

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP1801775

Kevin White et al
PLAINTIFF(S)

St George Health Care Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):

☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Based upon the Court of Appeals decision in Estate of Solesbee by Bayne v. Fundamental and Operational Services, LLC, 438 S.C. 638, 885 S.E. 2d 144 (Ct. App. 2023), the Court finds and concludes that the Arbitration Agreement and Admission Agreement did not merge and Defendant Sides' and Defendant St. George Healthcare, LLC's motions to compel arbitration based on equitable estoppel are denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 11/02/2023 .

Kevin White Personal Representative
Mary Brisbon Estate

EXHIBIT

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NAMES OF TRADITIONAL FILERS SERVED BY MAIL

RECEIVED
Dec 13 2024
SC Court of Appeals

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Dorchester Common Pleas

Case Caption: Kevin White , plaintiff, et al VS St George Health Care Llc ,
defendant, et al
Case Number: 2022CP1801775
Type: Order/Electronic Form 4

IT IS SO ORDERED.

Heath P. Taylor

Dec 13 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER) FIRST JUDICIAL CIRCUIT

KEVIN WHITE, as personal) NO. 2022-CP-18-01775
representative of the ESTATE OF)
MARY BRISBON)
VS.)
ST. GEORGE HEALTHCARE, LLC, et al)

and

BEVERLY CALLOWAY, as personal) NO. 2023-CP-18-00722
representative of the ESTATE OF)
HATTIE ADMORE)
VS.) TRANSCRIPT OF RECORD
OAKBROOK HEALTHCARE, LLC, et al) Motions

B E F O R E:

The Honorable Heath P. Taylor, Judge

DATE: Monday, October 23, 2023
10:46 a.m.
Saint George, South Carolina

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

Grahame Ellison Holmes, Esquire

Parker Law Group, LLP
Post Office Box 1164
Walterboro, South Carolina 29488
gholmes@parkerlawgroupsc.com
Attorney for the Plaintiff

Russell Grainger Hines, Esquire

Clement Rivers, LLP
Post Office Box 993
Charleston, South Carolina 29402-0993
rhines@ycrlaw.com's
Attorney for the Defendant

Reported by: Cathy J. Provost, RMR, Official Court Reporter

EXHIBIT

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INDEX TO WITNESSES

(No witnesses called.)

INDEX TO EXHIBITS

(No exhibits marked.)

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COURT REPORTER LEGEND:

dash -- intentional/purposeful interruption; change in thought
ellipses ... trailing off
[ph] phonetically written
[sic] written as said
[indiscernible] unable to be understood due to low volume or
quality of audio

-- P R O C E E D I N G S --

CLERK OF COURT: The first motion up is going to be on case No. 2022-CP-18-01775, Kevin White versus St. George Healthcare, LLC. And we have two motions on this case.

THE COURT: All right. What are we hearing first?

ATTORNEY HINES: Your Honor, may it please the Court.

THE COURT: Yes, sir.

ATTORNEY HINES: Russ Hines on behalf of Defendants St. George Healthcare, LLC, d/b/a St. George Healthcare Center, and Vicki Sides. I believe both motions are our motions. We filed them separately but what they are, both of them are substantively identical motions to compel arbitration, is what they are.

And, Your Honor, also out there is another case on your roster this morning, a case called Calloway. And I spoke briefly about this with opposing counsel before, I spoke with him. When that case gets called, what we might do is ask Your Honor to simply incorporate the arguments from this motion into that one just to save the Court time, because they are essentially, in both cases, although they're separate cases, the same arguments will be presented to the Court.

THE COURT: All right. And that's No. 12?

ATTORNEY HINES: I believe that's right, Your Honor.

THE COURT: Okay.

ATTORNEY HINES: But if it pleases the Court, I'll go ahead

1 with the motions in this case, which again is the White case, and
2 they are both motions to compel arbitration.

3 Your Honor, this is a nursing-home malpractice case, and the
4 motions today are made on behalf of both the facility, the
5 nursing-home facility, skilled-nursing facility and its
6 individual defendant, Ms. Sides.

7 Just as a housekeeping-type matter, the arguments that go
8 for the facility also cover Ms. Sides. The basis for that is
9 that the arbitration agreement involved in the case is signed on
10 behalf of the facility and its employees, agents, servants.
11 Ms. Sides is the administrator of the facility, so I say that
12 just to say that I'll be referring to the facility primarily as
13 opposed to Ms. Sides but the arguments go for one and all.

14 THE COURT: I understand.

15 ATTORNEY HINES: Now, Your Honor, we filed a rather
16 extensive memo in support, and there's a lot in there, but what
17 I'd like to focus on in the relatively brief amount of time that
18 we have today is our argument for merger and equitable estoppel.
19 And I want to -- there's plenty an arm on that, but I want to try
20 to hit the main points and then also be available to answer any
21 questions the Court might have, and also, of course, to reply, if
22 I might, briefly to opposing counsel's argument.

23 But, Your Honor, the way to look at this is sort of a
24 one-two punch, if you will, and it's merger and equitable
25 estoppel. And I'll admit to the Court, to prevail I've got to

1 land both punches.

2 And let me explain what I'm talking about in merger. Merger
3 has to do with when this resident was admitted into our facility,
4 Ms. Brisbon, her son, Mr. White, he signed the admissions
5 documents on his mother's behalf. Those documents included both
6 the arbitration agreement and an admission agreement, and so
7 merger is the idea that the arbitration agreement and admission
8 agreement merge under our law and they are to be considered and
9 construed as a single instrument.

10 And the basis for that argument, Your Honor, is a case
11 called *Coleman v. Mariner Healthcare*. There's other authority,
12 too. In fact, *Coleman* cites a case called *Klutts v. Down'Round*.
13 This is cited in our brief, but the point of law in the matters
14 is that when you have multiple instruments that are signed at the
15 same time, by the same parties, for the same purpose, and in the
16 course of the same transaction, our law deems them to merge
17 unless there is evidence indicating a contrary intention; that
18 is, an intention contrary to merger.

19 Now, that is the first punch that I have to land to win my
20 argument, Your Honor. Admittedly, I've got to win both of them.
21 Then you turn to equitable estoppel, and I just want to give you
22 a fairly brief overview before I come back and explain a little
23 bit more about both.

24 Equitable estoppel, Your Honor, there's a principle that's
25 called "direct-benefits estoppel." The best case that, I think,

1 gets into this in our law is a case called *Wilson v. Willis*.
2 It's a fairly recent Supreme Court case. I think it dates back
3 maybe four years now. The bottom line on "direct-benefits
4 estoppel" is you can't have your cake and eat it, too; you cannot
5 enjoy the benefits under a contract that includes an arbitration
6 clause and then deny the enforceability of the arbitration
7 clause.

8 So that's the roadmap, Your Honor: Merger of the
9 arbitration agreement and admission agreement; "direct-benefits
10 estoppel" of the merged agreement.

11 So going back to get a little more meat on the bone of my
12 merger argument, again, Your Honor, the law is multiple
13 instruments signed at the same time, by the same parties, for the
14 same purpose, in the course of the same transaction deem to
15 merge, be considered and construed as a single contract, unless
16 there's evidence of intention contrary to merger.

17 Now, Your Honor, some of the times it's argued against me
18 that you don't have those four boxes checked - time, parties,
19 purpose, transaction. We absolutely do. The admission agreement
20 and the arbitration agreement were both signed in conjunction
21 with the admission of this resident, Ms. Brisbon, at the same
22 time.

23 The case of *Coleman v. Mariner Healthcare* is particularly
24 instructive because in that case there was also a case -- in that
25 case it was the sister of the resident admitting her sister to a

1 skilled nursing facility -- and in *Coleman* the Court found that,
2 yes, indeed, the admission agreement signed, an arbitration
3 agreement signed at the same time when you're admitting someone
4 to a skilled nursing facility -- check all those boxes -- same
5 persons or parties, time, purpose, and transaction.

6 Now, *Coleman* came down against the proponent of arbitration
7 in that case, and it did so on the basis of what I mentioned is
8 the doctrine of merger applies unless there is evidence of an
9 intention contrary to merger. And in the *Coleman* case they
10 looked at the facts of that case, which are materially different
11 than the facts of our case, and said, Well, we don't think there
12 is evidence of an intention contrary to merger and, therefore,
13 the merger rule doesn't apply.

14 And the evidence in *Coleman* was the fact that the
15 arbitration agreement included within it a provision that allowed
16 it to be revoked within 30 days, and also the Court found that
17 there was language in the admission agreement, in the entire
18 provision of that agreement that, on its face recognized a
19 textual -- the *Coleman* court, I think, might have made up a word
20 in this case but it makes sense -- a separatedness, an attempt to
21 keep these documents separate and not merge them, and that was
22 what the *Coleman* court found.

23 In our case we like *Coleman* for the fact that it gives us
24 the law that allows me to argue merger; that is, same parties,
25 same time, purpose, and transaction. We like *Coleman* in that

1 Coleman says that, yes, you have all those boxes checked, those
2 four boxes, in the context of a nursing-home admission like this,
3 and the arbitration and admission agreement signed at the same
4 time.

5 Where we part company from *Coleman* is on these factual
6 distinctions that were present in *Coleman* but are not present in
7 this case. Now, in *Coleman*, as I mentioned, there was the
8 ability to revoke the arbitration agreement in 30 days. We don't
9 have that, we don't have the ability for the arbitration
10 agreement to just simply just disappear as though it's not there.
11 It doesn't have a -- there's no revocation clause.

12 Also, on this issue of the entire agreement provision and
13 what *Coleman* found in that case to be a textual -- the basis for
14 finding a separateness between admission agreement and
15 arbitration agreement, well, in our case the admission agreement
16 does have an entire agreement provision, but what it says is very
17 much different than what you had in the *Coleman*, but ours
18 specifically recognizes what I would call a connectedness to the
19 other documents. And here's the language: "The undersigned
20 forever acknowledges that he/she has received and read the
21 admission handbook and other admissions materials, and
22 understands these documents are made part of this agreement by
23 reference herein."

24 That language here, referring in particular to other
25 admissions materials, we submit, reaches out and grabs the

1 arbitration agreement and makes this case different than the
2 *Coleman* case because, yes, while we have an entire agreement
3 clause, this entire agreement clause is more expansive, it looks
4 outward beyond the four corners of this document, it specifically
5 refers to other admissions materials, and those materials would
6 include the arbitration agreement which was signed, again, in
7 conjunction with admission.

8 We cite a couple cases in our memo. There's a case called
9 *Stott v. White Oak Manor*; another case called *Hodge* -- I forgot
10 the defendant in the case right now. But both of them in just
11 plain or ordinarily language would reflect the fact that an
12 arbitration agreement that is signed in conjunction with the
13 admission is among the admissions paperwork which, again, we
14 believe it goes, it jives, with this other admissions-materials
15 language.

16 And I don't mean to misrepresent to the Court or run the
17 risk of doing that. I'm not saying that in *Stott* or in the *Hodge*
18 case the Court expressly looked at that language and held as
19 such, but just in stating the facts of those cases -- and we cite
20 the exact quotes, and I won't read them now, but -- the Court is
21 explaining the facts of the case and says so-and-so admitted his
22 relative in the facility and signed an admission agreement and
23 other admissions documents, including an arbitration agreement.

24 Just in the sort of common parlance, understanding that, as
25 we understand, as the term admission -- other admission materials

1 is not defined, my point is to say that those decisions recognize
2 that it is plain and ordinary language that what we are
3 describing here falls within what people, in plain language,
4 would consider to be part of the admissions materials, it's
5 documents signed in conjunction with the admission.

6 So that's the major point there on, what I'll call, the
7 *Coleman* and related case law. There are a couple cases -- I
8 mentioned *Hodge*. *Hodge* is another case that comes down against
9 the proponent of arbitration. There's another one called
10 *Thompson*. We explained some differences between those cases in
11 our brief. And I realize this is -- every time I've made this
12 argument I have pity for the Court and for certainly the court
13 reporter because it requires me to go through quite a lot of by
14 way of, I guess, explanation, but we do get into more granular
15 detail in the memo.

16 But the bottom line is that in *Coleman* and *Thompson* and
17 *Hodge*, in all those cases we were dealing with different language
18 in the arbitration agreement and the admission agreement than
19 we're dealing with in this case, or this type of case, because
20 I've argued this motion a number of times based upon these
21 admissions material documents, these particular arbitration
22 agreement and particular admission agreement.

23 One thing I have to acknowledge is that more recently
24 there's a case called *Solesbee* that's a Court of Appeals case. I
25 think it came down just in January of this year and, in fact, we

1 have a pending petition for a writ of certiorari before the
2 Supreme Court now. Now, in *Solesbee*, I have to acknowledge that
3 the *Solesbee* case dealt with identical arbitration agreement and
4 admission agreement to what I'm arguing to Your Honor today, and
5 it ruled against me and said that, no, there's no merger. The
6 *Solesbee* case did not go so far -- because the Court found
7 against us on merger, it didn't go so far as to consider the
8 equitable estoppel argument.

9 And as I mentioned at the outset, I've got to go to land
10 both punches, because if you don't go with me on merger I don't
11 have anything to argue on equitable estoppel because my argument
12 relies upon a merged admission and arbitration agreement and,
13 therefore, the resident in this case, Ms. Brisbon, receives
14 benefits, room, board, various services, various treatments about
15 which are not complained about in the case, so there's certainly
16 benefits that were received, but to get those benefits I need to
17 merge the admission agreement and the arbitration agreement.

18 But, and even in *Solesbee*, we explained our qualms with
19 *Solesbee* respectfully and how the Court of Appeals, when pursuing
20 this on a writ of cert, where we're asking for the court to grant
21 a writ of cert, about how the basis on which the Court of Appeals
22 found against us on merger in *Solesbee* respectfully are -- well,
23 they are not -- they're erroneous. And so we're having to
24 acknowledge that there is *Solesbee* out there, Your Honor, and
25 then also we think that the grounds upon which the *Solesbee* court

1 found against us on merger are mistaken, but also the *Solesbee*
2 court never fully addressed our reasoning.

3 THE COURT: So if I'm hearing you correctly, there's a Court
4 of Appeals opinion directly on point contrary to your position?

5 ATTORNEY HINES: Your Honor, the only caveat -- and I'll get
6 to that -- is this.

7 THE COURT: With the same document?

8 ATTORNEY HINES: The same documents. As far as to say --
9 and that's why obviously we need to bring this case to your
10 attention.

11 THE COURT: I mean, I understand you need to make your
12 record, but I certainly don't get to overrule the Court of
13 Appeals.

14 ATTORNEY HINES: That's certainly true, Your Honor, and I
15 wouldn't suggest that you do and have the ability to do that.
16 And the reason why, what our point is, my only hesitation is for
17 the idea directly on point, meaning that in a way that's true in
18 that it was the same documents, we're arguing merger, we're
19 arguing estoppel, the court in *Solesbee* didn't get to equitable
20 estoppel.

21 The only, I guess, caveat I need to bring is that we don't
22 feel, respectfully, that the Court of Appeals actually dealt with
23 every one of the distinguishing features that we would argue.
24 The Court of Appeals ruled against us, but we feel like when you
25 make a petition for re-hearing and then a petition for certiorari

1 you argue that the Court of Appeals misapprehended, or
2 overlooked, certain of your arguments, and we do feel that the
3 court did that, most respectfully.

4 And so there's perhaps a gray area in there where we're
5 talking about the Court of Appeals' misapprehension of what we
6 consider that to be where you could distinguish this case from
7 the *Solesbee* case on the basis of your consideration of
8 differences that the Court of Appeals, we would argue, didn't
9 appreciate.

10 But, yes, Your Honor, I -- well, I'm just trying to leave a
11 little room for nuance there, but we have to acknowledge that
12 *Solesbee* is a significant headwind that's blowing against us,
13 going against our position. And I probably would say that I
14 could leave it at our briefing, which begins on page 34 of our
15 brief and runs through, oh, page 39. It would save time to
16 simply say we explain why *Solesbee* should not control the
17 disposition of this current case, Your Honor, and I think
18 probably do it better there in writing than I can do it now
19 trying to just hit the high points. I'd be happy, if Your Honor
20 would appreciate me to try to do it via oral argument, I'd be
21 happy to do that. Otherwise, in the interest of time, I can -- I
22 can simply -- well, if the Court would allow me a brief reply to
23 opposing counsel's argument, then I can rest on what we've
24 written.

25 THE COURT: Certainly.

1 ATTORNEY HOLMES: May it please the Court.

2 THE COURT: Yes, sir.

3 ATTORNEY HOLMES: Your Honor, Gray Holmes with the Parker
4 Law Group on behalf of the plaintiffs, along with Caitlin Pope
5 who wrote our briefs on this issue.

