *very same Arbitration Agreement* and *the very same Admissions Agreement* as in this case, this Court found that the Admissions Agreement and the Arbitration Agreement *merged* and the plaintiff in that case was *equitably estopped* from accepting the benefits of the Admissions Agreement but denying the validity of the Arbitration Agreement. See Exhibit L-White Order dated November 24, 2020.

Accordingly, Mr. Pace, by and through the acts of his legal custodian DSS, and the Facility, both contemplated that the terms of the agreement to admit Mr. Pace were contained in the Admissions Agreement and Arbitration Agreement. DSS representative Calvin Hill executed the Arbitration Agreement and the Admissions Agreement at the same time – on January 29, 2015; the Arbitration Agreement and the Admissions Agreement both covered the same subject matter and transaction – Mr. Pace’s residency at the Facility and receipt of residential and skilled nursing services; the Arbitration Agreement and Admissions Agreement were executed by the same parties; the Arbitration Agreement specifically makes citation to and incorporates the Admission Agreement; and thus the Arbitration Agreement and Admission Agreement should be construed as part and parcel of the same agreement between the parties.

ii. Equitable Estoppel of Merged Agreement

“Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.” Int’l Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). “A nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause.’” Id. (quoting Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999)); *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 v. Willis, 426 S.C. 326, 339–345, 827 S.E.2d 167, 174–177 (2019) (discussing direct benefits test).

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)).²

Plaintiff, as Mr. Pace's son, embraced all aspects of DSS's decision to admit Mr. Pace to the Facility and to enter into the Admission Agreement with the Facility. Plaintiff does not dispute the validity of the Admission Agreement or his father's admission to the Facility. He never removed Mr. Pace from the Facility and, by all accounts, approved of presence at the Facility/did not seek his discharge. *Indeed, it is unfortunately also fair to state that Plaintiff had an opportunity to seek custody of his father, but accepted all benefits of DSS being his father's legal custodian as of January 29, 2015.*

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

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

In Gilbert, Judge McDonald applied, and Judge Hendricks adopted, estoppel principles to compel arbitration in the same exact setting where a DSS Representative signed on behalf of a “vulnerable adult,” ruling:

“[H]ere, having obtained for Ms. Gilbert the benefits of admission and treatment at Magnolia Manor–Inman pursuant to the Admission Contract, the defendant is estopped from denying the enforceability of the Arbitration Provision.”

2014 WL 6863550, at *4; report and recommendation adopted, 2015 WL 1268185 (See Exhibit G).

By repudiating the Arbitration Agreement, Mr. Pace attempts to take inconsistent positions regarding the same, single contract. DSS as the sole legal custodian for Mr. Pace, by and through its representative Calvin Hill, represented to Lake Emory Post Acute Care that it was authorized to sign the Admission Contract on behalf of Mr. Pace because DSS possessed legal custody over him. Having obtained for Mr. Pace the benefits of admission and treatment at the Lake Emory Post Acute Care pursuant to the Admission Contract, the Plaintiff is estopped from repudiating that very same authority to dispute the validity of its contents. Cf. International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) (“To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the [FAA].” (internal quotation marks omitted)).

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 this Defendant 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 agreement, where a non-signatory

receives the benefits of the contract, which Plaintiff certainly did here, Plaintiff must be prevented from refusing to comply with the Arbitration Agreement merely because he did not sign it. See Exhibit L - White Order dated November 24, 2020. For over 2 years, the validity of the Admissions Contract was acknowledged or acquiesced to by Plaintiff whereby payments have been made pursuant to its terms and treatment and care has been provided as set forth therein. Now, suddenly, Plaintiff seeks to invalidate this very same contract's enforceability. Such a result would be blatantly unfair. Accordingly, Mr. Pace is required to submit his claims against the Defendant to arbitration rather than in a judicial forum.

iii. Coleman, Thompson, and Hodge are Distinguishable

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

First, unlike Hodge, Coleman and Thompson, the resident in this instance – Mr. Pace – was rendered incapable of making his own decisions and placed into the legal custody of DSS. See Exhibit A. Plaintiff does not dispute that DSS admitted his father to the Facility pursuant to its rights and obligations under the Adult Protection Act. See generally Plf Memorandum in Opposition. The Adult Healthcare Consent Act is not the statutory mechanism under which DSS admitted Mr. Pace to the Facility. DSS admitted Mr. Pace to the Facility pursuant to authority granted to it by the Family Court on August 28, 2014 and found under Section 43-35-45 of the Adult Protection Act, the existence of which would be rendered unnecessary and superfluous if it were treated as equivalent to the authority conferred under the Adult Healthcare Consent Act.

Therefore, Hodge, Coleman and Thompson should not be followed as it relates to the doctrine of merger.

Second, these cases are distinguishable as it relates to the issue of “separateness” and the doctrine of merger, as described further below.

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

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

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

Instead, in the present case, the agreements “were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction” and, therefore, the documents merged. Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (citing Klutts, *supra*, 268 S.C. at 88, 232 S.E.2d at 24).³ Specifically, the Admission and Arbitration Agreements were signed by DSS as the ***sole and exclusive legal custodian***, on Plaintiff’s father’s behalf, and the Facility on January 29, 2015. The documents were signed by the exact same people: Calvin Hill, DSS representative as custodian for Mr. Pace and by the Admissions Director for the Facility. The documents were signed for the same purpose and transaction of establishing Mr. Pace’s residency at the skilled nursing facility.

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). Moreover, the Arbitration Agreement at issue contains no disclaimer provision, unlike Coleman, Thompson, and Hodge. Also, absent here is the type of discrepancy the Hodge Court pointed out with

³ 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).

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 ¶ IX. (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”).)

Further still, it must be remembered that 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,”⁴ as indeed the admission and arbitration agreements were here, there is evidence to upset the *default presumption* that the contracting parties intended the instruments to be construed together as effectively one contract. As a practical matter, if this presumption is to mean anything, upsetting it must require actual evidence of sufficient probity that, notwithstanding the concurrence of all the circumstances that must come together for the presumption of merger to even arise in the first place—i.e., same time, parties, purpose, and transaction—a reasonable, non-speculative inference can be drawn that the parties’ possessed a contrary intention. 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

⁴ Coleman, 407 S.C. at 355, 755 S.E.2d at 455.

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.

Even though, as noted above, the Arbitration Agreement was not a precondition to admission, this does not mean that the two instruments did not work hand-in-hand once the arbitration agreement came into existence (i.e., once it was in fact entered into). While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true; the Admission Agreement is indeed necessary to the Arbitration Agreement. In other words, yes, the Admission Agreement *could* have stood on its own, without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with; but that is not what happened. **The Arbitration Agreement was in fact executed, of course, and it was executed under circumstances giving rise to a presumption of merger—again, same time, parties, purpose, and transaction.** Unlike the Admission Agreement, however, which is capable of making sense either standing alone or, alternatively, together with the Arbitration Agreement, the Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitration Agreement's) sole reason for being.

It matters not whether the Arbitration Agreement was a condition of admission, only that it was in fact agreed to in conjunction with admission; and, here, there can be no question that the Arbitration Agreement—once agreed upon—was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument,

governing various interrelated aspects of Ms. White's relationship with Defendant. Indeed, this conclusion finds direct support in the Admission Agreement's "Entire Agreement" provision, which states, "[t]he undersigned further acknowledges that he/she has received and read the Admission Handbook and other Admissions materials and understand that these documents are made a part of this Agreement by reference herein." See Ex. B, p. 12 (emphasis added). Had the Arbitration Agreement not been executed, it would not constitute admissions material, but, of course, it was executed, and it does constitute admissions material; most respectfully, to conclude otherwise simply does not make sense.

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

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

a. Merger

In the alternative, and as additional grounds to compel arbitration, there is no dispute that Mr. Hill possessed actual authority under the Adult Protection Act to admit Mr. Pace to the Facility and, it follows, to enter into the Admission Agreement. By statute, the "adult protective services" that DSS was directed to provide to Mr. Pace "include, ***but [were] not limited to***, evaluating the need for protective services, securing and coordinating existing services, ***arranging for living quarters***, obtaining financial benefits to which a vulnerable adult is entitled, ***and securing medical services***, supplies, and legal services." *See* S.C. Code Ann. 43-35-10(9) (emphasis added). The Arbitration Agreement and Admission Agreement were executed by Mr. Hill on behalf of Mr. Earl Pace. The validity of these agreements, including the Arbitration

Agreement, must be determined in accordance with the general principles of contract law and agency law that would apply to any other contract. See 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. C (emphasis added). As previously described, the Arbitration Agreement and the Admissions Agreement were both signed by Mr. Hill on the same day, at the same time, and in connection with the same subject matter and transaction - Mr. Pace’s residency at Lake Emory and receipt of skilled nursing care there.

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. See 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. See 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).

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

Mr. Hill executed the Arbitration Agreement and the Admissions Agreement at the same time – on January 29, 2015; the Arbitration Agreement and the Admissions Agreement both covered the same subject matter and transaction - Mr. Pace’s residency at the Facility and receipt of residential and skilled nursing services; the Arbitration Agreement and Admissions Agreement were executed by the same parties, Mr. Hill and Ms. Kim Martin; the Arbitration Agreement specifically makes citation to and incorporates the Admission Agreement; and thus the Arbitration Agreement and Admission Agreement should be construed as part and parcel of the same agreement between the parties.

E. The Arbitration Agreement is Not Unconscionable

“In analyzing claims of unconscionability of arbitration agreements, . . . [courts should] focus generally on whether the arbitration clause is geared towards achieving an unbiased

decision by a neutral decision-maker.” One Belle Hall Prop. Owners Ass’n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 60, 791 S.E.2d 291 (Ct. App. 2016)(internal quotations omitted).

Should Plaintiff contend in any supplemental briefing that this Arbitration Agreement is unenforceable because it is unconscionable, the law and facts surrounding Mr. Hill entering into this Arbitration Agreement and the clear language of the Agreement demonstrates this is clearly not the case. As an initial matter, both state and federal courts in South Carolina have consistently ruled that arbitration agreements identical to the one *sub judice* are not unconscionable. See McCutcheon v. THI of S.C. at Charleston, LLC, *supra*, at 6* - *8; Benson v. THI of S.C. at Charleston, LLC, No. C.A. No. 7:11-CV-2613-HMH (D.S.C. Nov. 30, 2011)(attached hereto as Exhibit H); Abrams v. Fundamental Long-term Care Holdings, LLC, et al, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012)(attached hereto as Exhibit J; Campsen v. Fundamental Long-Term Care Holdings, LLC et al, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012) (attached hereto as Exhibit K).

Further, in the case of Arredondo, the Court found that an arbitration agreement separate from the admission agreement “. . . is conducive to greater freedom of choice for the consumer. It also better protects the nursing home from a contention that the arbitration contract is unconscionable.” 2019 WL 3814725, *2 (S.C. Ct. App. August 14, 2019)(quoting J. Toal dissent in Coleman, 407 S.C. 346, 357).

Anyone who enters into a written contract has a duty to read the contract which she or he signs. Maw v. McAlister, 252 S.C. 280, 284-285, 166 S.E.2d 203, 204 (1969). Anyone who is capable of reading and understanding, but fails to read a contract before signing, is bound by the terms thereof. Sims v. Tyler, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Furthermore,

arbitration clauses are not unconscionable and will be enforced if a person who can read fails to read the contract, regardless of whether he was advised of the arbitration terms by the contracting party. Munoz v. Green Tree Financial Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding the plaintiff's failure to read an arbitration provision did not render it unconscionable even though the plaintiffs claimed they were not advised of those terms). Additionally, "inequality of bargaining power alone will not invalidate an arbitration agreement." *Id.*

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

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

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. C (emphasis in original).

Since Mr. Pace's *sole and exclusive legal custodian*, DSS – by and through its employee and the case manager for Mr. Pace – Calvin Hill, had a duty to read and understand the documents he was signing on Mr. Pace's behalf and did so under proper authority, Plaintiff simply has not offered any basis that DSS – the state agency which the Family Court *ordered* and imbued in it authority and duties in regards to Mr. Pace - was unaware of the terms of the Arbitration Agreement that DSS voluntarily entered into on behalf of Mr. Pace.

CONCLUSION

Defendant submits that Mr. Calvin Hill had actual statutory authority to enter into the Arbitration Agreement under the terms of the South Carolina Adult Protection Act. See S.C. Code Ann. 43-35-5 *et seq.*

Alternatively, because there is no dispute that Mr. Hill had actual authority to enter into the Admission Agreement on behalf of Mr. Pace, he had inherent authority to enter into the accompanying Arbitration Agreement.

Further, since Mr. Pace was identified as the “resident” on the agreements, he was clearly the third-party beneficiary of the Contract signed by Mr. Hill and the Facility, and therefore arbitration is binding on him. This argument is supported by factually similar case law in Gilbert.

Finally, the doctrine of merger as between the Admission Agreement and the Arbitration Agreement should operate such that Plaintiff is equitably estopped from denying that the Arbitration Agreement is valid and binding as to Mr. Pace’s residency, care and treatment at Lake Emory. These documents were executed on the same date, by the same parties and with respect to the same transaction – the provision of nursing and other health care to Mr. Earl Pace at the Facility. Therefore, Plaintiff should be estopped from denying the validity of the Arbitration Agreement and his claims must be compelled to arbitration in accordance with the Federal Arbitration Act.

Therefore, Defendant respectfully requests that this Court enter an Order compelling arbitration and dismissing (or staying) the pending action until completion of arbitration proceedings.

[SIGNATURE BLOCK ON THE FOLLOWING PAGE]

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at Camp Care, LLC d/b/a Lake Emory Post Acute

Care

Charleston, South Carolina

Dated: December 1, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
KENNETH PACE, INDIVIDUALLY	)	CASE NO. 2019-CP-42-03709
AND AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF EARL E. PACE,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
LAKE EMORY POST ACUTE CARE;	)	
THI OF SOUTH CAROLINA AT CAMP	)	DEFENDANT FUNDAMENTAL
CARE, LLC; THI OF SOUTH	)	ADMINISTRATIVE SERVICES, LLC'S
CAROLINA, LLC; THI OF	)	MEMORANDUM IN SUPPORT OF ITS
BALTIMORE, INC; FUNDAMENTAL	)	MOTION TO STAY
ADMINISTRATIVE SERVICES, LLC;	)	(WRONGFUL DEATH)
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC;	)	
FUNDAMENTAL CLINICAL	)	
CONSULTING, LLC; FUNDAMENTAL	)	
LONG TERM CARE HOLDINGS, LLC	)	
AND KERRY L. WHEELER, DO ,	)	
	)	
DEFENDANTS.	)	
	)	

COMES NOW, Defendant Fundamental Administrative Services, LLC (hereinafter “this Defendant”), by and through its undersigned attorneys, and submits this Memorandum in Support of its Motion to Stay this action.

BACKGROUND FACTS

Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care (misidentified in Plaintiff’s Complaint as “Lake Emory Post Acute Care” and “THI of South Carolina at Camp Care, LLC” as separate parties and hereinafter referred to as “Facility Defendant” or “Lake Emory”), entered into a valid Arbitration Agreement with Plaintiff’s decedent, Earl Pace (the “Arbitration Agreement”), around the time of Mr. Pace’s admission to

Lake Emory. See **Exhibit A – Arbitration Agreement**. Per the Arbitration Agreement, Mr. Pace and Lake Emory agreed that the South Carolina Uniform Arbitration Act, S.C. Code §15-48-10, et seq., would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, 9 U.S.C. §1, et seq. (the “FAA”), because the services and reimbursement thereof to be provided to Mr. Pace upon his admission to the facility affected and involved interstate commerce. See **Ex. A**.

As set forth herein, Facility Defendant has filed a Motion with this Court to enforce the Arbitration Agreement against the Plaintiff. See **Exhibit B - Motion to Dismiss and Compel Arbitration**. Per this Court’s inherent power to manage its own docket and the statutory mandates of the FAA, this Defendant respectfully requests that this matter must be stayed as to this Defendant until such time as the Court has made a final decision regarding Lake Emory’s pending Motion to Compel Arbitration, the arbitration process is complete, and the appellate process, if any, has been exhausted. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, a stay would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

ARGUMENT

The FAA, 9 U.S.C. § 3, entitled “Stay of proceedings where issue therein referable to arbitration,” states the following:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, **the court** in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, **shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement**, providing the applicant for the stay is not in default in proceeding with such arbitration.

(Emphasis added.)¹

Citing this statutory provision, the South Carolina Court of Appeals held the “FAA clearly requires a court stay ‘any suit or proceeding’ pending the arbitration of ‘any issue referable to arbitration under an agreement in writing for such arbitration’ upon the application of one of the parties.” *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002).

Both federal and state policy favor arbitration of disputes. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Even when, as is the case here, a party to the lawsuit is not a party to the arbitration agreement, it “may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21, 103 S. Ct. 927, 939 (1983). This Court also possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court’s discretion. *Id.* See also *Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936)(“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.”).

