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SC Court of Appeals

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

Appeal from Colleton County
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2021-CP-15-00516
Appellate Case No. 2023-001282

Gabrielle Washington
as Personal Representative of the Estate of Walter Washington, Jr.,

Respondent,

v.

St. George Health Care, LLC, d/b/a St. George Healthcare Center and
Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center,

Defendants,

Of which St. George Health Care, LLC, d/b/a St. George Healthcare Center is

Appellant.

RECORD ON APPEAL

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¹ The “Facility” refers to Defendant/Appellant, St. George Health Care, LLC d/b/a St. George Healthcare Center.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	CIVIL ACTION NO.: 2021-CP-15-00516
	)	
Gabrielle Washington as Personal	)	
Representative of the Estate of	)	
Walter Washington, Jr.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
St. George Health Care, LLC, d/b/a	)	
St. George Health Care Center and	)	
Walterboro Community Hospital,	)	
Inc., d/b/a Colleton Medical Center,	)	
	)	
Defendants.	)	

This matter came before the Court on May 19, 2022, on a Motion to Compel Arbitration filed by Defendant St. George Health Care, LLC d/b/a St. George Health Care Center pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. Present at the hearing and arguing on behalf of Defendant was Russell G. Hines. Appearing and arguing on behalf of Plaintiff was Lee D. Cope and Shane Burroughs. After reviewing the submissions of the parties, the pleadings, and hearing the arguments of counsel, the Court denies Defendant's Motion to Compel Arbitration for the reasons set forth herein.

Plaintiff Gabrielle Washington as Personal Representative for the Estate of Walter Washington, Jr. filed this action on August 19, 2021, in the Colleton County Court of Common Pleas after the decedent allegedly developed sepsis, unstageable

pressure sores and suffered numerous aspiration events while in Defendant's care at its facility. Plaintiff has alleged wrongful death and survival claims as a result of the care and treatment provided to Mr. Washington.

The basis of Defendant's Motion is that a valid and enforceable arbitration agreement exists between the parties. Defendant has argued that state and federal policy favors arbitration. The Supreme Court of the United States has provided commentary in a recent decision at odds with Defendant's position. "[A] court may not devise novel rules to favor arbitration over litigation The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Morgan v. Sundance, Inc.*, No. 90-345, slip op. at 6 (U.S. May 23, 2022). Therefore, this Court is only required to place Defendant's Arbitration Agreement on equal footing with any other contract governed by state law.

The Arbitration Agreement relied upon by Defendant was signed by the decedent's niece, Gabrielle Washington, at the time of his admission to Defendant's facility, and it appears that no valid power of attorney had been filed at that time with a register of deeds in South Carolina for Ms. Washington to make healthcare or financial decisions on the decedent's behalf. Evidence presented by Plaintiff indicates that the decedent was suffering from aphasia and did not have the capacity to sign the facility's Admission Agreement or Arbitration Agreement at the time he was admitted.

At the outset, it is doubtful that Ms. Washington even had authority to enter the Admission Agreement and Arbitration Agreements on the decedent's behalf

under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10 *et seq.* In an affidavit signed by Ms. Washington and filed in opposition to Defendant's Motion to Compel Arbitration, Ms. Washington attested that the decedent's two sisters were readily available to act as the decedent's surrogates upon his admission to Defendant's facility. Under the Act, an individual is only authorized to make health care decisions on behalf of an incapacitated adult if they have priority, and the siblings of an adult have priority to act over a niece if they are reasonably available for consultation. S.C. Code Ann. § 44-66-30. Therefore, based on the evidence before the Court, it appears that Ms. Washington did not even have authority to make health care decisions on behalf of the decedent at the time of admission, much less the authority to waive his estate's right to a jury trial.

Even if Ms. Washington had authority under the Act to enter the Admission Agreement as an act in furtherance of the decedent's health care needs, it does not necessarily follow that she had authority to enter a separate Arbitration Agreement under the Act. Therefore, the Court must determine (1) if the Arbitration Agreement merged with and was a part of the Admission Agreement such that Plaintiff in her capacity as personal representative would be equitably estopped from denying the Arbitration Agreement's validity, and (2) if Ms. Washington had actual or apparent authority to enter the Arbitration Agreement on behalf of the decedent. The answer to both inquiries is "no".

While a signed Arbitration Agreement exists in this case, it is not a valid, enforceable agreement for the simple reason that the decedent's niece, Gabrielle

Washington, did not have any authority to execute the Arbitration Agreement at the time it was entered by the parties. A family member may be authorized to make decisions concerning **health care** under the Adult Health Care Consent Act. S.C. Code Ann. § 44-66-30(A). In contrast, arbitration is a means of resolving a legal dispute outside of the typical civil litigation process – a definition unrelated to physical or mental condition. *See* Black’s Law Dictionary, 125 (10th ed. 2014).

Therefore, the Act, even if it applied, only would have given Ms. Washington authority to consent on behalf of the decedent to the provision of medical care, including placement in Defendant’s facility, as well as authority to make certain financial decisions on behalf of the decedent which he would be obligated to pay. This authority “extends primarily to traditional health care decisions, and only secondarily to the financial decisions necessitated by those decisions.” *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 353, 755 S.E.2d 450, 454 (2014). Most jurisdictions, including South Carolina, have ruled execution of an arbitration agreement is not a health care decision. *See Johnson v. Kindred Healthcare, Inc.*, 466 Mass. 779, 789-90, 2 N.E.3d 849, 857-58 (Mass. 2014) (collecting cases).

Defendant’s Arbitration Agreement is admittedly optional, and separate from its Admission Agreement, and contains no provision for medical, nursing, or health care services to be provided to residents, nor does it require any financial commitment to pay for such services. The agreement is separately titled “Facility – Resident/Representative Arbitration Agreement”, is paginated as “Page 1 of 1”, and contains its own signature lines. The agreement is signed by Ms. Washington as

“Resident/Representative.” Further, the Arbitration Agreement by its very language distinguishes between itself and the Admission Agreement, stating that the Arbitration Agreement will survive any “breach of this Agreement or the Admission Agreement.” While the Admission Agreement purports to incorporate admissions materials into itself “by reference herein”, when viewed alongside the other details of the agreements, it creates at best an ambiguity as to merger when taken in context of the totality of the circumstances, and “the law is clear that any ambiguity in such a clause is construed against the drafter”, i.e., Defendant. *See Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

In sum, the Act provides statutory authority for family members to make an incapacitated loved one’s health care decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code. As previously stated, it is doubtful in this case that there ever was a valid conferral of authority under the Act. Regardless, Ms. Washington in her individual capacity had no legal authority to sign the Arbitration Agreement in a representative capacity for the estate, and Defendant knew or should have known this fact, as she apparently did not present them with documentation demonstrating power of attorney or guardianship. Since Ms. Washington lacked legal authority, the Arbitration Agreement is void and unenforceable.

Further, Plaintiff cannot be equitably estopped from denying enforcement of the Arbitration Agreement. “Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements.” *Kelly v.*

Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Defendant has not and cannot meet its burden to establish these elements, primarily because Defendant cannot prove it lacked the means of knowledge of the truth of the facts in question. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

In this case, Defendant had the ability to determine whether Plaintiff had authority to sign an arbitration agreement on Mr. Washington's behalf. First, under the Adult Healthcare Consent Act, Defendant had a duty to undertake and document its efforts to ascertain whether Plaintiff had priority and authority under the Act to make Mr. Washington's health care decisions, and it failed to do so. Second, it should be clear to health care entities such as Defendant that a niece without a general durable power of attorney at best only has authority to make healthcare decisions and does not have authority to waive other rights when a potential resident lacks capacity. Defendant is a sophisticated business entity frequently interacting with residents and their families during the rehabilitation center admission process. Defendant is or should be familiar with the legal concepts of guardianship and powers-of-attorney. Defendant had the ability to ask Plaintiff whether she was Mr. Washington's attorney-in-fact, to ask whether Mr. Washington

had any adult siblings who were readily available to act as his surrogates, and it had the ability to request supporting documentation proving authority. Since Defendant has not cited or provided evidence on this element of equitable estoppel, Plaintiff is not equitably estopped from denying the Arbitration Agreement. Further, the Admission Agreement and Arbitration Agreement are separate contracts that do not merge. *See Hodge v. UniHealth Post-Acute Care of Bamberg LLC*, 422 S.C. 544, 561-63, 813 S.E.2d 292, 308 (Ct. App. 2018); *Thompson v. Pruitt Corp*, 416 S.C. 43, 50, 784 S.E.2d 679, 683 (Ct. App. 2016); *Coleman*, 407 S.C. at 352, 755 S.E.2d at 450.

Defendant's assertion that Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement seems to hinge on a direct benefits theory of estoppel, i.e., that since Mr. Washington benefited from the terms of the Admission Agreement, the personal representative of his estate should be estopped from denying the validity of the Arbitration Agreement. *See Wilson v. Willis*, 426 S.C. 326, 340, 827 S.E.2d 167, 175 (2019). Virtually all of the Circuit Court orders filed by Defendant in support of its Motion rely in some form or another on this theory. However, as the Supreme Court explained in *Wilson*, to successfully assert direct benefits estoppel, the arbitration agreement must be a clause within the larger admissions agreement, and the plaintiff must be seeking to assert causes of action that arise from and are created by the contract. Here, as explained above and below, the Admission Agreement and optional Arbitration Agreement are separate documents that did not merge. Second, Plaintiff does not assert breach of contract,

or a violation of contractual duties, and instead has brought her lawsuit under a negligence theory arising from common law duties. *See Wilson*, 426 S.C. at 342, 827 S.E.2d at 176. If anything, Plaintiff's claims are indirectly related to the Arbitration Agreement, as it was optional, ancillary to, and separate from the Admission Agreement. *See id.* (stating that under direct benefits estoppel a nonsignatory's claim must be directly, not just indirectly, based on the contract containing the arbitration agreement).

Additionally, Plaintiff did not have any authority independent of the Adult Health Care Consent Act to enter the Arbitration Agreement. The legal consequences of an agent's actions can only be attributed to the principal when the agent has actual or apparent authority. *Charleston Registry v. Young Clement*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). South Carolina law requires that to prove apparent authority, the defendant must show that the purported principal consciously or impliedly represented another to be his agent. *Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). For the reasons mentioned above, the Adult Health Care Consent Act did not bestow Plaintiff with the authority to enter the Agreement. The simple fact that Plaintiff signed the agreements so that her uncle could be admitted to Defendant's facility and receive health care in no way indicates a manifestation of authority by Mr. Washington to waive his right to a jury trial or agree to arbitration. There is no evidence that Mr. Washington ever manifested any form of assent establishing Ms. Washington as his agent, nor could he have in his condition at the time of admission.