6 Your Honor, because we're dealing with the third-party
7 beneficiary aspects and that rest on whether or not there's a
8 valid contract, both the estoppel and the third-party beneficiary
9 arguments, you have to have a valid contract to get there, I'm
10 going to have to go through a little bit more than just the
11 merger and that argument.

12 THE COURT: Okay.

13 ATTORNEY HOLMES: And first I'm going to start with -- I'm
14 having trouble trying to figure out whether or not I can see from
15 here.

16 THE COURT: The struggle is real.

17 ATTORNEY HOLMES: First, a little bit of background of just
18 what the burden of proof in an arbitration issue is. First,
19 before we get to some of the preemption issues and some of those
20 issues, the Court first has to determine that there is, that the
21 arbitration agreement that's been executed is actually a binding
22 contract. And the defendant bears the burden of proof on that
23 issue, and the Court actually applies a summary judgment standard
24 to determine if there is a genuine issue of fact as to the
25 enforceability of the contract. And that's the *Aiken v. World*

1 *Finance* case, Your Honor.

2 In this case the defendants just haven't put forth any sort
3 of evidence to support the motion to create an issue of fact or
4 to satisfy their burden. And one of the issues here as to
5 whether or not the contract would be enforceable is whether or
6 not it was actually signed by an agent of Ms. Brisbon. And in
7 this case the arbitration agreement, which was a standalone
8 agreement, was signed by her son, Kevin Smith. Now, Kevin Smith
9 did not have a power of attorney; he did not have a healthcare
10 power of attorney; the only power that he had would have come
11 from the Adult Healthcare Consent Act.

12 And, Your Honor, in the *Coleman* case that you've been --
13 that's been discussed, it lays out the powers that the Adult
14 Healthcare Consent Act confers on an agent, and those powers are
15 limited, they're limited to healthcare decisions and financial
16 decisions.

17 And in both the *Coleman* case and the *Thompson* case, Your
18 Honor, they both state that healthcare and financial decisions do
19 not extend to an authority to enter into an arbitration
20 agreement; they do not give you a right to surrender a person's
21 constitutional right to a jury trial.

22 And the Adult Healthcare Consent Act also sets out priority
23 for agents. Kevin Smith is the son of Mary Brisbon. We have
24 provided you with the death certificate for Ms. Brisbon who lists
25 her husband, Martin Brisbon, as having survived her. Under that

1 act, he has priority over the son to act as her agent in that
2 decision. So even though that act wouldn't give him authority to
3 sign an arbitration agreement, Kevin Brisbin wasn't even the
4 proper -- or Kevin Smith, excuse me -- wasn't even the proper
5 agent under the act, the adult healthcare act, Your Honor.

6 And further, Section (B) of the act provides that the
7 defendant must document the efforts they make to identify the
8 people of record that are of priority, and they must include that
9 in the medical record, and there's no proof here that they did
10 that, so there's no authority there under the adult healthcare
11 act.

12 Now going to merger, Your Honor, if you look at the *Thompson*
13 *v. Pruitt* case which Mr. Hines correctly stated, that in the
14 absence of anything indicating a contrary intention, contract
15 signed at the same time, by the same parties, for the same person
16 can be merged together into one contract. And he's right, this
17 was signed, these two agreements were signed, at the same time,
18 the parties are the same, and the purpose of those agreements
19 were to have the mother admitted and receive care there at the
20 facility. But there is language in both the arbitration
21 agreement, which stands alone, and in the admission agreement
22 that both state that they're intended to be viewed as separate
23 documents.

24 And also, Your Honor, any ambiguity as to what the
25 intentions are in these contracts are to be construed against the

1 drafter which, in this case is the facility, but one of the
2 reasons that they should be construed against -- or, as separate
3 documents and their intention is -- how their intention is shown
4 that they intend for them to be construed as separate documents
5 is in the arbitration agreement they state "this agreement shall
6 remain in effect for all care rendered at the facility and shall
7 survive any termination or breach of this agreement or the
8 admission agreement."

9 So by that very sentence, they're saying, Look, even if you
10 terminate the admission agreement in this case, then the
11 arbitration agreement still stands on its own. So by their very
12 terms they're absolutely recognizing that these two contracts are
13 separate contracts, and they're reserving their rights to enforce
14 one if they decide to terminate the other.

15 Now, it also was pointed out to you that in the *Coleman* case
16 there was a right to terminate the admissions agreement within 30
17 days and there was not a provision that allowed for the
18 termination of the arbitration agreement within 30 days. Well,
19 actually there is a provision that allows -- excuse me, I have
20 that reversed. There was a provision in the arbitration
21 agreement that allowed for it to be terminated within 30 days but
22 not the admissions agreement.

23 In this case we have the same thing. We just have them
24 reversed. If you look at the admissions agreement which has been
25 submitted, it states on page 10 that the facility maintains the

1 right to unilaterally modify or terminate the admissions
2 agreement. So for the same reasons in *Coleman* -- it's just
3 flip-flopped as to which agreement reserved that right -- they're
4 having that -- they're keeping that right to terminate the
5 agreement.

6 Your Honor, we've made some arguments as to equitable
7 estoppel. I don't think that it's really necessary. We can rely
8 on our briefs as to those issues because I don't think they've
9 really been addressed. But, Your Honor, so those are the grounds
10 that we don't believe the two contracts merge.

11 And as far as the apparent authority which, I believe, was
12 mentioned in their brief, one thing here, when Ms. Brisbon was
13 admitted to the facility she suffered from dementia, so she had
14 no ability to make any representations to anybody, and it's not
15 been asserted that she did. There's no evidence and, of course,
16 they carry the burden of proof on that issue.

17 When looking at apparent authority, if you'll look at the
18 *Cowburn v. Leventis* case, Your Honor, the focuses are on the
19 principal's actions, not on the agent's actions, so Ms. Brisbon
20 would have had to have made some sort of statement or some sort
21 of action representing this to be, Kevin Smith to be, her agent,
22 and there's absolutely no evidence of that and it couldn't have
23 happened because she had dementia and couldn't communicate
24 properly and that's why she was going into a nursing home.

25 And, Your Honor, as to the third-party beneficiary argument,

1 under the *Thompson* case you have to have a valid contract to have
2 estoppel or the third-party beneficiary, and when the merger
3 argument fails, which it must because of the plain language of
4 the arbitration agreement, that argument fails as well.

5 Your Honor, lastly, we'd just point out the *Solesbee* case is
6 good law and it's directly on point until the Supreme Court says
7 otherwise, so that is the authority in the case.

8 The *Coleman* case, the *Thompson* case, the *Hodge's* case, all
9 those cases that have been relied on, they all, on similar
10 arguments, nearly directly on point, ruled against the proponent
11 of arbitration in basically identical circumstances.

12 And the orders that have been submitted -- and it's my fault
13 and not Mr. Hines, I didn't receive -- his memo was submitted on
14 Friday and because I'm covering for somebody, I just wasn't on
15 the list to get it, so I've only been able to brush through that
16 memo and the orders that were provided in support of it, but all
17 the orders predate *Solesbee*; most of them predate the *Thompson*
18 case, the *Coleman* case, and the *Hodge's* case.

19 And if Your Honor would like additional circuit court
20 orders, we have many that we can provide. In this case we're in
21 sort of a different situation because we've got a blank motion
22 just stating they're moving to compel arbitration. We then
23 submitted our memorandum in opposition just anticipating what the
24 arguments were going to be because we've had plenty of these
25 against one another, and then we got a response to theirs at that

1 time so we didn't include those orders, but if the Court would
2 like them then we certainly can provide them.

3 Your Honor, as far as the Calloway case that we were talking
4 about where the arguments are virtually identical, we're dealing
5 with the exact same arbitration agreement and the exact same
6 admission agreement. The only difference is in that case the
7 agreement was signed by the daughter and there were multiple
8 other children.

9 If you look at the priorities under the healthcare consent
10 act, the children have to get together and vote, there has to be
11 a majority of the children that consent to it, that has to be
12 recorded in the medical records, and that wasn't done. And that
13 would be essentially the only change in the arguments that I
14 believe either one of us would have as to in that regard. So as
15 we were able to incorporate our arguments for both of those, then
16 you can avoid having to hear from us for another 30 minutes.

17 THE COURT: Okay.

18 ATTORNEY HINES: Your Honor, briefly, and I'll start right
19 where Mr. Holmes began. Yes, we are certainly fine with the
20 benefits for judicial economy of not replaying all this,
21 specifically in the Calloway case, so long as our record shows
22 that the arguments we put forth here today in the White case will
23 also be considered to have been made in the Calloway case because
24 we argued the same arguments and issues.

25 THE COURT: Right.

1 ATTORNEY HINES: But, Your Honor, just briefly trying to
2 kick off a few points, and I want to be clear that the argument
3 that we're making for merger and equitable estoppel is not an
4 argument that requires there to be a valid contract. That is the
5 point of estoppel and the equitable device that allows you to --
6 what it does is it actually prevents the opponent of the
7 enforcement of the contract from arguing that it is not
8 enforceable, that it is not valid. There's what it estops, it
9 estops that on the basis of equitable considerations that would
10 make that inequitable.

11 So I understand opposing counsel's arguments about authority
12 and the Adult Healthcare Consent Act. And maybe to clean things
13 up a little bit for Your Honor's benefit and just for opposing
14 counsel's, as well, we don't rely on the Adult Healthcare Consent
15 Act providing authority here to either the son in this case or
16 the daughter in the Calloway case. It's perfectly true that in
17 the *Coleman* case that argument was made and rejected, and as far
18 as the Adult Healthcare Consent Act provided the authority to
19 re-arbitration, we agree that it does not and so we can dispense
20 with that.

21 The idea of authority, again, it's not essential to our
22 estoppel argument because, again, if our estoppel argument
23 prevails, that estoppel argument estops the opponent of
24 arbitration from denying enforceability on the basis of an
25 equitable consideration, because obviously if we had an

1 enforceable contract then we wouldn't need estoppel to get us
2 there. So estoppel operates in a world where you don't have an
3 enforceable contract, so that's -- I would just make that point.

4 And then the last thing I guess I'd mention is about the
5 idea of termination and showing some -- providing evidence of an
6 intention contrary to merger. Here's a case that we cite in our
7 brief, it's called *Hooters of America v. Phillips*. And I'm
8 quoting, "Under South Carolina arbitration law, the duty to
9 arbitrate under an arbitration clause in a contract survives
10 termination of the contract."

11 Well, this idea of termination, that the arbitration
12 agreement survives termination of the admission agreement, that's
13 just how arbitration agreements work, and that's the way they
14 work even when they're included in the very same document,
15 meaning that we have here a situation here where we do have two
16 instruments, one, an arbitration agreement, one, an admission
17 agreement. That's not always what you have.

18 For instance, in this very case you have a situation where
19 you have an admission agreement that includes within the same
20 instrument an arbitration clause. The law is that the
21 arbitration component survives termination of the rest, and,
22 again, that would be the same whether it's separate instruments
23 or a single instrument. And so on that basis I don't see how
24 that provides any evidence of an intention contrary to merger
25 when you're always going to have the arbitration clause held out

1 as not being terminated at the same time as the rest of the
2 contract. That's, again, how arbitration clauses work.

3 Only one very last thing I would mention, Your Honor,
4 because I see where it's briefed in opponent's response, which is
5 that this is a case where we have wrongful death and survival
6 claims, and the argument is that even if Your Honor were to
7 compel arbitration as to the survival claims, the wrongful death
8 claims could not be compelled to arbitration because essentially,
9 as I understand it, because the wrongful-death beneficiaries
10 themselves would not have signed an arbitration agreement and you
11 would have no basis to apply an estoppel argument, for instance,
12 as to them. Our response to that is to say that that analysis
13 would be true if you didn't have this derivative nature of the
14 wrongful death claim.

15 And I know I need to be a little bit careful here in terms
16 of the wrongful death claim as far as -- this the part where I
17 mean derivative -- is that any defense that would be good against
18 the decedent; for instance, well, if you had comparative
19 negligence, or if you had a situation where you have an accident
20 and the decedent, before they died, signed a full and complete
21 release of everything and then happen to pass away sometime
22 later, and there was an argument that could be made that the
23 death was actually caused by the accident, well, if they tried,
24 if the estate tried, to bring a wrongful death claim in, you'd be
25 able to take the release and say to the estate, You don't have a

1 claim because the decedent waived that.

2 Well, in the same way that those defenses would work against
3 the decedent, they also work against the estate, so my point is
4 that that analysis that would say that wrongful death claims are
5 not, would not be, subject to arbitration -- and again, that
6 argument in this case is even if you find that the survival
7 claims should be compelled to arbitration, wrongful death should
8 be held out and not compelled, we disagree with that because if
9 you find that arbitration should be compelled as to the survival
10 claim, your doing that would be based upon the idea that the
11 resident and therefore in turn their estate is subject to
12 arbitration, and that would be all you need to find to find that
13 the wrongful death claim is subject to arbitration.

14 This is where I can try to wrap it up. I would also note in
15 that regard the wrongful death claim obviously cannot be brought
16 by wrongful-death beneficiaries anyways; statutorily it's
17 required to be brought by the personal representative of the
18 estate. So it's not like the claim actually belongs to those
19 beneficiaries anyways. They might be the beneficiary to recover
20 the claim, but the claim is not one they, themselves, could
21 assert.

22 And I guess the very last thing I'd make on this point is
23 that this is an arbitration agreement that is subject to the
24 Federal Arbitration Act, the FAA, and that's because it is an
25 agreement that involves a transaction -- a transaction involving

1 interstate commerce.

2 We also have a case called *Dean v. Heritage Healthcare* which
3 makes it clear that an arbitration agreement signed in
4 conjunction with nursing-home admissions are -- they implicate,
5 or the FAA, because those contracts involve interstate commerce,
6 you cannot have -- under the FAA, you cannot have a rule that
7 singles out arbitration agreements for disfavored treatment.

8 And our final position on this issue of wrongful death not
9 being able to be compelled to arbitration is that to have a rule
10 that require all of the wrongful death beneficiaries to agree to
11 arbitration would essentially be a rule that singles out
12 arbitration disfavored treatment, and that would violate the
13 FAA's rule that requires arbitration agreements to be placed on
14 equal footing with all other contracts under state law.

15 I realize, Your Honor, that's quite a mouthful to say in
16 closing, but I think those are the only points that I wanted to
17 make, and otherwise we would just rest on our brief. Thank you.

18 THE COURT: Okay. Mr. Holmes, you got anything else to add?

19 ATTORNEY HOLMES: Your Honor, just very briefly since I
20 didn't -- I skipped the equitable estoppel argument. The burden
21 of proof as to equitable estoppel is also on the proponent of
22 arbitration, and what they would have to show is that the party
23 to be estopped made -- that they either said something or acted
24 in a way that amounted to a false representation that was
25 intended to be relied on, and that they had constructive notice

1 of the facts that were contrary. Of course, there's no evidence
2 to support those elements.

3 And then also as to the party that's asserting estoppel,
4 what they have to prove is that they lack knowledge, or the means
5 of knowledge, to ascertain the truth as to those facts, that they
6 relied on the contract of the other people and they had a
7 prejudicial change in position, there's no evidence to support
8 any of those facts.

9 But, also, Your Honor, they had a means of acquiring the
10 information. All they had to do was ask the son, Who are your
11 relatives?, which they're required to do under the act, and they
12 could also just say, Do you have a healthcare power of attorney?,
13 Do you have a power of attorney?, Show it to us. It actually
14 says in their admissions agreement that they're required to give
15 them those documents, so they absolutely have the means of
16 acquiring any information as to whether or not Mr. Smith had
17 authority, as well as Ms. Calloway. And those arguments are also
18 addressed in the *Coleman* and *Thompson* cases.

19 ATTORNEY HINES: Your Honor, if I'm at the risk of trying
20 your patience --

21 THE COURT: No, you're fine.

22 ATTORNEY HINES: I'll keep it under a minute. What
23 Mr. Holmes said about the test for estoppel, that's called a
24 traditional six-factor test, and I think it is in their brief.
25 That's addressed in a case called *Wilson v. Willis*. In *Wilson v.*

1 *Willis*, in that case it supports the application not of that
2 six-factor test but of the direct-benefits test. The
3 direct-benefits test doesn't have the same elements as the test
4 that Mr. Holmes was just mentioning; it is a test of receiving
5 direct benefits -- and we explained this in our brief -- it's
6 receiving direct benefits under a contract and then at the same
7 time trying to deny the enforceability of an arbitration clause
8 in that same contract.