The Court’s decision on whether to stay the pending action against this Defendant “should be motivated by the court’s ‘concern that litigation against a party not bound by an arbitration provision may impair an arbitrator’s consideration of claims against a party that is

¹ The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. See S.C. Code Ann. § 15-48-20(d)(“Any action or proceeding involving an issue subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section...” (emphasis added)

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In the instant matter, the Plaintiff’s claims against this Defendant arise out of the exact same factual underpinnings as his claims against Lake Emory, a party to the Arbitration Agreement. To be sure, the claims against both this Defendant and the Facility Defendant are solely concerned with Mr. Pace’s stay at Lake Emory and the provision of care and treatment provided to him. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration between Plaintiff and Lake Emory. Without the issuance of a stay, disposition of the Plaintiff’s claims against this Defendant may affect the disposition of the matter against Lake Emory, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

Generally, Plaintiff’s allegations of liability in the Complaint make very little distinction between this Defendant and Lake Emory. Rather, Plaintiff repeatedly alleges that the “Defendants” are liable to Plaintiff under the various causes of action set forth in the Complaint. See Pltf.’s Complaint at ¶¶ 23 – 47. In no uncertain terms, Plaintiff alleges and seeks to prove that this Defendant and Lake Emory should be viewed as one in the same by this Court. See Pltf.’s Complaint at ¶¶ 1-47. If this Defendant is forced to continue with this litigation, the arbitration proceedings against Lake Emory could become redundant and meaningless because of the substantial overlap in factual and legal underpinnings of the cases against this Defendant and Lake Emory. Should discovery and the trial of this matter continue against this Defendant in this Court, the right to arbitration of Lake Emory would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir. 2000)(Stay granted to defendant non-signatory to arbitration agreement because

continuing with litigation would adversely affect signatory's right to arbitrate.). Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

YOUNG CLEMENT RIVERS, LLP

By: s/ Kate C. Mettler

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Attorneys for the Defendant Fundamental

Administrative Services, LLC

Charleston, South Carolina

Dated: December 1, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
KENNETH PACE, INDIVIDUALLY	)	CASE NO. 2019-CP-42-03709
AND AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF EARL E. PACE,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
LAKE EMORY POST ACUTE CARE;	)	
THI OF SOUTH CAROLINA AT CAMP	)	DEFENDANT FUNDAMENTAL
CARE, LLC; THI OF SOUTH	)	CLINICAL AND OPERATIONAL
CAROLINA, LLC; THI OF	)	SERVICES, LLC’S MEMORANDUM IN
BALTIMORE, INC; FUNDAMENTAL	)	SUPPORT OF ITS MOTION TO STAY
ADMINISTRATIVE SERVICES, LLC;	)	(WRONGFUL DEATH)
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC;	)	
FUNDAMENTAL CLINICAL	)	
CONSULTING, LLC; FUNDAMENTAL	)	
LONG TERM CARE HOLDINGS, LLC	)	
AND KERRY L. WHEELER, DO ,	)	
	)	
DEFENDANTS.	)	
	)	

COMES NOW, Defendant Fundamental Clinical and Operational Services, LLC (hereinafter “this Defendant”), by and through its undersigned attorneys, and submits this Memorandum in Support of its Motion to Stay this action.

BACKGROUND FACTS

Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care (misidentified in Plaintiff’s Complaint as “Lake Emory Post Acute Care” and “THI of South Carolina at Camp Care, LLC” as separate parties and hereinafter referred to as “Facility Defendant” or “Lake Emory”), entered into a valid Arbitration Agreement with Plaintiff’s decedent, Earl Pace (the “Arbitration Agreement”), around the time of Mr. Pace’s admission to

Lake Emory. See **Exhibit A – Arbitration Agreement**. Per the Arbitration Agreement, Mr. Pace and Lake Emory agreed that the South Carolina Uniform Arbitration Act, S.C. Code §15-48-10, et seq., would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, 9 U.S.C. §1, et seq. (the “FAA”), because the services and reimbursement thereof to be provided to Mr. Pace upon his admission to the facility affected and involved interstate commerce. See **Ex. A**.

As set forth herein, Facility Defendant has filed a Motion with this Court to enforce the Arbitration Agreement against the Plaintiff. See **Exhibit B - Motion to Dismiss and Compel Arbitration**. Per this Court’s inherent power to manage its own docket and the statutory mandates of the FAA, this Defendant respectfully requests that this matter must be stayed as to this Defendant until such time as the Court has made a final decision regarding Lake Emory’s pending Motion to Compel Arbitration, the arbitration process is complete, and the appellate process, if any, has been exhausted. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, a stay would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

ARGUMENT

The FAA, 9 U.S.C. § 3, entitled “Stay of proceedings where issue therein referable to arbitration,” states the following:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, **the court** in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, **shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement**, providing the applicant for the stay is not in default in proceeding with such arbitration.

(Emphasis added.)¹

Citing this statutory provision, the South Carolina Court of Appeals held the “FAA clearly requires a court stay ‘any suit or proceeding’ pending the arbitration of ‘any issue referable to arbitration under an agreement in writing for such arbitration’ upon the application of one of the parties.” *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002).

Both federal and state policy favor arbitration of disputes. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Even when, as is the case here, a party to the lawsuit is not a party to the arbitration agreement, it “may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21, 103 S. Ct. 927, 939 (1983). This Court also possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court’s discretion. *Id.* See also *Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936)(“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.”).

The Court’s decision on whether to stay the pending action against this Defendant “should be motivated by the court’s ‘concern that litigation against a party not bound by an arbitration provision may impair an arbitrator’s consideration of claims against a party that is

¹ The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. See S.C. Code Ann. § 15-48-20(d)(“Any action or proceeding involving an issue subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section...” (emphasis added)

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In the instant matter, the Plaintiff’s claims against this Defendant arise out of the exact same factual underpinnings as his claims against Lake Emory, a party to the Arbitration Agreement. To be sure, the claims against both this Defendant and the Facility Defendant are solely concerned with Mr. Pace’s stay at Lake Emory and the provision of care and treatment provided to him. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration between Plaintiff and Lake Emory. Without the issuance of a stay, disposition of the Plaintiff’s claims against this Defendant may affect the disposition of the matter against Lake Emory, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

Generally, Plaintiff’s allegations of liability in the Complaint make very little distinction between this Defendant and Lake Emory. Rather, Plaintiff repeatedly alleges that the “Defendants” are liable to Plaintiff under the various causes of action set forth in the Complaint. See Pltf.’s Complaint at ¶¶ 23 – 47. In no uncertain terms, Plaintiff alleges and seeks to prove that this Defendant and Lake Emory should be viewed as one in the same by this Court. See Pltf.’s Complaint at ¶¶ 1-47. If this Defendant is forced to continue with this litigation, the arbitration proceedings against Lake Emory could become redundant and meaningless because of the substantial overlap in factual and legal underpinnings of the cases against this Defendant and Lake Emory. Should discovery and the trial of this matter continue against this Defendant in this Court, the right to arbitration of Lake Emory would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir. 2000)(Stay granted to defendant non-signatory to arbitration agreement because

continuing with litigation would adversely affect signatory's right to arbitrate.). Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

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By: s/ Kate C. Mettler

D. Jay Davis, Jr.

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Attorneys for the Defendant Fundamental Clinical
and Operational Services, LLC

Charleston, South Carolina

Dated: December 1, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
KENNETH PACE, INDIVIDUALLY	)	CASE NO. 2019-CP-42-03709
AND AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF EARL E. PACE,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
LAKE EMORY POST ACUTE CARE;	)	
THI OF SOUTH CAROLINA AT CAMP	)	
CARE, LLC; THI OF SOUTH	)	
CAROLINA, LLC; THI OF	)	
BALTIMORE, INC; FUNDAMENTAL	)	
ADMINISTRATIVE SERVICES, LLC;	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC;	)	
FUNDAMENTAL CLINICAL	)	
CONSULTING, LLC; FUNDAMENTAL	)	
LONG TERM CARE HOLDINGS, LLC	)	
AND KERRY L. WHEELER, DO ,	)	
	)	
DEFENDANTS.	)	
	)	

**DEFENDANT HUNT VALLEY
HOLDINGS, LLC F/K/A FUNDAMENTAL
LONG TERM CARE HOLDINGS, LLC'S
MEMORANDUM IN SUPPORT OF ITS
MOTION TO STAY
(WRONGFUL DEATH)**

COMES NOW, Defendant Hunt Valley Holdings, LLC f/k/a Fundamental Long Term Care Holdings, LLC (misidentified in Plaintiff's Complaint as "Fundamental Long Term Care Holdings, LLC" and hereinafter referred to as "this Defendant"), by and through its undersigned attorneys, and submits this Memorandum in Support of its Motion to Stay this action.

BACKGROUND FACTS

Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care (misidentified in Plaintiff's Complaint as "Lake Emory Post Acute Care" and "THI of South Carolina at Camp Care, LLC" as separate parties and hereinafter referred to as "Facility Defendant" or "Lake Emory"), entered into a valid Arbitration Agreement with Plaintiff's

decedent, Earl Pace (the “Arbitration Agreement”), around the time of Mr. Pace’s admission to Lake Emory. *See Exhibit A – Arbitration Agreement.* Per the Arbitration Agreement, Mr. Pace and Lake Emory agreed that the South Carolina Uniform Arbitration Act, S.C. Code §15-48-10, *et seq.*, would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* (the “FAA”), because the services and reimbursement thereof to be provided to Mr. Pace upon his admission to the facility affected and involved interstate commerce. *See Ex. A.*

As set forth herein, Facility Defendant has filed a Motion with this Court to enforce the Arbitration Agreement against the Plaintiff. *See Exhibit B - Motion to Dismiss and Compel Arbitration.* Per this Court’s inherent power to manage its own docket and the statutory mandates of the FAA, this Defendant respectfully requests that this matter must be stayed as to this Defendant until such time as the Court has made a final decision regarding Lake Emory’s pending Motion to Compel Arbitration, the arbitration process is complete, and the appellate process, if any, has been exhausted. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, a stay would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

ARGUMENT

The FAA, 9 U.S.C. § 3, entitled “Stay of proceedings where issue therein referable to arbitration,” states the following:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, **the court** in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, **shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the**

agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(Emphasis added.)¹

Citing this statutory provision, the South Carolina Court of Appeals held the “FAA clearly requires a court stay ‘any suit or proceeding’ pending the arbitration of ‘any issue referable to arbitration under an agreement in writing for such arbitration’ upon the application of one of the parties.” *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002).

Both federal and state policy favor arbitration of disputes. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Even when, as is the case here, a party to the lawsuit is not a party to the arbitration agreement, it “may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration.” *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21, 103 S. Ct. 927, 939 (1983). This Court also possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court’s discretion. *Id.* See also *Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936)(“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.”).

The Court’s decision on whether to stay the pending action against this Defendant “should be motivated by the court’s ‘concern that litigation against a party not bound by an arbitration provision may impair an arbitrator’s consideration of claims against a party that is

¹ The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. See S.C. Code Ann. § 15-48-20(d)(“Any action or proceeding involving an issue subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section...” (emphasis added)

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In the instant matter, the Plaintiff’s claims against this Defendant arise out of the exact same factual underpinnings as his claims against Lake Emory, a party to the Arbitration Agreement. To be sure, the claims against both this Defendant and the Facility Defendant are solely concerned with Mr. Pace’s stay at Lake Emory and the provision of care and treatment provided to him. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration between Plaintiff and Lake Emory. Without the issuance of a stay, disposition of the Plaintiff’s claims against this Defendant may affect the disposition of the matter against Lake Emory, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

Generally, Plaintiff’s allegations of liability in the Complaint make very little distinction between this Defendant and Lake Emory. Rather, Plaintiff repeatedly alleges that the “Defendants” are liable to Plaintiff under the various causes of action set forth in the Complaint. See Pltf.’s Complaint at ¶¶ 23 – 47. In no uncertain terms, Plaintiff alleges and seeks to prove that this Defendant and Lake Emory should be viewed as one in the same by this Court. See Pltf.’s Complaint at ¶¶ 1-47. If this Defendant is forced to continue with this litigation, the arbitration proceedings against Lake Emory could become redundant and meaningless because of the substantial overlap in factual and legal underpinnings of the cases against this Defendant and Lake Emory. Should discovery and the trial of this matter continue against this Defendant in this Court, the right to arbitration of Lake Emory would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir. 2000)(Stay granted to defendant non-signatory to arbitration agreement because

continuing with litigation would adversely affect signatory's right to arbitrate.). Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

YOUNG CLEMENT RIVERS, LLP

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Attorneys for the Defendant Hunt Valley Holdings,

LLC f/k/a Fundamental Long Term Care Holdings,

LLC

Charleston, South Carolina

Dated: December 1, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
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KENNETH PACE, INDIVIDUALLY	)	CASE NO. 2019-CP-42-03709
AND AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF EARL E. PACE,	)	
	)	
PLAINTIFF,	)	
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LAKE EMORY POST ACUTE CARE;	)	
THI OF SOUTH CAROLINA AT CAMP	)	
CARE, LLC; THI OF SOUTH	)	
CAROLINA, LLC; THI OF	)	
BALTIMORE, INC; FUNDAMENTAL	)	
ADMINISTRATIVE SERVICES, LLC;	)	
FUNDAMENTAL CLINICAL AND	)	
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FUNDAMENTAL CLINICAL	)	
CONSULTING, LLC; FUNDAMENTAL	)	
LONG TERM CARE HOLDINGS, LLC	)	
AND KERRY L. WHEELER, DO ,	)	
	)	
DEFENDANTS.	)	
	)	

**DEFENDANT THI OF BALTIMORE,
INC.'S MEMORANDUM IN SUPPORT OF
ITS AMENDED MOTION TO STAY
(WRONGFUL DEATH)**

COMES NOW, Defendant THI of Baltimore, Inc. (improperly referred to as “THI of Baltimore, LLC” and hereinafter referred to as “this Defendant”), by and through its undersigned attorneys, and submits this Memorandum in Support of its Amended Motion to Stay this action.

BACKGROUND FACTS

Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care (misidentified in Plaintiff’s Complaint as “Lake Emory Post Acute Care” and “THI of South Carolina at Camp Care, LLC” as separate parties and hereinafter referred to as “Facility Defendant” or “Lake Emory”), entered into a valid Arbitration Agreement with Plaintiff’s decedent, Earl Pace (the “Arbitration Agreement”), around the time of Mr. Pace’s admission to

Lake Emory. See **Exhibit A – Arbitration Agreement**. Per the Arbitration Agreement, Mr. Pace and Lake Emory agreed that the South Carolina Uniform Arbitration Act, S.C. Code §15-48-10, et seq., would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, 9 U.S.C. §1, et seq. (the “FAA”), because the services and reimbursement thereof to be provided to Mr. Pace upon his admission to the facility affected and involved interstate commerce. See **Ex. A**.

As set forth herein, Facility Defendant has filed a Motion with this Court to enforce the Arbitration Agreement against the Plaintiff. See **Exhibit B - Motion to Dismiss and Compel Arbitration**. Per this Court’s inherent power to manage its own docket and the statutory mandates of the FAA, this Defendant respectfully requests that this matter must be stayed as to this Defendant until such time as the Court has made a final decision regarding Lake Emory’s pending Motion to Compel Arbitration, the arbitration process is complete, and the appellate process, if any, has been exhausted. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, a stay would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

ARGUMENT

The FAA, 9 U.S.C. § 3, entitled “Stay of proceedings where issue therein referable to arbitration,” states the following:

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The Court’s decision on whether to stay the pending action against this Defendant “should be motivated by the court’s ‘concern that litigation against a party not bound by an arbitration provision may impair an arbitrator’s consideration of claims against a party that is

¹ The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. See S.C. Code Ann. § 15-48-20(d)(“Any action or proceeding involving an issue subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section...” (emphasis added)

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In the instant matter, the Plaintiff’s claims against this Defendant arise out of the exact same factual underpinnings as his claims against Lake Emory, a party to the Arbitration Agreement. To be sure, the claims against both this Defendant and the Facility Defendant are solely concerned with Mr. Pace’s stay at Lake Emory and the provision of care and treatment provided to him. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration between Plaintiff and Lake Emory. Without the issuance of a stay, disposition of the Plaintiff’s claims against this Defendant may affect the disposition of the matter against Lake Emory, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

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continuing with litigation would adversely affect signatory's right to arbitrate.). Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

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Attorneys for the Defendant THI of Baltimore, Inc.

Charleston, South Carolina

Dated: December 1, 2020

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REPRESENTATIVE OF THE ESTATE	)	
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CARE, LLC; THI OF SOUTH	)	
CAROLINA, LLC; THI OF	)	
BALTIMORE, INC; FUNDAMENTAL	)	
ADMINISTRATIVE SERVICES, LLC;	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC;	)	
FUNDAMENTAL CLINICAL	)	
CONSULTING, LLC; FUNDAMENTAL	)	
LONG TERM CARE HOLDINGS, LLC	)	
AND KERRY L. WHEELER, DO ,	)	
	)	
DEFENDANTS.	)	
	)	

**DEFENDANT THI OF SOUTH
CAROLINA, LLC’S MEMORANDUM IN
SUPPORT OF ITS MOTION TO STAY
(WRONGFUL DEATH)**

COMES NOW, Defendant THI of South Carolina, LLC (hereinafter referred to as “this Defendant”), by and through its undersigned attorneys, and submits this Memorandum in Support of its Motion to Stay this action.