Defendant's assertion that Plaintiff held "inherent agency powers" to act on behalf of the decedent is unsupported by South Carolina law. South Carolina law is clear that an individual does not have inherent agency powers concerning health care, financial, and other affairs of their spouse, much less an uncle or extended family member. *Hinson v. Roof*, 128 S.C. 470, 475, 122 S.E. 488, 490 (1924) ("The marriage relation of the parties . . . is not necessarily enough to establish the fact that the one is the agent of the other. There must be other proof."); S.C. Jur. *Agency* § 6 (1994) ("No presumption arises from the fact of the marital relationship, without more, that [a spouse] is the agent of [the other spouse].") (footnote omitted).

Lastly, it is doubtful that the scope of the Arbitration Agreement, even if it was valid, would cover wrongful death claims asserted on behalf of a decedent's statutory beneficiaries. That is because the wrongful death claim belongs solely to the wrongful death beneficiaries, and is brought only on their behalf by the personal representative of the estate. S.C. Code Ann. §§ 15-51-10 and -20; *Self v. Goodrich*, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App. 1989). The statutory beneficiaries are nonsignatories to the Arbitration and Admission Agreements, regardless of whether the Arbitration Agreement purports to include "any alleged tort, personal injury, negligence, or other claim" "arising out of or relating to Facility's Admission Agreement." Therefore, if the Arbitration Agreement were valid, the wrongful death beneficiaries would only be bound to its terms as third-party beneficiaries.

A third-party beneficiary may only be bound by an arbitration agreement if it is attempting to enforce the contract containing the arbitration agreement.

Thompson, 426 S.C. at 57, 784 S.E.2d at 687. Here, the Arbitration Agreement is a standalone document not contained within the Admission Agreement, and the wrongful death beneficiaries are not attempting to enforce the Admission Agreement or Arbitration Agreement. Instead, they are seeking to recover under the wrongful death scheme for Defendant's breach of common law duties arising from its care for Mr. Washington. Thus, even if the Arbitration Agreement is valid and enforceable, it would only reach the survival claim of the estate, and not any wrongful death claims brought on behalf of the statutory beneficiaries. This conclusion comports with the law of other state jurisdictions. *See FutureCare NorthPoint, LLC v. Peeler*, 143 A.3d 191, 209-10, 213 (Md. App. 2016); *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 494 n. 1 (Pa. 2016) (citing *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 660 (Pa. Super. 2013)); *Boler v. Sec. Health Care, LLC*, 336 P.3d 468, 477 (Okla. 2014); *Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc.*, 316 P.3d 607, 614 (Ariz. Ct. App. 2014); *Daniels v. Sunrise Sr. Living, Inc.*, 212 Cal. App. 4th 674, 151 Cal. Rptr. 3d 273 (2013); *Carter v. SSC Odin Operating Co, LLC*, 976 N.E.2d 344, 355-58 (Ill. 2012); *Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581 (Ky. 2012); *Woodall v. Avalon Care Center-Federal Way, LLC*, 231 P.3d 1252 (Wash. App. 2010); *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009); *Bybee v. Abdulla*, 189 P.3d 40 (Utah 2008); *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258, 1262 (Ohio 2007); *Chapman v. Cardiac Pacemakers, Inc.*, 673 P.2d 385 (Idaho 1983); *see also Strickholm v. Evangelical Lutheran Good Samaritan Soc'y*, Case No. 4:11-CV-

00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011). At best, even if the Arbitration Agreement was valid, it would only reach the estate's survival claims. However, since it is not valid, it cannot compel arbitration of the wrongful death or survival claims in this action, and Defendant's motion will be denied by the Court.

In the alternative, Defendant has requested that the Court grant additional discovery on the nature of Ms. Washington's agency relationship with her uncle. Here, the only relevant and necessary evidence for the Court to make its determination is already available for the Court's review. Any further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, waste judicial resources, and increase costs for both parties unnecessarily.

Based on the foregoing authorities and findings, the Court denies Defendant's Motion to Compel Arbitration.

THEREFORE, it is ORDERED that the Defendant's Motion to Compel Arbitration is DENIED.

IT IS SO ORDERED.

The Honorable Bentley Price
Chief Administrative Judge
Fourteenth Judicial Circuit

_____, 2022.
Charleston, South Carolina



Colleton Common Pleas

Case Caption: Gabrielle Washington , plaintiff, et al VS St George Health Care Llc ,
defendant, et al
Case Number: 2021CP1500516
Type: Order/Compel

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

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STATE OF SOUTH CAROLINA

COUNTY OF COLLETON

Gabrielle Washington as Personal
Representative of the Estate of Walter
Washington, Jr.,

Plaintiff,

vs.

St. George Health Care, LLC, d/b/a St. George
Healthcare Center and Walterboro Community
Hospital, Inc., d/b/a Colleton Medical Center,

Defendants.

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

CASE NO.: 2021-CP-15-00516

**ORDER DENYING FACILITY'S
MOTION TO ALTER, AMEND, AND/OR
RECONSIDER ORDER DENYING
MOTION TO COMPEL ARBITRATION**

The Defendant, St. George Health Care, LLC, d/b/a St. George Healthcare Center ("Facility"), filed a Motion to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration pursuant to Rule 59(e), SCRCF, filed December 19, 2022, asking this Court to reconsider its Order filed December 7, 2022, denying the Facility's motion to compel arbitration.

STANDARD OF REVIEW

Motions for reconsideration will not be granted absent "highly unusual circumstances." U.S. ex rel. Becker v. Washington Savannah River Co., 305 F.3d 284, 290 (4th Cir. 2002) (stating that simple disagreements with the court's ruling will not support Rule 59(e) relief).¹ Courts have recognized three circumstances in which a court should grant a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Importantly, a motion for reconsideration is not a vehicle to re-litigate previously raised issues or "to raise argument or present evidence that could

¹ Rule 59 is substantially the same as the Federal Rule. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21, 602 S.E. 2d 772, 779 (2004) ("Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.").

have been presented prior to the entry of judgment.” Dash v. Mayweather, C/A No. 3:10-1036-JFA, 2010 U.S. Dist. LEXIS 95277, *2 (D.S.C. Sept. 13, 2010) (quoting Exxon Shipping Co. v. Baker, 554 U.S. 471, n.5 (2008)). In other words, “[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.” Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Nor does “[a] party’s mere disagreement with the court’s ruling . . . warrant a Rule 59(e) motion.” In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prods. Liab. Litig., 269 F.Supp. 3d 685, 691 (D.S.C. 2017); *see also* Lyons v. Fid. Nat’l Title Ins. Co., 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015).

After consideration of the issues raised in Facility’s Motion and a filed memorandum in opposition, the Court hereby DENIES Facility’s Motion to Reconsider.

AND IT IS SO ORDERED.

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Colleton Common Pleas

Case Caption: Gabrielle Washington , plaintiff, et al VS St George Health Care Llc ,
defendant, et al
Case Number: 2021CP1500516
Type: Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON) CIVIL ACTION NO.: 2021-CP-15-

GABRIELLE WASHINGTON, AS)
PERSONAL REPRESENTATIVE OF)
THE ESTATE OF WALTER)
WASHINGTON, JR.,)

v.)

ST. GEORGE HEALTH CARE, LLC,)
D/B/A ST. GEORGE HEALTHCARE)
CENTER AND WALTERBORO)
COMMUNITY HOSPITAL, INC., D/B/A)
COLLETON MEDICAL CENTER,)

Summons
(Negligence/Gross Negligence)
(Jury Trial Requested)

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to said Complaint on the subscribed at their office, 101 Mulberry Street East, Hampton, South Carolina, within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in this Complaint.

-Signature Page to Follow-

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& DETRICK, P.A.

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ATTORNEYS FOR THE PLAINTIFF

August 19, 2021.
Hampton, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	CIVIL ACTION NO.: 2021-CP-15-
	)	
GABRIELLE WASHINGTON, AS	)	
PERSONAL REPRESENTATIVE OF	)	
THE ESTATE OF WALTER	)	
WASHINGTON, JR.,	)	
	)	
	)	Complaint
	)	(Negligence/Gross Negligence)
v.	)	(Jury Trial Requested)
	)	
ST. GEORGE HEALTH CARE, LLC,	)	
D/B/A ST. GEORGE HEALTHCARE	)	
CENTER AND WALTERBORO	)	
COMMUNITY HOSPITAL, INC., D/B/A	)	
COLLETON MEDICAL CENTER,	)	
	)	

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

1. That the Plaintiff is a citizen and resident of Orangeburg County, South Carolina and brings this action as the Personal Representative of the Estate of Walter Washington, Jr. 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, Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center is an entity organized under the laws of South Carolina but provides services in Colleton County, South Carolina.

4. That upon information and belief, Mr. Washington was admitted to Defendant St. George Health Care, LLC d/b/a St. George Healthcare Center in October of 2017.

5. On May 11, 2018, he was sent to Colleton Medical Center via EMS because of altered mental status. He was diagnosed with sepsis, aspiration pneumonia and severe dehydration. He was discharged back to St. George Healthcare Center on May 15, 2018

6. Beginning March 3, 2019, Mr. Washington was noted to start pulling out his PEG tube. It was documented on at least 6 occasions between March of 2019 and July of 2019 that Mr. Washington either pulled the tube out or was found with the tube in his bed. He was treated multiple times during 2019 for aspiration pneumonia and sepsis.

7. On May 25, 2019, Mr. Washington was found in his room with shortness of breath due to him aspirating. He was taken to Colleton Medical Center.

8. On May 28, 2019, while at Colleton Medical Center, Mr. Washington was found to have an unstageable pressure sore on his left hip, unstageable pressure sore to his foot and Stage 1 pressure sore to his left ankle. He returned back to St. George Healthcare on June 2, 2019.

9. On June 4, 2019, Mr. Washington was taken back to Colleton Medical center because his PEG tube became dislodged. He returned back to St. George Healthcare on June 9, 2019.

10. On July 26, 2019, Mr. Washington was noted to have shortness of breath after receiving tube feeding the night before. He was taken to Colleton Medical Center and diagnosed with aspiration pneumonia. He returned back to St. George Healthcare on June 28, 2019.

11. On August 22, 2019, Mr. Washington was being bathed and his lip struck the side of the bath tub. He was transported to Colleton Medical Center for treated for a lip laceration. He returned back to St. George Healthcare on August 22, 2019.

12. On October 19, 2019, Mr. Washington was taken to Colleton Medical Center because he was coughing up brown/yellow sputum. He returned back to St. George Healthcare on October 23, 2019.