9 And again, the same-contract part comes into my merger
10 argument, so you have to go with me on merger to get beyond
11 estoppel, just to be clear.

12 The other last little thing about asking him, Mr. White in
13 this case -- and the same would go for in the Calloway case --
14 the signatory, the last line of the arbitration agreement reads:
15 "By his/her signature below, the executing party represents that
16 he/she has the authority to sign on resident's behalf so as to
17 bind the resident, as well as the representative."

18 We don't take the position that that language gives us proof
19 positive of authority, but it does give us proof positive that
20 they represented their authority to the facility, because under
21 our law if you sign something it is assumed that you read,
22 understood, and agreed to what you signed. And that was signed.
23 It's just a one-page document. So they did represent in both
24 cases the authority to do that.

25 And again, we don't claim that means that they did, in fact,

1 have authority, but it certainly means that that doesn't cut
2 against us in any kind of estoppel sense --

3 THE COURT: Let me stop you there because I do have a
4 question about that. If the plaintiff is correct and he did not
5 have authority to sign the document, how do you get off square
6 one?

7 ATTORNEY HINES: Because the nature of the estoppel argument
8 is one that allows us to overcome that problem. If we were
9 arguing to Your Honor -- estoppel is a device that allows us to,
10 based upon equitable considerations, estop the opponent from
11 arguing against enforceability. I mean, I understand -- so it's
12 two different tracks. One track would be, Yep, he's got
13 authority, he signed a binding arbitration agreement and,
14 therefore, just enforcing the contract just sort of straight-up.

15 The estoppel argument is, all right, even if there was not
16 authority and even if this is not a valid agreement that is
17 enforceable per se, you, opponent of arbitration, cannot stand up
18 and complain about that; you're estopped to do so because equity
19 steps in.

20 THE COURT: Because they got the benefits of the contract.

21 ATTORNEY HINES: Correct.

22 THE COURT: Okay.

23 ATTORNEY HINES: And thank you very much for your
24 indulgence, Your Honor. I realize I rambled a little bit long --

25 THE COURT: Not a problem.

ATTORNEY HINES: -- but hopefully we combined this case with Calloway and maybe saved a little bit of time.

THE COURT: Okay. Anything else?

ATTORNEY HOLMES: Thank you, Your Honor.

ATTORNEY HINES: No, thank you.

THE COURT: All right. We'll look at everything and let you all know something.

(End of Transcript of Record.)

CERTIFICATE OF REPORTER

I, Cathy J. Provost, Official Court Reporter for the Fourteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial/proceedings of the captioned case in the Court of Common Pleas for Dorchester County, South Carolina, on the 23rd day of October, 2023.

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

Date: June 16, 2024

\s\ Cathy J. Provost
Cathy J. Provost, RMR
Official Circuit Reporter

EXHIBIT

1

RESIDENT NAME:

RESIDENT NUMBER:

DATE OF ADMISSION:

ADMISSION AGREEMENT – SOUTH CAROLINA

Dec 13 2024

SC Court of Appeals

Mary Brisbon

4-21-19

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among St. George Healthcare Center ("Facility"), Mary Brisbon ("Resident") and/or _____ ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative").

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

I. GENERAL CONDITIONS

1. **Inducement:** Resident and/or Representative verifies that all information submitted to Facility, including without limitation, financial information, medical history and medical diagnosis, is true and correct and acknowledges that providing false information constitutes a breach of this Agreement.
2. **Personal Property:** It is understood that Facility is not responsible for either damage to or theft/loss of Resident's valuables, monies or clothing unless the item(s) are held in trust by Facility and the damage, theft, loss was caused by the negligent or willful conduct of Facility personnel. Personal property will not be considered to be held in trust unless the policies and procedures outlined in the *Admission Handbook*, which is made a part of this Agreement by reference herein, and any future amendments thereto, have been followed. Facility reserves the right to prohibit certain personal effects, funds or other property in accordance with state and federal law. Facility is not liable for either damages to or theft/loss of any personal belongings or personal care items, such as dentures, hearing aides and eyeglasses, except with respect to damage, theft or loss caused by the negligent or willful conduct of Facility personnel.
3. **Emergency Care:** In case of an emergency and Resident's personal physician is not available, Resident and/or Representative allows Facility to retain a physician on Resident's behalf. The physician will bill Resident directly and Facility will not be responsible for payment of the bill for such service.
4. **Representative:** When Resident has a Representative, Representative will act on Resident's behalf for all purposes permitted under applicable law. Representative will pay all fees and charges incurred hereunder by or on behalf of Resident using proceeds from Resident's assets or estate. Representative may act in more than one capacity and will be bound by the applicable terms and conditions of this Agreement. Except when Representative has access to Resident's assets, or as otherwise expressly provided to the contrary herein, or as permitted by state or federal law, Representative will not become personally liable for the payment of Resident's fees and charges by signing this Agreement. To the extent possible, Resident acknowledges and consents to the execution of this Agreement by Representative.
5. **Terms and Conditions:** By signing this Agreement, Resident and/or Representative agree(s) to comply with all terms and conditions set forth in this Agreement and Facility's policies, as same apply and as may change from time to time.

Original: Business File • Photocopy: Resident/Representative

II. AGREEMENT FOR CARE

A. FACILITY AGREES TO:

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

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 \$ 255.00 per day, payable one month in advance. In the event Resident is unable or unwilling to receive any of the services included in the room and board charge, such as meals, laundry, etc., no adjustment will be made to the daily rate. Payment for all invoices is due upon receipt. In the event public aid funds are denied for services for which coverage has been expected, Resident and/or Representative will be responsible for payment and will pay such charges upon receipt of invoice. Resident and/or Representative agree(s) to pay any rate change charged to Resident so long as each party to this Agreement is given at least thirty (30) days written notice of the new rate, including any increases or adjustments in Resident's liability by any financial third party or regulatory agency. Additional notice may be provided under applicable state regulations.

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

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

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

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.

Original: Business File • Photocopy: Resident/Representative

2. **Ancillary Services.** Resident and/or Representative may purchase services and products that are not included in Routine Services from Facility. An itemized list of fees for these additional services and products is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office. Resident and/or Representative shall pay for ancillary services at the end of the month in which such services are rendered.

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

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

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

VIII. NOTICES

All notices, consents, approvals and the like required to be given hereunder shall be given in writing to Facility to the address below or such other address as Facility may designate:

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

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

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

Kevin White 4-26-19
Signature of Representative, if any Date

Printed Name of Representative

Witness Signature Date

Printed Name of Witness

Representative Social Security No. (Voluntary Info.)

[Signature]
Signature of Facility Official

[Signature]
Printed Name of Facility Official & Title

4-26-19
Date

Original: Business File • Photocopy: Resident/Representative

EXHIBIT

2

PLEASE READ CAREFULLY

RECEIVED

Dec 13 2024

FACILITY - RESIDENT/REPRESENTATIVE
ARBITRATION AGREEMENT

SC Court of Appeals

This Agreement is made between St. George Healthcare ("Facility"), its agents, employees and servants, and Mary Brishon ("Resident") or Mary Brishon ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative"). It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.

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

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

The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry. If the parties cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court. The arbitrator shall hear and decide the controversy, and the decision shall be binding on all parties, and may be enforced by a court of competent jurisdiction.

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

I understand and agree that I am giving up and waiving my right to a jury trial.

This Agreement shall remain in effect for all care rendered at Facility and shall survive any termination or breach of this Agreement or the Admission Agreement. By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.

X Kevin White 4-24-19
Resident/Representative Signature Date

Printed Name of Resident/Representative

[Signature] 4-24-19
Authorized Agent of Facility Date

Printed Name & Title

DEFENDANT'S
EXHIBIT

2

Original: Business File • Photocopy: Resident/Representative

Dec 13 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

KEVIN WHITE, AS PERSONAL
REPRESENTATIVE OF THE ESTATE
OF MARY BRISBON.,

v.

ST. GEORGE HEALTH CARE, LLC,
D/B/A ST. GEORGE HEALTHCARE
CENTER and VICKI SIDES

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2022-CP-18-

Summons
(Jury Trial Requested)



TO THE ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at Post Office Box 457, Hampton, SC 29924, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

-Signature Page to Follow-

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: s/Lee D. Cope

Lee D. Cope
SC Bar # 14361
P.O. Box 457
Hampton, SC 29924
(803) 943-2111

AND

Bright Matthews Law Firm, LLC
Margie Bright Matthews, Esquire
SC Bar # 13200
P.O. Box 499
Walterboro, SC 29488

ATTORNEYS FOR THE PLAINTIFF

November 18, 2022.
Hampton, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CIVIL ACTION NO.: 2022-CP-18-
KEVIN WHITE, AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF MARY BRISBON.,	)	
	)	
	)	Complaint
	)	(Jury Trial Requested)
v.	)	
	)	
ST. GEORGE HEALTH CARE, LLC,	)	
D/B/A ST. GEORGE HEALTHCARE	)	
CENTER and VICKI SIDES	)	
	)	

COMES NOW the Plaintiff above named complaining of the Defendants alleges and says as follows:

1. The Plaintiff, Kevin White, as Personal Representatives of the Estate of Mary Brisbon, seek a jury trial pursuant S.C. Code Ann. §15-51-10, the Wrongful Death Act, and other applicable statutory and/or common law other applicable statutory and/or common law and seek a jury trial pursuant to the Survival Action of South Carolina, S.C. Code Ann. §15-5-90 *et seq.* on behalf of the Estate for conscious pain and suffering of the deceased for all damages authorized by said statute.

2. That upon information and belief, Defendant St. George Health Care, LLC d/b/a St. George Healthcare Center is a Delaware corporation with its principal place of business in the County of Dorchester, South Carolina. At the time of the acts complained of, St. George Healthcare Center was a skilled nursing home facility.

3. That upon information and belief, Defendant Vicki Sides is a resident of Dorchester County State of South Carolina. Upon information and belief, she was the administrator of the Defendant St. George Healthcare.

4. On April 24, 2019, Mrs. Brisbon was admitted to St. George Healthcare Center. On admission the skin assessment noted a deep tissue injury to her left heel and left lower buttock.

5. On June 4, 2019, Mrs. Brisbon had 3 small open area to her sacrum.

6. On July 3, 2019, Mrs. Brisbon was noted to have a left knee “growth” and a Stage III sacral wound.

7. On July 22, 2019, the sacral wound was a Stage IV.

8. On August 7, 2019, an assessment showed a wound on her left ischium measuring 4cm x 4cm x 1 cm.

9. On August 14, 2019, Mrs. Brisbon was sent emergently to Colleton Medical Center due to hypotension and severe hyperthermia.

10. Mrs. Brisbon was diagnosed with severe sepsis due to infected sacral wound, dehydration, severe calorie-protein malnutrition and acute kidney injury due to the sepsis. She was treated aggressively with IV antibiotics and readmitted to St. George Healthcare.

11. On September 6, 2019, Mrs. Brisbon was readmitted to Colleton Medical Center for severe sepsis. The admission assessment showed she had a right hip unstageable pressure injury, right ischium Stage IV pressure injury, left ischium unstageable pressure injury and multiple wounds to her right and left leg and feet were covered in eschar.

12. On September 17, 2019, Mrs. Brisbon was readmitted to St. George Healthcare Center. On admission, she was noted to have pressure injures to 13 areas.

13. On September 20, 2019, Mrs. Brisbon was transferred to Trident Medical Center and diagnosed with pneumonia.

14. On September 26, 2019, Mrs. Brisbon was admitted to Vibra Hospital for further treatment of pneumonia.

15. On November 6, 2019, Mrs. Brisbon was admitted to Riverside Health & Rehab.
16. On November 14, 2019, Mrs. Brisbon passed away.

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence)

17. While in the Defendants care, custody and control, Mrs. Brisbon did suffer grave and severe injuries and humiliation at the facility as a direct and proximate result of the following negligent, reckless, willful, careless, negligent per se and grossly negligent acts of the Defendants, combining and concurring:

- a. In failing to provide oversight of Mrs. Brisbon's safety and dignity;
- b. In failing to exercise due care, including without limitation, failing to care for Mrs. Brisbon;
- c. In failing to provide appropriate administrative oversight and management to assure Mrs. Brisbon was appropriately cared for;
- d. In failing to realize Mrs. Brisbon needed a higher level of medical care;
- e. In failing to conduct an assessment of Mrs. Brisbon's change in condition;
- f. In failing to communicate with appropriate staff to advise of a potential need of a higher level of care;
- g. In failing to exercise reasonable care for the safety and well-being of Mrs. Brisbon under the circumstances;
- h. In failing to monitor for and prevent infection;
- i. In failing to implement appropriate dehydration and malnutrition preventions;
- j. In failing to implement appropriate pressure sore preventions;

- k. In failing to have sufficient and properly trained staff to care for its residents;
- l. In failing to have sufficient nursing and nursing assist time to provide the care that was needed for Mrs. Brisbon;
- m. In failing to manage its revenue and income such that appropriate care may be rendered to Mrs. Brisbon;
- n. In failing to implement an appropriate care plan;
- o. In failing to implement appropriate measures to prevent Mrs. Brisbon from aspirating;
- p. In failing to exercise that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances; and
- q. In such other particulars as the evidence may establish.

18. That as a direct and proximate result of the aforesaid negligent, reckless, willful, careless, negligent per se and grossly negligent acts of the Defendants, the deceased Plaintiff's beneficiaries have suffered grief, sorrow, mental anguish and all of the damages which accompany the loss of a loved one; the beneficiaries have suffered pecuniary loss, all to the Plaintiff's actual and punitive damages.

19. That as a direct and proximate result of the aforesaid negligent, reckless, willful, careless, negligent per se and grossly negligent acts of the Defendants, the deceased Plaintiff suffered grave and severe injuries prior to her death; she was hospitalized; she incurred medical expenses; she suffered conscious pain and suffering and mental anguish prior to her death; she suffered a loss of her dignity and individuality; she suffered a diminished quality of life prior to her death; her estate has incurred funeral expenses.

20. That by reason of the foregoing, the Plaintiff is informed and believes that he is entitled to judgment against the Defendants on behalf of the Estate of the deceased Plaintiff, for both actual and punitive damages; all of which damages were proximately caused by the Defendants' acts and/or omissions as are more fully set forth above, in an amount as may be set and determined by the trier of fact in this matter.

WHEREFORE, Plaintiff prays this Honorable Court for a Judgment against the Defendant for actual and punitive damages in an amount to be determined by a trier of fact, and any other and further relief as this Honorable Court deems just, proper, and equitable.

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: s/Lee D. Cope

Lee D. Cope
SC Bar # 14361
P.O. Box 457
Hampton, SC 29924
(803) 943-2111

AND

Bright Matthews Law Firm, LLC
Margie Bright Matthews, Esquire
SC Bar # 13200
P.O. Box 499
Walterboro, SC 29488

ATTORNEYS FOR THE PLAINTIFF

November 18, 2022.
Hampton, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CIVIL ACTION NO.: 2022-NI-18-
	)	
KEVIN WHITE, AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF MARY BRISBON.,	)	
	)	
	)	Affidavit of Merit of
	)	Luanne Trahant, MSN, APRN, FNP-BC,
v.	)	LNCC
	)	
ST. GEORGE HEALTH CARE, LLC,	)	
D/B/A ST. GEORGE HEALTHCARE	)	
CENTER and VICKI SIDES	)	
	)	

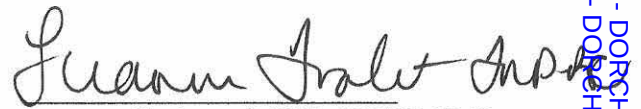
The Affiant, Luanne Trahant, MSN, APRN, FNP-BC, LNCC, having been duly sworn testifies as follows:

-
- 1) I am over 18, legally competent, and I make this affidavit based upon medical records provided to me as well as my background, education, training, and experience.
 - 2) I am a registered nurse in Louisiana. I received my Bachelor of Science in Nursing from Northwestern State University in 1992 and a Master of Science in Nursing in 2005. I am a Board Certified Family Nurse Practitioner. I have practiced in the field of which I give this opinion for at least three out of the last five years.
 - 3) I have been provided with the medical records from St. George Healthcare, Franklin Fetter-Walterboro, Riverside Health & Rehab, Vibra Hospital, Colleton Medical Center and Hallmark Skilled Nursing Facility pertaining to Mary Brisbon.
 - 4) On April 24, 2019, Mrs. Brisbon was admitted to St. George for rehabilitation. On admission to St. George, Mrs. Brisbon was assessed as alert and oriented to self and place. The assessment revealed contractures to her bilateral upper and lower extremities and the skin assessment noted a deep tissue injury to her left heel and left lower buttock. There was also a description of a “discoloration” to her sacrum, but no further assessment of this area was found on admission.