BACKGROUND FACTS

Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care (misidentified in Plaintiff’s Complaint as “Lake Emory Post Acute Care” and “THI of South Carolina at Camp Care, LLC” as separate parties and hereinafter referred to as “Facility Defendant” or “Lake Emory”), entered into a valid Arbitration Agreement with Plaintiff’s decedent, Earl Pace (the “Arbitration Agreement”), around the time of Mr. Pace’s admission to

Lake Emory. *See* **Exhibit A – Arbitration Agreement**. Per the Arbitration Agreement, Mr. Pace and Lake Emory agreed that the South Carolina Uniform Arbitration Act, S.C. Code §15-48-10, et seq., would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* (the “FAA”), because the services and reimbursement thereof to be provided to Mr. Pace upon his admission to the facility affected and involved interstate commerce. *See* **Ex. A**.

As set forth herein, Facility Defendant has filed a Motion with this Court to enforce the Arbitration Agreement against the Plaintiff. *See* **Exhibit B - Motion to Dismiss and Compel Arbitration**. Per this Court’s inherent power to manage its own docket and the statutory mandates of the FAA, this Defendant respectfully requests that this matter must be stayed as to this Defendant until such time as the Court has made a final decision regarding Lake Emory’s pending Motion to Compel Arbitration, the arbitration process is complete, and the appellate process, if any, has been exhausted. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, a stay would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

ARGUMENT

The FAA, 9 U.S.C. § 3, entitled “Stay of proceedings where issue therein referable to arbitration,” states the following:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, **the court** in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, **shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement**, providing the applicant for the stay is not in default in proceeding with such arbitration.

(Emphasis added.)¹

Citing this statutory provision, the South Carolina Court of Appeals held the “FAA clearly requires a court stay ‘any suit or proceeding’ pending the arbitration of ‘any issue referable to arbitration under an agreement in writing for such arbitration’ upon the application of one of the parties.” *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002).

Both federal and state policy favor arbitration of disputes. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Even when, as is the case here, a party to the lawsuit is not a party to the arbitration agreement, it “may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21, 103 S. Ct. 927, 939 (1983). This Court also possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court’s discretion. *Id.* See also *Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936)(“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.”).

The Court’s decision on whether to stay the pending action against this Defendant “should be motivated by the court’s ‘concern that litigation against a party not bound by an arbitration provision may impair an arbitrator’s consideration of claims against a party that is

¹ The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. See S.C. Code Ann. § 15-48-20(d)(“Any action or proceeding involving an issue subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section...” (emphasis added)

compelled to arbitrate.’” *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999), citing *Kroll v. Doctor's Associates, Inc.*, 3 F.3d 1167, 1171 (7th Cir. 1993).

In the instant matter, the Plaintiff’s claims against this Defendant arise out of the exact same factual underpinnings as his claims against Lake Emory, a party to the Arbitration Agreement. To be sure, the claims against both this Defendant and the Facility Defendant are solely concerned with Mr. Pace’s stay at Lake Emory and the provision of care and treatment provided to him. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration between Plaintiff and Lake Emory. Without the issuance of a stay, disposition of the Plaintiff’s claims against this Defendant may affect the disposition of the matter against Lake Emory, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

Generally, Plaintiff’s allegations of liability in the Complaint make very little distinction between this Defendant and Lake Emory. Rather, Plaintiff repeatedly alleges that the “Defendants” are liable to Plaintiff under the various causes of action set forth in the Complaint. See Pltf.’s Complaint at ¶¶ 23 – 47. In no uncertain terms, Plaintiff alleges and seeks to prove that this Defendant and Lake Emory should be viewed as one in the same by this Court. See Pltf.’s Complaint at ¶¶ 1-47. If this Defendant is forced to continue with this litigation, the arbitration proceedings against Lake Emory could become redundant and meaningless because of the substantial overlap in factual and legal underpinnings of the cases against this Defendant and Lake Emory. Should discovery and the trial of this matter continue against this Defendant in this Court, the right to arbitration of Lake Emory would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir. 2000)(Stay granted to defendant non-signatory to arbitration agreement because

continuing with litigation would adversely affect signatory's right to arbitrate.). Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

YOUNG CLEMENT RIVERS, LLP

By: s/ Kate C. Mettler

D. Jay Davis, Jr.

Kate C. Mettler

T. Ashton Phillips, III

P.O. Box 993, Charleston, SC 29402

(843) 724-6695; jdavis@ycrlaw.com;

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Attorneys for the Defendant THI of South Carolina,
LLC

Charleston, South Carolina

Dated: December 1, 2020

Hines, Russell

From: Anthony Harbin <aharbin@harbinlaw.com>
Sent: Monday, February 1, 2021 11:11 AM
To: Kelly, R. Keith Law Clerk (Joshua Greene); Hines, Russell
Cc: Mettler, Kate C.; Jennifer Burnett
Subject: RE: Pace v. Lake Emory Post Acute Care et al- 2019-CP-42-03709 and 2019-CP-42-03708

Thank you. We will get this drafted right away.

Tony

Anthony L. Harbin
Managing Partner
Harbin & Burnett, LLP
2124 Hwy 81 North
Anderson, SC 29621
(864) 964-0333
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AV Peer Review Rated
The Best Lawyers in America®
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From: Kelly, R. Keith Law Clerk (Joshua Greene) <kkellylc@sccourts.org>
Sent: Monday, February 1, 2021 10:11 AM
To: rhines@ycrlaw.com; Anthony Harbin <aharbin@harbinlaw.com>
Cc: kmettler@ycrlaw.com; jennifer@harbinlaw.com
Subject: Pace v. Lake Emory Post Acute Care et al- 2019-CP-42-03709 and 2019-CP-42-03708

Good Morning,

After hearing your arguments and taking the matter under advisement, Judge Kelly would like the following order prepared. Mr. Harbin please prepare an order that reflects the following:

- Defendants' Motions to Compel Arbitration are denied.
 - o Court finds that DSS employee Calvin Hill was without authority to enter into the arbitration agreement.
 - o Court interprets the statute as authorizing DSS to hire an attorney to provide legal services, but it does not authorize DSS to perform legal services.
 - o That statute would likewise authorize DSS to hire a doctor or medical facility to treat Mr. Hill, or it would authorize an accountant to be hired to obtain financial benefits, but the statute does not authorize DSS to perform those services itself.
- Defendants' Motions to Dismiss are denied.
- Defendants' Motions to Stay are denied.

Please let me know if there are any questions. Judge Kelly would like the order submitted by end of business on February 15, 2021.

Thanks,

J. Christian Greene

Law Clerk for The Honorable R. Keith Kelly

125 E. Floyd Baker Boulevard
Gaffney, South Carolina 29340
Phone: (864) 596-2400

kkellylc@sccourts.org

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Common Pleas

Spartanburg

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**Event(s):**

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**Filed by or on behalf of:** Jennifer Spragins Burnett

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Russell W. Harter, Jr. for Kerry L. Wheeler, Do

Kate Mettler for Fundamnetal Long Term Care  
Holdings, Llc, Lake Emory Post Acute Care,  
Fundamental Clinical And Opertational Services,  
Llc, Fundamental Administrative Services, Llc, Thi  
Of Baltimore, Inc, Thi Of South Carolina, Llc, Thi  
Of South Carolina At Camp Care, Llc

Donald Jay Davis, Jr. for Fundamnetal Long Term  
Care Holdings, Llc, Lake Emory Post Acute Care,  
Fundamental Clinical And Opertational Services,  
Llc, Fundamental Administrative Services, Llc, Thi  
Of Baltimore, Inc, Thi Of South Carolina, Llc, Thi  
Of South Carolina At Camp Care, Llc

Jennifer Spragins Burnett for Kenneth Pace



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**Kate Mettler** - Notification transmitted on 02-16-2021 09:03:59 AM.

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Common Pleas

Spartanburg

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defendant, et al

**Event(s):**

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**Document(s) Submitted:** Proposed Order/Other

**Filed by or on behalf of:** Jennifer Spragins Burnett

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**The following people were served electronically:**

Anthony Lee Harbin for Kenneth Pace

Russell W. Harter, Jr. for Kerry L. Wheeler, Do

Kate Mettler for Fundamental Long Term Care  
Holdings, Llc, Lake Emory Post Acute Care,  
Fundamental Clinical And Operational Services,  
Llc, Fundamental Administrative Services, Llc, Thi  
Of Baltimore, Inc, Thi Of South Carolina, Llc, Thi  
Of South Carolina At Camp Care, Llc

Donald Jay Davis, Jr. for Fundamental Long Term  
Care Holdings, Llc, Lake Emory Post Acute Care,  
Fundamental Clinical And Operational Services,  
Llc, Fundamental Administrative Services, Llc, Thi  
Of Baltimore, Inc, Thi Of South Carolina, Llc, Thi  
Of South Carolina At Camp Care, Llc

Jennifer Spragins Burnett for Kenneth Pace

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

|                                             |   |                                        |
|---------------------------------------------|---|----------------------------------------|
| STATE OF SOUTH CAROLINA                     | ) | IN THE COURT OF COMMON PLEAS           |
|                                             | ) | SEVENTH JUDICIAL CIRCUIT               |
| COUNTY OF SPARTANBURG                       | ) | CASES NO. 2019-CP-42-03708 & -03709    |
| KENNETH PACE,                               | ) |                                        |
| Individually and as Personal Representative | ) |                                        |
| of the Estate of Earl E. Pace,              | ) |                                        |
|                                             | ) |                                        |
| Plaintiff,                                  | ) |                                        |
|                                             | ) | <b>DEFENDANTS'<sup>1</sup> MOTION</b>  |
| vs.                                         | ) | <b>TO ALTER, AMEND, AND/OR</b>         |
|                                             | ) | <b>RECONSIDER ORDER DENYING</b>        |
|                                             | ) | <b>DEFENDANTS' MOTIONS TO DISMISS,</b> |
| LAKE EMORY POST ACUTE CARE; THI             | ) | <b>COMPEL ARBITRATION, AND TO STAY</b> |
| OF SOUTH CAROLINA AT CAMP CARE,             | ) | <b>THE STATE COURT PROCEEDING</b>      |
| LLC; THI OF SOUTH CAROLINA, LLC;            | ) |                                        |
| THI OF BALTIMORE, INC.;                     | ) |                                        |
| FUNDAMENTAL ADMINISTRATIVE                  | ) |                                        |
| SERVICES, LLC; FUNDAMENTAL                  | ) |                                        |
| CLINICAL AND OPERATIONAL                    | ) |                                        |
| SERVICES, LLC; FUNDAMENTAL                  | ) |                                        |
| CLINICAL CONSULTING, LLC;                   | ) |                                        |
| FUNDAMENTAL LONG TERM CARE                  | ) |                                        |
| HOLDINGS, LLC; and KERRY L.                 | ) |                                        |
| WHEELER, DO,                                | ) |                                        |
|                                             | ) |                                        |
| Defendants.                                 | ) |                                        |

TO: THE HONORABLE R. KEITH KELLY, Presiding Judge, and PLAINTIFF'S COUNSEL

NOW COMES Defendant THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory Post Acute Care (the "Facility"),<sup>2</sup> along with the Other Defendants,<sup>3</sup> by and through their

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<sup>1</sup> This motion is made in both of the above-referenced actions by all of the above-named Defendants except Fundamental Clinical Consulting, LLC ("FCC"), and Kerry L. Wheeler, DO ("Dr. Wheeler"). FCC was dismissed from these actions without prejudice by stipulations filed January 8, 2020. Dr. Wheeler is represented by other counsel.

<sup>2</sup> Plaintiff has misidentified "Lake Emory Post Acute Care" and "THI of South Carolina at Camp Care, LLC," as separate entities. In this motion, the reference to the Facility covers both the party identified as "THI of South Carolina at Camp Care, LLC" and the party identified as "Lake Emory Post Acute Care," which are in fact a single entity, the correct legal name for the entity doing business as "Lake Emory Post Acute Care," i.e., the Facility, being "THI of South Carolina at Camp Care, LLC."

<sup>3</sup> The "Other Defendants" are Defendants THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and

undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set forth below, hereby moves this Honorable Court to alter, amend, and/or reconsider its Order Denying Defendants' Motions to Dismiss, Compel Arbitration, and Stay the State Court Proceeding, filed (in both actions above referenced) April 8, 2021 (the "Subject Order").

1. **Most respectfully, Defendants ask the Court to (re)consider and expressly rule on each and every distinct issue/argument they raised in support of the Motion to Compel Arbitration<sup>4</sup> and the Motions to Stay<sup>5</sup>, i.e., each and every distinct issue/argument set forth in the Motion to Compel Arbitration, the Memo in Support of Arbitration<sup>6</sup>, the Motions to Stay, and the Memos in Support of a Stay<sup>7</sup>, and via oral argument, all of which is/are hereby incorporated herein by reference.**

*See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original).

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Operational Services, LLC; and Fundamental Long Term Care Holdings, LLC, collectively, i.e., the Other Defendants are all Defendants except the Facility, FCC, and Dr. Wheeler. Hereinafter, where this motion simply refers to "Defendants," it refers to the Facility and the Other Defendants, collectively, i.e., to all of the above-named Defendants except FCC and Dr. Wheeler.

<sup>4</sup> The "Motion to Compel Arbitration" refers to the Facility's Motion to Dismiss Plaintiff's Complaint, Compel Arbitration and Stay State Court Proceedings, filed (in both actions above referenced) April 13, 2020.

<sup>5</sup> The "Motions to Stay" refers, collectively, to the Other Defendants' respective Motions to Stay, filed (in both actions above referenced) April 13, 2020.

<sup>6</sup> The "Memo in Support of Arbitration" refers to the Facility's memo in support of the Motion to Compel Arbitration, filed (in both actions above referenced) December 1, 2020.

<sup>7</sup> The "Memos in Support of a Stay" refers, collectively, to the Other Defendants' respective memos in support of their Motions to Stay, filed (in both actions above referenced) December 1, 2020.

2. **The Subject Order’s analysis of DSS’s authority under the Omnibus Adult Protection Act, S.C. Code Ann. §§ 43-35-5 to -595 (the “Protection Act”), is erroneous. The Court should have found that DSS was duly authorized to execute the Arbitration Agreement on Mr. Pace’s<sup>8</sup> behalf.**

The Court’s analysis of DSS’s authority to sign the Arbitration Agreement on Mr. Pace’s behalf turns on its interpretation of the statutorily defined term “protective services” under § 43-35-10(9) of the Protection Act. Although the Court acknowledges that, “[a]t the time Mr. Pace was admitted to [the Facility], *he was under the custody of DSS*”<sup>9</sup> pursuant to the Protection Act, and thus DSS was authorized to provide “protective services” to Mr. Pace, according to the Court, “protective services” included “arrang[ing] for living quarters, secur[ing] medical care, and hir[ing] an attorney for [Mr. Pace]” but not “provid[ing] legal services to Mr. Pace or waiv[ing] his constitutional right to a jury trial . . . .” (Subject Order p. 5.)

“Questions of statutory interpretation are questions of law . . . .” *S.C. Prop. & Cas. Ins. Guar. Ass’n v. Brock*, 410 S.C. 361, 365, 764 S.E.2d 920, 922 (2014) (quotation marks and citation omitted). “All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.” *Broadhurst v. City of Myrtle Beach Election Comm’n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). The Court should give words “their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.” *Sloan v. S.C. Bd. of Physical Therapy Exam’rs*, 370 S.C. 452, 469, 636

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<sup>8</sup> “Mr. Pace” refers to the decedent, Earl E. Pace.

<sup>9</sup> (Subject Order p. 1 (emphasis added).) The Court likewise acknowledges that it was at this time, i.e., when Mr. Pace was admitted to the Facility, that DSS employee Calvin Hill (“Mr. Hill”) signed the Admission Agreement and the Arbitration Agreement on Mr. Pace’s behalf. (See Subject Order pp. 1–2.)

S.E.2d 598, 607 (2006), *overruled on other grounds by Joseph v. S.C. Dep’t of Labor, Licensing & Regulation*, 417 S.C. 436, 790 S.E.2d 763 (2016).

“‘Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers.’” *Peake v. S.C. Dep’t of Motor Vehicles*, 375 S.C. 589, 599, 654 S.E.2d 284, 289 (Ct. App. 2007) (quoting *Collins Music Co., Inc. v. IGT*, 365 S.C. 544, 550, 619 S.E.2d 1, 3 (Ct. App. 2005)). The statutory language must be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). “[N]o word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.” *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citation omitted). “Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law.” *Bennett v. Sullivan’s Island Bd. of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct.App.1993). Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

The Protection Act defines “protective services” to mean “those services whose objective is to protect a vulnerable adult from harm caused by the vulnerable adult or another. These services include, *but are not limited to*, evaluating the need for protective services, securing and coordinating existing services, arranging for living quarters, *obtaining financial benefits to which a vulnerable adult is entitled*, and securing medical services, supplies, and legal services.” § 43-35-10(d) (emphasis added).