13. On November 19, 2019, Mr. Washington was taken back to Colleton Medical Center for vomiting what appeared to be coffee-ground emesis. He returned back to St. George Healthcare on November 19, 2019.

14. On November 20, 2019, Mr. Washington was taken back to Colleton Medical Center due to multiple vomiting episodes. He was diagnosed with an upper GI bleed. He was discharged home with hospice care on December 3, 2019.

15. On December 10, 2019, Mr. Washington passed away.

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

16. While in the Defendants' custody and control, Mrs. Miller 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 Mr. Washington's safety and dignity;
- b. In failing to exercise due care, including without limitation, failing to care for Mr. Washington;
- c. In failing to provide appropriate administrative oversight and management to assure Mr. Washington was appropriately cared for;
- d. In failing to realize Mr. Washington needed a higher level of medical care;

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

17. 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 his death; he was hospitalized; he incurred medical expenses; he suffered conscious pain and suffering and mental anguish prior to his death; he

suffered a loss of his dignity and individuality; he suffered a diminished quality of life prior to his death; his estate has incurred funeral expenses.

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 by reason of the foregoing, the Plaintiff is informed and believes that she 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 for judgment against the Defendants for actual damages, together with punitive damages in an appropriate amount, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

-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

Lanier & Burroughs, LLC
Shane M. Burroughs, Esquire
SC Bar #70346
P.O. Drawer 2789
Orangeburg, SC 29116

ATTORNEYS FOR THE PLAINTIFF

August 19, 2021.
Hampton, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON) CIVIL ACTION NO.: 2021-NI-15-

GABRIELLE WASHINGTON, AS)
PERSONAL REPRESENTATIVE OF)
THE ESTATE OF WALTER)
WASHINGTON, JR.,)

v.)

ST. GEROGE HEALTH CARE, LLC, D/B/A)
ST. GEORGE HEALTHCARE CENTER)
AND WALTERBORO COMMUNITY)
HOSPITAL, INC., D/B/A COLLETON)
MEDICAL CENTER,)

**AFFIDAVIT OF MERIT OF
LUANNE TRAHANT MSN, APRN, FNP-BC**

The Affiant, Luanne Trahant, MSN, APRN, FNP-BC, 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 and Colleton Medical Center pertaining to Walter Washington, Jr.
- 4) A basic factual summary is as follows: Mr. Washington was admitted to St. George Healthcare in October of 2017. Mr. Washington was 67 years old and had a history of stroke with aphasia, gastritis, hypertension, and COPD. His stroke left him with limited use of the left arm and hand and he had contractures of the upper extremities documented in the records. Mr. Washington received oxygen at 2 liters and was fed through a PEG tube.
- 5) On May 11, 2018, he was sent to Colleton Medical Center via EMS because of altered mental status. He was diagnosed with sepsis, aspiration pneumonia and severe dehydration. He was discharged back to St. George Healthcare Center.

EXHIBIT

D

- 6) Beginning March 3, 2019, Mr. Washington was noted to start pulling out his PEG tube. It was documented on at least 6 occasions between March of 2019 and July of 2019 that Mr. Washington either pulled the tube out or was found with the tube in his bed. He was treated multiple times during 2019 for aspiration pneumonia and sepsis.
- 7) On May 25, 2019, Mr. Washington was found in his room with shortness of breath due to him aspirating. He was taken to Colleton Medical Center.
- 8) On May 28, 2019, while at Colleton Medical Center, Mr. Washington was found to have an unstageable pressure sore on his left hip, unstageable pressure sore to his foot and Stage 1 pressure sore to his left ankle.
- 9) On June 2, 2019 he returned to St. George Healthcare.
- 10) On June 4, 2019, Mr. Washington's left hip wound measured 3.0cm x 2.0cm and was an open area with 80% tan/yellow necrotic tissue.
- 11) On June 4, 2019, Mr. Washington was taken back to Colleton Medical center because his PEG tube became dislodged.
- 12) On June 9, 2019, Mr. Washington was discharged back to St. George Healthcare.
- 13) On July 26, 2019, Mr. Washington was noted to have shortness of breath after receiving tube feeding the night before. He was taken to Colleton Medical Center and diagnosed with aspiration pneumonia.
- 14) On July 28, 2019, Mr. Washington was discharged back to St. George Healthcare.
- 15) On August 22, 2019, Mr. Washington was being bathed and his lip struck the hard tub. He was transported to Colleton Medical Center for treatment.
- 16) On August 22, 2019, Mr. Washington was transferred to Colleton Medical Center for treatment of a lip laceration.
- 17) On October 19, 2019, Mr. Washington was taken to Colleton Medical Center because he was coughing up brown/yellow sputum. It is noted in the chart that when EMS arrived at the facility, Mr. Washington was supposed to be on constant oxygen but upon arrival, Mr. Washington was found lying flat with no oxygen. He was discharged back to the facility on October 23, 2019.
- 18) On November 19, 2019, Mr. Washington was taken back to Colleton Medical Center for vomiting of what appeared to be coffee-ground emesis. He was discharged back to the facility the same day.
- 19) On November 20, 2019, Mr. Washington was taken back to Colleton Medical Center due to multiple vomiting episodes. He was diagnosed with an upper GI bleed.

- 20) On December 3, 2019, Mr. Washington was discharged home with hospice care.
- 21) On December 10, 2019, Mr. Washington passed away.
- 22) The Defendants' employees of St. George Healthcare failed to properly monitor Mr. Washington's condition. They failed to implement appropriate measures to prevent Mr. Washington from aspirating.
- 23) The Defendants' employees of Colleton Medical Center failed to implement appropriate pressure injury prevention.
- 24) I reserve the right to alter, amend, add, or delete opinions as new information becomes available.

Luanne Trahan
Luanne Trahan, MSN, APRN, FNP-BC

Sworn to and subscribed before me:

Alison Blair

Notary Public

Date:

05/11/2021



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
GABRIELLE WASHINGTON AS	)	CASE NO. 2021-CP-15-00516
PERSONAL REPRESENTATIVE OF	)	
THE ESTATE OF WALTER	)	
WASHINGTON, JR. ,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	DEFENDANT ST. GEORGE HEALTH
	)	CARE, LLC D/B/A ST. GEORGE HEALTH
ST. GEORGE HEALTH CARE, LLC,	)	CARE CENTER'S ANSWER TO
D/B/A ST. GEORGE HEALTH CARE	)	PLAINTIFF'S COMPLAINT
CENTER AND WALTERBORO	)	
COMMUNITY HOSPITAL, INC., D/B/A	)	
COLLETON MEDICAL CENTER ,	)	
	)	
DEFENDANTS.	)	
	)	

TO: LEE D. COPE, ESQUIRE, AND SHANE M. BURROUGHS, ESQUIRE, ATTORNEYS FOR PLAINTIFF:

Defendant St. George Health Care, LLC d/b/a St. George Health Care Center (hereinafter this "Defendant" or "the facility"), *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. Responding to the allegations set forth in Paragraph 1 of Plaintiff's Complaint, this Defendant admits, upon information and belief, that Plaintiff is a citizen of Orangeburg County, South Carolina. The remainder of the allegations in the above paragraph call for legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied.

3. Responding to Paragraph 2 of Plaintiff's Complaint, this Defendant admits it is organized pursuant to the laws of the State of Delaware and operates the skilled nursing facility at issue in Plaintiff's Complaint located in Dorchester County, South Carolina. Any allegations inconsistent with this response is denied and strict proof is demanded thereof.

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. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

5. Responding to the allegations set forth in Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of Plaintiff's Complaint, this Defendant would crave reference to the relevant nursing records or hospital records for their contents. This Defendant denies any and all allegations inconsistent with those contents or intended to allege liability or damages against this Defendant. Further responding, this Defendant would affirmatively assert that the care and treatment provided to Mr. Washington during his residency at the facility was at all times in compliance with the governing standard of care. Further, this Defendant admits that Mr. Washington died on December 10, 2019.

6. This Defendant denies the allegations of Paragraphs 16, 17, 18, and 19 of Plaintiff's Complaint including all subparts, and demands strict proof thereof.

7. This Defendant denies the allegations set forth in Plaintiff's Prayer for Relief.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

8. 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) of the South Carolina Rules of Civil Procedure and compelled to arbitration.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

9. 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, the Defendant would assert Plaintiff's damages, if any, should be proportionately barred or reduced under the doctrine of comparative fault if such evidence is found as the case proceeds.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

11. 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

12. 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

13. 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

14. This Defendant would affirmatively assert that, to the extent it was 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

15. 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

16. This Defendant would allege that some of the injuries or damages sustained by the Plaintiff or Plaintiff's decedent, if any, were due to, caused and occasioned by a natural disease process over which 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

17. 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

18. The care and treatment provided to Plaintiff's decedent provided by this Defendant was at all times in compliance with the governing standard of care.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

20. 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.

CLEMENT RIVERS, LLP

By: /s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

James D. Gandy, III

SC State Bar ID No.: 11925

Gaillard T. Dotterer, III

SC State Bar ID No.: 11925

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

tgandy@ycrlaw.com, gdotterer@ycrlaw.com

Attorneys for the Defendant St. George Health Care,

LLC d/b/a St. George Health Care Center

Charleston, South Carolina

Dated: September 30, 2021

1 STATE OF SOUTH CAROLINA

2 COURT OF COMMON PLEAS

3 COUNTY OF COLLETON

4 2021-GS-15-00516

5 Gabriella Washington, et als.

6 Vs.

7 St. George Health Care, LLC., et als.

8

9 Webex

10 May 19, 2022

11 Before the Honorable Bentley Price

12 APPEARANCES

13 For the Defendant: Russell G. Hines

14

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16 Reported by: Webex (transcribed by Michael C. Watkins

17 Official Court Reporter)

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1 THE COURT: All right. So whose motion is this?