- 5) On June 4, 2019, the nurses document that Ms. Brisbon has 3 small open areas to her sacrum, that were light red with small amounts of drainage. The wounds measured: 1) 2cm x 1.5cm x 0.2cm, 2) 1.6cm x 1.0cm x <0.2cm and 3) 0.6cm x 0.6cm x <0.2cm
- 6) Ms. Brisbon was finally referred to a wound care consultant and her first visit was on July 3, 2019. Her skin was assessed and noted to have a left knee “growth” and the wound doctor suggested biopsy, and she was noted to have a Stage III sacral wound measuring 9cm x 5cm x 0.1cm.
- 7) By July 22nd, her sacral wound was described as measuring 4cm x 3cm x 0.5cm, with tunneling and undermining, indicating a Stage IV wound at this time.
- 8) On August 13, 2019, the dietician noted a “new” unstageable wound to Ms. Brisbon’s left ischium.
- 9) August 14, 2019, she was sent emergently to Colleton Medical Center due to hypotension and severe hyperthermia . Ms. Brisbon was diagnosed with severe sepsis due to infected sacral wound, dehydration, severe calorie-protein malnutrition, and acute kidney injury due to the sepsis.
- 10) She was admitted with a left hip pressure injury that had purulent drainage and was cultured on admission. It measured 3.5cm x 4cm and was unstageable. The sacral wound measured 1.5cm x 2cm.
- 11) On August 26, 2019 Mrs. Brisbon was readmitted to St. George.
- 12) Ms. Brisbon was readmitted to Colleton on September 6, 2019 for severe sepsis. Her wounds were described as a right hip unstageable pressure injury, right ischium Stage IV pressure injury, left ischium unstageable pressure injury and multiple wounds to her right and left leg and feet that were covered in eschar.
- 13) She returned to St. George on September 17th. On readmission the nursing staff noted that Mary Brisbon had skin injuries and pressure injuries to 13 areas which included: 1) left lateral foot, 2) left heel, 3) left medial ankle, 4) left hip, 5) left buttock, 6) right buttock, 7) sacrum, 8) right heel, 9) right lateral foot, 10) right lateral foot, 11) left knee, 12) left lower leg, and 13) left great toe. At this point, Mary Brisbon was suffering from skin failure more likely than not due to her two episodes of severe sepsis and multi organ failure.
- 14) Mary Brisbon required transfer to Trident Medical Center on September 26, 2019 for pneumonia and from trident was transferred to Vibra Hospital on September 26, 2019 for further treatment of her pneumonia and severe skin issues.

- 15) Mary Brisbon remained at Vibra Hospital until November 6, 2019 when she was admitted to Riverside Health and Rehab. The admission records indicate that Ms. Brisbon continued to suffer from 25 different wounds.
- 16) Mrs. Brisbon passed away on November 14, 2019.
- 17) The Defendants' employees failed to provide adequate assessments and monitoring of Mrs. Brisbon's condition which led to multiple wounds and deterioration of those wounds.
- 18) I reserve the right to alter, amend, add, or delete opinions as new information becomes available.


Luanne Trahant, MSN, APRN, FNP-
BC

Sworn to and subscribed before me:



Notary Public

Date: 03/14/2022



Dec 13 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
KEVIN WHITE, AS PERSONAL
REPRESENTATIVE OF THE ESTATE
OF MARY BRISBON,

PLAINTIFF,

vs.

ST. GEORGE HEALTH CARE, LLC,
D/B/A ST. GEORGE HEALTHCARE
CENTER AND VICKI SIDES
,

DEFENDANTS.

) IN THE COURT OF COMMON PLEAS
)
) FIRST JUDICIAL CIRCUIT
)
) CASE NO. 2022-CP-18-01775
)
)
)

DEFENDANT ST. GEORGE HEALTH
CARE, LLC D/B/A ST. GEORGE
HEALTHCARE CENTER'S ANSWER TO
PLAINTIFF'S COMPLAINT

EXHIBIT

4

TO: LEE COPE AND MARGIE MATTHEWS, ATTORNEYS FOR THE PLAINTIFF:

The Defendant St. George Health Care, LLC d/b/a St. George Healthcare Center (hereinafter "this Defendant" or "Facility"), by and through its undersigned counsel, *and subject to and without waiving its right to compel this matter to arbitration*, hereby answers the Plaintiff's Complaint and alleges and states as follows:

1. Any and all allegations set forth in Plaintiff's Complaint which are not specifically admitted, qualified, or otherwise explained or denied, are hereby expressly denied and strict proof is demanded thereof.
2. This Defendant is without knowledge or information sufficient to respond to the allegations set forth in Paragraph 1 of Plaintiff's Complaint regarding Mr. White's status as personal representative of the estate of Mr. Brisbon, and therefore denies the same and demands strict proof thereof. The remaining allegations in Paragraph 1 call for legal conclusions and require

no response. To the extent those allegations intend to allege liability against this Defendant, they are denied and strict proof is demanded thereof.

3. Responding to the allegations set forth in Paragraph 2 of Plaintiff's Complaint, this Defendant admits those allegations insofar as they allege that this Defendant operates the skilled nursing facility at issue in Plaintiff's Complaint located in Dorchester County, South Carolina.

4. The allegations set forth in Paragraph 3 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required.

5. Responding to the allegations set forth in Paragraph 4 of Plaintiff's Complaint, this Defendant admits Ms. Brisbon was a resident of the Facility but would crave reference to her medical records for their contents, including Ms. Brisbon's admission date. This Defendant denies any and all allegations inconsistent with those contents including those intended to allege liability or damages against this Defendant.

6. In responding to the allegations set forth in Paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 of Plaintiff's Complaint, this Defendant would crave reference to Ms. Brisbon's medical records for their contents. Any allegations inconsistent with those contents or which assert or imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof.

7. Responding to the allegations set forth in Paragraph 13 of Plaintiff's Complaint, this Defendant admits that Ms. Brisbon was discharged to Trident Medical Center on September 20, 2019, upon information and belief. This Defendant is without sufficient knowledge or information to respond to the remaining allegations set forth in Paragraph 13 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

8. This Defendant is without sufficient knowledge or information to respond to the allegations set forth in Paragraphs 14, 15 and 16 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

9. This Defendant denies the allegations set forth in Paragraphs 17, 18, 19 and 20 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

10. This Defendant denies in full the Plaintiff's "WHEREFORE" Paragraph and demands strict proof thereof.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

11. This Court lacks jurisdiction over this matter because Plaintiff's claims as to this Defendant should be submitted to arbitration pursuant to a valid arbitration agreement entered into between the parties to this litigation, and therefore this matter should be dismissed pursuant to Rule 12(b)(1) and Rule 12(b)(2) of the South Carolina Rules of Civil Procedure and compelled to arbitration.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

12. This action must be stayed until the validity of the Plaintiff's arbitration agreement is determined by the appropriate court.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

13. To the extent this Defendant is required to raise the affirmative defense of comparative negligence under applicable South Carolina law in order to avoid an argument of waiver by Plaintiff, this Defendant would assert Plaintiff's damages, if any, should be proportionately barred or reduced under the doctrine of comparative fault if such evidence is found as the case proceeds.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

14. This Defendant reserves and does not waive its right to contest this Court's jurisdiction over this matter and assert that Plaintiff's claims as to this Defendant should be submitted to arbitration pursuant to any valid arbitration agreement entered into between the parties to this litigation, and assert that this matter should be dismissed pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure and compelled to arbitration.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

15. There was no negligence, recklessness, gross negligence or wantonness on the part of this Defendant which proximately caused or contributed to Plaintiff's alleged injuries.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

16. Plaintiff's claims for punitive damages and an award of punitive damages would violate those clauses of the Constitution of the United States and South Carolina related to privileges and immunities, due process and equal protection and this Defendant would further assert the protections, defenses, and statutory rights set forth in S.C. Code Ann. §15-32-510, §15-32-520, §15-32-530, and §15-32-540 *et. seq.*

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

18. Plaintiff's Recovery in this matter, if any, is limited by and subject to the provisions of the South Carolina Noneconomic Damages Awards Act of 2005, codified at South Carolina Code Ann. § 15-32-200, *et seq.*, which is pled as a limitation or partial bar to the Plaintiff's claims and alleged damages.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

19. This Defendant would affirmatively assert that, to the extent it is liable to Plaintiff, which is vehemently denied, it would be entitled to any and all benefits, joint and several liability protections, emergency situations limitations on liability, any and all monetary limitations or caps of liability and/or damages under the Uniform Contributions Among Tortfeasors Act, Noneconomic Damages Award Act, and Medical Malpractice Reform Bill, including but not limited to §15-38-15; §15-32-200 *et. seq.*; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

20. This Defendant would affirmatively assert the defense of intervening and superseding negligence of third parties and/or other parties to this action.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

21. This Defendant would allege that some of the injuries or damages sustained by the Plaintiff, if any, were due to, caused and occasioned by a natural disease process over which this Defendant had no control and, as such, this Defendant pleads such a natural disease process as a complete or partial bar to this action.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

22. This Defendant asserts that it complied with the applicable standard of care at all times during the timeframe alleged in the Complaint and did not proximately cause damage to the Plaintiff.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

23. Plaintiff's claims in whole or in part are barred by the statute of limitations.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

24. This Defendant would affirmatively state that Plaintiff lacks standing to pursue some or all of the claims they allege.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

25. This Defendant would assert that some, or all, of the standards and/or guidelines cited by the Plaintiff do not create a standard of care applicable to Plaintiff's claims in this matter.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

26. This Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and thus reserves the right to amend its Answer to assert any such defenses. Furthermore, this Defendant hereby incorporates all defenses asserted by its Codefendants in this matter to the extent they are applicable.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

27. This Defendant pleads the doctrine of election of remedies as a defense to the Plaintiff's claims.

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice, and that it be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

[SIGNATURE BLOCK ON THE FOLLOWING PAGE]

CLEMENT RIVERS, LLP

By: s/D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

Matthew O. Riddle

SC State Bar ID No.: 76650

T. Ashton Phillips, III

SC State Bar ID No.: 104227

P.O. Box 993, Charleston, SC 29402

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

mriddle@ycrlaw.com, aphillips@ycrlaw.com

Attorneys for the Defendant St. George Health Care,

LLC d/b/a St. George Healthcare Center

Charleston, South Carolina

Dated: March 20, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
	)	
KEVIN WHITE, AS PERSONAL	)	CASE NO. 2022-CP-18-01775
REPRESENTATIVE OF THE ESTATE	)	
OF MARY BRISBON,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	DEFENDANT VICKI SIDES' ANSWER TO
ST. GEORGE HEALTH CARE, LLC,	)	PLAINTIFF'S COMPLAINT
D/B/A ST. GEORGE HEALTHCARE	)	
CENTER AND VICKI SIDES	)	
,	)	
	)	
DEFENDANTS.	)	

TO: LEE COPE AND MARGIE MATTHEWS, ATTORNEYS FOR THE PLAINTIFF:

The Defendant Vicki Sides (hereinafter “this Defendant”), by and through her undersigned counsel, *and subject to and without waiving its right to compel this matter to arbitration*, hereby answers the Plaintiff’s Complaint and alleges and states as follows:

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

2. This Defendant is without knowledge or information sufficient to respond to the allegations set forth in Paragraph 1 of Plaintiff’s Complaint regarding Mr. White’s status as personal representative of the estate of Ms. Brisbon, and therefore denies the same and demands strict proof thereof. The remaining allegations in Paragraph 1 call for legal conclusions and require no response. To the extent those allegations intend to allege liability against this Defendant, they are denied and strict proof is demanded thereof.

3. The allegations set forth in Paragraph 2 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required.

4. This Defendant denies the initial allegations set forth in Paragraph 3 of Plaintiff's Complaint regarding this Defendant's residency and demands strict proof thereof. Responding to the remaining allegations, this Defendant admits that she was the administrator at St. George Healthcare Center during part of Ms. Brisbon's residency there.

5. Responding to the allegations set forth in Paragraph 4 of Plaintiff's Complaint, this Defendant admits Ms. Brisbon was a resident of the Facility but would crave reference to her medical records for their contents, including Ms. Brisbon's admission date. This Defendant denies any and all allegations inconsistent with those contents including those intended to allege liability or damages against this Defendant.

6. In responding to the allegations set forth in Paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 of Plaintiff's Complaint, this Defendant would crave reference to Ms. Brisbon's medical records for their contents. Any allegations inconsistent with those contents or which assert or imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof.

7. Responding to the allegations set forth in Paragraph 13 of Plaintiff's Complaint, this Defendant admits that Ms. Brisbon was discharged to Trident Medical Center on September 20, 2019, upon information and belief. This Defendant is without sufficient knowledge or information to respond to the remaining allegations set forth in Paragraph 13 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

8. This Defendant is without sufficient knowledge or information to respond to the allegations set forth in Paragraphs 14, 15 and 16 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

9. This Defendant denies the allegations set forth in Paragraphs 17, 18, 19 and 20 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

10. This Defendant denies in full the Plaintiff's "WHEREFORE" Paragraph and demands strict proof thereof.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

11. This Court lacks jurisdiction over this matter because Plaintiff's claims as to this Defendant should be submitted to arbitration pursuant to a valid arbitration agreement entered into between the parties to this litigation, and therefore this matter should be dismissed pursuant to Rule 12(b)(1) and Rule 12(b)(2) of the South Carolina Rules of Civil Procedure and compelled to arbitration.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

12. This action must be stayed until the validity of the Plaintiff's arbitration agreement is determined by the appropriate court.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

13. To the extent this Defendant is required to raise the affirmative defense of comparative negligence under applicable South Carolina law in order to avoid an argument of waiver by Plaintiff, this Defendant would assert Plaintiff's damages, if any, should be proportionately barred or reduced under the doctrine of comparative fault if such evidence is found as the case proceeds.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

14. This Defendant reserves and does not waive its right to contest this Court's jurisdiction over this matter and assert that Plaintiff's claims as to this Defendant should be submitted to arbitration pursuant to any valid arbitration agreement entered into between the

parties to this litigation, and assert that this matter should be dismissed pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure and compelled to arbitration.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

15. There was no negligence, recklessness, gross negligence or wantonness on the part of this Defendant which proximately caused or contributed to Plaintiff's alleged injuries.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

16. Plaintiff's claims for punitive damages and an award of punitive damages would violate those clauses of the Constitution of the United States and South Carolina related to privileges and immunities, due process and equal protection and this Defendant would further assert the protections, defenses, and statutory rights set forth in S.C. Code Ann. §15-32-510, §15-32-520, §15-32-530, and §15-32-540 *et. seq.*

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

18. Plaintiff's Recovery in this matter, if any, is limited by and subject to the provisions of the South Carolina Noneconomic Damages Awards Act of 2005, codified at South Carolina Code Ann. § 15-32-200, *et seq.*, which is pled as a limitation or partial bar to the Plaintiff's claims and alleged damages.

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19. This Defendant would affirmatively assert that, to the extent it is liable to Plaintiff, which is vehemently denied, she would be entitled to any and all benefits, joint and several liability

protections, emergency situations limitations on liability, any and all monetary limitations or caps of liability and/or damages under the Uniform Contributions Among Tortfeasors Act, Noneconomic Damages Award Act, and Medical Malpractice Reform Bill, including but not limited to §15-38-15; §15-32-200 *et. seq.*; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

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20. This Defendant would affirmatively assert the defense of intervening and superseding negligence of third parties and/or other parties to this action.

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21. This Defendant would allege that some of the injuries or damages sustained by the Plaintiff, if any, were due to, caused and occasioned by a natural disease process over which this Defendant had no control and, as such, this Defendant pleads such a natural disease process as a complete or partial bar to this action.

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22. This Defendant asserts that she complied with the applicable standard of care at all times during the timeframe alleged in the Complaint and did not proximately cause damage to the Plaintiff.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

23. Plaintiff's claims in whole or in part are barred by the statute of limitations.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

24. This Defendant would affirmatively state that Plaintiff lacks standing to pursue some or all of the claims they allege.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

25. This Defendant would assert that some, or all, of the standards and/or guidelines cited by the Plaintiff do not create a standard of care applicable to Plaintiff's claims in this matter.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

26. This Defendant hereby gives notice that she intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and thus reserves the right to amend its Answer to assert any such defenses. Furthermore, this Defendant hereby incorporates all defenses asserted by its Codefendants in this matter to the extent they are applicable.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

27. This Defendant pleads the doctrine of election of remedies as a defense to the Plaintiff's claims.

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice, and that she be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

[SIGNATURE BLOCK ON THE FOLLOWING PAGE]

CLEMENT RIVERS, LLP

By: s/D. Jay Davis, Jr.