Again, in interpreting a statute, “no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.” *In re Decker*, 322 S.C. at 219, 471 S.E.2d at 463. The



Subject Order, however, does not address or otherwise account for the presence of the language “include, but are not limited to” in the Protection Act’s definition of “protective services.” The legislature’s deliberate use of this expansive and open-ended language reflects its intent to leave the scope of “protective services” unrestricted and to broadly empower DSS to exercise its discretion to act for the protection of persons in its custody.

Moreover, even putting aside the Court’s interpretative error in not addressing or otherwise accounting for the presence of the language “include, but are not limited to” in the Protection Act’s definition of “protective services,” the Court’s view of the statutory language “securing . . . legal services” is itself unduly restrictive. In the Court’s view, this only allowed DSS to “hire an attorney” for Mr. Pace, not to “provide legal services to Mr. Pace or waive his constitutional right to a jury trial . . . .” (Subject Order p. 5.) But if DSS is only able to hire an attorney and no more, this would leave open an obviously unacceptable gap in DSS’s ability to protect vulnerable adults like Mr. Pace.

As the Subject Order states, “It is undisputed that Mr. Pace was diagnosed with dementia, was incompetent, and unable to provide consent or acquiesce to Mr. Hill’s actions.” (Subject Order p. 4.) Just as Mr. Pace was not able to consent or acquiesce to Mr. Hill’s actions, he would not be able to make the kinds of client decisions needed to determine the purposes to be served by legal representation. *See* Rule 1.2, RPC, Rule 407, SCACR (addressing the allocation of authority between client and lawyer and requiring, among other things, a lawyer to “abide by a client’s decision whether to make or accept an offer of settlement of a matter”). Unless DSS—the party to whom Mr. Pace’s custody was entrusted at the time of his admission the Facility—had the authority to make such decisions for Mr. Pace, there would be no one to make such decisions.

Obviously, there has to be someone to make such decisions in order to fully protect Mr. Pace's interests.

The Protection Act grants DSS the authority to make such decisions, and these decisions include the authority to waive Mr. Pace's right to a jury trial and agree to arbitration. By granting DSS the authority to hire an attorney for Mr. Pace (authority the Court itself agrees it had), the Protection Act necessarily entrusted DSS with the discretion to determine *when, if at all*, an attorney was needed for Mr. Pace. This necessarily granted DSS the authority to determine whether and how Mr. Pace's legal rights were to be advanced, exercised, or otherwise protected, to include, necessarily, whether and how to compromise or even waive such rights when in Mr. Pace's best interests to do so.

It should be remembered that even to settle a lawsuit is to forego the legal right to a jury trial. Obviously, the protection of Mr. Pace's interests required his custodian to be able to make a decision about whether accepting a settlement was to his advantage. Indeed, the Protection Act expressly includes within the definition of "protective services" "obtaining financial benefits to which a vulnerable adult is entitled." It is only logical, and in keeping with the purpose and the plain, intentionally expansive and open-ended language of the Protection Act, that DSS was duly authorized to address forum selection via the Arbitration Agreement. The exercise of such authority is not, as the Court called it, "provid[ing] legal services to Mr. Pace . . . ." (Subject Order p. 5.) It is simply making necessary decisions about legal matters that a protected person like Mr. Pace is not capable of making for himself, matters which must be entrusted to some decision maker for Mr. Pace's protection. At the operative time here—the time of Mr. Pace's admission to the Facility—DSS was that decision maker per the Protection Act.

3. **The merger/equitable estoppel analysis in the Subject Order is erroneous. The Court erred in rejecting the Facility's merger/equitable estoppel argument, i.e., it erred in failing to find (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Pace effectively embraced and directly benefitted from the Admission Agreement, Plaintiff should be estopped to deny the enforceability of the Arbitration Agreement.**

To be clear, the Facility's merger/equitable estoppel argument is not an argument for the enforceability of the Arbitration Agreement but rather an argument for Plaintiff—as personal representative of Mr. Pace's estate—to be estopped to deny the enforceability of the Arbitration Agreement. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Mr. Pace having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Arbitration Agreement merged therewith. Accordingly, any contention about the Arbitration Agreement's supposed lack of enforceability is beside the point and unavailing to refute the Facility's merger/equitable estoppel argument, which, again, turns not on the question of whether the Facility can show that the Arbitration Agreement is enforceable but whether it can show that Plaintiff should be estopped to deny that the Arbitration Agreement is enforceable—and, most respectfully, the Facility has done so.

#### Re: Merger

South Carolina law recognizes numerous viable theories under which a nonsignatory can be bound to an arbitration agreement. *See Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (“South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel.”); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (acknowledging the

possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel).

In *Coleman*, even though our Supreme Court found against merger on the *particular facts* then before it, the Court nonetheless confirmed the validity of the general proposition of *law* on which the *Coleman* appellants based their merger/equitable estoppel argument:

Appellants contend that even if Sister lacked capacity to execute the AA under the Act, she is nevertheless equitably estopped to deny the AA's enforceability. The circuit court held there was no estoppel here, and we agree.

Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the AAs merged. In South Carolina,

The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

*Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).

Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.*

407 S.C. at 354–355, 755 S.E.2d at 455 (emphasis added).

Here, the Court has erred in rejecting the Facility's merger argument, failing to recognize material differences between the facts and arguments involved in the instant case and those that controlled (or were simply not addressed in) *Coleman* and its progeny, *Thompson v. Pruitt Corp.*,

416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

The Subject Order wrongfully concludes that the Admission Agreement and the Arbitration Agreement are separate contacts that do not merge. (See Subject Order pp. 5–6 (“In this case, the admission agreement and the arbitration agreement were wholly independent and shall not be construed together. See *Hodge v. Unihealth Post-Acute Care of Bamberg, LLC*, 422 SC 544, 813 S.E.2d 292 (Ct. App. 2018). Because the admission agreement is not merged with the arbitration agreement, this argument is without merit.”).)

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,”<sup>10</sup> as indeed the Admission Agreement and the Arbitration Agreement were here,<sup>11</sup> there is evidence to upset the presumption *in favor of merger*, i.e., the presumption that the contracting parties intended the instruments to be construed together as effectively one contract. This is a question of the parties’ intention. *Id.* at 355, 755 S.E.2d at 455 (“in the absence of anything indicating a contrary *intention* . . .”) (emphasis added). “[I]n attempting to ascertain th[e] [parties’] intention,” the Court must “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.

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<sup>10</sup> *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

<sup>11</sup> To be clear, *Coleman* unequivocally answers the question of whether the instant Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly observes regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), “the documents were [indeed] executed at *the same time, by the same parties, for the same purposes, and in the course of the same transaction.*” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

For the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). No such inference can be drawn here. Indeed, it does not even make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement not to merge

Unlike the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (See Arbitration Agreement.) Moreover, while the instant Admission Agreement does contain an “Entire Agreement” clause, it does not reference the Arbitration Agreement as a separate contract. (Admission Agreement p. 12.) Indeed, directly contradicting the idea of “separatedness” (in the parlance of the *Coleman* Court<sup>12</sup>), 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.) And without question, the Arbitration Agreement is among these other Admissions materials. *See Stott v. White Oak*

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<sup>12</sup> 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).

*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).

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. But all this means is that it did not have to be agreed to for Mr. Pace to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact agreed to. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

Moreover, while it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement’s) sole reason for being. (See Arbitration Agreement (providing for arbitration of “any controversy or dispute between the parties arising out of or

relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident . . . ."); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at Facility . . . .").)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Mr. Pace'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. Pace's admission to the Facility) *with* Arbitration Agreement (providing for arbitration of disputes arising out of Mr. Pace'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 (providing "This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located.") *with* Arbitration Agreement (providing that, "because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action;" but also providing that arbitration shall be "as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules").) Essentially, both instruments provide that South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.



Similarly, the termination provisions provide no evidence of “separatedness.” The only reason for the Arbitration Agreement is the Admission Agreement, i.e., the Arbitration Agreement covers disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13(D.S.C. 1998) (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

And to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that *merger is the default position*, i.e., it is presumed, and that this presumption arises only upon the occurrence of

a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger presumption to be upset based on evidence that is merely ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention, but at most might (or might not) reflect a contrary intention—is to allow the exception to devour the rule.

Respectfully, the Court’s finding against merger relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties’ intent. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130. It 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. Pace’s admission to the Facility and would not have been done at all but for his admission to the Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties’ intent.

Re: Equitable Estoppel

In *Wilson*, our Supreme Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals’ earlier decision in *Pearson v. Hilton Head*

*Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which the Facility contends Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Mr. Pace received direct benefits (in the form of his admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement was merged. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner’s alternative argument based on the application of the state’s “traditional” six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., “[t]he traditional test referenced by [the] [p]etitioners,” “has been analyzed most-often in non-arbitration cases”) (emphasis added).

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Mr. Pace received the benefit of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein. Not even Plaintiff himself alleges that every single aspect of the residency (every meal, every instance of care/treatment delivered, essentially every moment at the Facility) was deficient.

Respectfully, the Court should have found that the Arbitration Agreement merged with the Admission Agreement (the validity of which Plaintiff does not challenge<sup>13</sup>) and that Plaintiff is estopped to deny the Arbitration Agreement’s enforceability, Mr. Pace having effectively embraced the contract with the Facility for the purpose of his admission and receipt of the benefits thereof only to later, via his estate, attempt to repudiate the Arbitration Agreement with which his Admission Agreement merged.

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<sup>13</sup> Although the dispute here is about the Arbitration Agreement, as opposed to the Admission Agreement, to the extent there were any question about the enforceability of the Admission Agreement, the Facility’s equitable estoppel argument applies with equal for to the Admission Agreement.

#### 4. The Motions to Stay should be granted, too.

The relationship between the Motion to Compel Arbitration and the Motions to Stay is such that the grant of the former requires the grant of the latter. Accordingly, the above analysis also shows why the Motions to Stay should be granted. *See* 9 U.S.C. § 3 (“If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.”) (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) (“[The] FAA clearly requires a court stay ‘any suit or proceeding’ pending the arbitration of ‘any issue referable to arbitration under an agreement in writing for such arbitration’ upon the application of one of the parties.”); *see also Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) (“The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement. However, the Circuit Court included in its order the requirement that all parties be included in one arbitration proceeding. Federal has signed no arbitration agreement and cannot be forced into compulsory arbitration. We feel it was erroneous to condition the relief to which respondents are plainly entitled upon the voluntary submission of Federal to arbitration proceedings. This provision has been deleted from the foregoing Order of the lower court.”).

WHEREFORE, for the foregoing reasons, Defendants ask that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Motion to Compel Arbitration and the Motions to Stay.

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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Charleston, South Carolina

April 19, 2021

|                                             |   |                                        |
|---------------------------------------------|---|----------------------------------------|
| STATE OF SOUTH CAROLINA                     | ) | IN THE COURT OF COMMON PLEAS           |
|                                             | ) | SEVENTH JUDICIAL CIRCUIT               |
| COUNTY OF SPARTANBURG                       | ) | CASES NO. 2019-CP-42-03708 & -03709    |
| KENNETH PACE,                               | ) |                                        |
| Individually and as Personal Representative | ) |                                        |
| of the Estate of Earl E. Pace,              | ) |                                        |
|                                             | ) |                                        |
| Plaintiff,                                  | ) |                                        |
|                                             | ) | <b>DEFENDANTS'<sup>1</sup> MOTION</b>  |
| vs.                                         | ) | <b>TO ALTER, AMEND, AND/OR</b>         |
|                                             | ) | <b>RECONSIDER ORDER DENYING</b>        |
|                                             | ) | <b>DEFENDANTS' MOTIONS TO DISMISS,</b> |
| LAKE EMORY POST ACUTE CARE; THI             | ) | <b>COMPEL ARBITRATION, AND TO STAY</b> |
| OF SOUTH CAROLINA AT CAMP CARE,             | ) | <b>THE STATE COURT PROCEEDING</b>      |
| LLC; THI OF SOUTH CAROLINA, LLC;            | ) |                                        |
| THI OF BALTIMORE, INC.;                     | ) |                                        |
| FUNDAMENTAL ADMINISTRATIVE                  | ) |                                        |
| SERVICES, LLC; FUNDAMENTAL                  | ) |                                        |
| CLINICAL AND OPERATIONAL                    | ) |                                        |
| SERVICES, LLC; FUNDAMENTAL                  | ) |                                        |
| CLINICAL CONSULTING, LLC;                   | ) |                                        |
| FUNDAMENTAL LONG TERM CARE                  | ) |                                        |
| HOLDINGS, LLC; and KERRY L.                 | ) |                                        |
| WHEELER, DO,                                | ) |                                        |
|                                             | ) |                                        |
| Defendants.                                 | ) |                                        |

TO: THE HONORABLE R. KEITH KELLY, Presiding Judge, and PLAINTIFF'S COUNSEL

NOW COMES Defendant THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory Post Acute Care (the "Facility"),<sup>2</sup> along with the Other Defendants,<sup>3</sup> by and through their

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<sup>1</sup> This motion is made in both of the above-referenced actions by all of the above-named Defendants except Fundamental Clinical Consulting, LLC ("FCC"), and Kerry L. Wheeler, DO ("Dr. Wheeler"). FCC was dismissed from these actions without prejudice by stipulations filed January 8, 2020. Dr. Wheeler is represented by other counsel.

<sup>2</sup> Plaintiff has misidentified "Lake Emory Post Acute Care" and "THI of South Carolina at Camp Care, LLC," as separate entities. In this motion, the reference to the Facility covers both the party identified as "THI of South Carolina at Camp Care, LLC" and the party identified as "Lake Emory Post Acute Care," which are in fact a single entity, the correct legal name for the entity doing business as "Lake Emory Post Acute Care," i.e., the Facility, being "THI of South Carolina at Camp Care, LLC."

<sup>3</sup> The "Other Defendants" are Defendants THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and

undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set forth below, hereby moves this Honorable Court to alter, amend, and/or reconsider its Order Denying Defendants' Motions to Dismiss, Compel Arbitration, and Stay the State Court Proceeding, filed (in both actions above referenced) April 8, 2021 (the "Subject Order").

1. **Most respectfully, Defendants ask the Court to (re)consider and expressly rule on each and every distinct issue/argument they raised in support of the Motion to Compel Arbitration<sup>4</sup> and the Motions to Stay<sup>5</sup>, i.e., each and every distinct issue/argument set forth in the Motion to Compel Arbitration, the Memo in Support of Arbitration<sup>6</sup>, the Motions to Stay, and the Memos in Support of a Stay<sup>7</sup>, and via oral argument, all of which is/are hereby incorporated herein by reference.**

*See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original).

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Operational Services, LLC; and Fundamental Long Term Care Holdings, LLC, collectively, i.e., the Other Defendants are all Defendants except the Facility, FCC, and Dr. Wheeler. Hereinafter, where this motion simply refers to "Defendants," it refers to the Facility and the Other Defendants, collectively, i.e., to all of the above-named Defendants except FCC and Dr. Wheeler.

<sup>4</sup> The "Motion to Compel Arbitration" refers to the Facility's Motion to Dismiss Plaintiff's Complaint, Compel Arbitration and Stay State Court Proceedings, filed (in both actions above referenced) April 13, 2020.

<sup>5</sup> The "Motions to Stay" refers, collectively, to the Other Defendants' respective Motions to Stay, filed (in both actions above referenced) April 13, 2020.

<sup>6</sup> The "Memo in Support of Arbitration" refers to the Facility's memo in support of the Motion to Compel Arbitration, filed (in both actions above referenced) December 1, 2020.

<sup>7</sup> The "Memos in Support of a Stay" refers, collectively, to the Other Defendants' respective memos in support of their Motions to Stay, filed (in both actions above referenced) December 1, 2020.

2. **The Subject Order’s analysis of DSS’s authority under the Omnibus Adult Protection Act, S.C. Code Ann. §§ 43-35-5 to -595 (the “Protection Act”), is erroneous. The Court should have found that DSS was duly authorized to execute the Arbitration Agreement on Mr. Pace’s<sup>8</sup> behalf.**

The Court’s analysis of DSS’s authority to sign the Arbitration Agreement on Mr. Pace’s behalf turns on its interpretation of the statutorily defined term “protective services” under § 43-35-10(9) of the Protection Act. Although the Court acknowledges that, “[a]t the time Mr. Pace was admitted to [the Facility], *he was under the custody of DSS*”<sup>9</sup> pursuant to the Protection Act, and thus DSS was authorized to provide “protective services” to Mr. Pace, according to the Court, “protective services” included “arrang[ing] for living quarters, secur[ing] medical care, and hir[ing] an attorney for [Mr. Pace]” but not “provid[ing] legal services to Mr. Pace or waiv[ing] his constitutional right to a jury trial . . . .” (Subject Order p. 5.)