2 MR. HINES: Your Honor, I believe -- is it the
3 Gabrielle Washington case, is that what you're calling?

4 THE COURT: It is, yes, sir.

5 MR. HINES: If it may please the Court? Russ Hines
6 here for -- it might say Jay Davis from our office on your
7 roster, but here for the moving party, which is St. George
8 Healthcare, and this is our motion to compel arbitration.
9 Your Honor, the simplest way, I think, to look at this, we
10 have filed a memo and it is certainly is packed with plenty
11 of -- plenty of things in it, but what I want to focus on
12 Your Honor's attention is merger and the equitable estoppel.
13 And let me just give you a little background on the case,
14 it's a nursing home malpractice case. The resident is
15 Walter Washington, who is now deceased. The case is for --
16 it's a wrongful death and survival action brought by the
17 personal representative of Mr. Washington's estate, his
18 niece, Gabrielle Washington. Back in October of 2017 when
19 Mr. Washington was admitted to our facilities, a skilled
20 nursing facility, Gabrielle Washington signed for him -- she
21 handled the paperwork associated with his admission, and so
22 in doing so she signed for him an admission agreement and
23 she signed an arbitration agreement. And what we are trying
24 in this motion, or what we're asking Your Honor to do in
25 this motion is to compel arbitration on the basis of the

1 arbitration agreement that Ms. Washington signed for Mr.
2 Washington. And our argument is sort of a one-two punch.
3 The first one, Your Honor, to give you better roadmap here,
4 is the merger of the admission agreement and the arbitration
5 agreement, and I'll explain it later in a little more detail
6 why we argue in favor of that merger. If Your Honor goes
7 with me that far, the next concern or the argument is
8 equitable estoppel. And equitable estoppel, the argument
9 there, Your Honor, is based on some direct benefits
10 estoppel. And the basic idea of direct benefits estoppel is
11 that you can't have your cake and eat it too. You cannot
12 receive direct benefits on the basis of a contract that
13 includes an arbitration provision and then deny the
14 enforceability of that arbitration provision. So, Your
15 Honor, back to the original point about merger. The law of
16 South Carolina is you have multiple instruments that are
17 signed at the same time by the same parties for the same
18 purpose in the course of the same transaction, they are
19 presumed to merge and intended to be treated as one contract
20 unless there's evidence to the contrary intention. That
21 principle, Your Honor, is established, or it is recognized
22 in the case called Coleman versus Mariner (phonetically)
23 Healthcare which cites an older authority for that
24 principle, it's also recognized. The Coleman case was also
25 a case about moving to compel arbitration. What I would

1 mention about Coleman is, the main fight in Coleman had to
2 do with whether or not the South Carolina Adult Healthcare
3 Consent Act allowed a surrogate, in the case of Cullman
4 (phonetically) it was the sister of the resident, to agree
5 to arbitration on the resident's behalf. There's no
6 question in Coleman the Supreme Court said, no, it doesn't,
7 that statute does not provide authority to agree to
8 arbitration. We only bring that up, Your Honor, to say that
9 that whole principle has nothing to do with the argument
10 that I'm making today, we're not relying on the Adult
11 Healthcare Consent Act in any way. What Coleman did say in
12 addressing a separate argument, an argument that did not
13 rely upon the statute, is it confirmed that in certain
14 particulars the Coleman case is factually the same, or
15 substantially the same as this one. There are facts that
16 are particularly different and I distinguish the two.
17 What's the same about Coleman is you had a case where it was
18 a nursing home, an admission agreement, and an arbitration
19 agreement, and the argument was merger. And the Coleman
20 court said, yes, we recognize that that is the law, same
21 times, same parties, same place, same transaction, and yes,
22 that all checks, all of those boxes check, admission
23 agreement, arbitration agreement all at the same time,
24 parties, purpose, transaction. However, the Coleman court
25 said and went on and found that there was evidence to the

1 contrary in intention to the merger, and it did that on
2 particular facts in the case, the facts that are materially
3 different from the case that we have here. I make the point
4 also that we're talking about a fact specific analysis when
5 we're talking intention. In Coleman what they noted was
6 that the admission agreement had an entire agreement in it,
7 and in the entire agreement clause the admission agreement
8 made reference to the arbitration agreement as a separate
9 agreement, or separate contract, and the Coleman court found
10 that to be indicative of an intent to not merge the two.
11 The Coleman court also noted that the admission agreement --
12 excuse me, the arbitration agreement had a provision that
13 allowed it to be disclaimed for any reason within 30 days,
14 which the arbitration agreement did not have, and therefore
15 the idea was that they were -- there was an intention not to
16 merge them because the one could simply fall apart and, you
17 know, fall out by way of the disclaimer. We have a
18 materially different case here. In this case we have an
19 entire agreement clause in our admission agreement. That
20 clause, not only does it not reference the arbitration
21 agreement as a separate document, it indicates that there
22 are other admissions and materials that are incorporated
23 into it. And if Your Honor will bear with me to read just
24 shorty, just a short bit. The entire agreement clause here
25 reads: The undersigned further acknowledges that he or she,

1 he/she, has received and read the admission handbook and
2 other admissions materials and understands these documents
3 are made a part of this agreement by reference herein. So,
4 Your Honor, unlike Coleman we have a situation where you do
5 have in the entire agreement clause what -- Coleman used the
6 word separatedness. It talked about the ideas, it was
7 looking for evidence of separatedness, meaning intent to
8 maintain separation between the admission and the
9 arbitration agreement. Here we don't have that
10 separatedness just evidenced by the entire agreement. In
11 fact we have the opposite, we have other admissions
12 materials that aren't deemed to be a part of the agreement.
13 Now, in the arbitration agreement I'll note here there is --
14 this is language, it says: This agreement shall remain in
15 effect for all care rendered at facility which shall survive
16 any termination or breach of this agreement or the admission
17 agreement. It is argued sometimes that that is the same
18 thing as what Coleman encountered, it's not. In Coleman the
19 language that evidenced separation was in the entire
20 agreement clause of the contract, or of the admission
21 agreement. What I just read to you where it refers to
22 admission agreement and this agreement, this being the
23 arbitration agreement, is not in the entire agreement
24 clause. Furthermore, the very nature of the way arbitration
25 works is it's going to survive the termination or breach of

1 the agreement, and we cite this in our brief. It explains
2 how -- if you imagine it this way, Your Honor, the admission
3 agreement in this case is no longer. There is no admission,
4 obviously Mr. Washington is deceased, so the terms of the
5 admission agreement are not operative at this point. But
6 the terms of the arbitration agreement, of course, are
7 because it has to survive the termination of the other
8 agreement so that we can make this argument now to compel
9 arbitration. Because if it was no longer operable that
10 it -- there would be no basis to argue it, so that's just
11 the nature of arbitration agreements is that in order to
12 survive -- if Your Honor would indulge me for just one
13 moment.

14 (Break in proceedings.)

15 MR. HINES: Your Honor, you have to use the cases that
16 you have, but this is Hooters of America, Incorporated
17 versus Phillips, 39 F.Supp 2d, it's a South Carolina
18 District Court case 582. It says: Under South Carolina law
19 the duty to arbitrate under an arbitration clause survives
20 termination of the contract. My point about this is the
21 language that could be argued, or has been argued, to be
22 showing evidence of separatedness, number one, it's in the
23 arbitration and it's not in the entire agreement clause, so
24 it is materially different on that basis than Coleman. But
25 also what it is saying is simply what is the very nature of

1 arbitration which is to survive the termination of the
2 contract so that can be invoked by the form of a motion to
3 compel. And, again, the other point, we don't have the
4 disclaimer here, or the revocation provision up to 30 days.
5 So, Your Honor, that's my -- there's more to this and we
6 have set it forth in our materials, but in the interest of
7 the Court's time I will just underscore the point, we argue
8 for merger of admission and arbitration agreement. The
9 Coleman case recognizes that's a possible, it's a viable
10 theory, it recognizes that we have all of the ingredients
11 for merger in terms of same time, parties, place -- the same
12 time, parties, purpose, and transaction. Where Coleman
13 ended up --

14 THE COURT: Are you wanting me also to compel them to
15 participate in the arbitration or are you just asking for an
16 order to merge?

17 MR. HINES: No. This -- the merger is part one of a
18 two part argument, Your Honor. Because once --

19 THE COURT: I understand. But are you asking me to
20 compel them to go to arbitration?

21 MR. HINES: Yes, to compel the claims against the
22 facility to arbitration.

23 THE COURT: Okay. Well, I don't do that so I don't
24 want to waste your time. If you want a brief in the record
25 obviously we will incorporate your memorandums in support of

1 your motion to compel. But, I mean, the Court of Appeals
2 has made it very clear they want all of these justiciable
3 issues to be tried in the trial courts, and that the
4 archaic, you know, arbitration that they once thought was a
5 good idea at this point in time is not, so I am not going to
6 order anyone to arbitration. If they have a justiciable
7 claim it will be tried in the trial courts. Anything
8 further?

9 MR. HINES: Your Honor, just for the record a few
10 points, because I think -- in case there's any part of your
11 ruling that would include the idea that the wrongful
12 death component of this claim could not be compelled to
13 arbitration because it's different, meaning that it's a
14 claim that is for the benefit of the statute toward
15 beneficiaries, this is just me out of abundance of caution
16 wanting to note my -- just that would be -- that's not a --

17 THE COURT: A justiciable claim that needs to be tried
18 in trial courts, that's my ruling.

19 MR. HINES: Thank you, Your Honor. But to the extent
20 your ruling is going to include that, I just want to make
21 sure I've argued against it. I don't know if it will. I'm
22 talking about the wrongful death component, Your Honor. If
23 it is just a flight denial as you indicated I just wouldn't
24 want there to be an order that says we also deny -- I also
25 deny this on the basis that you can't compel a wrongful

1 death claim --

2 THE COURT: It won't. That will not be included.

3 MR. HINES: Thank you, Your Honor.

4 THE COURT: You're more than welcome.

5 (End of the hearing.)

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STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF COLLETON	)	2021-CP-15-00657
	)	
	)	
	)	
	)	
RAHN, AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF ROBERT RAMSEY,	)	
PLAINTIFF,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
PRIORITY HOME CARE, LLC, AND	)	
ST. GEORGE HEALTH CARE, LLC,	)	
D/B/D/ ST. GEORGE HEALTHCARE	)	
CENTER,	)	
DEFENDANTS.	)	
_____	)	

May 19, 2022
Via WebEx

B E F O R E:

THE HONORABLE BENTLEY PRICE, JUDGE.

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

LEE D. COPE, ESQ.
Attorney for the Plaintiff

RUSSELL G. HINES, ESQ.
Attorney for the Defendant

Proceedings Recorded by DCRP
Transcribed by Penny M. Johnson

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits submitted.)

P R O C E E D I N G S

MR. COPE: Judge, as I mentioned to you, we have the exact same issues --

THE COURT: Number 33?

MR. COPE: Yes, sir, that's right, number 33 on the roster. That is the Rahn case.

MR. HINES: And, Your Honor, for interest in time, I'd be happy for us to put something quickly on -- we don't need to do the same thing again. I'd like to make sure my record is protected.

THE COURT: Why don't you just file a memorandum in support of your motion because, obviously, my ruling is going to be identical.

MR. HINES: So --

THE COURT: And I'll just incorporate that into the record.