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SC State Bar ID No.: 12084

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P.O. Box 993, Charleston, SC 29402

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

mriddle@ycrlaw.com, aphillips@ycrlaw.com

Attorneys for the Defendant Vicki Sides

Charleston, South Carolina

Dated: March 20, 2023

Dec 13 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
KEVIN WHITE, AS PERSONAL
REPRESENTATIVE OF THE ESTATE
OF MARY BRISBON,

PLAINTIFF,

vs.

ST. GEORGE HEALTH CARE, LLC,
D/B/A ST. GEORGE HEALTHCARE
CENTER AND VICKI SIDES
,

DEFENDANTS.

) IN THE COURT OF COMMON PLEAS
)
) FIRST JUDICIAL CIRCUIT
)
) CASE NO. 2022-CP-18-01775
)
)
)

DEFENDANT ST. GEORGE HEALTH
CARE, LLC D/B/A ST/ GEORGE
HEALTHCARE CENTER'S MOTION TO
DISMISS AND COMPEL ARBITRATION

EXHIBIT

5

TO: LEE COPE AND MARGIE MATTHEWS, ATTORNEYS FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant St. George Health Care, LLC d/b/a St. George Healthcare Center (hereinafter "this Defendant" or "Facility"), by and through its undersigned counsel, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure and compelling this matter to arbitration, or, alternatively, staying the action pending arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.

Plaintiff has sued this Defendant pursuant to his mother's residency at the Facility. However, prior to being admitted to the Facility, Plaintiff's mother, Mary Brisbon, entered into an Arbitration Agreement with the Facility. (See Arbitration Agreement attached as **Exhibit A**). The Arbitration Agreement was signed on behalf of Ms. Brisbon by Plaintiff Kevin White. See

Ex. A. Mr. White identified himself as Ms. Brisbon's "Durable Power of Attorney for Health Care/Legal Guardian/Responsible Party" in the Arbitration Agreement. Id.

The parties to the Arbitration Agreement agreed that the South Carolina Uniform Arbitration Act would not apply; rather, arbitration would be governed by the Federal Arbitration Act ("FAA"), because the services and reimbursement thereof to be provided to the Plaintiff upon his admission to the facility involved interstate commerce. In accordance with the terms of this agreement, the Defendant respectfully requests that this matter be compelled to arbitration. Alternatively, this Defendant requests that these proceedings be stayed pending the outcome of arbitration pursuant to Section 3 of the FAA.

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

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

CLEMENT RIVERS, LLP

By: s/D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

Matthew O. Riddle

SC State Bar ID No.: 76650

T. Ashton Phillips, III

SC State Bar ID No.: 104227

P.O. Box 993, Charleston, SC 29402

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

mriddle@ycrlaw.com, aphillips@ycrlaw.com

*Attorneys for the Defendant St. George Health Care,
LLC d/b/a St. George Healthcare Center*

Charleston, South Carolina

Dated: March 20, 2023

PLEASE READ CAREFULLY**FACILITY - RESIDENT/REPRESENTATIVE
ARBITRATION AGREEMENT**

This Agreement is made between St. George Healthcare ("Facility"), its agents, employees and servants, and Mary Beishon ("Resident") or Mary Beishon ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative"). It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.

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

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

The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry. If the parties cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court. The arbitrator shall hear and decide the controversy, and the decision shall be binding on all parties, and may be enforced by a court of competent jurisdiction.

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

I understand and agree that I am giving up and waiving my right to a jury trial.

This Agreement shall remain in effect for all care rendered at Facility and shall survive any termination or breach of this Agreement or the Admission Agreement. By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.

X Kevin White 4-24-19
Resident/Representative Signature Date

Printed Name of Resident/Representative

[Signature] 4-24-19
Authorized Agent of Facility Date

[Signature]
Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
	)	
KEVIN WHITE, AS PERSONAL	)	CASE NO. 2022-CP-18-01775
REPRESENTATIVE OF THE ESTATE	)	
OF MARY BRISBON,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	DEFENDANT VICKI SIDES' MOTION TO
	)	DISMISS AND COMPEL ARBITRATION
ST. GEORGE HEALTH CARE, LLC,	)	
D/B/A ST. GEORGE HEALTHCARE	)	
CENTER AND VICKI SIDES	)	
,	)	
	)	
DEFENDANTS.	)	

TO: LEE COPE AND MARGIE MATTHEWS, ATTORNEYS FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant Vicki Sides (hereinafter “this Defendant”), by and through her undersigned counsel, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure and compelling this matter to arbitration, or, alternatively, staying the action pending arbitration pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, et seq.

Plaintiff has sued this Defendant pursuant to his mother’s residency at St. George Healthcare Center (“the Facility”). However, prior to being admitted to the Facility, Plaintiff’s mother, Mary Brisbon, entered into an Arbitration Agreement with the Defendants. (See Arbitration Agreement attached as **Exhibit A**). The Arbitration Agreement was signed on behalf of Ms. Brisbon by Plaintiff Kevin White. See Ex. A. Mr. White identified himself as Ms.

Brisbon's "Durable Power of Attorney for Health Care/Legal Guardian/Responsible Party" in the Arbitration Agreement. Id.

The parties to the Arbitration Agreement agreed that the South Carolina Uniform Arbitration Act would not apply; rather, arbitration would be governed by the Federal Arbitration Act ("FAA"), because the services and reimbursement thereof to be provided to the Plaintiff upon his admission to the facility involved interstate commerce. In accordance with the terms of this agreement, this Defendant respectfully requests that this matter be compelled to arbitration. Alternatively, this Defendant requests that these proceedings be stayed pending the outcome of arbitration pursuant to Section 3 of the FAA.

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

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

CLEMENT RIVERS, LLP

By: s/D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

Matthew O. Riddle

SC State Bar ID No.: 76650

T. Ashton Phillips, III

SC State Bar ID No.: 104227

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mriddle@ycrlaw.com, aphillips@ycrlaw.com

Attorneys for the Defendant Vicki Sides

Charleston, South Carolina

Dated: March 20, 2023

PLEASE READ CAREFULLY**FACILITY - RESIDENT/REPRESENTATIVE
ARBITRATION AGREEMENT**

This Agreement is made between St. George Healthcare ("Facility"), its agents, employees and servants, and Mary Beishon ("Resident") or Mary Beishon ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative"). It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.

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

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

The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry. If the parties cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court. The arbitrator shall hear and decide the controversy, and the decision shall be binding on all parties, and may be enforced by a court of competent jurisdiction.

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

I understand and agree that I am giving up and waiving my right to a jury trial.

This Agreement shall remain in effect for all care rendered at Facility and shall survive any termination or breach of this Agreement or the Admission Agreement. By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.

X Kevin White 4-24-19
Resident/Representative Signature Date

Printed Name of Resident/Representative

[Signature] 4-24-19
Authorized Agent of Facility Date

Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

Dec 13 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
CASE NO. 2023-CP-18-01775

KEVIN WHITE,
as Personal Representative of the Estate of
Mary Brisbon,

Plaintiff,

vs.

ST. GEORGE HEALTH CARE, LLC, d/b/a
St. George Healthcare Center and
VICKI SIDES,

Defendants.

**MOTION TO ALTER, AMEND, AND/OR
RECONSIDER ORDER
DENYING DEFENDANTS' MOTIONS
TO COMPEL ARBITRATION**



TO: THE HONORABLE HEATH P. TAYLOR, Presiding Judge, and PLAINTIFF'S
COUNSEL OF RECORD

NOW COME Defendants, St. George Healthcare, LLC d/b/a St. George Healthcare Center (the "Facility") and Vicki Sides ("Sides") (collectively, "Defendants"), by and through their undersigned counsel, pursuant to Rule 59(e), SCRPC, and, on the grounds set forth below, hereby most respectfully move this Honorable Court to alter, amend, and/or reconsider its order filed November 2, 2023 (the "Subject Order"), denying Defendants' motions, filed March 20, 2023, to compel Plaintiff's¹ claims to arbitration (collectively, the "Underlying Motions").

¹ "Plaintiff" refers to Kevin White ("Mr. White"), as Personal Representative of the Estate of Mary Brisbon ("Ms. Brisbon").

- I. Contending, most respectfully, that the Underlying Motions should have been (and should now be) granted, Defendants ask the Court to (re)consider and expressly rule on each and every distinct issue/argument raised in support of the Underlying Motions, i.e., each and every distinct issue/argument set forth in the Underlying Motions themselves; in Defendants' memo in support of the Underlying Motions, filed October 20, 2023; and via oral argument at the hearing on the Underlying Motions on October 23, 2023, all of which is/are hereby incorporated herein by reference.**

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

- II. Without waiving or otherwise lessening the all-encompassing scope of the foregoing (i.e., I. above), Defendants most respectfully ask the Court to (re)consider and expressly rule on/address the following particular points.**

- A. The Court should have found (and should now find) that the Admission Agreement and the Arbitration Agreement merged and that, because Ms. Brisbon effectively embraced and directly benefitted from the Admission Agreement, she and, in turn, Plaintiff (her estate) is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.**

- 1. The Court's merger analysis is erroneous.**

In *Coleman v. Mariner Health Care, Inc.*, even though our Supreme Court found against merger on the particular *facts* of the case, it nonetheless confirmed the validity of the general proposition of *law* on which the *Coleman* appellants based their merger/equitable estoppel argument:

Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] under the [Adult Health Care Consent] Act, she is nevertheless equitably estopped to deny the [arbitration

agreement's] enforceability. The circuit court held there was no estoppel here, and we agree.

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

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

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

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

407 S.C. 346, 354–55, 755 S.E.2d 450, 455 (2014) (emphasis added).

Here, the Court erred in rejecting Defendants' merger argument, failing to recognize material differences between the facts and arguments involved in the instant case and those that controlled (or were simply not addressed in) *Coleman* and its progeny *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), and, as addressed separately below, in *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023).

The Court wrongfully concluded that the Admission Agreement and the Arbitration Agreement are separate contracts that do not merge. The merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and

in the course of the same transaction,”² as undoubtedly the Admission Agreement and the Arbitration Agreement were here,³ there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the instruments were intended to be construed together as effectively one contract. This is a question of intention. *Id.* at 355, 755 S.E.2d at 455 (“in the absence of anything indicating a contrary *intention . . .*”) (emphasis added). And “in attempting to ascertain th[e] [parties’] intention,” our courts “endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into.” *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

It must be remembered that, where, as here, the instruments in question were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For the merger presumption to mean anything in practice it cannot be upset based on mere conjecture, but only by actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. 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, under the circumstances, the idea that there would have been an intention contrary to merger does not make sense.

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

³ To be clear, *Coleman* unequivocally answers the question of whether the instant Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly observed regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), “the documents *were* executed at *the same time, by the same parties, for the same purposes, and in the course of the same transaction.*” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

Unlike the arbitration agreement at issue in *Coleman*—and, for that matter, the arbitration agreements at issue in *Coleman*’s progeny *Thompson* and *Hodge*, all of which cases involved arbitration agreements that contained a provision allowing them to be disclaimed or revoked within 30 days of signing while the corresponding admission agreements did not—the instant Arbitration Agreement has no disclaimer/revocation provision. (Arbitration Agreement.) Moreover, while the instant Admission Agreement does contain an “Entire Agreement” clause, it does not reference the Arbitration Agreement as a separate contract. (Admission Agreement p. 12.) Indeed, directly contradicting the idea of “separatedness” (in the parlance of the *Coleman* Court⁴), the “Entire Agreement” clause in the instant Admission Agreement expressly states that “other Admissions materials” are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed “separatedness.” (Admission Agreement p. 12.) Without question, the Arbitration Agreement is among these other materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) (“The same day as Decedent’s admission to White Oak, Stott, acting as Decedent’s authorized representative, signed White Oak’s admission documentation—including the Arbitration Agreement.”) (emphasis added) (internal footnote omitted); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 (“Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement.*”) (emphasis added)).⁵

⁴ 407 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).

⁵ To be clear, Defendants’ point here is not that the holding of either *Stott* or *Hodge* established a legal standard for what counts as admission paperwork, but rather that the very fact that the language that the *Stott* and *Hodge* Courts used in discussing the facts of the cases so readily made the natural and logical connection between arbitration agreements signed in conjunction with admission and “admission documentation” / “documents related to . . . admission” that it illustrates

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required as a precondition of Ms. Brisbon's residency at the Facility. But all this means is that the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become part of the admissions materials once it was in fact executed. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

Moreover, while it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement's) sole reason for being. (Arbitration Agreement

that, in its plain, ordinary, and popular sense, "Admissions materials" plainly includes the Arbitration Agreement. *See Beaufort Cnty. Sch. Dist. v. United Nat'l Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) ("If the contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect."). Moreover, this connection between the Admission Agreement and the Arbitration Agreement (with the Arbitration Agreement being understood in the plain, ordinary, and popular sense as included in the term "Admissions materials") is underscored by the *Coleman* Court's recognition that an admission agreement and arbitration agreement signed in conjunction with resident's admission to a nursing facility are 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).

(providing for arbitration of “any controversy or dispute between the parties arising out of or relating to [the] Facility’s Admission Agreement, or breach thereof, or relating in any way to [Ms. Brisbon’s] stay at [the] Facility, or to the provisions of care or services to [Ms. Brisbon]”); *id.* (“This [Arbitration] Agreement shall remain in effect for all care rendered at [the] Facility”).^{6 7}

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Ms. Brisbon’s relationship with the Facility, the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission. (*Compare* Admission Agreement (setting forth the terms of Ms. Brisbon’s admission to the Facility) *with* Arbitration Agreement (providing for arbitration of disputes arising out of Ms. Brisbon’s admission in the Facility).)

⁶ Without question, Plaintiff’s claims against Defendants are within the scope of the Arbitration Agreement, the plain language of which calls for arbitration of “any controversy or dispute between the parties arising out of or relating to [the] Facility’s Admission Agreement, or breach thereof, or relating in any way to [Ms. Brisbon’s] stay at [the] Facility, or to the provisions of care or services to [Ms. Brisbon]” (Arbitration Agreement.) But even if there were “any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration” *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) (“[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.”).

⁷ There is also no question that the Arbitration Agreement covers both the Facility and Sides. The Arbitration Agreement states, “It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assignees, personal representatives, guardians, or any persons deriving their claims through or on behalf of Resident.” (Arbitration Agreement.) By its terms, the Arbitration Agreement is binding on the Facility’s “agents, employees, and servants” as well. (Arbitration Agreement) This includes Sides, whom Plaintiff sues as “the Administrator of the Facility.” (Compl. ¶ 3.)

Also absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* Admission Agreement p. 10 (“This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located.”) *with* Arbitration Agreements (providing that, “because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action,” but also providing that arbitration shall be “as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules”).) Essentially, both instruments provide that South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, the survival of the Arbitration Agreement is no evidence of “separatedness.” Again, the only reason for the Arbitration Agreement is the Admission Agreement, as the point of the Arbitration Agreement is to cover disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intention contrary to merger. To point to such things, is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about whether they are intended to be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. The very nature of *merger* is to *merge* separate documents.

And—besides the fact that there is indeed no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement—to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. 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. While it is true that the *Coleman* Court also cited the rule that

ambiguity is construed against the drafter, (a) it did so in dicta⁸ and (b) it never addressed the logical inconsistency—which thus remains fair game as an argument in this case⁹—in recognizing a rule of law creating a presumption in favor of merger (i.e., in recognizing the occurrence of a set of circumstances (same time, parties, purpose, and transaction) as sufficiently probative to affirmatively tip the scales in favor of merger) while at the same time allowing that presumption to be completely overturned by evidence that is merely ambiguous, i.e., evidence that does not even go so far as to clearly indicate a contrary intention and, indeed, is actually still susceptible to a reasonable conclusion in favor of merger. *See S.C. Dep’t of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) (“A contract is ambiguous when the terms of the contract are *reasonably* susceptible of more than one interpretation.”) (emphasis added).