“Questions of statutory interpretation are questions of law . . . .” *S.C. Prop. & Cas. Ins. Guar. Ass’n v. Brock*, 410 S.C. 361, 365, 764 S.E.2d 920, 922 (2014) (quotation marks and citation omitted). “All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.” *Broadhurst v. City of Myrtle Beach Election Comm’n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). The Court should give words “their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.” *Sloan v. S.C. Bd. of Physical Therapy Exam’rs*, 370 S.C. 452, 469, 636

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<sup>8</sup> “Mr. Pace” refers to the decedent, Earl E. Pace.

<sup>9</sup> (Subject Order p. 1 (emphasis added).) The Court likewise acknowledges that it was at this time, i.e., when Mr. Pace was admitted to the Facility, that DSS employee Calvin Hill (“Mr. Hill”) signed the Admission Agreement and the Arbitration Agreement on Mr. Pace’s behalf. (See Subject Order pp. 1–2.)



S.E.2d 598, 607 (2006), *overruled on other grounds by Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 790 S.E.2d 763 (2016).

“Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers.” *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 599, 654 S.E.2d 284, 289 (Ct. App. 2007) (quoting *Collins Music Co., Inc. v. IGT*, 365 S.C. 544, 550, 619 S.E.2d 1, 3 (Ct. App. 2005)). The statutory language must be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). “[N]o word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.” *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citation omitted). “Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law.” *Bennett v. Sullivan’s Island Bd. of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct.App.1993). Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

The Protection Act defines “protective services” to mean “those services whose objective is to protect a vulnerable adult from harm caused by the vulnerable adult or another. These services include, *but are not limited to*, evaluating the need for protective services, securing and coordinating existing services, arranging for living quarters, *obtaining financial benefits to which a vulnerable adult is entitled*, and securing medical services, supplies, and legal services.” § 43-35-10(d) (emphasis added).

Again, in interpreting a statute, “no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.” *In re Decker*, 322 S.C. at 219, 471 S.E.2d at 463. The

Subject Order, however, does not address or otherwise account for the presence of the language “include, but are not limited to” in the Protection Act’s definition of “protective services.” The legislature’s deliberate use of this expansive and open-ended language reflects its intent to leave the scope of “protective services” unrestricted and to broadly empower DSS to exercise its discretion to act for the protection of persons in its custody.

Moreover, even putting aside the Court’s interpretative error in not addressing or otherwise accounting for the presence of the language “include, but are not limited to” in the Protection Act’s definition of “protective services,” the Court’s view of the statutory language “securing . . . legal services” is itself unduly restrictive. In the Court’s view, this only allowed DSS to “hire an attorney” for Mr. Pace, not to “provide legal services to Mr. Pace or waive his constitutional right to a jury trial . . . .” (Subject Order p. 5.) But if DSS is only able to hire an attorney and no more, this would leave open an obviously unacceptable gap in DSS’s ability to protect vulnerable adults like Mr. Pace.

As the Subject Order states, “It is undisputed that Mr. Pace was diagnosed with dementia, was incompetent, and unable to provide consent or acquiesce to Mr. Hill’s actions.” (Subject Order p. 4.) Just as Mr. Pace was not able to consent or acquiesce to Mr. Hill’s actions, he would not be able to make the kinds of client decisions needed to determine the purposes to be served by legal representation. *See* Rule 1.2, RPC, Rule 407, SCACR (addressing the allocation of authority between client and lawyer and requiring, among other things, a lawyer to “abide by a client’s decision whether to make or accept an offer of settlement of a matter”). Unless DSS—the party to whom Mr. Pace’s custody was entrusted at the time of his admission the Facility—had the authority to make such decisions for Mr. Pace, there would be no one to make such decisions.

Obviously, there has to be someone to make such decisions in order to fully protect Mr. Pace's interests.

The Protection Act grants DSS the authority to make such decisions, and these decisions include the authority to waive Mr. Pace's right to a jury trial and agree to arbitration. By granting DSS the authority to hire an attorney for Mr. Pace (authority the Court itself agrees it had), the Protection Act necessarily entrusted DSS with the discretion to determine *when, if at all*, an attorney was needed for Mr. Pace. This necessarily granted DSS the authority to determine whether and how Mr. Pace's legal rights were to be advanced, exercised, or otherwise protected, to include, necessarily, whether and how to compromise or even waive such rights when in Mr. Pace's best interests to do so.

It should be remembered that even to settle a lawsuit is to forego the legal right to a jury trial. Obviously, the protection of Mr. Pace's interests required his custodian to be able to make a decision about whether accepting a settlement was to his advantage. Indeed, the Protection Act expressly includes within the definition of "protective services" "obtaining financial benefits to which a vulnerable adult is entitled." It is only logical, and in keeping with the purpose and the plain, intentionally expansive and open-ended language of the Protection Act, that DSS was duly authorized to address forum selection via the Arbitration Agreement. The exercise of such authority is not, as the Court called it, "provid[ing] legal services to Mr. Pace . . . ." (Subject Order p. 5.) It is simply making necessary decisions about legal matters that a protected person like Mr. Pace is not capable of making for himself, matters which must be entrusted to some decision maker for Mr. Pace's protection. At the operative time here—the time of Mr. Pace's admission to the Facility—DSS was that decision maker per the Protection Act.

3. **The merger/equitable estoppel analysis in the Subject Order is erroneous. The Court erred in rejecting the Facility's merger/equitable estoppel argument, i.e., it erred in failing to find (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Pace effectively embraced and directly benefitted from the Admission Agreement, Plaintiff should be estopped to deny the enforceability of the Arbitration Agreement.**

To be clear, the Facility's merger/equitable estoppel argument is not an argument for the enforceability of the Arbitration Agreement but rather an argument for Plaintiff—as personal representative of Mr. Pace's estate—to be estopped to deny the enforceability of the Arbitration Agreement. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Mr. Pace having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Arbitration Agreement merged therewith. Accordingly, any contention about the Arbitration Agreement's supposed lack of enforceability is beside the point and unavailing to refute the Facility's merger/equitable estoppel argument, which, again, turns not on the question of whether the Facility can show that the Arbitration Agreement is enforceable but whether it can show that Plaintiff should be estopped to deny that the Arbitration Agreement is enforceable—and, most respectfully, the Facility has done so.

#### Re: Merger

South Carolina law recognizes numerous viable theories under which a nonsignatory can be bound to an arbitration agreement. *See Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (“South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel.”); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (acknowledging the

possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel).

In *Coleman*, even though our Supreme Court found against merger on the *particular facts* then before it, the Court nonetheless confirmed the validity of the general proposition of *law* on which the *Coleman* appellants based their merger/equitable estoppel argument:

Appellants contend that even if Sister lacked capacity to execute the AA under the Act, she is nevertheless equitably estopped to deny the AA's enforceability. The circuit court held there was no estoppel here, and we agree.

Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the AAs merged. In South Carolina,

The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

*Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).

Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.*

407 S.C. at 354–355, 755 S.E.2d at 455 (emphasis added).

Here, the Court has erred in rejecting the Facility's merger argument, failing to recognize material differences between the facts and arguments involved in the instant case and those that controlled (or were simply not addressed in) *Coleman* and its progeny, *Thompson v. Pruitt Corp.*,

416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

The Subject Order wrongfully concludes that the Admission Agreement and the Arbitration Agreement are separate contacts that do not merge. (See Subject Order pp. 5–6 (“In this case, the admission agreement and the arbitration agreement were wholly independent and shall not be construed together. See *Hodge v. Unihealth Post-Acute Care of Bamberg, LLC*, 422 SC 544, 813 S.E.2d 292 (Ct. App. 2018). Because the admission agreement is not merged with the arbitration agreement, this argument is without merit.”).)

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,”<sup>10</sup> as indeed the Admission Agreement and the Arbitration Agreement were here,<sup>11</sup> there is evidence to upset the presumption *in favor of merger*, i.e., the presumption that the contracting parties intended the instruments to be construed together as effectively one contract. This is a question of the parties’ intention. *Id.* at 355, 755 S.E.2d at 455 (“in the absence of anything indicating a contrary *intention* . . .”) (emphasis added). “[I]n attempting to ascertain th[e] [parties’] intention,” the Court must “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.

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<sup>10</sup> *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

<sup>11</sup> To be clear, *Coleman* unequivocally answers the question of whether the instant Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly observes regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), “the documents were [indeed] executed at *the same time, by the same parties, for the same purposes, and in the course of the same transaction.*” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

For the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). No such inference can be drawn here. Indeed, it does not even make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement not to merge

Unlike the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (See Arbitration Agreement.) Moreover, while the instant Admission Agreement does contain an “Entire Agreement” clause, it does not reference the Arbitration Agreement as a separate contract. (Admission Agreement p. 12.) Indeed, directly contradicting the idea of “separatedness” (in the parlance of the *Coleman* Court<sup>12</sup>), 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.) And without question, the Arbitration Agreement is among these other Admissions materials. *See Stott v. White Oak*

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<sup>12</sup> 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).

*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).

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. But all this means is that it did not have to be agreed to for Mr. Pace to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact agreed to. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

Moreover, while it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement’s) sole reason for being. (See Arbitration Agreement (providing for arbitration of “any controversy or dispute between the parties arising out of or



relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident . . . ."); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at Facility . . . .").)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Mr. Pace'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. Pace's admission to the Facility) *with* Arbitration Agreement (providing for arbitration of disputes arising out of Mr. Pace'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 (providing "This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located.") *with* Arbitration Agreement (providing that, "because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action;" but also providing that arbitration shall be "as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules").) Essentially, both instruments provide that South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, the termination provisions provide no evidence of “separatedness.” The only reason for the Arbitration Agreement is the Admission Agreement, i.e., the Arbitration Agreement covers disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13(D.S.C. 1998) (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

And to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that *merger is the default position*, i.e., it is presumed, and that this presumption arises only upon the occurrence of

a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger presumption to be upset based on evidence that is merely ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention, but at most might (or might not) reflect a contrary intention—is to allow the exception to devour the rule.

Respectfully, the Court’s finding against merger relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties’ intent. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130. It 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. Pace’s admission to the Facility and would not have been done at all but for his admission to the Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties’ intent.

Re: Equitable Estoppel

In *Wilson*, our Supreme Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals’ earlier decision in *Pearson v. Hilton Head*

*Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which the Facility contends Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Mr. Pace received direct benefits (in the form of his admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement was merged. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner’s alternative argument based on the application of the state’s “traditional” six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., “[t]he traditional test referenced by [the] [p]etitioners,” “has been analyzed most-often in non-arbitration cases”) (emphasis added).

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Mr. Pace received the benefit of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein. Not even Plaintiff himself alleges that every single aspect of the residency (every meal, every instance of care/treatment delivered, essentially every moment at the Facility) was deficient.

Respectfully, the Court should have found that the Arbitration Agreement merged with the Admission Agreement (the validity of which Plaintiff does not challenge<sup>13</sup>) and that Plaintiff is estopped to deny the Arbitration Agreement’s enforceability, Mr. Pace having effectively embraced the contract with the Facility for the purpose of his admission and receipt of the benefits thereof only to later, via his estate, attempt to repudiate the Arbitration Agreement with which his Admission Agreement merged.

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<sup>13</sup> Although the dispute here is about the Arbitration Agreement, as opposed to the Admission Agreement, to the extent there were any question about the enforceability of the Admission Agreement, the Facility’s equitable estoppel argument applies with equal for to the Admission Agreement.

#### 4. The Motions to Stay should be granted, too.

The relationship between the Motion to Compel Arbitration and the Motions to Stay is such that the grant of the former requires the grant of the latter. Accordingly, the above analysis also shows why the Motions to Stay should be granted. *See* 9 U.S.C. § 3 (“If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.”) (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) (“[The] FAA clearly requires a court stay ‘any suit or proceeding’ pending the arbitration of ‘any issue referable to arbitration under an agreement in writing for such arbitration’ upon the application of one of the parties.”); *see also Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) (“The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement. However, the Circuit Court included in its order the requirement that all parties be included in one arbitration proceeding. Federal has signed no arbitration agreement and cannot be forced into compulsory arbitration. We feel it was erroneous to condition the relief to which respondents are plainly entitled upon the voluntary submission of Federal to arbitration proceedings. This provision has been deleted from the foregoing Order of the lower court.”).

WHEREFORE, for the foregoing reasons, Defendants ask that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Motion to Compel Arbitration and the Motions to Stay.

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,  
CLEMENT RIVERS, LLP

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*Attorneys for Defendants*

Charleston, South Carolina

April 19, 2021

## Hines, Russell

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**From:** Davis, Jay  
**Sent:** Monday, June 13, 2022 2:18 PM  
**To:** Hines, Russell; Wakeham, Rebecca (Becky)  
**Subject:** FW: Kenneth Pace VS Lake Emory Post Acute Care 2019CP4203708 & 2019CP4203709 Motion to Reconsider

### D. Jay Davis, Jr. | Partner

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**CLEMENT RIVERS, LLP**  
ATTORNEYS AT LAW

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**From:** Jennifer Burnett <[jennifer@harbinlaw.com](mailto:jennifer@harbinlaw.com)>  
**Sent:** Friday, June 10, 2022 2:48 PM  
**To:** Kelly, R. Keith Law Clerk (Sarah Shugars) <[kkellylc@sccourts.org](mailto:kkellylc@sccourts.org)>  
**Cc:** Davis, Jay <[jdavis@ycrlaw.com](mailto:jdavis@ycrlaw.com)>; Anthony Harbin <[aharbin@harbinlaw.com](mailto:aharbin@harbinlaw.com)>; Mettler, Kate C. <[kmettler@ycrlaw.com](mailto:kmettler@ycrlaw.com)>; Malloree Cocchia <[mcocchia@harbinlaw.com](mailto:mcocchia@harbinlaw.com)>; Sarah Kellner <[skellner@harbinlaw.com](mailto:skellner@harbinlaw.com)>; [rwhjr@chhlaw.net](mailto:rwhjr@chhlaw.net)  
**Subject:** RE: Kenneth Pace VS Lake Emory Post Acute Care 2019CP4203708 & 2019CP4203709 Motion to Reconsider

Ms. Shugars,  
Please be advised that the Plaintiff has sent a draft order to Mr. Davis's office to review and requested any objections by Monday. We will be filing for Judge Kelly's review and signature Tuesday morning. Thank you.

Jennifer Burnett

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**From:** Kelly, R. Keith Law Clerk (Sarah Shugars) <[kkellylc@sccourts.org](mailto:kkellylc@sccourts.org)>  
**Sent:** Monday, June 6, 2022 11:44 AM  
**To:** '[jennifer@harbinlaw.com](mailto:jennifer@harbinlaw.com)' <[jennifer@harbinlaw.com](mailto:jennifer@harbinlaw.com)>  
**Cc:** Davis, Jay <[jdavis@ycrlaw.com](mailto:jdavis@ycrlaw.com)>; Anthony Harbin <[aharbin@harbinlaw.com](mailto:aharbin@harbinlaw.com)>; Mettler, Kate C. <[kmettler@ycrlaw.com](mailto:kmettler@ycrlaw.com)>; Malloree Cocchia <[mcocchia@harbinlaw.com](mailto:mcocchia@harbinlaw.com)>; Sarah Kellner <[skellner@harbinlaw.com](mailto:skellner@harbinlaw.com)>; [rwhjr@chhlaw.net](mailto:rwhjr@chhlaw.net)  
**Subject:** Kenneth Pace VS Lake Emory Post Acute Care 2019CP4203708 & 2019CP4203709 Motion to Reconsider

Good morning,

After careful consideration of the written motion and memorandum submitted by counsel, the Court **denies** the Motion to Reconsider.

The Court still finds that the DSS employee was without authority to enter into the arbitration agreement. Further, the Court reviewed the prior Motion to Dismiss and the Motion to Stay and neither were denied in error.

Ms. Burnett, please prepare an order, share it with opposing counsel, and then e-file the order for Judge Kelly's review and signature.

Thank you,

Sarah D. Shugars

**Law Clerk to the Honorable R. Keith Kelly**

125 E. Floyd Baker Blvd.

Gaffney, South Carolina 29340

(864) 596-2400

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Recipients

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Donald Davis - Notification transmitted on 06-17-2022 09:17:14 AM.

Kate Mettler - Notification transmitted on 06-17-2022 09:21:12 AM.

Anthony Harbin - Notification transmitted on 06-17-2022 09:20:10 AM.

Jennifer Burnett - Notification transmitted on 06-17-2022 09:19:45 AM.