MR. COPE: And, Judge, this is for you to have a part of the record. These are two cases that I believe Mr. Hines argued and we got orders on. I'm not involved in one of the cases. I am involved in the other case. Judge Dennis ruled on these exact same issues. We got the ruling about a week ago. It's just the exact same arguments he made, the same brief he filed in those two cases.

THE COURT: Because Judge Dennis was sitting next to me when we warned and cautioned to allow people to continue go

1 to arbitration.

2 MR. COPE: Can I hand these up to Your Honor?

3 THE COURT: Sure. He wasn't sitting next to me, he was
4 sitting at the table next to me when we were warned by the
5 Supreme Court to continue.

6 MR. COPE: I will prepare orders for you.

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CERTIFICATE OF TRANSCRIBER

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

November 2, 2022

Penny M. Johnson
Penny M. Johnson
Court Reporter III

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
GABRIELLE WASHINGTON AS	)	CASE NO. 2021-CP-15-00516
PERSONAL REPRESENTATIVE OF	)	
THE ESTATE OF WALTER	)	
WASHINGTON, JR. ,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	DEFENDANT ST. GEORGE HEALTH
	)	CARE, LLC, D/B/A ST. GEORGE
ST. GEORGE HEALTH CARE, LLC,	)	HEALTH CARE CENTER'S MOTION TO
D/B/A ST. GEORGE HEALTH CARE	)	COMPEL ARBITRATION
CENTER AND WALTERBORO	)	
COMMUNITY HOSPITAL, INC., D/B/A	)	
COLLETON MEDICAL CENTER ,	)	
	)	
DEFENDANTS.	)	
	)	

TO: LEE COPE, ESQUIRE, ATTORNEY FOR THE PLAINTIFF :

PLEASE TAKE NOTICE that the Defendant, St. George Health Care, LLC d/b/a St. George Health Care Center (hereinafter referred to as “this Defendant” or “the Facility”), by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action and compelling arbitration pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, et seq. and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. This Motion is based on the terms and provisions of a valid and binding Arbitration Agreement executed at the time of Walter Washington’s admission to the Facility. (See Arbitration Agreement attached as **Exhibit A**). The Arbitration Agreement is expressly binding on all parties and requires that Plaintiff’s claims be submitted to arbitration.

This Defendant further requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any motions or discovery filed or served by Plaintiff while the current motion is pending. This Motion is supported by the attached Arbitration Agreement, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

CLEMENT RIVERS, LLP

By: /s/D. Jay Davis, Jr.

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

Charleston, South Carolina

Dated: December 2, 2021

PLEASE READ CAREFULLY

FACILITY - RESIDENT/REPRESENTATIVE
ARBITRATION AGREEMENT

This Agreement is made between St. George Healthcare ("Facility"), its agents, employees and servants, and Gabrielle Washington ("Resident") or Walter Washington ("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 Gabrielle Washington 10/13/17
Resident/Representative Signature Date
Tana Smiles 10/13/17
Authorized Agent of Facility Date

Gabrielle Washington
Printed Name of Resident/Representative
Tana Smiles
Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

FFSC019 South Carolina Arbitration Agreement (6/2009)

Page 1 of 1

DEFENDANT'S
EXHIBIT

A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	CIVIL ACTION NO.: 2021-CP-15-00516
	)	
Gabrielle Washington as Personal	)	
Representative of the Estate of	)	
Walter Washington, Jr.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	MEMORANDUM IN OPPOSITION TO
	)	MOTION TO COMPEL ARBITRATION
St. George Health Care, LLC, d/b/a	)	
St. George Health Care Center and	)	
Walterboro Community Hospital,	)	
Inc., d/b/a Colleton Medical Center,	)	
	)	
Defendants.	)	

Defendant St. George Health Care, LLC d/b/a St. George Health Care Center has moved to dismiss this action and compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. The basis of Defendant's Motion is that a valid and enforceable arbitration agreement exists between the parties. Defendant relies on a slew of unreported Circuit Court orders to support its arguments.¹ In doing so, Defendant attempts to minimize and distract from three precedential decisions of the Supreme Court of South Carolina and Court of Appeals, *Coleman*, *Thompson*, and *Hodge*, which are nearly identical to the case at hand, and define the current law of South Carolina pertaining to arbitration agreements within the health care facility context.

¹ Plaintiff has attached unreported Circuit Court orders supporting her arguments as Exhibit B.

The Arbitration Agreement relied upon by Defendant was signed by Plaintiff, who is the niece of the decedent, at a time when she did not have authority to enter any such agreement on the decedent's behalf. Further, the Arbitration Agreement was separate from and does not merge with the Admission Agreement, so Plaintiff is not equitably estopped from denying the Arbitration Agreement's enforceability. Lastly, there is no evidence that Plaintiff had actual or apparent authority to enter the Arbitration Agreement on behalf of the decedent, and South Carolina law is clear that only the representations and conduct of the principal himself, and not the actions of the agent, can create the agency relationship. Therefore, Defendant's Motion should be denied by the Court.

FACTUAL BACKGROUND

On or about October 13, 2017, Walter Washington, Jr. was admitted to Defendant's facility after experiencing a stroke and suffering from aphasia, gastritis, hypertension, COPD, and limited use of his left arm and hand. (Compl. ¶ 4). During his stay at Defendant's facility, his condition worsened and he developed sepsis, aspiration pneumonia, severe dehydration on numerous occasions. (*Id.* at ¶¶ 5-15). These conditions resulted from multiple occasions in which Mr. Washington, who was suffering from aphasia, would pull his PEG tube out. Mr. Washington also developed unstageable pressure sores on his left hip, foot and ankle which were not discovered until he was admitted to Defendant Colleton Medical Center. After being taken to Colleton Medical Center on numerous occasions for aspiration events, a lip

laceration, ingestion of coffee grounds, and an upper GI bleed, Mr. Washington eventually passed away on December 10, 2019.

Plaintiff commenced this action on August 19, 2021, alleging wrongful death and survival claims as a result of the care and treatment provided to Mr. Washington while a he was a patient at Defendants' facilities. (*See generally* Compl.). On December 2, 2021, Defendant filed a Motion to Compel Arbitration, relying on an Arbitration Agreement that was signed by Plaintiff on October 13, 2017. (Mot. Compel Arbitration, Ex. A). Presumably, Plaintiff signed the Agreement instead of Mr. Washington because he was suffering from aphasia. The Affidavit of Merit provided by Luanne Trahant MSN, APRN, FNP-BC indicates that he was suffering from aphasia, a condition that effects an individual's ability to communicate and understand communication, prior to his admission to Defendant's facility. (Ex. B).

ARGUMENT

While a signed Arbitration Agreement exists in this case, it is not a valid, enforceable agreement for the simple reason that Plaintiff did not have authority to execute the Arbitration Agreement at the time it was entered by the parties. While there is a presumption in favor of arbitration, it only applies to the scope of an arbitration agreement; "it does not apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement." *Wilson v. Willis*, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019).

To the extent that Defendant may maintain that Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement due to her execution of an admission agreement, there was no merger of the agreements, as the language of the Arbitration Agreement indicates that Defendant considered it to be a separate agreement. Additionally, there is no evidence that Plaintiff had actual or apparent authority to act on Mr. Washington's behalf at the time she entered the Arbitration Agreement, as there is no evidence that Mr. Washington ever consciously represented or implied to Defendant that she was his agent for the purposes of entering an arbitration agreement. For these and the following reasons, Defendant's motion should be denied.

- I. Plaintiff may have had authority to make health care decisions for Mr. Washington, as well as any financial decisions necessitated by those decisions, but did not have authority to waive Plaintiff's right to a jury trial.

"It is essential that the parties to a contract have the capacity to contract Furthermore, a capacity to contract relates to the status of the person rather than to the circumstances surrounding the transaction." 17 C.J.S. Contracts § 45. At the time Mr. Washington was admitted to Defendant's facility, he had not executed and filed a healthcare or general power of attorney granting Plaintiff authority to waive legal rights or do anything and everything necessary to handle his affairs. There is no evidence that he ever represented to Defendant or anyone else, including Plaintiff, that she had authority to act on his behalf. Thus, any authority Plaintiff had to act would have been derived from the Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10 *et seq.*

Plaintiff concedes that Mr. Washington did not have the capacity to consent or enter Defendant's Admission Agreement on the date of his admission to its facility. The Act pertains to adults who are "unable to appreciate the nature and implications of [their] condition and proposed health care, to make a reasoned decision concerning the proposed health care, or to communicate that decision in an unambiguous manner." S.C. Code Ann. § 44-66-20(8).

A niece is authorized to make decisions **concerning health care** under the Act if she has priority. S.C. Code Ann. § 44-66-30(A). Under the Act, health care is defined as

[A] procedure to diagnose or treat a human disease, ailment, defect, abnormality, or complaint, whether of physical or mental origin. It also includes the provision of intermediate or skilled nursing care; services for the rehabilitation of injured, disabled, or sick persons; and the placement in or removal from a facility that provides these forms of care.

S.C. Code Ann. § 44-66-20(1). In contrast, arbitration is a means of resolving a legal dispute outside of the typical civil litigation process – a definition unrelated to physical or mental condition. *See Black's Law Dictionary*, 125 (10th ed. 2014).

Additionally, under the Act, priority is assigned to family members as follows:

(A) Where a patient is unable to consent, decisions concerning his health care may be made by the following persons in the following order of priority:

(6) an adult sibling of the patient, or if the patient has more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation;

(8) any other adult relative by blood or marriage who is reasonably believed by the health care professional to have a close personal relationship with the patient, or if the patient has more than one other adult relative, a majority of those other adult relatives who are reasonably available for consultation

S.C. Code Ann. § 44-66-30. The statute sets forth in numerous sections that the standard for determining if a particular family member or individual has priority is whether they are “reasonably available.”

Therefore, the Act gave Plaintiff authority to consent on behalf of Mr. Washington to the provision of medical care, including placement in Defendant’s facility, as well as authority to make certain financial decisions on behalf of Mr. Washington which he would be obligated to pay, but only if no other family members who had priority under that Act were reasonably available. This authority “extends primarily to traditional health care decisions, and only secondarily to the financial decisions necessitated by those decisions.” *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 353, 755 S.E.2d 450, 454 (2014). Most jurisdictions, including South Carolina, have ruled execution of an arbitration agreement is not a health care decision. *See Johnson v. Kindred Healthcare, Inc.*, 466 Mass. 779, 789-90, 2 N.E.3d 849, 857-58 (Mass. 2014) (collecting cases).