Respectfully, the Court’s finding against merger relies on improper speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding intent. The presumption of merger arises from the concurrence of the four elements of time, parties, purpose, and transaction. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. This is why for the merger presumption to mean anything in practice it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and

⁸ *Id.* at 407 S.C. at 355–56, 755 S.E.2d at 455 (“By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply. *Even if* the ‘Entirety’ clause creates an ambiguity as to merger, the law is clear that any ambiguity in such a clause is construed against the drafter, in this case, appellants.”) (emphasis added) (internal citation omitted); *see Nash v. Tindall Corp.*, 375 S.C. 36, 40–41, 650 S.E.2d 81, 83 (Ct. App. 2007) (“Judicial dicta is not essential to the decision. Dicta . . . is a statement on a matter not necessarily involved in the case, and is not binding as authority.”) (internal citations and quotations marks omitted).

⁹ To be clear, none of *Coleman*’s progeny has addressed this either.

transaction)—can nonetheless support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). The merger presumption is “earned,” so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

The Court should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Ms. Brisbon’s admission to the Facility and would not have been done at all but for her admission to the Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties’ intent.

(a) Most respectfully, the merger analysis in *Solesbee* is erroneous and incomplete, and it should not control the disposition of this case.

During the pendency of this case, our Court of Appeals decided *Solesbee*, 438 S.C. 638, 885 S.E.2d 144, wherein it affirmed the circuit court’s denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as at present. Indeed, the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*.

In affirming the circuit court’s denial of the motion to compel arbitration, the *Solesbee* Court likened that case to *Coleman* and *Hodge* and found that the circuit court had correctly determined that there was no merger of the Admission Agreement and the Arbitration Agreement

and, in turn, had properly denied the Facility's equitable estoppel argument. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149 ("Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and [the Facility's] equitable estoppel argument was properly denied.".) Most respectfully, the merger analysis in *Solesbee* is erroneous and incomplete, and it should not control the disposition of this case.¹⁰

First, the *Solesbee* Court erroneously found against merger on the basis that "the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law." It is not true that "the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law."

Regarding governing law, what the Admission Agreement actually states is this: "This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which the Facility is located." (Admission Agreement.) And what the Arbitration Agreement actually states is this:

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

(Arbitration Agreement.)

Without question, the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (the "FAA"), applies to the Arbitration Agreement. The FAA applies "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties

¹⁰ In this regard, Defendants would also note that it is still possible that the Supreme Court might review *Solesbee* via a writ of certiorari.

contemplated an interstate transaction.” *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress’s power under the Commerce Clause); *Allied-Bruce*, 513 U.S. at 273–77 (explaining that, unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce). And our Supreme Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

The rule that the FAA applies whenever an arbitration agreement involves interstate commerce of course applies even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law. *See Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (The FAA “create[d] a body of federal substantive law,” which is “applicable in state and federal courts.”); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (“[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.”); *see also Allied-Bruce*, 513 U.S. 265, 270–77. Moreover, even under the FAA, the general state law of contracts continues to apply. *Allied-Bruce*, 513 U.S. at 281 (“States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause ‘upon such grounds as exist at law or in equity for the revocation of any contract.’ What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal ‘footing,’ directly contrary to the Act’s language and Congress’ intent.”) (emphasis added) (internal citations omitted). Further still, the Arbitration Agreement

expressly calls for the arbitration proceedings to be conducted pursuant to the South Carolina ADR Rules. (Arbitration Agreement.)

Essentially, the provisions of the Admission Agreement and the Arbitration Agreement regarding governing law are to the effect that South Carolina law applies except where displaced by federal law, and indeed, even if the Arbitration Agreement had been included as a provision within the Admission Agreement itself, the FAA would still apply separately to the Arbitration Agreement. In other words, any difference between the governing law as to the Arbitration Agreement and the governing law as to the Admission Agreement would still exist even if the Arbitration Agreement had been included as a provision within the Admission Agreement itself. Accordingly, the supposed difference in the governing law does not support any reasonable inference of any intent contrary to merger.

Second, the *Solesbee* Court erroneously found against merger on the basis that “[t]he Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement ‘shall survive any termination or breach of this Agreement or the Admission Agreement.’” 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger here. Unlike in *Coleman* and *Hodge*, the supposed textual recognition of the Admission Agreement as being separate from the Arbitration Agreement is not included in any “Entire Agreement” provision. Rather, the “Entire Agreement” provision of the Admission Agreement expressly states, “other Admissions materials . . . are made a part of this Agreement by reference.” (Admission Agreement p. 12.) And as in the instant case, the Arbitration Agreement that was signed in conjunction with the admission is clearly among these “other Admissions materials.” Moreover, that the Arbitration Agreement “shall survive any termination or breach of this Agreement or the Admission Agreement” just means that any claims relating to/arising out of

the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. Again, this is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. 2d at 612–13 (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

Third, the *Solesbee* Court erroneously found against merger on the basis that “[t]he Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, ‘Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.’” 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. The absence of a “revocation” provision is one way in which the Arbitration Agreement is materially different from those at issue in *Coleman* and *Hodge*, and, for that matter, *Thompson*. Moreover, the *Solesbee* Court drew a false equivalency between the concept of “revocation” and that of “termination.” A “revocation” is an annulment (i.e., to make something a nullity),¹¹ whereas “termination” is to put or bring something to an end. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. at 612–13.

¹¹ *Black’s Law Dictionary* p. 1321 revocation (7th ed. 1999); *id.* at 89 annulment (“The act of nullifying or making void.”).

Fourth, the *Solesbee* Court erroneously found against merger on the basis that “the Admission Agreement and Arbitration Agreement were separately paginated and had their own signature pages.” 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. Again, the fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. The very nature of *merger* is to *merge* separate documents.

Finally, the *Solesbee* Court erroneously found against the Facility on merger on the basis that Arbitration Agreement was voluntary. 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. Again, to be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. But all this means is that it did not have to be agreed to for the resident to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was signed. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

To say that the Arbitration Agreement was not required for admission, which it was not, is not to say that it was not intended to be part of the admissions materials in the event it was agreed to, which it was, by Mr. Dover on Ms. Solesbee's behalf in *Solesbee* and by Mr. White on Ms. Brisbon's behalf in the instant case. While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement's) sole reason for being. (See Arbitration Agreement (providing for arbitration of “any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident”); *id.* (“This [Arbitration] Agreement shall remain in effect for all care rendered at Facility”).)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission, whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of the resident's relationship with the Facility: the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission. (*Compare* Admission Agreement (setting forth

the terms of the admission) *with* Arbitration Agreement (providing for arbitration of disputes arising out of the admission).)

Accordingly, the merger analysis in *Solesbee* is erroneous and incomplete, and it should not control the disposition of this case.

2. Had the Court found the Admission Agreement and the Arbitration Agreement merged, as respectfully it should have, the Court should have found (and should now find) that equitable estoppel applies to prohibit Plaintiff from denying the enforceability of the Arbitration Agreement.

Defendants’ merger/equitable estoppel argument is a standalone argument that does not depend on any showing of authority (actual or apparent or otherwise) on the part of Mr. White or otherwise on the existence of any per se valid and enforceable agreement between the parties. *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (“South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including . . . estoppel.”); *see also Coleman*, 407 S.C. at 354–55, 755 S.E.2d at 455 (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel); *id.* (explaining that “Appellants’ equitable estoppel argument,” which “[wa]s premised on [Appellants’] contention that, under state law, the admission agreements and the [arbitration agreements] merged,” as follows: “Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] . . . , she is nevertheless *equitably estopped to deny the [arbitration agreement’s] enforceability.*”) (emphasis added).

Conceptually, Defendants’ merger/equitable estoppel argument is *not* an argument for the *enforceability* of the Admission Agreement/Arbitration Agreement *but rather* an argument for *Ms. Brisbon* and, in turn, Plaintiff (her estate) to be estopped to deny the *enforceability* of the Admission Agreement/Arbitration Agreement. In short, the idea is that the Admission Agreement

and the Arbitration Agreement merged, and Ms. Brisbon having effectively embraced and directly benefitted from the Admission Agreement, her estate is now estopped to deny the enforceability not only of the Admission Agreement but also the Arbitration Agreement merged therewith.

Accordingly, as to Defendants' merger/equitable estoppel argument, any contrary analysis regarding the Admission Agreement/Arbitration Agreement's supposed lack of enforceability—e.g., that Mr. White lacked authority to sign the Admission Agreement/Arbitration Agreement on behalf of Ms. Brisbon under the law of agency and/or under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80, and/or because Mr. White lacked power of attorney or guardianship over Ms. Brisbon—is beside the point and unavailing to refute Defendants' merger/equitable estoppel argument, which, again, turns not on the question of whether the Arbitration Agreement is enforceable but whether Ms. Brisbon and, in turn, Plaintiff (her estate) is estopped to deny its enforceability.

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 Defendants contend Ms. Brisbon and, in turn, Plaintiff (her estate) is estopped from refusing to comply with the Arbitration Agreement here, where Ms. Brisbon received direct benefits (in the form of her admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement was merged. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test

referenced by [the] [p]etitioners,” “has been analyzed most-often in *non*-arbitration cases”) (emphasis added).

Wilson supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration case like this, and it instructs that the key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability but whether benefits to the nonsignatory are direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 (“Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause. In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. Stated another way, [u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement”) (internal citations and quotation marks omitted); *id.* at 343, 827 S.E.2d at 176 (“It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.”) (internal citations omitted).

Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration

clause (which is the case here because the Admission Agreement and the Arbitration Agreement merge) while at the same time denying that the arbitration clause is enforceable. *See Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 (“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 Arbitration Act.”) (citation and internal quotation marks omitted).

Here, Ms. Brisbon was a direct beneficiary. To deny her receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of her residency: every night’s stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even her complaint does not go nearly so far as that. (*See Compl.*)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Ms. Brisbon received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein. Respectfully, the Court should have found that the Arbitration Agreement merged with the Admission Agreement and that Ms. Brisbon and, in turn, Plaintiff (her estate) is estopped to deny the Admission Agreement/Arbitration Agreement’s enforceability, Ms. Brisbon having effectively embraced the contract with the Facility for the purpose of her admission and receipt of the benefits thereof.¹²

WHEREFORE, for the foregoing reasons (and, again, for that matter, for all of the reasons previously advanced to the Court in and in support of the Underlying Motions (both those advanced in writing and those advanced via oral argument), all of which Defendants incorporate

¹² To be clear, 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 force to the Admission Agreement.

by reference herein and asks the Court to (re)consider and expressly rule upon in full), Defendants ask that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Underlying Motions.

PLEASE NOTE: Defendants reserve all rights to provide further support for this motion via such briefing, argument (to include oral argument), and/or additional submissions as the Court may permit or require.

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines
D. Jay Davis, Jr. (SC Bar No. 12084)
jdavis@ycrlaw.com
Matthew O. Riddle (SC State Bar No. 76650)
mriddle@ycrlaw.com
Russell G. Hines (SC State Bar No. 72100)
rhines@ycrlaw.com
T. Ashton Phillips III (SC State Bar No. 104227)
aphillips@ycrlaw.com
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5406
Attorneys for Defendants

Charleston, South Carolina

November 13, 2023

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP1801775

Kevin White et al
PLAINTIFF(S)

St George Health Care Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐

JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒

DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐

ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other

☐

ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other

☐

STAYED DUE TO BANKRUPTCY

☐

DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):

☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

The Defendant's motion to alter, amend and/or reconsider is hereby denied. Counsel for Appellant is reminded of the requirement to provide a copy of the motion to alter or amend to the undersigned pursuant to Rule 59(g) to ensure timely and efficient disposition of the motion.

ORDER INFORMATION

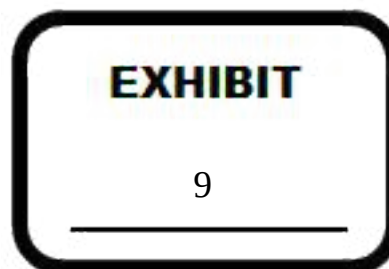
This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 05/02/2024 .

Kevin White Personal Representative
Mary Brisbon Estate



NAMES OF TRADITIONAL FILERS SERVED BY MAIL

RECEIVED
Dec 13 2024
SC Court of Appeals

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Dorchester Common Pleas

Case Caption: Kevin White , plaintiff, et al VS St George Health Care Llc ,
defendant, et al
Case Number: 2022CP1801775
Type: Order/Electronic Form 4

IT IS SO ORDERED.

Heath P. Taylor

Dec 13 2024

SC Court of Appeals

1 STATE OF SOUTH CAROLINA: COURT OF COMMON PLEAS
2 SIXTH JUDICIAL CIRCUIT: FAIRFIELD COUNTY

2

3

4 Thomas D. Kilpatrick as)
Special Administrator for the) Docket No.
5 Estate of Anthony Lemon) 2023-CP-20-00268

6)

Plaintiff,)

7 V.)

8)

Pruitthealth-Ridgeway, LLC,) **Motion to Compel**
8 et al.)

9)

Defendant.)

10

11 February 29, 2024
12 Fairfield, South Carolina

12

13 B-E-F-O-R-E:

14 **THE HONORABLE PATRICK C. FANT, II**

15

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

16

17 Neil E. Alger, ESQ.
Attorney for the Plaintiff

18

19 Russell G. Hines, ESQ.
Attorney's for the Defendant's

20

21

22

23

24 Maria DiScioscia, RPR
Official Court Reporter

25



1 THE COURT: I guess we're here, this is a
2 Motion to Compel.

3 MR. HINES: Thank you, your Honor. May it
4 please the Court.

5 Russ Hines for all the moving parties.

6 And this Motion to Compel is a Motion to
7 Compel Arbitration, so it's not a Discovery Motion. I
8 realized that on your roster, you don't have -- you
9 don't have but so much information.

10 If I could just, as a housekeeping --

11 THE COURT: -- I do have this.

12 MR. HINES: Very good. Just as a housekeeping
13 matter, I wanted to make sure I've got to identify --
14 because there are, I think, five total motions. But
15 really, it's one motion and four motions that are all
16 identical that tag along with the lead dog, so to speak.

17 THE COURT: Okay.

18 MR. HINES: The Motion to Compel is made by
19 the defendant called THI of South Carolina Columbia,
20 LLC, d/b/a Midlands Health and Rehabilitation Center.
21 Then we have four motions that are identical in
22 substance. They're all Motions to Stay. And defendant
23 who've made those are THI of South Carolina, LLC;
24 Fundamental Clinical Operations Services, LLC;
25 Fundamental Administrative Services, LLC; and Hunt

1 Valley Holdings, LLC.

2 And if I could, just to get that out of the
3 way, to say that those motions, the Motion to Stay that
4 is. What they do is, they recognized that this THI,
5 I'll call them, is just a facility. Because what it is,
6 is a skilled nursing facility.

7 I guess I should probably give your Honor a
8 little bit of a background on the facts. It's a medical
9 malpractice case -- it's a malpractice case in the
10 context of a skilled nursing facility. So the parties
11 moving to Compel Arbitration is the facility itself.
12 These others are the defendants. And what the other
13 defendant's Motion to Stay say:

14 Is that, we're asking for the case against us
15 to be stayed pending the outcome of the Motion to Compel
16 Arbitration and any arbitration that is, in fact,
17 compelled. So the case should be stayed as to these
18 other parties. And the basis for that stay is the same
19 in every case. And it comes from Section 3 of the
20 Federal Arbitration Act. And the FAA definitely applies
21 here, your Honor, because we're talking about a
22 situation where the -- it has to do with the transaction
23 involving interstate commerce. And we can get into some
24 of the specifics in our briefing.

25 But to explain, the FAA always applies when

1 talking about a transaction or regarding a transaction,
2 an agreement regarding a transaction involving
3 interstate commerce.

4 And in particular, there's a case called *Dean*
5 *versus Heritage Health Care* and has other parties, we've
6 cited it in our brief. Where our supreme court
7 recognized in the context of skilled nursing care,
8 you're dealing with interstate commerce. So an
9 Arbitration Agreement in that context would attribute
10 FAA.

11 My point of that is to say, that under Section
12 3 of the FAA, it provides that -- if the Court will
13 indulge a little bit of reading.

14 "If any suit or proceeding be brought in any
15 of the Court's of the United States upon any issue
16 referable to arbitration under an agreement in writing
17 for such arbitration, the Court in which, such suit is
18 pending, upon being satisfied with the issue involved in
19 such suit or proceeding is referable to arbitration
20 under such agreement, shall on application of one of the
21 parties stay the trial of the action until such
22 arbitration has been had."

23 We've cited another case called *Stokes versus*
24 *Metro Life*. The cite on that is 351 S.C. 606, a Court
25 of Appeals case from 2002.

1 "The FAA clearly requires the Court to stay
2 any suit or proceeding pending the arbitration of any
3 issue referable to arbitration under agreement in
4 writing for such arbitration."