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A filing has been submitted to the court RE: 2019CP4203708

Official File Stamp: 06-17-2022 09:16:22 AM

Court: CIRCUIT COURT

Common Pleas

Spartanburg

Case Caption: Kenneth Pace VS Lake Emory Post Acute Care ,
defendant, et al

Event(s):

Order/Order Cover Sheet \$25.00

Document(s) Submitted: Proposed Order/Other

Filed by or on behalf of: Jennifer Spragins Burnett

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The following people were served electronically:

Anthony Lee Harbin for Kenneth Pace

Russell W. Harter, Jr. for Kerry L. Wheeler, Do

Kate Mettler for Fundamnetal Long Term Care
Holdings, Llc, Lake Emory Post Acute Care,
Fundamental Clinical And Opertational Services,
Llc, Fundamental Administrative Services, Llc, Thi
Of Baltimore, Inc, Thi Of South Carolina, Llc, Thi
Of South Carolina At Camp Care, Llc

Donald Jay Davis, Jr. for Fundamnetal Long Term
Care Holdings, Llc, Lake Emory Post Acute Care,
Fundamental Clinical And Opertational Services,
Llc, Fundamental Administrative Services, Llc, Thi
Of Baltimore, Inc, Thi Of South Carolina, Llc, Thi
Of South Carolina At Camp Care, Llc

Jennifer Spragins Burnett for Kenneth Pace

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

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Anthony Harbin - Notification transmitted on 06-17-2022 09:17:14 AM.

Jennifer Burnett - Notification transmitted on 06-17-2022 09:16:29 AM.

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NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2019CP4203709

Official File Stamp: 06-17-2022 09:14:22 AM

Court: CIRCUIT COURT

Common Pleas

Spartanburg

Case Caption: Kenneth Pace VS Lake Emory Post Acute Care ,
defendant, et al

Event(s):

Order/Order Cover Sheet \$25.00

Document(s) Submitted: Proposed Order/Other

Filed by or on behalf of: Jennifer Spragins Burnett

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

-

The following people were served electronically:

Anthony Lee Harbin for Kenneth Pace

Russell W. Harter, Jr. for Kerry L. Wheeler, Do

Donald Jay Davis, Jr. for Fundamental Long Term
Care Holdings, Llc, Lake Emory Post Acute Care,
Fundamental Clinical And Operational Services,
Llc, Fundamental Administrative Services, Llc, Thi
Of Baltimore, Inc, Thi Of South Carolina, Llc, Thi
Of South Carolina At Camp Care, Llc

Jennifer Spragins Burnett for Kenneth Pace

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

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

Appeal from Spartanburg County
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No. 2019-CP-42-03708 and
Case No. 2019-CP-42-03709

Kenneth Pace,
Individually and as Personal Representative of
the Estate of Earl E. Pace,

Respondent,

v.

Lake Emory Post Acute Care; THI of South Carolina at Camp
Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.;
Fundamental Administrative Services, LLC; Fundamental
Clinical and Operational Services, LLC; Fundamental Clinical
Consulting, LLC; Fundamental Long Term Care Holdings, LLC;
and Kerry L. Wheeler, DO,

Defendants,

Of which Lake Emory Post Acute Care; THI of South Carolina at
Camp Care, LLC; THI of South Carolina, LLC; THI of
Baltimore, Inc.; Fundamental Administrative Services, LLC;
Fundamental Clinical and Operational Services, LLC; and
Fundamental Long Term Care Holdings, LLC, are

Appellants.

NOTICE OF APPEAL

**Counsel identified on next page*

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Attorneys for Respondent

Defendants Lake Emory Post Acute Care; THI of South Carolina at Camp Care, LLC;¹ THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; and Fundamental Long Term Care Holdings, LLC (collectively, “Appellants”), hereby appeal the following orders of the Honorable R. Keith Kelly, Circuit Court Judge:

- **Order Denying Defendants’ Motions to Dismiss, Compel Arbitration, and to Stay the State Court Proceeding**, filed April 8, 2021, and
- **Order Denying the Motion to Alter, Amend and/or Reconsider by the Defendants**, filed June 27, 2022.

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 June 27, 2022.

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
T. Ashton Phillips, III (SC Bar No. 104227)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488
Attorneys for Appellants

Charleston, South Carolina

July 26, 2022

¹ Plaintiff/Respondent misidentified “Lake Emory Post Acute Care” and “THI of South Carolina at Camp Care, LLC” as separate entities. “THI of South Carolina at Camp Care, LLC” does business as “Lake Emory Post Acute Care.”

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

Appeal from Spartanburg County
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No. 2019-CP-42-03708 and
Case No. 2019-CP-42-03709

Kenneth Pace,
Individually and as Personal Representative of
the Estate of Earl E. Pace,

Respondent,

v.

Lake Emory Post Acute Care; THI of South Carolina at Camp
Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.;
Fundamental Administrative Services, LLC; Fundamental
Clinical and Operational Services, LLC; Fundamental Clinical
Consulting, LLC; Fundamental Long Term Care Holdings, LLC;
and Kerry L. Wheeler, DO,

Defendants,

Of which Lake Emory Post Acute Care; THI of South Carolina at
Camp Care, LLC; THI of South Carolina, LLC; THI of
Baltimore, Inc.; Fundamental Administrative Services, LLC;
Fundamental Clinical and Operational Services, LLC; and
Fundamental Long Term Care Holdings, LLC, are

Appellants.

PROOF OF SERVICE

**Counsel identified on next page*

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
T. Ashton Phillips, III (SC Bar No. 104227)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488
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 July 26, 2022, by emailing (see attached) a copy of the same to Respondent's counsel of record:

Jennifer Spragins Burnett, Esquire
jennifer@harbinlaw.com
Anthony L. Harbin, Esquire
aharbin@harbinlaw.com
HARBIN & BURNETT, LLP
2124 Highway 81 North
Anderson, SC 29621
Attorneys for Respondent

I also certify that a copy of this **NOTICE OF APPEAL** is this day, July 26, 2022, being E-Filed with the lower court (which will also, i.e., in addition to service by email, effect service of the notice today on Respondent's above-identified counsel of record via the E-Filing System).

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Russell G. Hines (SC Bar No. 72100)
Attorneys for Appellants

Charleston, South Carolina

July 26, 2022

From: [Hines, Russell](#)
To: [Jennifer Burnett](#); ["Anthony Harbin"](#)
Cc: ["Brown, Steve"](#); [Davis, Jay](#); [Phillips, Ashton](#); [Wakeham, Rebecca \(Becky\)](#); [Peterson, Susan](#); [Preiser, Skyla](#); [Justman, Aimee](#); [Bell, Pollyana \(Polly\)](#)
Subject: Pace v. Lake Emory Post Acute Care (Cases No. 2019-CP-42-03708 & -03709) -- Notice of Appeal
Date: Tuesday, July 26, 2022 11:36:15 PM
Attachments: [image001.png](#)
[Pace v. Lake Emory -- Notice of Appeal.pdf](#)
[Appealed Order 1 -- 2021 4-8 -- Order Denying MTCA and MTS.pdf](#)
[Appealed Order 2 -- 2022 6-27 -- Order Denying MTR.pdf](#)

Attached please find our **Notice of Appeal** in the above-referenced cases.

Russell G. Hines
CLEMENT RIVERS, LLP
www.ycrlaw.com
25 Calhoun Street, Suite 400
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CLEMENT RIVERS, LLP
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Certificate of Electronic Notification

Recipients

Russell Harter - Notification transmitted on 07-26-2022 11:47:14 PM.

Donald Davis - Notification transmitted on 07-26-2022 11:47:13 PM.

Kate Mettler - Notification transmitted on 07-26-2022 11:47:14 PM.

Anthony Harbin - Notification transmitted on 07-26-2022 11:47:14 PM.

Jennifer Burnett - Notification transmitted on 07-26-2022 11:47:13 PM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2019CP4203708

Official File Stamp: 07-26-2022 11:46:52 PM

Court: CIRCUIT COURT

Common Pleas

Spartanburg

Case Caption: Kenneth Pace VS Lake Emory Post Acute Care ,
defendant, et al

Event(s):

Notice/Notice of Appearance

Document(s) Submitted: Appeal/Notice of Appeal to Court of Appeals

- Exhibit/Filing of Exhibits
- 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:

Anthony Lee Harbin for Kenneth Pace

Russell W. Harter, Jr. for Kerry L. Wheeler, Do

Kate Mettler for Fundamnetal Long Term Care
Holdings, Llc, Lake Emory Post Acute Care,
Fundamental Clinical And Opertational Services,
Llc, Fundamental Administrative Services, Llc, Thi
Of Baltimore, Inc, Thi Of South Carolina, Llc, Thi
Of South Carolina At Camp Care, Llc

Donald Jay Davis, Jr. for Fundamnetal Long Term
Care Holdings, Llc, Lake Emory Post Acute Care,
Fundamental Clinical And Opertational Services,
Llc, Fundamental Administrative Services, Llc, Thi
Of Baltimore, Inc, Thi Of South Carolina, Llc, Thi
Of South Carolina At Camp Care, Llc

Jennifer Spragins Burnett for Kenneth Pace

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

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

Appeal from Spartanburg County
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No. 2019-CP-42-03708 and
Case No. 2019-CP-42-03709

Kenneth Pace,
Individually and as Personal Representative of
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Respondent,

v.

Lake Emory Post Acute Care; THI of South Carolina at Camp
Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.;
Fundamental Administrative Services, LLC; Fundamental
Clinical and Operational Services, LLC; Fundamental Clinical
Consulting, LLC; Fundamental Long Term Care Holdings, LLC;
and Kerry L. Wheeler, DO,

Defendants,

Of which Lake Emory Post Acute Care; THI of South Carolina at
Camp Care, LLC; THI of South Carolina, LLC; THI of
Baltimore, Inc.; Fundamental Administrative Services, LLC;
Fundamental Clinical and Operational Services, LLC; and
Fundamental Long Term Care Holdings, LLC, are

Appellants.

NOTICE OF APPEAL

**Counsel identified on next page*

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
T. Ashton Phillips, III (SC Bar No. 104227)
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P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellants

Other Counsel of Record:

Jennifer Spragins Burnett (SC Bar No. 69617)
Anthony L. Harbin (SC Bar No. 63999)
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2124 Highway 81 North
Anderson, South Carolina 29621
(864) 622-7801

Attorneys for Respondent

Defendants Lake Emory Post Acute Care; THI of South Carolina at Camp Care, LLC;¹ THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; and Fundamental Long Term Care Holdings, LLC (collectively, “Appellants”), hereby appeal the following orders of the Honorable R. Keith Kelly, Circuit Court Judge:

- **Order Denying Defendants’ Motions to Dismiss, Compel Arbitration, and to Stay the State Court Proceeding**, filed April 8, 2021, and
- **Order Denying the Motion to Alter, Amend and/or Reconsider by the Defendants**, filed June 27, 2022.

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 June 27, 2022.

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
T. Ashton Phillips, III (SC Bar No. 104227)
25 Calhoun Street, Suite 400
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P.O. Box 993 (29402)
(843) 720-5488
Attorneys for Appellants

Charleston, South Carolina

July 26, 2022

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

Appeal from Spartanburg County
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No. 2019-CP-42-03708 and
Case No. 2019-CP-42-03709

Kenneth Pace,
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Respondent,

v.

Lake Emory Post Acute Care; THI of South Carolina at Camp
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Fundamental Administrative Services, LLC; Fundamental
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and Kerry L. Wheeler, DO,

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Fundamental Clinical and Operational Services, LLC; and
Fundamental Long Term Care Holdings, LLC, are

Appellants.

PROOF OF SERVICE

**Counsel identified on next page*

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
T. Ashton Phillips, III (SC Bar No. 104227)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488
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 July 26, 2022, by emailing (see attached) a copy of the same to Respondent's counsel of record:

Jennifer Spragins Burnett, Esquire
jennifer@harbinlaw.com
Anthony L. Harbin, Esquire
aharbin@harbinlaw.com
HARBIN & BURNETT, LLP
2124 Highway 81 North
Anderson, SC 29621
Attorneys for Respondent

I also certify that a copy of this **NOTICE OF APPEAL** is this day, July 26, 2022, being E-Filed with the lower court (which will also, i.e., in addition to service by email, effect service of the notice today on Respondent's above-identified counsel of record via the E-Filing System).

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Russell G. Hines (SC Bar No. 72100)
Attorneys for Appellants

Charleston, South Carolina

July 26, 2022

From: [Hines, Russell](#)
To: [Jennifer Burnett](#); ["Anthony Harbin"](#)
Cc: ["Brown, Steve"](#); [Davis, Jay](#); [Phillips, Ashton](#); [Wakeham, Rebecca \(Becky\)](#); [Peterson, Susan](#); [Preiser, Skyla](#); [Justman, Aimee](#); [Bell, Pollyana \(Polly\)](#)
Subject: Pace v. Lake Emory Post Acute Care (Cases No. 2019-CP-42-03708 & -03709) -- Notice of Appeal
Date: Tuesday, July 26, 2022 11:36:15 PM
Attachments: [image001.png](#)
[Pace v. Lake Emory -- Notice of Appeal.pdf](#)
[Appealed Order 1 -- 2021 4-8 -- Order Denying MTCA and MTS.pdf](#)
[Appealed Order 2 -- 2022 6-27 -- Order Denying MTR.pdf](#)

Attached please find our **Notice of Appeal** in the above-referenced cases.

Russell G. Hines
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ycrlaw.com

Certificate of Electronic Notification

Recipients

Russell Harter - Notification transmitted on 07-26-2022 11:51:14 PM.

Donald Davis - Notification transmitted on 07-26-2022 11:51:13 PM.

Anthony Harbin - Notification transmitted on 07-26-2022 11:51:14 PM.

Jennifer Burnett - Notification transmitted on 07-26-2022 11:51:14 PM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2019CP4203709

Official File Stamp: 07-26-2022 11:50:59 PM

Court: CIRCUIT COURT

Common Pleas

Spartanburg

Case Caption: Kenneth Pace VS Lake Emory Post Acute Care ,
defendant, et al

Event(s):

Notice/Notice of Appearance

Document(s) Submitted: Appeal/Notice of Appeal to Court of Appeals

- Exhibit/Filing of Exhibits
- 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:

Anthony Lee Harbin for Kenneth Pace

Russell W. Harter, Jr. for Kerry L. Wheeler, Do

Donald Jay Davis, Jr. for Fundamental Long Term
Care Holdings, Llc, Lake Emory Post Acute Care,
Fundamental Clinical And Operational Services,
Llc, Fundamental Administrative Services, Llc, Thi
Of Baltimore, Inc, Thi Of South Carolina, Llc, Thi
Of South Carolina At Camp Care, Llc

Jennifer Spragins Burnett for Kenneth Pace

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

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

Appeal from Spartanburg County
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No. 2019-CP-42-03708 and
Case No. 2019-CP-42-03709

Kenneth Pace,
Individually and as Personal Representative of
the Estate of Earl E. Pace,

Respondent,

v.

Lake Emory Post Acute Care; THI of South Carolina at Camp
Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.;
Fundamental Administrative Services, LLC; Fundamental
Clinical and Operational Services, LLC; Fundamental Clinical
Consulting, LLC; Fundamental Long Term Care Holdings, LLC;
and Kerry L. Wheeler, DO,

Defendants,

Of which Lake Emory Post Acute Care; THI of South Carolina at
Camp Care, LLC; THI of South Carolina, LLC; THI of
Baltimore, Inc.; Fundamental Administrative Services, LLC;
Fundamental Clinical and Operational Services, LLC; and
Fundamental Long Term Care Holdings, LLC, are

Appellants.

AMENDED NOTICE OF APPEAL

**Counsel identified on next page*

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
T. Ashton Phillips, III (SC Bar No. 104227)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488
Attorneys for Appellants

Other Counsel of Record:

Jennifer Spragins Burnett (SC Bar No. 69617)
Anthony L. Harbin (SC Bar No. 63999)
HARBIN & BURNETT, LLP
2124 Highway 81 North
Anderson, South Carolina 29621
P.O. Box 35 (29622)
(864) 964-0333
Attorneys for Respondent

Russell W. Harter, Jr. (SC Bar No. 2778)
CHAPMAN, HARTER & HARTER, P.A.
14 Lavinia Avenue
Greenville, South Carolina 29601
P.O. Box 10224 (29603)
(864) 233-4500
Attorney for Defendant Kerry L. Wheeler, DO

Defendants Lake Emory Post Acute Care; THI of South Carolina at Camp Care, LLC;¹ THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; and Fundamental Long Term Care Holdings, LLC (collectively, “Appellants”), hereby appeal the following orders of the Honorable R. Keith Kelly, Circuit Court Judge:

- **Order Denying Defendants’ Motions to Dismiss, Compel Arbitration, and to Stay the State Court Proceeding**, filed April 8, 2021, and
- **Order Denying the Motion to Alter, Amend and/or Reconsider by the Defendants**, filed June 23, 2022, and June 27, 2022.

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 June 27, 2022.

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
T. Ashton Phillips, III (SC Bar No. 104227)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488
Attorneys for Appellants

Charleston, South Carolina

July 27, 2022

¹ Plaintiff/Respondent misidentified “Lake Emory Post Acute Care” and “THI of South Carolina at Camp Care, LLC” as separate entities. “THI of South Carolina at Camp Care, LLC” does business as “Lake Emory Post Acute Care.”