An affidavit submitted by Plaintiff indicates that Mr. Washington’s two sisters, Carrie Washington and Annie Washington, both reside at the same address as Plaintiff and were readily available to make health care decisions on Mr. Washington’s behalf on the date of his admission to Defendant’s facility. Further, the affidavit provides that Defendant never made attempts to verify if Mr.

Washington's sisters were readily available and willing to act as his surrogate at the time of his admission. Under the Act, Defendant was required to document that efforts were made to locate a decision maker who has priority under the Act. S.C. Code Ann. § 44-66-30(B). Defendant has not come forth with any proof that it made efforts to ascertain if Mr. Washington's sisters were reasonably available to act as his surrogates at the time of his admission. Therefore, Plaintiff did not have authority at the time of admission to act as Mr. Washington's surrogate for health care decisions.

Even if Plaintiff did have authority to make health care decisions on Mr. Washington's behalf, she did not have authority to sign an arbitration agreement waiving his right to a jury trial such that she would later be bound to the agreement as the personal representative of his estate. Upon seeking admission of Mr. Washington to Defendant's facility, Plaintiff was presented with two documents, an Admission Agreement and an Arbitration Agreement. The Arbitration Agreement is separate from the Admission Agreement and contains no provision for medical, nursing, or health care services to be provided to Mr. Washington, nor does it require any financial commitment to pay for such services.² The agreement is separately titled "Facility – Resident/Representative Arbitration Agreement", is paginated as "Page 1 of 1", and contains its own signature lines. Further, the Arbitration Agreement by its very language distinguishes between itself and the Admission Agreement, stating that the Arbitration Agreement will survive any

² The Arbitration Agreement was presumptively optional under federal law. *See* 42 C.F.R. § 483.70(n). There is no language within the Arbitration Agreement indicating that it was a prerequisite to admission, and thus it must be viewed in this proceeding as optional.

“breach of this Agreement or the Admission Agreement.” While the Admission Agreement purports to incorporate admissions materials into itself “by reference herein”, when viewed alongside the other details of the agreements, it creates an ambiguity as to merger when taken in context of the totality of the circumstances, and “the law is clear that any ambiguity in such a clause is construed against the drafter”, i.e., Defendant. *See Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

The Supreme Court of South Carolina has held that a surrogate without proper legal authority cannot bind a person, or that person's estate, to arbitration. In *Coleman*, the circuit court refused to compel arbitration because the sister of a nursing home resident who signed the arbitration and admission agreements lacked authority to bind the resident to the arbitration agreement. In affirming the circuit court's order, the Supreme Court found that, although the South Carolina Adult Healthcare Consent Act gave the sister authority to make ‘healthcare decisions’ on behalf of her sister, consent for medical treatment is not the same as binding an incompetent person to a legally binding contract such as an arbitration agreement. *Coleman*, 407 S.C. at 352, 755 S.E.2d at 453-54. The court reasoned that the Act only extends authority to surrogates to make traditional healthcare decisions and financial decisions that arise out of those decisions.

The Act “provides statutory authority for family members to make an incapacitated loved one's ‘health care’ decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code.” *Murphy v. Hunt Valley Holdings, LLC*, No. 2018-CP-46-01459, 2018

WL 11033620, at *6 (S.C. Com. Pl. Dec. 17, 2018). Plaintiff had no legal authority to sign the Arbitration Agreement, and Defendant knew or should have known this fact, as she did not present them with documentation demonstrating power-of-attorney or guardianship. Since Plaintiff lacked legal authority to enter into a contract, the Arbitration Agreement is void and unenforceable.

II. Plaintiff is not equitably estopped from denying the validity of the Arbitration Agreement because the Admission Agreement and Arbitration Agreement do not merge.

Plaintiff cannot be equitably estopped from denying enforcement of the Arbitration Agreement. “Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements.” *Kelly v. Logan, Jolley & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that **the party to be estopped** (1) acted in a way amounting to a false representation; (2) intended that such conduct be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting the estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on the conduct of the party to be estopped. *Id.*

Defendant has not and cannot meet its burden to establish these elements, primarily because Defendant cannot prove it lacked the means of knowledge of the truth of the facts in question. Equitable doctrines such as estoppel favor diligent

parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

In this case, Defendant had the ability to determine whether Plaintiff had authority to sign an arbitration agreement on Mr. Washington's behalf. First, under the Adult Healthcare Consent Act, Defendant had a duty to undertake and document its efforts to ascertain whether Plaintiff had priority and authority under the Act to make Mr. Washington's health care decisions, and it failed to do so. Second, it should be clear to health care entities such as Defendant that a niece without a general durable power of attorney at best only has authority to make healthcare decisions and does not have authority to waive other rights when a potential resident lacks capacity. Defendant is a sophisticated business entity frequently interacting with residents and their families during the rehabilitation center admission process. Defendant is or should be familiar with the legal concepts of guardianship and powers-of-attorney. Defendant had the ability to ask Plaintiff whether she was Mr. Washington's attorney-in-fact, to ask whether Mr. Washington had any adult siblings who were readily available to act as his surrogates, and it had the ability to request supporting documentation proving authority. Since Defendant has not cited or provided evidence on this element of equitable estoppel, Plaintiff is not equitably estopped from denying the Arbitration Agreement.

Further, the fact that Plaintiff signed the Arbitration Agreement in her individual capacity and is now a party to this action as a nonsignatory in her capacity as personal representative of the estate does not bind the estate to the Arbitration Agreement, at least as far as equitable estoppel is concerned. The Supreme Court addressed this concept in *Thompson*:

Respondent is attempting to use equitable estoppel against [the patient's] estate based on actions that [patient's niece] took *in her individual capacity*. The fact that [the patient's niece] is *now the personal representative for [the patient's] estate* is of no moment; we will not hold this circumstance against [the patient's] estate. Simply put, [the patient's] estate is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] estate, that has affected Respondent's position. This, too, is a necessary element of an equitable estoppel defense.

Thompson, 416 S.C. at 61, 784 S.E.2d at 689.

Equitable estoppel arguments within the health care facility context are frequently premised on the contention that admission agreements and arbitration agreements merge. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

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). Any ambiguity as to merger is to be construed against the drafter. See *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 129 n.4, 713 S.E.2d 799, 805 n.4 (Ct. App. 2011).

Here, the Admission Agreement and Arbitration Agreement are separate contracts that do not merge. *See Hodge v. UniHealth Post-Acute Care of Bamberg LLC*, 422 S.C. 544, 561-63, 813 S.E.2d 292, 308 (Ct. App. 2018); *Thompson v. Pruitt Corp*, 416 S.C. 43, 50, 784 S.E.2d 679, 683 (Ct. App. 2016); *Coleman*, 407 S.C. at 352, 755 S.E.2d at 450. *Coleman* refused to apply the doctrine of merger because language in the contracts “recognize[d] the ‘separateness’ of the admission and arbitration agreements.” *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455. *Thompson* and *Hodge* applied *Coleman* and provided further examples of factors demonstrating “separateness and preventing merger.” *Thompson*, 416 S.C. at 52, 784 S.E.2d at 684; *Hodge*, 422 S.C. at 563, 813 S.E.2d at 302.

Defendant’s assertion that Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement seems to hinge on a direct benefits theory of estoppel, i.e., that since Mr. Washington benefited from the terms of an Admission Agreement that Plaintiff signed, she should be estopped as the personal representative of his estate from denying the validity of the Arbitration Agreement. *See Wilson*, 426 S.C. at 340, 827 S.E.2d at 175. Virtually all of the Circuit Court orders filed by Defendant in support of its Motion rely in some form or another on this theory. However, as the Supreme Court explained in *Wilson*, to successfully assert direct benefits estoppel, the arbitration agreement must be a clause within the larger admissions agreement, and the plaintiff must be seeking to assert causes of action that arise from and are created by the contract. Here, as explained above and below, the Admission Agreement and optional Arbitration Agreement are

separate documents that did not merge. Second, Plaintiff does not assert breach of contract, or a violation of contractual duties, and instead has brought her lawsuit under a negligence theory arising from common law duties. *See Wilson*, 426 S.C. at 342, 827 S.E.2d at 176. If anything, Plaintiff's claims are indirectly related to the Arbitration Agreement, as it was optional, ancillary to, and separate from the Admission Agreement. *See id.* (stating that under direct benefits estoppel a claim must be directly, not just indirectly, based on the contract containing the arbitration agreement).

As discussed above briefly, there were two separate agreements and they were not merged. As in *Hodge*, the separate contracts here have separate signature pages and separate pagination. The Arbitration Agreement is a separate document designated as "Page 1 of 1". As in *Thompson*, the arbitration agreement announces its independence with its "Arbitration Agreement" title. The text of the Arbitration Agreement refers to Defendant's Admission Agreement as a separate, standalone document ("This Agreement . . . shall survive any termination or breach of **this Agreement or the Admission Agreement.**"). This language mirrors that addressed in *Coleman* and *Thompson*, in which the Supreme Court found such language to be proof that an admission agreement was separate and did not merge with an arbitration agreement:

The court then explained the evidence of the parties' intent to keep the two agreements separate by highlighting the admission agreement's recognition of the arbitration agreement as a separate document, i.e., "This Agreement, including all Exhibits hereto, and the Arbitration Agreement"

Thompson, 416 S.C. at 52, 784 S.E.2d at 685.

Since the arbitration and admission contracts have different pagination with different signature pages, and the arbitration contract is entitled “Arbitration Agreement” at the top of its first page, these factors further indicate the parties’ intent for the Arbitration Agreement to stand by itself as an independent contract. *Thompson*, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n.1; *Hodge*, 422 S.C. at 562-63, 813 S.E.2d at 302. The Arbitration Agreement was not a precondition to admission.

Defendant will likely argue that such details are “superficial things” and that they cannot be relied on by Plaintiff as proof that the two separate agreements never merged. However, to do so flies in the face of binding precedent from our Supreme Court indicating that such details are exactly what should be looked to by courts in determining whether merger exists. *See Hodge*, 422 S.C. at 562-63, 813 S.E.2d at 302 (“Further, each document was separately paginated and had its own signature page. Additionally, the Arbitration Agreement stated signing it was not a precondition to admission.”); *Thompson*, 416 S.C. at 52, 784 S.E.2d at 684 (noting that evidence of parties’ intent to keep two agreements separate includes language from agreements recognizing and referring to agreements as separate documents). The details of Defendant’s Admission Agreement and Arbitration Agreement are nearly identical to those addressed by our Supreme Court in *Coleman*, *Hodges*, and *Thompson*. Defendant cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit, and any equitable estoppel argument should be denied by the Court.