5 I realize that's a mouthful. And the reason I
6 wanted to say that at the outset, your Honor, is simply
7 to say:

8 As goes the motion -- or arbitration, go the
9 Motions to Stay, as the argument. Our argument is, if
10 the Court will agree with the facility, that arbitration
11 should be compelled, the FAA requires the stay as to the
12 rest of the case. And that's what these other
13 defendant's have moved for a stay have asked for. It's
14 a stay against them.

15 If the Court doesn't agree with us, doesn't
16 agree with the facility, that arbitration should be
17 compelled, then their motions for a stay are effectively
18 mooted, because there would be no reason for the stay
19 absent arbitration being brought.

20 So with that, I'll move to the Motion to
21 Compel Arbitration, your Honor. And as I mentioned, it
22 is a motion -- the context of the case is a skilled
23 nursing care facility. And I will admit at the outset
24 that -- well, my argument, just to give a little bit of
25 a roadmap here, it's a little bit cumbersome to make it

1 candidally. And that's one of the reasons why our memo
2 in support is a bit long, because there's some steps
3 that need to be explained. But the basic idea that I'm
4 arguing to you your Honor, is not about -- I should also
5 say that we filed a rather extensive memo. And I
6 realize that our time here is limited, so I do rely on
7 that.

8 THE COURT: I'm here to listen to you.

9 MR. HINES: Thank you, your Honor. But I'm
10 gonna try and hit the high points and certainly answer
11 any questions that your Honor my have. And if your
12 Honor will allow me to respond to opposing counsel's
13 argument at the appropriate time, I'll do that. But I
14 do want to say that that memo is there in the background
15 and we do rely on it.

16 But the -- it's sort of a one-two punch you
17 might say, as far as my argument. There is -- the
18 Arbitration Agreement that we are seeking the Court to
19 enforce was not signed by the resident in this case.
20 The resident who was admitted to the facility, Anthony
21 Lemon, was admitted with the help of a family member
22 named Minnie Gamble. And it was Ms. Gamble who signed
23 an Admission Agreement and Arbitration Agreement on
24 behalf of the resident, Mr. Lemon, back when he was
25 admitted to the facility. And I wanted to say that at

1 the outset. I'm not able to make an argument to your
2 Honor today based upon Ms. Gamble having power of
3 attorney to act for Mr. Lemon or an argument based on
4 the agency.

5 The argument that I'm making, comes a concept
6 of merger, coupled with equitable estoppel.

7 In the case of merger, what we're talking
8 about and there's a case called *Coleman versus Mariner*
9 *Health Care* that we've cited in our brief. And it
10 recognizes and it recognizes specifically in the context
11 of an admission to a nursing facility.

12 "An Arbitration Agreement signed at the time
13 of admission along with an Admission Agreement, where
14 you have multiple instruments signed at the same time,
15 by the same parties, for the same purpose, and of
16 course, the same transaction, the law will deem those
17 instruments to be merged and that they should be treated
18 together as a single instrument and construed in that
19 fashion."

20 The point here, is my argument starts with
21 that proposition of merger. Merger with the Arbitration
22 Agreement and Admission Agreement. If the Court will go
23 along with me to that point, there's another concept
24 that comes into play, which is equitable estoppel. And
25 in particular, a concept of direct benefits estoppel.

1 And that concept is recognized in a case called *Wilson*
2 *versus Willis* cited in our brief. That's a supreme
3 court case I think in 2019, South Carolina Supreme
4 Court, that is. And the idea of *Wilson versus Willis*,
5 was a direct benefits estoppel that it recognizes is
6 that essentially, you can't have your cake and eat it
7 too. And you cannot directly benefit from the provision
8 of a contract that contains Arbitration Agreement and
9 then accept those benefits under the provisions of that
10 contract and then deny the enforceability of an
11 Arbitration Agreement in the same contract. You can't
12 pick and choose the parts of the contracts you like if
13 you directly benefited from certain provisions of that.
14 And that's why I call it a one-two punch. The reason
15 for the first part is the merger is, if you will agree
16 your Honor, that Admission Agreement and Arbitration
17 Agreement should be merged so they're altogether as one
18 contract. On the benefit side of that, there's no
19 question that Mr. Lemon was admitted pursuant to the
20 Admission Agreement and received various services during
21 his stay at the facility, various treatments, care...
22 There's no question that he received benefits based upon
23 that Admission Agreement. With which, I'm arguing under
24 the merger side of this, that we wished an Arbitration
25 Agreement should be construed as being part of.

1 That's the rough outline of this. Merger of
2 the Admission Agreement, Arbitration Agreement. And
3 then equitable estoppel based upon the direct benefits
4 Mr. Lemon received under that merge and agreement.

5 And to put a little more meat on those bones,
6 your Honor. I also need to bring to the Court's
7 attention. We've cited this and we've distinguished
8 this, a case called *Solesbee*. *Solesbee versus*
9 *Fundamental*. That's a case that the Court of Appeals
10 decided back in 2023. And we were counsel in that case
11 as well, and the Court decided against us.

12 In that case, the Court decided against us on
13 the basis of, it's rejection of our merger argument.
14 And I do have to acknowledge that the Admission
15 Agreement in this case and the Arbitration Agreement in
16 this case, are the same four documents that were at
17 issue in the *Solesbee* case. The reason why I believe
18 it's appropriate nonetheless for us to argue to your
19 Honor today, the merger of Admission Agreement and
20 Arbitration Agreement, notwithstanding *Solesbee*, and
21 again, we've dedicated a number of pages to this, is
22 because the *Solesbee* Court, although, it rejected our
23 arguments for merger in that case, it did not do so in a
24 way that actually refuted or recognized all of those
25 arguments. And it also, like in that case and the

1 Arbitration Agreement and the Admissions Agreement to
2 some other authorities, namely a case called the *Coleman*
3 case that I mentioned and another case called *Hodge*.
4 And those cases were very different and their
5 differences between the facts of the case that we have
6 here and it was also the facts in *Solesbee* in terms of
7 what these documents said and those other cases, *Coleman*
8 and *Hodge* and what they said. And again, I realize it's
9 a lot of ground to cover here. But if your Honor will
10 remember, I mentioned that in the *Coleman* case, the
11 Court said, "the same parties, time, purpose,
12 transaction." If you've got all those boxes checked
13 with multiple instruments the doctrine of merger says,
14 "they should be deemed to be construed together, unless,
15 there is evidence of a contrary intention." Meaning,
16 intention to have them not merged. So *Coleman* actually
17 gives us the backbone -- the bedrock upon which to build
18 this argument by recognizing, "yes, in the context of
19 Admission Agreement and Arbitration Agreement, upon
20 entry into a nursing facility, if you check all these
21 boxes, parties, purpose, time, and transaction, they're
22 all the same and merger does apply." *Coleman* flat out
23 says, "yes, the proponents of arbitration in that case,
24 they're right," every one of those is present here. So
25 *Coleman* not only recognizes the validity that

1 propositioned, but it also recognizes our ability to
2 merge Admission Agreements, Arbitration Agreements. It
3 recognized that everyone of those boxes were checked.
4 What it ended up finding was, we find there actually is
5 evidence of an intention to contrary to merger. And the
6 reason it found that was because it looked at the
7 Admission Agreement and it had an entire agreement
8 clause in it, a merger clause in it and that merger
9 clause made a reference to the Arbitration Agreement.

10 And it said: Well, this a textual basis here
11 where these documents are treating these things as
12 separate. It used the word "separatedness" the *Coleman*
13 Court said. It also said, we looked at the Arbitration
14 Agreement. There is a provision in it that says, "this
15 can be disclaimed within 30 days." And it's essentially
16 treated as if it never existed.

17 Well, so -- and the Court looks at that and
18 says: That's an indication of intention contrary to
19 merger, because the document itself can essentially
20 vanish and not even be apart of this thing, in which
21 it's supposed to have been merged. We don't have that
22 here. And the *Solesbee Court*, respectfully, never
23 addressed that even though it ruled against us. It did
24 not at all look at these differences between the cases.
25 And in again, in *Solesbee* there's currently a cert

1 pending. We remain with some hope that the supreme
2 court will take a look at it. But whether or not the
3 supreme court does, I believe there's daylight between
4 the Court's actual decision in *Solesbee* and the
5 arguments that I'm making now. Which are, that the
6 *Solesbee Court* didn't address the arguments I'm making
7 now. I feel like if the *Solesbee Court* had addressed
8 the arguments I'm making now, and flat out -- and shot
9 them down, that would be a different situation. The
10 *Solesbee Court* didn't do that. And I would also add
11 that the *Solesbee Courts* arguments, for the ones it did
12 address, it's reasoning is mistaken respectfully. And I
13 do believe it's appropriate to continue to argue that
14 point.

15 As I've mentioned, we don't have a revocation
16 provision in this Arbitration Argument, that doesn't
17 even exist. Moreover, what we do have is the Admission
18 Agreement. There is an entire agreement provision.
19 Unlike what happened in the case in *Coleman*, the entire
20 agreement provision specifically references other
21 admissions materials being incorporated by reference
22 therein. So unlike in *Coleman*, we you have this notion
23 with a "separatedness" there was evidence there. Ours
24 is explicitly contemplating something that's not
25 separated. It negates referencing other admissions

1 materials. We cite in our brief a case called, *Stock*
2 *versus White Oak Manner* and another case, the *Hodge*
3 case. Where the court of appeals, just in setting forth
4 the background in those cases, recognized the Admission
5 Agreements and Arbitration Agreements as being documents
6 that were signed in conjunction with admission.

7 I should be clear, that issue wasn't put to
8 those court's, they didn't hold that. My point is, when
9 you're talking about the construction of the plain
10 language of the document it says:

11 "Other Admission materials are included."

12 And the *Stock Court* and the *Hodge Court*,
13 they're both explaining the background of the facts for
14 those two cases. They say things -- paraphrasing like,
15 "relative of the resident signed arbitration agreement,
16 other admissions documentation upon admission." Then
17 they go on to analyze the case. It underscores the
18 point that just in the plain ordinary meaning of
19 "admissions documents" those are the documents you sign
20 at the time of the admissions. Which, in this case, was
21 obviously the Arbitration Agreement. That's a basis for
22 distinguishing obviously this case from *Coleman*. Also,
23 it get's back to the, respectfully, the error of the
24 *Solesbee Courts* ways in ruling against us and the client
25 we represented in that case.

1 And I can make that point a little bit further
2 if I look, for instance, directly at *Solesbee*. If I'll
3 go over that with your Honor, I'll do that briefly.

4 The *Solesbee Court* made a few points citing --
5 well, the *Hodge case* in particular, and I guess in
6 *Coleman* as well. But it said:

7 "Here the Admission Agreement provides it's
8 governed by South Carolina law and the Arbitration
9 Agreement provides it's governed by federal law."

10 So the Court's thinking was that that means
11 there's some indication there of separatedness between
12 the two, because you have two different bodies of law to
13 govern. Well, there's two reasons why that's incorrect
14 and doesn't actually address the arguments that we've
15 made.

16 One, it's incorrect factually. This is what
17 the -- it's not the case that the Admission Agreement
18 says is governed by South Carolina Law and the
19 Arbitration Agreement says it's governed by the FAA,
20 federal law. What the Admission Agreement actually says
21 is: "This agreement will be governed by and construed
22 in accordance with the applicable federal regulations
23 and those of the State in which the facility is
24 located."

25 What the Arbitration Agreement says: "The

1 parties acknowledge that interstate commerce is involved
2 and this is governed by the FAA."

3 Well, I mentioned "factually" the idea that
4 these agreements express the idea that they're governed
5 by different bodies of law is simply correct. I just
6 read the Admissions Agreement. It actually says it's
7 gonna be construed in accordance with state law too.

8 Essentially, what it says is it's gonna be
9 incorporated in accordance with state law except for
10 where it's displaced by federal regulations that would
11 preempt state law. That's exactly the same thing as
12 saying, the FAA applies to the Arbitration Agreement.
13 The FAA preempts South Carolina law. One of the things
14 it does, in fact historically, the reason it was passed
15 was because it was to -- because congress wanted to stop
16 state courts, and this all goes back the maybe the 40s,
17 that were sort of antagonistic to the idea of
18 arbitration agreements and were not enforcing them. And
19 said: We're gonna pass the FAA. But all the FAA really
20 does is, it prevents state's from applying state
21 specific law that treats Arbitration Agreements
22 different than other contracts.

23 Arbitration Agreements ^ Check court says:
24 "You have to place Arbitration Agreements on equal
25 footing with all the contracts under state law." The

1 point of that here is to say, sort of the irony of
2 *Solesbee Court* thinking that two different bodies of law
3 applies. The FAA just holds South Carolina to applying
4 South Carolina Law evenhandedly. If you're determining
5 whether or not an Arbitration Agreement is to be
6 enforced even under the FAA, you apply South Carolina
7 contract principals, you just apply them in a way that
8 it doesn't single out Arbitration Agreements with this
9 favor of treatment.

10 In fact, the FAA is really providing it's
11 South Carolina substantive law will apply. That's all
12 off-base, that reasoning in *Solesbee*, and the *Solesbee*
13 *Court* never explained or addressed that and we made
14 these arguments to it.

15 Furthermore, under something called *Prima*
16 *Paint Doctrine*, arbitration clauses are always supposed
17 to be looked at in a way in terms of their contract, the
18 validity and clause. They are looked at in a way, at
19 least a certain sense, as being separate from the
20 agreements that they're in, the contracts that they're
21 in. And that applies whether -- so my point is, the FAA
22 would apply -- let's imagine you had a situation that
23 this Admission Agreement just had an arbitration clause
24 in it. One document, without questions. No question of
25 merger. The FAA would always apply to that Arbitration

1 Agreement. It doesn't have to be separate, because it
2 involves interstate commerce. In the *Dean* case that I
3 mentioned, it holds that that's the case and it wouldn't
4 take *Dean* to do it. It's obvious that it does, because
5 of the way the services are provided in the context of
6 these skilled nursing facilities.

7 My whole point is, your Honor, that no
8 intention contrary to merger there. There are formal
9 basis that *Solesbee* got into and we do address each one
10 of them in some detail. And your Honor's been very
11 indulgent of the time, other wise this has been one heck
12 of a monolog. And I have some sympathy for your Honor
13 and everyone else in the Court to hear it.

14 But if you have any questions, I'd be
15 delighted to do my best to answer them. Other wise,
16 I'll wait for opposing counsel to rebut this and I'd ask
17 for time to reply.

18 THE COURT: Okay. Thank you.

19 Yes, sir?

20 MR. ALGER: Your Honor, Neil Alger here for
21 the plaintiff's.

22 Thanks Russ.

23 Anybody need a break?

24 THE COURT: (Court laughs.)

25 MR. ALGER: Where do we dive-in.

1 I should say: Russ, myself, and many of us
2 who practice in the realm of nursing home, I think we
3 have all argued these motions and issues until we're
4 almost blue in the face.

5 Russ and his partners have been up through the
6 appellate courts numerous times, as myself, and my
7 partners. And we're we are at here today, sitting here
8 today is, with a lot of precedent guiding the way. We
9 also have some other issues that I want to discuss before
10 we even get into the precedential aspect of the law in
11 this. Is the context of this particular case, which we
12 didn't hear anything about.

13 Mr. Lemon was admitted to this facility in
14 2012 due to symptoms related to a diagnoses of MS and he
15 was physically deteriorating. But he still had his
16 mental faculties. In fact, we attached the medical
17 records to our brief in order to provide the Court with
18 some evidence. But he had his mental capacity. They
19 found he was alert, oriented, place, time, self. And
20 there were numerous instances in the record -- in fact,
21 all the way up from 2012 until 2019, where he would have
22 had the requisite capacity to do any contracting he
23 needed to do on his own.

24 Now, as you did hear, this agreement, as well
25 as, Admission Agreement were not signed by Mr. Lemon.

1 We know from the basic tenets of contract law, that
2 that's an exception to the normal course of business
3 under contract, right. And that there are only a few
4 instances where somebody can enforce a contract where
5 you have not actually signed it yourself. And in the
6 context of this case, and the arguments presented by
7 opposing counsel, the only way in which that could
8 derive would be through a power of attorney. A legal
9 enforceable power of attorney, which we don't have or
10 through apparent authority. And in order for the
11 apparent authority argument to have been successful, the
12 defense would have to come forward, the burden of proof
13 is on them. And without even getting into the law here,
14 I'll say, I've read through their brief. I looked at
15 their exhibits. I looked for affidavits and I see no
16 evidence that's been submitted to this Court in order to
17 establish an kind of apparent authority, there's none.