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

Appeal from Spartanburg County
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No. 2019-CP-42-03708 and
Case No. 2019-CP-42-03709

Kenneth Pace,
Individually and as Personal Representative of
the Estate of Earl E. Pace,

Respondent,

v.

Lake Emory Post Acute Care; THI of South Carolina at Camp
Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.;
Fundamental Administrative Services, LLC; Fundamental
Clinical and Operational Services, LLC; Fundamental Clinical
Consulting, LLC; Fundamental Long Term Care Holdings, LLC;
and Kerry L. Wheeler, DO,

Defendants,

Of which Lake Emory Post Acute Care; THI of South Carolina at
Camp Care, LLC; THI of South Carolina, LLC; THI of
Baltimore, Inc.; Fundamental Administrative Services, LLC;
Fundamental Clinical and Operational Services, LLC; and
Fundamental Long Term Care Holdings, LLC, are

Appellants.

PROOF OF SERVICE

**Counsel identified on next page*

CLEMENT RIVERS, LLP

Stephen L. Brown (SC Bar No. 66468)

D. Jay Davis, Jr. (SC Bar No. 12084)

Russell G. Hines (SC Bar No. 72100)

T. Ashton Phillips, III (SC Bar No. 104227)

25 Calhoun Street, Suite 400

Charleston, South Carolina 29401

P.O. Box 993 (29402)

(843) 720-5488

Attorneys for Appellants

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellants, hereby certify that Appellants' **AMENDED NOTICE OF APPEAL** was served on Respondent and on Defendant Kerry L. Wheeler, DO, on July 27, 2022, by emailing (see attached) a copy of the same to their following counsel of record:

Jennifer Spragins Burnett, Esquire

jennifer@harbinlaw.com

Anthony L. Harbin, Esquire

aharbin@harbinlaw.com

HARBIN & BURNETT, LLP

2124 Highway 81 North

Anderson, SC 29621

Attorneys for Respondent

Russell W. Harter, Jr., Esquire

rwhjr@chhlaw.net

CHAPMAN, HARTER & HARTER, P.A.

14 Lavinia Avenue

Greenville, SC 29601

Attorney for Defendant Kerry L. Wheeler, DO

I also certify that a copy of Appellants' **AMENDED NOTICE OF APPEAL** was today, July 27, 2022, E-Filed with the lower court (which also, i.e., in addition to service by email, effected service of the notice today on the above-identified counsel of record for Respondent and for Defendant Kerry L. Wheeler, DO, via the E-Filing System).

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines

Russell G. Hines (SC Bar No. 72100)

Attorneys for Appellants

Charleston, South Carolina

July 27, 2022

Hines, Russell

From: Hines, Russell
Sent: Wednesday, July 27, 2022 11:28 AM
To: 'Jennifer Burnett'; 'Anthony Harbin'; 'rwhjr@chhlaw.net'
Cc: 'Brown, Steve'; Davis, Jay; Phillips, Ashton; Wakeham, Rebecca (Becky); Peterson, Susan; Preiser, Skyla; Justman, Aimee; Bell, Pollyana (Polly)
Subject: Pace v. Lake Emory Post Acute Care (Cases No. 2019-CP-42-03708 & -03709) -- Amended Notice of Appeal
Attachments: Pace v. Lake Emory -- Amended Notice of Appeal.pdf; Appealed Order 1 -- 2021 4-8 -- Order Denying MTCA and MTS (03708, -09).pdf; Appealed Order 2 -- 2022 6-23, -27 -- Order Denying MTR (03708, -09).pdf

With apologies for the additional email, and for leaving Mr. Harter off the previous one, attached please find our **Amended Notice of Appeal** in the above-referenced cases.

Russell G. Hines
 CLEMENT RIVERS, LLP
www.ycrlaw.com
 25 Calhoun Street, Suite 400
 Charleston, South Carolina 29401
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CLEMENT RIVERS, LLP
 25 Calhoun Street • Suite 400 • Charleston, SC 29401
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Certificate of Electronic Notification

Recipients

Russell Harter - Notification transmitted on 07-27-2022 11:37:08 AM.

Donald Davis - Notification transmitted on 07-27-2022 11:37:07 AM.

Russell Hines - Notification transmitted on 07-27-2022 11:37:09 AM.

Kate Mettler - Notification transmitted on 07-27-2022 11:37:09 AM.

Anthony Harbin - Notification transmitted on 07-27-2022 11:37:08 AM.

Jennifer Burnett - Notification transmitted on 07-27-2022 11:37:08 AM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2019CP4203708

Official File Stamp: 07-27-2022 11:36:51 AM

Court: CIRCUIT COURT

Common Pleas

Spartanburg

Case Caption: Kenneth Pace VS Lake Emory Post Acute Care ,
defendant, et al

Document(s) Submitted: Appeal/Notice of Appeal to Court of Appeals

- Exhibit/Filing of Exhibits
- 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:

Russell Grainger Hines for Fundamnetal Long
Term Care Holdings, Llc, Lake Emory Post Acute
Care, Fundamental Clinical And Opertational
Services, Llc, Fundamental Administrative
Services, Llc, Thi Of Baltimore, Inc, Thi Of South
Carolina, Llc, Thi Of South Carolina At Camp
Care, Llc

Anthony Lee Harbin for Kenneth Pace

Russell W. Harter, Jr. for Kerry L. Wheeler, Do

Kate Mettler for Fundamnetal Long Term Care Holdings, Llc, Lake Emory Post Acute Care, Fundamental Clinical And Opertational Services, Llc, Fundamental Administrative Services, Llc, Thi Of Baltimore, Inc, Thi Of South Carolina, Llc, Thi Of South Carolina At Camp Care, Llc

Donald Jay Davis, Jr. for Fundamnetal Long Term Care Holdings, Llc, Lake Emory Post Acute Care, Fundamental Clinical And Opertational Services, Llc, Fundamental Administrative Services, Llc, Thi Of Baltimore, Inc, Thi Of South Carolina, Llc, Thi Of South Carolina At Camp Care, Llc

Jennifer Spragins Burnett for Kenneth Pace

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**THE STATE OF SOUTH CAROLINA
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Appeal from Spartanburg County
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R. Keith Kelly, Circuit Court Judge

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Fundamental Clinical and Operational Services, LLC; and
Fundamental Long Term Care Holdings, LLC, are

Appellants.

AMENDED NOTICE OF APPEAL

**Counsel identified on next page*

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
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T. Ashton Phillips, III (SC Bar No. 104227)
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Attorneys for Appellants

Other Counsel of Record:

Jennifer Spragins Burnett (SC Bar No. 69617)
Anthony L. Harbin (SC Bar No. 63999)
HARBIN & BURNETT, LLP
2124 Highway 81 North
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(864) 964-0333
Attorneys for Respondent

Russell W. Harter, Jr. (SC Bar No. 2778)
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14 Lavinia Avenue
Greenville, South Carolina 29601
P.O. Box 10224 (29603)
(864) 233-4500
Attorney for Defendant Kerry L. Wheeler, DO

Defendants Lake Emory Post Acute Care; THI of South Carolina at Camp Care, LLC;¹ THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; and Fundamental Long Term Care Holdings, LLC (collectively, “Appellants”), hereby appeal the following orders of the Honorable R. Keith Kelly, Circuit Court Judge:

- **Order Denying Defendants’ Motions to Dismiss, Compel Arbitration, and to Stay the State Court Proceeding**, filed April 8, 2021, and
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CLEMENT RIVERS, LLP

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Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
T. Ashton Phillips, III (SC Bar No. 104227)
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(843) 720-5488
Attorneys for Appellants

Charleston, South Carolina

July 27, 2022

¹ Plaintiff/Respondent misidentified “Lake Emory Post Acute Care” and “THI of South Carolina at Camp Care, LLC” as separate entities. “THI of South Carolina at Camp Care, LLC” does business as “Lake Emory Post Acute Care.”

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

Appeal from Spartanburg County
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No. 2019-CP-42-03708 and
Case No. 2019-CP-42-03709

Kenneth Pace,
Individually and as Personal Representative of
the Estate of Earl E. Pace,

Respondent,

v.

Lake Emory Post Acute Care; THI of South Carolina at Camp
Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.;
Fundamental Administrative Services, LLC; Fundamental
Clinical and Operational Services, LLC; Fundamental Clinical
Consulting, LLC; Fundamental Long Term Care Holdings, LLC;
and Kerry L. Wheeler, DO,

Defendants,

Of which Lake Emory Post Acute Care; THI of South Carolina at
Camp Care, LLC; THI of South Carolina, LLC; THI of
Baltimore, Inc.; Fundamental Administrative Services, LLC;
Fundamental Clinical and Operational Services, LLC; and
Fundamental Long Term Care Holdings, LLC, are

Appellants.

PROOF OF SERVICE

**Counsel identified on next page*

CLEMENT RIVERS, LLP
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Attorneys for Appellants

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellants, hereby certify that Appellants' **AMENDED NOTICE OF APPEAL** was served on Respondent and on Defendant Kerry L. Wheeler, DO, on July 27, 2022, by emailing (see attached) a copy of the same to their following counsel of record:

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Attorney for Defendant Kerry L. Wheeler, DO

I also certify that a copy of Appellants' **AMENDED NOTICE OF APPEAL** was today, July 27, 2022, E-Filed with the lower court (which also, i.e., in addition to service by email, effected service of the notice today on the above-identified counsel of record for Respondent and for Defendant Kerry L. Wheeler, DO, via the E-Filing System).

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines

Russell G. Hines (SC Bar No. 72100)

Attorneys for Appellants

Charleston, South Carolina

July 27, 2022

Hines, Russell

From: Hines, Russell
Sent: Wednesday, July 27, 2022 11:28 AM
To: 'Jennifer Burnett'; 'Anthony Harbin'; 'rwhjr@chhlaw.net'
Cc: 'Brown, Steve'; Davis, Jay; Phillips, Ashton; Wakeham, Rebecca (Becky); Peterson, Susan; Preiser, Skyla; Justman, Aimee; Bell, Pollyana (Polly)
Subject: Pace v. Lake Emory Post Acute Care (Cases No. 2019-CP-42-03708 & -03709) -- Amended Notice of Appeal
Attachments: Pace v. Lake Emory -- Amended Notice of Appeal.pdf; Appealed Order 1 -- 2021 4-8 -- Order Denying MTCA and MTS (03708, -09).pdf; Appealed Order 2 -- 2022 6-23, -27 -- Order Denying MTR (03708, -09).pdf

With apologies for the additional email, and for leaving Mr. Harter off the previous one, attached please find our **Amended Notice of Appeal** in the above-referenced cases.

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Certificate of Electronic Notification

Recipients

Russell Harter - Notification transmitted on 07-27-2022 11:40:58 AM.

Donald Davis - Notification transmitted on 07-27-2022 11:40:57 AM.

Russell Hines - Notification transmitted on 07-27-2022 11:40:59 AM.

Anthony Harbin - Notification transmitted on 07-27-2022 11:40:58 AM.

Jennifer Burnett - Notification transmitted on 07-27-2022 11:40:58 AM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2019CP4203709

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Court: CIRCUIT COURT

Common Pleas

Spartanburg

Case Caption: Kenneth Pace VS Lake Emory Post Acute Care ,
defendant, et al

Document(s) Submitted: Appeal/Notice of Appeal to Court of Appeals

- Exhibit/Filing of Exhibits
- 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:

Russell Grainger Hines for Fundamental Long
Term Care Holdings, Llc, Lake Emory Post Acute
Care, Fundamental Clinical And Operational
Services, Llc, Fundamental Administrative
Services, Llc, Thi Of Baltimore, Inc, Thi Of South
Carolina, Llc, Thi Of South Carolina At Camp
Care, Llc

Anthony Lee Harbin for Kenneth Pace

Russell W. Harter, Jr. for Kerry L. Wheeler, Do

Donald Jay Davis, Jr. for Fundamental Long Term
Care Holdings, Llc, Lake Emory Post Acute Care,
Fundamental Clinical And Operational Services,
Llc, Fundamental Administrative Services, Llc, Thi
Of Baltimore, Inc, Thi Of South Carolina, Llc, Thi
Of South Carolina At Camp Care, Llc

Jennifer Spragins Burnett for Kenneth Pace

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

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Aug 01 2022

SC Court of Appeals

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

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

R. KEITH KELLY, CIRCUIT COURT JUDGE

CASE No. 2019-CP-42-03709

Kenneth Pace, Individually and as Personal
Representative of the Estate of Earl E. Pace,

Respondent,

v.

Lake Emory Post Acute Care; THI of South Carolina
at Camp Care, LLC; THI of South Carolina, LLC; THI
of Baltimore, Inc.; Fundamental Administrative
Services, LLC; Fundamental Clinical and Operational
Services, LLC; Fundamental Clinical Consulting,
LLC; Fundamental Long Term Care Holdings, LLC,
and Kerry L. Wheeler, DO,

Defendants,

Of which Lake Emory Post Acute Care; THI of
South Carolina at Camp Care, LLC; THI of South
Carolina, LLC; THI of Baltimore, Inc.; Fundamental
Administrative Services, LLC; Fundamental Clinical
and Operational Services, LLC; Fundamental
Clinical Consulting, LLC; Fundamental Long Term
Care Holdings, LLC, are

Appellants.

RESPONDENT'S MOTION TO DISMISS APPEAL

**Counsel identified on following page.*

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Attorney for Kerry L. Wheeler, DO

Respondent, Kenneth Pace, Individually and as Personal Representative of the Estate of Earl E. Pace respectfully moves this Court for an Order dismissing the Appeal filed by Appellants Lake Emory Post Acute Care; THI of South Carolina at Camp Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; Fundamental Clinical Consulting, LLC; Fundamental Long Term Care Holdings, LLC. This Motion is filed pursuant to South Carolina Appellate Court Rules 240, 260 and 203(b).

SCACR 203(b) provides, in pertinent part, “[a] notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.” SCACR 203(b)(1).

It is anticipated that Appellants will assert that they did not receive written notice of the entry of Judge Kelly’s Order in this case until June 27, 2022. The above captioned matter is the Wrongful Death Action filed by Kenneth Pace. (CA No. 2019-CP-42-03709). Mr. Pace has also filed a Survival Action matter (CA No. 2019-CP-42-03708) against the Appellants. All parties filed pleadings bearing both case numbers and the matters were argued in one hearing. Judge Kelly issued an Order denying the Appellants’ motion that bore both case numbers on June 23, 2022. This Appeal was filed by the Appellants on July 27, 2022 – thirty-four days after the entry of the Judge’s Order. *June 23, 2022 Order* attached as Exhibit A and the first page of which is pasted into the body of this Motion below.

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Kenneth Pace, Individually and as Personal
Representative of the Estate of Earl E.
Pace,

Plaintiff,

v.

Luke Emory Post Acute Care; THI of South
Carolina at Camp Care, LLC; THI of South
Carolina, LLC; THI of Baltimore, Inc.;
Fundamental Administrative Services, LLC;
Fundamental Clinical and Operational
Services, LLC; Fundamental Clinical
Consulting, LLC; Fundamental Long Term
Care Holdings, LLC, and Kerry L. Wheeler,
DO,

Defendants.

IN THE COURT OF COMMON PLEAS

2019-CP-42-03700
2019-CP-42-03708

**ORDER DENYING THE MOTION
TO ALTER, AMEND AND/OR
RECONSIDER BY THE
DEFENDANTS**

This matter is before the Court upon motions filed by the Defendants to stay the underlying state court litigation and compel the above-captioned matters to arbitration. The parties submitted written memoranda in support and opposition to the motions and the Court heard oral argument of counsel for both parties on January 20, 2021. This Court denied the Defendants' motion in an Order filed April 8, 2021. Defendants' subsequently filed a Motion to Alter, Amend or Reconsider. The parties submitted written memoranda in support and opposition to the motion. This Court carefully considered arguments of both parties.

For the reasons set forth below, the Defendants' motions are hereby DENIED.

11/1/2022

Judge Kelly's Order was served on the parties through the E-Filing system of the South Carolina Courts. The Certificate of Electronic Notification reveals that counsel for Appellants received the Order on June 23, 2022 at 4:31 PM. *See Certificate of Electronic Notification* attached as Exhibit B and pasted into the body of this Motion below.

Certificate of Electronic Notification

Recipients

Russell Harter - Notification transmitted on 06-23-2022 04:31:03 PM.

Donald Davis - Notification transmitted on 06-23-2022 04:31:02 PM.

Kate Mettler - Notification transmitted on 06-23-2022 04:31:06 PM.

Anthony Harbin - Notification transmitted on 06-23-2022 04:31:05 PM.

Jennifer Burnett - Notification transmitted on 06-23-2022 04:31:02 PM.