III. **Plaintiff did not have actual or apparent authority to enter the Arbitration Agreement.**

The legal consequences of an agent's actions can only be attributed to the principal when the agent has actual or apparent authority. *Charleston Registry v. Young Clement*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). It is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority. *Frasier v. Palmetto Homes of Florence*, 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). South Carolina law requires that to prove apparent authority, the defendant must show: (1) **that the purported principal consciously or impliedly represented another to be his agent**; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." *Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005).

The basis of apparent authority is representations **made by the principal to the third party** and reliance by the third party on those representations. *Young v. S.C. Dep't of Disabilities and Special Needs*, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that **between the principal and the third party**. *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 428, 412 S.E.2d 425, 428 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists. *Id.*

Defendant has not produced any evidence indicating that Plaintiff had authority to enter the Arbitration Agreement on Mr. Washington's behalf or waive

Mr. Washington's right to a jury trial. For the reasons mentioned above, the Adult Health Care Consent Act did not bestow Plaintiff with the authority to enter the Agreement. The simple fact that Plaintiff signed the agreements so that her uncle could be admitted to Defendant's facility and receive health care in no way indicates a manifestation of authority by Mr. Washington to waive his right to a jury trial or agree to arbitration. There is no evidence that Mr. Washington ever manifested any form of assent establishing Plaintiff as his agent. Defendant will likely point to language in the Arbitration Agreement indicating that the executing party of the agreement had authority to sign on the resident's behalf. However, this language is not a representation made by Mr. Washington to Defendant that his niece had authority to act on his behalf. Instead, it is a representation made by Plaintiff in her individual capacity to Defendant, and fails to meet the requirement for proving apparent authority.

In fact, Defendant's position has been directly addressed and disagreed with by the Supreme Court in *Hodge*. In *Hodge*, the facility argued that a husband had taken over his wife's medical affairs and had authority to enter an arbitration agreement on her behalf. The court described the apparent authority as follows:

Apparent authority to do an act is created as to a third person **by written or spoken words or any other conduct of the *principal*** which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him. Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief.

Hodge, 422 S.C. at 572, 813 S.E.2d at 307. (emphasis added) (citations and punctuation omitted). The court then went on to disagree with the exact arguments advanced in this case by Defendant, stating that merely because a family member signs an arbitration agreement, admissions agreement, and other forms does not make them an agent, especially when there is no power of attorney and there is no evidence that the principal represented the family member was their agent. *Id.* at 573-74, 813 S.E.2d at 308.

Apparent authority must be established based upon manifestations by the principal, **not the agent**. The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but on that between the principal and the third party.

Id. at 577, 813 S.E.2d at 310.

In *Thompson*, other circumstances similar to the instant facts were addressed by the Supreme Court and found not to constitute evidence of apparent or actual authority. In *Thompson*, the facility asserted that the resident “allowed, passively or otherwise” a family member to sign her admissions agreement and arbitration agreement, and to handle other financial affairs for her, as evidence of apparent or actual authority. *Thompson*, 426 S.C. at 55, 784 S.E.2d at 686. The court did not take the same view of the circumstances:

While the evidence indicates Son handled Mother’s finances in the years leading up to her admission to UniHealth, the evidence also indicates Mother had dementia prior to being admitted to UniHealth. Therefore, her incapacity prevented her from “consciously or impliedly” representing another to be her agent. Further, the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal’s right of access to the courts and to a jury trial. Based on the foregoing, the evidence does

not show that Son had either actual or apparent authority to execute the AA on Mother's behalf.

Thompson, 416 S.C. at 55-56, 784 S.E.2d at 686 (citations omitted). In other words, "an agency may not be established solely by the declarations and conduct of an alleged agent." *Id.* (citation omitted).

Defendant's assertion that Plaintiff held "inherent agency powers" to act on behalf of Mr. Washington is unsupported by South Carolina law. First, the theory proposed by Defendant has no supporting South Carolina authorities outside of a passing mention of the term in an abrogated case. *See Smith v. Fitton and Pittman, Inc.*, 264 S.C. 129, 212 S.E.2d 925 (1975). If anything, *Smith* makes clear that the inherent agency powers theory finds no support in South Carolina law. *Id.* ("[A]ppellant has offered no authority, and we have found none, that [individual] would have inherent agency power"). Second, South Carolina law is clear that an individual does not have inherent agency powers concerning health care, financial, and other affairs of their family members. *Hinson v. Roof*, 128 S.C. 470, 475, 122 S.E. 488, 490 (1924) ("The marriage relation of the parties . . . is not necessarily enough to establish the fact that the one is the agent of the other. There must be other proof."); S.C. Jur. *Agency* § 6 (1994) ("No presumption arises from the fact of the marital relationship, without more, that [a spouse] is the agent of [the other spouse].") (footnote omitted).

Regardless of whether Plaintiff "held herself out as an agent for her uncle", there is no evidence that at any point Mr. Washington himself made representations, or voluntarily placed Plaintiff in a position, which would indicate a

conscious or implied representation that she was authorized to enter arbitration agreements on his behalf. Plaintiff's position and sole authority, if she had any, was derived from the Adult Healthcare Consent Act, a statutory construct, which did not bestow authority to enter arbitration agreements for the reasons described above. Despite Defendant's contentions, Mr. Washington never consciously held Plaintiff out or represented that she was authorized to act on his behalf in connection with arbitration, and Defendant has produced no evidence supporting its argument, making the Arbitration Agreement invalid and unenforceable. There is no evidence that Plaintiff had actual or apparent authority to enter the Arbitration Agreement.

IV. Plaintiff as personal representative of Mr. Washington's estate is not a third-party beneficiary to the Arbitration Agreement.

"A third-party beneficiary is a party that the contracting parties intend to directly benefit." *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). "However, there can be no third-party beneficiary unless a valid contract exists." *Thompson*, 416 S.C. at 57, 784 S.E.2d at 687. Since Plaintiff in her individual capacity was not authorized to execute the Arbitration Agreement on Mr. Washington's behalf, there was no valid contract, and neither Plaintiff in her capacity as personal representative of Mr. Washington's estate, nor the estate itself, could be the third-party beneficiary of the Arbitration Agreement between Plaintiff and Defendant.

Additionally, a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement. *Thompson*, 426 S.C. at 57, 784

S.E.2d at 687. Plaintiff is not attempting to enforce the Arbitration Agreement on her own behalf or on behalf of the estate; instead, she is asserting tort claims arising from common law duties independent of the Arbitration Agreement and Admission Agreement. Therefore, Plaintiff in her capacity as personal representative was not a third-party beneficiary to the Arbitration Agreement signed individually by Plaintiff, and it cannot be enforced against her independently of any authority she did not have to enter the agreement.

V. **The scope of the Arbitration Agreement does not cover wrongful death claims by Mr. Washington's statutory beneficiaries.**

Even if Plaintiff had authority to sign the Arbitration Agreement and it was valid, the wrongful death claims of Mr. Washington's statutory beneficiaries would not be excluded, as they are not within the scope of the Arbitration Agreement. South Carolina law is clear that wrongful death claims belong to the statutory beneficiaries and are distinct and separate from survival claims belonging to the estate. *Bennett v. Spartanburg Ry. Gas and Elec. Co.*, 97 S.C. 27, 81 S.E. 189 (1914). Wrongful death actions are brought by the personal representative of the decedent directly for the benefit of the statutory beneficiaries and include pecuniary loss, mental shock and suffering, grief and sorrow, and loss of companionship. S.C. Code Ann. §§ 15-51-10 and -20; *Self v. Goodrich*, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App. 1989). Survival actions, on the other hand, are separate claims for separate injuries, and belong to the estate, not the statutory beneficiaries. See *Bennett*, 97 S.C. at 27, 81 S.E. at 189-90.

The statutory beneficiaries are nonsignatories to the Arbitration and Admission Agreements, regardless of whether the Arbitration Agreement purports to include “any alleged tort, personal injury, negligence, or other claim” “arising out of or relating to Facility’s Admission Agreement.” Therefore, if the Arbitration Agreement were valid, which it is not, the wrongful death beneficiaries would only be bound to its terms as third-party beneficiaries. As explained above, a third-party beneficiary may only be bound by an arbitration agreement if it is attempting to enforce the contract containing the arbitration agreement. Here, the Arbitration Agreement is a standalone document not contained within the Admission Agreement, and the wrongful death beneficiaries are not attempting to enforce the Admission Agreement or Arbitration Agreement.

Instead, they are seeking to recover under the wrongful death scheme for Defendant’s breach of common law duties arising from its care for Mr. Washington. Thus, even if the Arbitration Agreement is valid and enforceable, it would only reach the survival claim of the estate, and not any wrongful death claims brought on behalf of the statutory beneficiaries. This conclusion comports with the law of other state jurisdictions. *See FutureCare NorthPoint, LLC v. Peeler*, 143 A.3d 191, 209-10, 213 (Md. App. 2016); *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 494 and n. 1 (Pa. 2016) (citing *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 660 (Pa. Super. 2013)); *Boler v. Sec. Health Care, LLC*, 336 P.3d 468, 477 (Okla. 2014); *Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc.*, 316 P.3d 607, 614 (Ariz. Ct. App. 2014); *Daniels v. Sunrise Sr. Living, Inc.*, 212 Cal.

App. 4th 674, 151 Cal. Rptr. 3d 273 (2013); *Carter v. SSC Odin Operating Co, LLC*, 976 N.E.2d 344, 355-58 (Ill. 2012); *Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581 (Ky. 2012); *Woodall v. Avalon Care Center-Federal Way, LLC*, 231 P.3d 1252 (Wash. App. 2010); *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009); *Bybee v. Abdulla*, 189 P.3d 40 (Utah 2008); *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258, 1262 (Ohio 2007); *Chapman v. Cardiac Pacemakers, Inc.*, 673 P.2d 385 (Idaho 1983); *see also Strickholm v. Evangelical Lutheran Good Samaritan Soc'y*, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011).

Furthermore, Defendant cannot meet the requirements to show that the wrongful death beneficiaries qualify as third-party beneficiaries to the Arbitration Agreement. Defendant must show the Arbitration Agreement was “made for the benefit of” the family members and the Arbitration Agreement’s terms were intended to provide a “direct, rather than an incidental or consequential” benefit to them. *Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132 (2014) (quoting *Windsor Green Owners Ass’n v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004)). The only supposed benefit Defendant could argue the statutory beneficiaries receive is the promise that its legal claims will also be subject to arbitration. But, Defendant has not identified any legal claims it could ever have against the statutory beneficiaries. Any legal claims Defendant had against Mr. Washington at his death could only be asserted against his estate, not the statutory beneficiaries for his wrongful death claim. S.C. Code Ann. § 15-5-90 (providing that, at a person’s death, legal claims “survive both to and against” the decedent’s

personal representative). Since there is not even the possibility of a legal claim by Defendant against the wrongful death beneficiaries, there is no “direct benefit” to support a third-party beneficiary argument.