18 So unequivocally, this Court can say that they
19 have failed to meet the evidentiary burden, proof of
20 burden for them to establish that aspect of their
21 arguments. There's other portions of their brief where
22 similar burdens of proof can be applied and can, quite
23 frankly, negate their arguments because they have failed
24 to meet that part. And I will say, the Court, between
25 them and my own brief, I think you have about 100 pages

1 of reading material for you to review and that's
2 exclusive of all exhibits. So rather than me going
3 through and sort of checking off the sections, I'll just
4 simply say: Keep that in mind as you review the
5 arguments for the requisite burdens of proof to be met,
6 because it hasn't been. It just hasn't. The only
7 burden of proof that has been met is if they want to
8 actually argue the terms of the contract itself, which
9 false back on the arguments you didn't hear regarding
10 merger and equitable estoppel.

11 In this case the precedent is out there. It
12 is established through *Coleman*, through *Thompson*,
13 through *Hodge*. And then, most recently, in the last six
14 months those precedents -- *Solesbee* -- those precedents
15 have all been reaffirmed through unpublished opinions.
16 So I'm not arguing the precedential value of those
17 opinions, but I did attach them to my brief. Because,
18 your Honor, can simply say: I can rely in comfort on
19 those precedents knowing that the appellant courts
20 themselves have withheld them, turned them down, and
21 sent them home.

22 There are, I believe, I attached 10
23 unpublished opinions that all came out within the last
24 four months that have firmly rejected the arguments that
25 have been presented here by opposing counsel.

1 So it seems to me, that while the defense is
2 attempting to essentially thread the needle here with
3 their equitable estoppel argument, as well as, the
4 discussions of theory and construing of the *Wilson case*
5 in order to make it align itself and counter to
6 *Solesbee*. Our court's have consider this. And while
7 they haven't maybe touched on the exact arguments of
8 counsel, they have said that precedent establishes that:

9 One, these agreements do not merger. And
10 these agreements have been reviewed by our court's in
11 the appellant process. And no court has yet found that
12 these agreement merge.

13 And two, that in order for the equitable
14 estoppel argument to be successful, you must find that
15 the agreements come together and they don't.

16 My understanding is that the *Solesbee case* was
17 a published opinion from the court of appeals. So there
18 is precedential value there. The rehearing was denied
19 and I believe it's currently pending up at our supreme
20 court. That doesn't negate the precedential value that
21 it has from our court of appeals.

22 Just as in *Thompson* and just as in *Hodge*, I
23 wouldn't be surprised if our supreme court were to deny
24 cert and simply leave the precedential value that it has
25 in court of appeals right now.

1 Both of those cases were attempted to be
2 elevated up to our supreme court and both the certs were
3 denied. So those precedents remain in place.

4 But I will say the *Thompson* case is clear.
5 It's unequivocal. That when there are standalone
6 agreements such as this, where you have an Admission
7 Agreement and you have an Arbitration Agreement and
8 they're separately paginated. They're two completely
9 separate documents. In fact, the Arbitration Agreement
10 itself notes it's exclusivity in it's own terms.

11 And I don't have it in front of me because I
12 didn't want to waste the paper and print off the
13 voluminous exhibits we have. But it says right in the
14 last paragraph of the agreement that: "It is a
15 standalone agreement." That it is, "exclusive of all
16 other contracts." So based on that, based on the basic
17 obvious difference that the two separate agreements, the
18 Court found that merger is not applicable.

19 There was some mention in opposing counsel's
20 arguments about the *Prima Paint Doctrine* in *Dean*. I'll
21 simply say that as an initial inquiry, this Court can
22 take the concepts that were articulated by defense
23 counsel about presumption and the favor arbitrability
24 and set them aside. Because *Dean* in it's footnote *Prima*
25 *Paint* -- pretty much every case that has come out in the

1 last 10 to 15 years has recognized that a threshold
2 matter for this court in conjunction with Section 2 of
3 the FAA: "That the Court sitting in law and equity must
4 first determine that there is in fact a contract." And
5 that, is for the Court to decide based on state law
6 principals, on a basic fundamental contract terms.

7 And going full circle, your Honor. In this
8 instance, we don't have a contract. There is no way
9 that Mr. Hines or the facts of this case can honestly
10 stand in front of you and say that, Ms. Gamble, Ms.
11 Minnie Gamble, had some kind of authority to bind
12 Mr. Lemon, because Mr. Lemon had capacity. He could
13 have signed the agreement on his own. Ms. Gamble had no
14 legal authority over what she could have signed on his
15 behalf.

16 With that, I'll take a break and hear if
17 Mr. Hines has anything in rebut.

18 THE COURT: Thank you.

19 Yes, sir?

20 MR. HINES: Your Honor, I'll move through this
21 as briefly as possible.

22 In fact, I'll be very brief. And this is a
23 bit unusual for me to start by asking this. It's just
24 occurred to me when Mr. Alger mentioned a brief. I
25 realized it wasn't because it filed something way in

1 advance. I thank you. I hadn't had a chance to see
2 their brief. I just wanted to flip through it.

3 I would imagine we would at least, in our
4 counter points to what's in here. But in particular,
5 because this is a wrongful death case, I thought that --
6 and it occurred to me to look and see if they're making
7 the argument that specifically, you can't have an
8 arbitration of a wrongful death, even if you have --
9 it's argued sometimes, your Honor, that when it comes to
10 wrongful death, to enforce arbitration or compel a claim
11 under that arbitration, you have to have an arbitration
12 agreement that's enforceable against all of the wrongful
13 death beneficiaries. And that's a different argument
14 then what I've addressed so far and I'll address it in
15 just one moment. But to be clear, the logic of that
16 argument is, even if there's no question that -- in
17 fact, the logic of that argument is even if Mr. Lemon
18 with full contractual capacity signed that Arbitration
19 Agreement, that you still couldn't compel the wrongful
20 death claim in arbitration. That's the logic of it.
21 The logic of it is, that's it's own independent in
22 pattern talk Judge.

23 I will argue against that by saying the *Dean*
24 case does not go, so far as, to hold specifically that
25 -- it doesn't specifically refute their argument, but it

1 does give us a pretty good way of starting to do it.
2 Which is saying that, it recognizes that it would be
3 contrary to the FAA to exclude a certain type of claim
4 from arbituability. Because the FAA requires,
5 obviously, the Arbitration Agreement to be placed on
6 equal footing with all the contracts. And you can't
7 come up with a state law rule that says, you can't
8 arbitrate wrongful death claims. That much is for sure.
9 The FAA says, you can't do that.

10 Now, *Dean* doesn't go further in talking about
11 the logical implications of that. The logical
12 implications of that, as a practical matter, are that if
13 the rule is, all of the wrongful death beneficiaries in
14 the case have to agree on arbitration, you're going to
15 throw a whole bunch of cold water on the idea of
16 arbitrating wrongful death claims based upon any sort of
17 agreement to arbitrate like this one. Where you're
18 talking about the people entering into a relationship
19 and they have agreements that address that relationship
20 and the claims that might arise out of it. I'm not
21 saying that you couldn't conceivably get wrongful
22 beneficiaries to all agree after the claim has risen,
23 but I find it to be highly unlikely.

24 If that is the case, I do think *Dean* certainly
25 suggest that you would have a problem with the FAA to do

1 that. But more than that, it's a nonstarter argument to
2 begin with under our law, because any agreement or any
3 sort of contractual provision that would be enforceable
4 against the wrongful death, the decedent, would also be
5 effective to defeat the wrongful death beneficiaries
6 claim. Keep in mind, it is not in fact their claim.
7 They're simply the beneficiary of the claim that has to
8 be brought by the personal representative of the
9 decedents estate. That claim does derive from the
10 claim. It has -- for the claim to even exist the
11 decedent themselves, statutorily would have to have had
12 a claim against whoever the tort feasor is, it's being
13 sued for wrongful death. The decedent would have to
14 have a claim. In as much as you can enforce the
15 arbitration against the decedent, you can enforce it
16 against the wrongful death beneficiaries.

17 Similarly, let's imagine that you have a
18 situation where somebody was hurt in an accident and
19 they're not yet deceased, they're in a hospital. And
20 somehow, they start settlement negotiations with that
21 decedent when they're in the hospital. And they come up
22 with some agreement to resolve any and all claims
23 arising out of the accident that put them there to
24 include any and all claims, obviously and they sign a
25 release and the decedent passes away after that.

1 Obviously, the wrongful death claim based upon that
2 accident wouldn't even accrue until the decedent passed
3 away. Nonetheless, the release the decedent signed
4 waiving any and all claims would bar a wrongful death
5 suit.

6 Again, I'm talking about -- we're not
7 hairsplitting the language of the release. But image
8 that the release does indeed cover any and all ground,
9 known, unknown, now and future, anything arising out of
10 that accident. In the same way that such a release
11 would be enforceable against a wrongful death
12 beneficiary, against the claim to defeat the claim, the
13 wrongful death. So does an arbitration operate, not to
14 defeat it, but to require it to be arbitrated. So I
15 just want to make sure I wasn't silent on that point,
16 your Honor.

17 Back to what Mr. Alger did argue. He
18 mentioned that I'm trying to thread the needle. Well,
19 he's right about that. I'll certainly give him that. I
20 just would say that we are indeed threading it. There's
21 room in there to get the thread, that's my point. Not
22 that this might be an attempt. But surely, that's
23 exactly what we're doing. We recognized that there are
24 eventually head-wins, but we're nonetheless, trying to
25 chart that course past them. And he did mention a

1 number of -- I don't even blame him. I can understand
2 the point. But no precedential value means no
3 precedential value. You can stack to the roof opinions
4 with -- that have no precedential value. And say to the
5 Court: I'm not asking you to rely on them. Well,
6 again, I get --

7 THE COURT: -- he does have a published
8 opinion.

9 MR. HINES: He has one, that's right. And
10 that's what I believe all you need in terms -- if we
11 were on all fours. I'm not trying to tarnish the one
12 he's got. But I am trying to distinguish to the Court,
13 that it's really not addressed all facts. And the fact
14 that he even seemed to give me a little bit of a nod
15 when he says: "Even the Court had to address exactly
16 what they're arguing." That's my point, the Court has
17 not knocked out from underneath us what we're arguing.

18 And the whole point about having to say:
19 There's no power of attorney, no agency they
20 commissioned.

21 My equitable estoppel argument, merger, and
22 estoppel argument, doesn't align with either of those
23 principals. It's completely independent of that.

24 In fact, the way estoppel works is, I'm not
25 having to prove we had a valid agreement per se. I'm

1 just establishing that the plaintiff is estopped to try
2 to argue it's not enforceable. I have more than one way
3 to skin this cat. In fact, *Wilson versus Willis*
4 recognizes that there are recognized theory under South
5 Carolina Law in which you can enforce an Arbitration
6 Agreement against a non-signatory, among them estoppel.

7 So the legal framework, your Honor, is there
8 and I suggest to the Court that the factual building on
9 that framework is there in this case, with all due
10 respect to the *Solesbee Court*, which I have to
11 acknowledge is there. And have to acknowledge, it did
12 deal with these same four documents. It just did not
13 deal and refute with these same arguments.

14 Thank you, your Honor.

15 THE COURT: Thank you.

16 MR. ALGER: Your Honor, and I will be brief
17 'cause I know there's other individuals waiting now.

18 Back to the equitable estoppel argument. In
19 order for that to be successful, the defendant would
20 have had to come forward and show that the party to be
21 estopped, which in this instance is the estate of
22 Mr. Lemon.

23 That he acted in a way of having to a false
24 representation.

25 That he intended that such conduct be acted on

1 by the other party.

2 That he had actual constructive knowledge of
3 the real facts.

4 It's almost -- it is a kin to saying he acted
5 fraudulently. With that notion, back to the basic
6 burden of proof in this instance, nothing has been
7 presented to this Court showing that Mr. Lemon acted in
8 any of those ways. You don't have any testimony here,
9 unfortunately, Mr. Lemon is deceased. His family
10 members can't attest to this. There is no medical
11 record, or doctor, or nurse, no admission assistant.
12 Nobody can come forward and establish those facts and
13 they haven't been presented to this Court.

14 So simply, based on the burden of proof, the
15 Court can't find equitable estoppel as even a viable
16 reason to compel this in arbitration, because those
17 requisite elements haven't been met.

18 Lastly, not to open another avenue. As a
19 fundamental issue as well, the Arbitration Agreement
20 itself is flawed, in that, it lacks consideration. Our
21 courts as you have heard over and over again, they find
22 that these two agreements do not merge. And however the
23 defendant wants to put it, there is that element lacking
24 in a contract. You've got to have neutrality of
25 promises. You've got to have the contract itself and

1 you have to have consideration. And there is no
2 consideration in this instance, no real consideration in
3 this instance. And the reason is, because the promise
4 that is exchanged is that neither party will bring suit
5 against them and if they do, it will be by arbitration.
6 But that, what we know from our simple tort law is:

7 What does it mean to bring suit, right?

8 In order to have suit, you have to have a
9 duty.

10 I have to be responsible to you for acting in
11 some way. And in this instance, there is no duty of
12 Mr. Lemon back to the nursing home. He can't make a
13 promise that is an impossibility. The nursing home has
14 a duty to provide care and treatment for him. They have
15 a duty to make sure that he is not neglected, that he's
16 feed, that he's taken care of. The list goes on and on
17 of the duties that the nursing home has to Mr. Lemon.
18 Mr. Lemon, the only duty he has back to the nursing home
19 is to pay his bill and be present, but that's under the
20 Admission Agreement. They don't merge. So what
21 consideration is there that's left for Mr. Lemon back to
22 the nursing home? There is none. He has no other duty.
23 And so there can't be that neutrality of promises in
24 order to establish the consideration of the contract.
25 And with that, I'm done.

1 THE COURT: Thank you.

2 MR. HINES: If you will, your Honor, like 30
3 seconds.

4 THE COURT: Sure.

5 MR. HINES: That argument, the last argument,
6 about the lack of consideration is:

7 One, it's beside the point. And because as
8 I've just mentioned, one, it goes by counsel's own
9 argument that it was premised on the idea that he was
10 isolating the Arbitration Agreement as not merged. So
11 obviously, my point is, it is merged. And I'll
12 acknowledge to the Court that my argument flows from the
13 proposition that we're talking merger of admission and
14 arbitration and so really it does not under-mind my
15 merger, estoppel argument at all.

16 It also doesn't under-mind it because, I'm
17 again, not arguing for a contract to be enforceable per
18 se. I'm arguing on the basis of estoppel, which is a
19 different way of getting there.

20 The other point is, you mentioned the idea of
21 not -- and I would also say, there is consideration to
22 the extent it could matter for the Admission Agreement
23 mutual promise to arbitrate. I understood counsel to
24 say: There was no duty to flow from Mr. Lemon back
25 toward the facility, but the duty to pay them. Well,

1 that's a duty. We've got mutual promise to arbitrate
2 any claims that arise including the claim that he might
3 -- the facility might have against him for nonpayment or
4 any other conceivable claim that could arise from that
5 relationship. And it's beyond me, in a moment to think
6 about all the different things that could possibly
7 arise. But anyway, it's really not -- it really doesn't
8 matter, because again, it's not material to my argument,
9 which goes through merger.

10 And the final point, maybe the most important
11 one, your Honor. Opposing counsel talked about the
12 burden of proof about representations that were made by
13 Mr. Lemon and so forth. Essentially, something
14 analogized as fraudulent conduct. That's just the wrong
15 test, your Honor, for equitable estoppel. The *Wilson*
16 *versus Willis* case is about direct benefits estoppel,
17 not -- *Wilson versus Wilson* even makes a footnote of
18 this. Is that because of the traditional six part test
19 for estoppel. It looks about like three parts about the
20 party to be estopped. And three parts about the party
21 asserting estoppel and that's just not the right test.

22 So I can will conceded that's I've not passed
23 that test. It's just that it's not a test that I have
24 to take to make my argument. My argument is based on
25 direct benefits. Thank you, your Honor.

1 THE COURT: Okay. Thank you. I will take this
2 under advisement and be back with you.

3 (Whereupon, the above-captioned motion
4 was concluded.)
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C E R T I F I C A T E

I, the undersigned Maria DiScioscia, Official Court Reporter for the Sixth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the record of all the proceedings in the captioned case, in the Circuit Court for Fairfield, South Carolina, on the 29th day of February, 2024.

I do further certify that I am not related, either by blood or marriage, to any of the parties in this action; and that I am in no way interested in the outcome of this matter.


Maria DiScioscia
Official Court Reporter