ELECTRONICALLY FILED - 2022 Jun 23 4:31 PM - SPARTANBURG - COMMON PLEAS - CASE#2019CP4203708

This Court has held that service of an order through the email address in AIS (Attorney Information System) constitutes notice of the entry of an order. *See Wells Fargo Bank, NA v. Fallon Properties SC, LLC*, 413 S.C. 642, 643-45, 776 S.E..2d 575, 576-77 (Ct. App. 2015). An email providing written notice of the entry of an order triggers the time for appeal. *See id* at 217.

While the Respondent concedes that the Order Denying the Motion to Alter, Amend and/or Reconsider was entered *in the above captioned* case on July 27, 2022 – Appellants certainly had notice that the Order was entered in both cases on June 23, 2022 by the entry of the Order denying their motion that bore both case numbers 2019-CP-42-03708 and 2019-CP-42-03709. It would be disingenuous to assert that the Appellants were not aware that the Order was being entered in both cases.

On June 23, 2022, Appellants received written notice of the entry of an Order denying their motion. The Order they received on June 23rd – on its face – revealed that the court was denying their motion in both civil actions. The time to serve notice of appeal commences at the time the party first receives notice of the entry of an order. *See id.*

Respondent respectfully asserts that the Appellants' Appeal is not timely and must be dismissed.

s/ Jennifer Spragins Burnett
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Anderson, South Carolina
August 1, 2022

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

RECEIVED

Aug 11 2022

SC Court of Appeals

Appeal from Spartanburg County
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Cases No. 2019-CP-42-03708 and 2019-CP-42-03709

Appellate Case No. 2022-001059

Kenneth Pace,
Individually and as Personal Representative of
the Estate of Earl E. Pace,

Respondent,

v.

Lake Emory Post Acute Care; THI of South Carolina at Camp
Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.;
Fundamental Administrative Services, LLC; Fundamental
Clinical and Operational Services, LLC; Fundamental Clinical
Consulting, LLC; Fundamental Long Term Care Holdings, LLC;
and Kerry L. Wheeler, DO,

Defendants,

Of which Lake Emory Post Acute Care; THI of South Carolina at
Camp Care, LLC; THI of South Carolina, LLC; THI of
Baltimore, Inc.; Fundamental Administrative Services, LLC;
Fundamental Clinical and Operational Services, LLC; and
Fundamental Long Term Care Holdings, LLC, are

Appellants.

**APPELLANTS' RETURN TO
RESPONDENT'S MOTIONS TO DISMISS APPEAL**

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Appellants¹ submit this return in opposition to Plaintiff's² motions to dismiss this appeal.

BACKGROUND

When Mr. Pace was admitted to the Facility on or about January 30, 2015, he was a vulnerable adult in the protective custody of the South Carolina Department of Social Services ("DSS"). (App.³ pp. 4, 13, 70–81, 144–55.) Mr. Pace's DSS caseworker handled the paperwork in conjunction with his admission and, in so doing, signed an Admission Agreement and an Arbitration Agreement on Mr. Pace's behalf. (App. pp. 22, 38, 82–93, 156–67.)

¹ "Appellants" refers to both the "Facility," which is a skilled nursing facility in Spartanburg County, and the "Other Appellants," collectively. The "Facility" refers to both the Defendant/Appellant identified as Lake Emory Post Acute Care ("LEPAC") and Defendant/Appellant THI of South Carolina at Camp Care, LLC ("Camp Care LLC"), collectively. (Note: LEPAC and Camp Care LLC are misidentified in the caption as separate entities, which they are not. Rather, LEPAC, or, more precisely, "Lake Emory Post-Acute Care," is the name under which Camp Care LLC does business.) The "Other Appellants" refers to Defendants/Appellants THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; and Fundamental Long Term Care Holdings, LLC, n/k/a Hunt Valley Holdings, LLC, collectively.

² "Plaintiff" refers to Plaintiff/Respondent, Kenneth Pace, individually and as personal representative of the Estate of Earl E. Pace. "Mr. Pace" refers to the decedent, Earl E. Pace.

³ Because the Record on Appeal has not been filed, an appendix of documentary material ("App.") accompanies this memorandum. See Rule 240(c)(3), SCACR ("Where the Record on Appeal . . . has not been filed . . . the parties shall file affidavits and other documents in support of their positions."); Rule 240(e), SCACR ("The provisions of Rule 240(c) shall apply to a return.").

On October 21, 2019, Plaintiff filed two lawsuits in the Spartanburg County Court of Common Pleas styled *Kenneth Pace, Individually and as Personal Representative of the Estate of Earl E. Pace v. Lake Emory Post Acute Care; THI of South Carolina at Camp Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; Fundamental Clinical Consulting, LLC; Fundamental Long Term Care Holdings, LLC; and Kerry L. Wheeler, DO*, one of which was docketed as Case No. 2019-CP-42-03708 (“Case 3708”), the other as Case No. 2019-CP-42-03709 (“Case 3709”). (App. pp. 1–18.) Plaintiff’s summons and complaint in Case 3708 identify it as a survival action. (App. pp. 1, 3.) Plaintiff’s summons and complaint in Case 3709 identify it as an action for wrongful death. (App. pp. 10, 12.) In both cases, Plaintiff asserts Appellants are liable for money damages because of alleged deficiencies in the care/treatment Mr. Pace received as a resident of the Facility. (App. pp. 3–9, 12–18.)

Based on the Arbitration Agreement Mr. Pace’s DSS caseworker signed for him, the Facility moved in both cases to compel Plaintiff’s claims against it to arbitration (the “Motion to Compel Arbitration”). (App. pp. 19–22, 35–37.) Contemporaneously, the Other Appellants moved in both cases for a stay until the arbitrability issue, i.e., the issue raised by the Motion to Compel Arbitration, was finally decided and any arbitration proceedings were concluded (the “Motions to

Stay”). (App. pp. 23–34, 39–50.) Collectively, the Motion to Compel Arbitration and the Motions to Stay are referred to as the “Principal Motions.”

The circuit court heard the Principal Motions on January 20, 2021, the Honorable R. Keith Kelly presiding. (App. pp. 204, 216.) On February 1, 2021, Judge Kelly’s law clerk emailed all counsel advising of the court’s decision to deny the Principal Motions and requesting Plaintiff’s counsel to submit a proposed order to that effect. (App. p. 199.) On February 16, 2021, Plaintiff’s counsel e-filed the same proposed order in both cases. (App. pp. 201–03, 213–15.) The caption of the order included both case numbers, and it was filed by the court in both cases on April 8, 2021. (App. pp. 204–210, 216–22.)

Pursuant to Rule 59(e), SCRCP, on April 19, 2021, Appellants timely moved in both cases for reconsideration (the “Motion to Reconsider”). (App. pp. 225–58.) On June 6, 2022, Judge Kelly’s law clerk emailed all counsel advising of the court’s decision to deny the Motion to Reconsider and requesting Plaintiff’s counsel to submit a proposed order to that effect. (App. pp. 259–60.) On June 17, 2022, Plaintiff’s counsel e-filed the same proposed order in both cases. (App. pp. 261–63, 276–77.) The caption of the order included both case numbers, and it was filed by the court in Case 3708 on June 23, 2022, and in Case 3709 four days later, on June 27, 2022. (App. pp. 264–73, 278–87.)

By notice served and filed July 26, 2022,⁴ and amended notice served and filed July 27, 2022,⁵ this appeal follows.

Plaintiff has made two motions to dismiss the appeal, one specifically targeting Case 3708 and another specifically targeting Case 3709. At bottom, however, Plaintiff’s argument for dismissal is the same as to both cases, and it is this: The time for Appellants to appeal began to run as to both Case 3708 and Case 3709 on June 23, 2022, when Appellants’ counsel received the NEF for the circuit court’s order denying the Motion to Reconsider in Case 3708; therefore, Appellants’ notice of appeal, which was “filed” more than 30 days thereafter on “July 27, 2022,” is untimely as to both cases—even though, admittedly, it was within 30 days after Appellants’ counsel received the NEF for the circuit court’s order denying the Motion to Reconsider in Case 3709 on June 27, 2022. (*See* Pl.’s Mot. to Dismiss as to Case 3708; Pl.’s Mot. to Dismiss as to Case 3709.)⁶ According to Plaintiff, notwithstanding the fact that the order denying the Motion

⁴ (App. pp. 290–96.)

⁵ (App. pp. 297–303.)

⁶ To be clear, although it was not stamped “received” by the Court until July 27, 2022, Appellants’ original notice of appeal (App. pp. 290–96) was in fact served and filed via email on July 26, 2022. *See* Rule 262, SCACR (regarding filing and service); Order No. 2022-05-06-03 (S.C. Sup. Ct. filed May 6, 2022) (regarding Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules). And Appellants’ amended notice of appeal (App. pp. 297–303) was then served and filed, as well as stamped “received” by the Court, on July 27, 2022. Appellants do, however, acknowledge that, while they were both within 30 days of June 27, 2022, July 26 and 27, 2022, were both more than 30 days after June 23, 2022.

to Reconsider was not entered in Case 3709 until June 27, 2022, “Appellants certainly had notice that the Order was entered in both cases on June 23, 2022 by the entry [in Case 3708] of the Order denying their [Motion to Reconsider] that bore both case numbers 2019-CP-42-03708 and 2019-CP-42-03709,” and “[i]t would be disingenuous to assert that the Appellants were not aware that the Order was being entered in both cases.” (Pl.’s Mot. to Dismiss as to Case 3709 at 5.)

ARGUMENT

I. Without question, Appellants’ notice of appeal is timely as to Case 3709.

The time to serve a notice of appeal from the Court of Common Pleas is addressed in Rule 203(b)(1), SCACR, which, in pertinent part, provides as follows⁷:

A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of

⁷ *Service* and *filing* are materially different concepts under the South Carolina Appellate Court Rules. See Rules 203 and 262, SCACR. Although this distinction is somewhat muddled in Plaintiff’s motions to dismiss (*e.g.* Pl.’s Mot. to Dismiss as to Case 3708 p. 3 (citing Rule 203(b) regarding the time for *service* of the notice of appeal but then asserting that Appellants’ notice of appeal is untimely because it was “*filed* . . . on July 27, 2022 – thirty-four days after the entry of the Judge’s Order.”) (emphasis added); Pl.’s Mot. to Dismiss as to Case 3709 (same)), it is clear enough that Plaintiff’s point is to challenge this appeal as untimely *served*, not as untimely *filed*. Accordingly, this return focuses on *service*, not *filing*. Out of an abundance of caution, however, Appellants would note that the time for *filing* a notice of appeal is “within ten (10) days after the notice of appeal is *served*,” Rule 203(d)(2)(B), SCACR (emphasis added), and without question, Appellants’ original (App. pp. 290–96) and amended (App. pp. 297–303) notices of appeal were timely *filed*, because they were both *filed* the same day they were *served*.

entry of the order or judgment. When a timely . . . motion to alter or amend the judgment (Rule[] . . . 59, SCRCPP) has been made, . . . the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.

See also Rule 59(f), SCRCPP (“The time for appeal for all parties shall be stayed by a timely motion under this Rule and shall run from the receipt of written notice of entry of the order granting or denying such motions.”).

“An order is not final until it is entered by the clerk of court; and until the order or judgment is entered by the clerk of the court, the judge retains control of the case.” *Upchurch v. Upchurch*, 367 S.C. 16, 22, 624 S.E.2d 643, 646 (2006), *overruled on other grounds by Miles v. Miles*, 393 S.C. 111, 711 S.E.2d 880 (2011). The time to appeal an order does not begin to run until “written notice that the order has been entered into the record by the clerk of court has been received.” *Id.* at 24, 624 S.E.2d at 647.

As Plaintiff admits, the order denying the Motion to Reconsider was not entered in Case 3709 until June 27, 2022. Nonetheless, Plaintiff asserts that, by virtue of the entry of the order denying the Motion to Reconsider in Case 3708 on June 23, 2022, “the Order *was entered* in both cases on June 23, 2022” and Appellants were “aware that the Order *was being entered* in both cases.” (Pl.’s Mot. to Dismiss as to Case 3709 at 5 (emphasis added).) This is just not so. As a

matter of logic and law⁸ (and, for that matter, equity⁹), the most that can be said of Appellants’ awareness upon the entry of the order denying the Motion to Reconsider in Case 3708 on June 23, 2022, is that Appellants were aware the order *was entered* in Case 3708 but *was not yet entered* in Case 3709. Obviously, Appellants were not aware that the order denying the Motion to Reconsider *was entered* in Case 3709 until in fact the order *was entered* in Case 3709, which was not until June 27, 2022.

Without question, Appellants’ original notice of appeal, served July 26, 2022, and Appellants’ amended notice of appeal, served on July 27, 2022, were both served within 30 days of June 27, 2022. *See* Rule 263(a), SCACR (regarding computation of time).¹⁰ Thus, without question, Appellants’ notice of appeal is timely as to Case 3709.

II. Rather than showing why this appeal should be dismissed as to both cases, Plaintiff’s argument shows why Appellants’ notice of appeal is timely as to both cases.

To be sure, Case 3708 and Case 3709 are inherently linked by their subject matter, and indeed, the circuit court took up both cases together in deciding the

⁸ *Upchurch*, 367 S.C. at 22, 624 S.E.2d at 646.

⁹ *See Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004) (“[C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party”); Rule 1, SCRCPP (civil procedure rules “shall be construed to secure the just, speedy, and inexpensive determination of every action”).

¹⁰ June is a 30-day month. Respectively, July 26 and 27, 2022, were the 29th and 30th days after June 27, 2022.

Principal Motions and the Motion to Reconsider. Appellants agree with Plaintiff that the time for appeal should begin to run at the same time for both cases—but this means that the time for appeal cannot begin to run until the receipt of notice of the last entry of the last appealed order in both cases.

Again, Plaintiff argues that the time for appeal began to run as to both of these companion cases at a time before the last appealed order in the cases, i.e., the order denying the Motion to Reconsider, was even entered in one of the cases. (See Pl.’s Mot. to Dismiss as to Case 3709.) Besides its reliance on the sort of procedural trap our law disfavors,¹¹ Plaintiff’s argument contravenes established law that “[a]n order is not final until it is entered by the clerk of court; and until the order or judgment is entered by the clerk of the court, the judge retains control of the case.” *Upchurch*, 367 S.C. at 22, 624 S.E.2d at 646.

In arguing that the order denying the Motion to Reconsider “was entered in both cases on June 23, 2022” because it “bore both case numbers” in its caption,¹² Plaintiff ignores the plain fact that the very same order was filed on June 27, 2022, too. Because it was expressly drafted so as to be filed in both of these two companion cases, Appellants submit that the order denying the Motion to Reconsider is analogous to a check made out to both of two payees, and that it is

¹¹ See *Elam*, 361 S.C. at 25, 602 S.E.2d at 780; Rule 1, SCRCP.

¹² (Pl.’s Mot. to Dismiss at to Case 3709 p. 5.)

neither logical nor lawful¹³ nor equitable¹⁴ for the time to appeal to begin to run before the order is in fact filed in both cases.

And in any event, as explained above, without question, Appellants' notice of appeal is timely as to Case 3709, because, without question, Appellants' original notice of appeal, served July 26, 2022, and Appellants' amended notice of appeal, served on July 27, 2022, were both served within 30 days of June 27, 2022. Thus, without question, the appealed orders, i.e., the order denying the Principal Motions and the order denying the Motion to Reconsider, which are in fact the same orders in both cases, are properly before this Court for review.

Moreover, even assuming, *arguendo*, this appeal only proceeds as to Case 3709, the underlying right of arbitration which the Facility seeks to vindicate is the same and covers the entirety of Plaintiff's claims against it in both cases, such that if the Facility is successful in obtaining reversal of the circuit court's denial of the Motion to Compel Arbitration in Case 3709, and Plaintiff is therefore compelled to arbitration with the Facility, it will preclude Plaintiff's prosecution of Case 3708 against the Facility by virtue of the doctrine of election of remedies. *See Save Charleston Foundation v. Murray*, 286 S.C. 170, 176–77, 333 S.E.2d 60, 64 (1985) ("The invocation of one remedy constitutes an election of remedies that will bar another remedy consistent therewith where the suit upon the remedy first invoked

¹³ *Upchurch*, 367 S.C. at 22, 624 S.E.2d at 646.

¹⁴ *See Elam*, 361 S.C. at 25, 602 S.E.2d at 780; Rule 1, SCRC.

reached the stage of final adjudication. . . . The [plaintiff] clearly [obtained a recovery arising out of its dispute with the defendants] as a result of the arbitration proceeding. . . . [H]aving obtained through arbitration a recovery on its claim against [the defendants], [the plaintiffs] can no longer sue [the defendants] for fraud, notwithstanding the [plaintiff's] attempt to preserve its fraud cause of action by agreeing to its dismissal 'without prejudice.' . . . A party cannot agree to submit a claim to arbitration, receive a final and conclusive arbitration award, and then relitigate the claim employing a different theory of recovery.”).

CONCLUSION

For the foregoing reasons, Appellants asks this Honorable Court to deny Plaintiff's motions to dismiss this appeal.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines
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Certificate of Counsel

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

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Respectfully submitted,
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