Additionally, the South Carolina Supreme Court has been ambivalent at best as to whether a third-party beneficiary theory can ever be used to force arbitration on unconsenting non-parties. *Wilson*, 426 S.C. at 338 n. 7, 827 S.E.2d at 174 n. 7 (citing *Comer v. Micor, Inc.*, 436 F.3d 1098, 1102 (9th Cir. 2006) (finding third-party may be able to enforce a contract but “certainly cannot be bound to a contract it did not sign or otherwise assent to”)). The court has rejected third-party beneficiary arguments to enforce nursing home arbitration contracts on multiple occasions. *Thompson*, 416 S.C. at 57, 784 S.E.2d at 687 (quoting *Dickerson v. Longoria*, 995 A.2d 721, 742 (Md. 2010) (“a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement”)); *see also Hodge*, 422 S.C. at 574, 813 S.E.2d at 308 (nursing home conceded *Thompson* foreclosed third-party beneficiary argument). At best, even if the Arbitration Agreement was valid, it would only reach the estate's survival claims. However, since it is not valid, it cannot compel arbitration of the wrongful death or survival claims in this action, and Defendant's motion should be denied.

VI. Additional discovery on the issue of authority is unnecessary and would violate S.C. Code Ann. § 15-48-20.

In the alternative, Defendant has requested that the Court grant additional discovery on the nature of Plaintiff's agency relationship with her uncle. S.C. Code

Ann. § 15-48-20 only permits a court to “summarily” proceed to the determination of whether arbitration is appropriate when an agreement to arbitrate has been contested. Here, the only relevant and necessary evidence for the Court to make its determination is already available for the Court’s review. Any further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, offend section 15-48-20’s mandate for an expedient determination of arbitrability, waste judicial resources, and increase costs for both parties unnecessarily. The Court should deny Defendant’s request for additional discovery.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant’s Motion to Compel Arbitration.

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ATTORNEYS FOR THE PLAINTIFF

May 19, 2022.
Hampton, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON) CIVIL ACTION NO.: 2021-CP-15-516

GABRIELLE WASHINGTON, AS
PERSONAL REPRESENTATIVE OF
THE ESTATE OF WALTER
WASHINGTON, JR.,

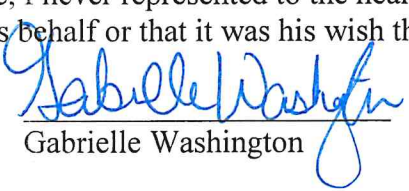
Affidavit of Gabrielle Washington

v.

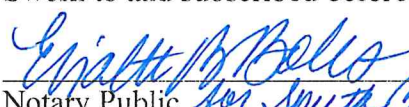
ST. GEORGE HEALTH CARE, LLC,
D/B/A ST. GEORGE HEALTHCARE
CENTER AND WALTERBORO
COMMUNITY HOSPITAL, INC., D/B/A
COLLETON MEDICAL CENTER,

The Affiant, Gabrielle Washington, having been duly sworn testifies as follows:

1. I am over 18 and legally competent.
2. On October 13, 2017, I signed documents that were presented to me by St. George Health Care Center in relation to my uncle Walter Washington's admission to their facility.
3. My uncle has two adult sisters, Carrie Washington and Annie Washington, both of whom reside at the same address as me.
4. During the intake process, no one from the health care center ever inquired if my uncle's sisters were available and willing to act as surrogates on his behalf.
5. Both of my uncle's sisters were willing and available to act as his surrogates but were not present at the facility at the time of his admission.
6. At the time of his admission, no one from the health care center ever asked if I had power of attorney or had been appointed as my uncle's guardian or conservator.
7. While Walter Washington was alive, I never represented to the health care center that I had any legal authority to act on my uncle's behalf or that it was his wish that I act on his behalf.


Gabrielle Washington

Sworn to and subscribed before me:


Notary Public for South Carolina

Date: 5-17-2022

My Commission Expires: 11-8-2022

ROA 074

EXHIBIT

A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
GABRIELLE WASHINGTON AS	)	CASE NO. 2021-CP-15-00516
PERSONAL REPRESENTATIVE OF	)	
THE ESTATE OF WALTER	)	
WASHINGTON, JR. ,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	DEFENDANT ST. GEORGE HEALTH
	)	CARE, LLC D/B/A ST. GEORGE HEALTH
ST. GEORGE HEALTH CARE, LLC,	)	CARE CENTER'S MOTION TO COMPEL
D/B/A ST. GEORGE HEALTH CARE	)	ARBITRATION
CENTER AND WALTERBORO	)	
COMMUNITY HOSPITAL, INC., D/B/A	)	
COLLETON MEDICAL CENTER ,	)	
	)	
DEFENDANTS.	)	
	)	

TO: LEE COPE, ESQUIRE, ATTORNEY FOR PLAINTIFF

COMES NOW Defendant St. George Health Care, LLC d/b/a St. George Health Care Center (the “Facility”) and submits the following Memorandum in Support of its Motion to Compel Arbitration pursuant to the Federal Arbitration Act (“FAA”) 9 U.S.C. § 1, et seq., and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure.

INTRODUCTION

In this nursing home malpractice action, Plaintiff, Gabrielle Washington (“Ms. Washington”), as personal representative of her uncle, Walter Washington, Jr. (“Mr. Washington”), has sued the Facility for damages based on allegations that solely arise out of and concern Mr. Washington’s residency at the Facility.

When Mr. Washington was admitted to the Facility, Ms. Washington handled the paperwork on his behalf, and in so doing, she executed not only an Admission Agreement but also

an Arbitration Agreement that covers all claims asserted against the Facility in this lawsuit. When she executed the Admission Agreement and the Arbitration Agreement, Ms. Washington expressly represented to the Facility that she was duly authorized to act on Mr. Washington's behalf. And from then on (i.e., through the end of his residency at the Facility), Mr. Washington received and accepted the direct benefits of his admission, with no complaint being raised about the actions Ms. Washington took on his behalf prior to Plaintiff's opposition to the Facility's present efforts to enforce the Arbitration Agreement.

As discussed further herein, the Arbitration Agreement is enforceable—or, alternatively, under the circumstances, Plaintiff should be estopped to deny its enforceability—it covers the entirety of Plaintiff's claims against the Facility, and it requires that those claims proceed in arbitration, not litigation. Accordingly, the Facility respectfully requests that the Court compel Plaintiff's claims to arbitration.

BACKGROUND

With the help of Ms. Washington, Mr. Washington, age 69, was admitted to the Facility on October 13, 2017, for skilled nursing care following hospitalization at Colleton Medical Center for seizure activity. Ms. Washington handled the paperwork in conjunction with Mr. Washington's admission, and in so doing, Ms. Washington executed an Admission Agreement and an Arbitration Agreement on Mr. Washington's behalf, both of which were duly countersigned by the Facility's representative Tana Shuler. (See **Exhibits 1** and **2**, respectively, attached hereto).

Based on the Admission Agreement and pursuant to the terms thereof, Mr. Washington was admitted to the Facility and received skilled nursing care and treatment. During his stay at the Facility, Mr. Washington received and accepted the benefits of the Admission Agreement, which included the Facility furnishing Mr. Washington a room, providing routine meals, and rendering

nursing, personal, and custodial care. Mr. Washington has never challenged any agreement's validity until now. Notably, Plaintiff does not assert that the Admission Agreement is invalid or that he entered the Facility unwillingly or without consent.

Upon admission, Ms. Washington explicitly represented that she was authorized to admit Mr. Washington to the Facility and execute the documents she executed on his behalf, including the Arbitration Agreement. Indeed, the very first provision of the Admission Agreement states that *all information provided to the Facility* is truthful and correct, including Ms. Washington's authority to bind Mr. Washington (See **Ex. 1**). Ms. Washington signed the Admission Agreement on behalf of Mr. Washington as his responsible party and representative.

The Arbitration Agreement provides:

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules. (See **Ex. 2**).

The Arbitration Agreement further provides:

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law. (See **Ex. 2**).

Regarding Ms. Washington's authority to sign on behalf of her uncle and also bind herself as his representative, the Arbitration Agreement states:

By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident **as well as the Representative**.

(See **Ex. 2**)(Emphasis added).

Because the acts complained of by Plaintiff fall within the scope of the Arbitration Agreement, the Court should stay or dismiss these proceedings, and compel this matter to arbitration. 9 U.S.C. § 3.

ARGUMENT

I. BOTH STATE AND FEDERAL POLICY FAVOR OF ARBITRATION.

There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir.1997). Indeed, both federal and state policy favor arbitrating disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) (“The policy of the United States and this State is to favor arbitration of disputes.”). “This preference for arbitration has manifested itself in legislation and judicial decisions supporting the expeditious appeal of decisions denying an application to compel arbitration.” *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999). Therefore, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Id.*, 338 S.C. at 41, 524 S.E. 2d at 846 (internal quotations and citations omitted).

II. THE FAA GOVERNS THE ARBITRATION AGREEMENT.

The Arbitration Agreement, by its terms and by law, is governed by the FAA. For one reason, the Arbitration Agreement expressly states that the FAA applies:

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the [FAA], notwithstanding any contrary provision of this Agreement or contrary state law.

(See **Ex. 2.**) This must be enforced like any other contract term. *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 196, 844 S.E.2d 66, 70 (Ct. App. 2020) (“We first consider whether the FAA applies. We hold it does, for two reasons. First, the [subject contract] provides the parties ‘specifically agree that this transaction involves interstate commerce.’ We must enforce this agreement like any other contract term.”) (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001) (finding the FAA applied because the parties had agreed the subject contract involved interstate commerce)).

Moreover, and in any event, the FAA applies “to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363; *see also Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress’s power under the Commerce Clause). Our Supreme Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

III. THE FAA REQUIRES ARBITRATION AGREEMENTS TO BE PLACED ON EQUAL FOOTING WITH ALL OTHER CONTRACTS UNDER SOUTH CAROLINA LAW.

“[T]he basic purpose of the [FAA] is to overcome courts’ refusals to enforce agreements to arbitrate”¹ and “ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement.” *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). To that end, the FAA provides that an arbitration agreement is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. “By its terms, the [FAA] leaves no place for the exercise of discretion by a . . . court, but instead *mandates* that . . . courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis added); *see also* 9 U.S.C. § 4 (“The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.*”) (emphasis added).

While a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not do so based on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). Under the FAA, “courts *must* place arbitration agreements on *equal footing with other contracts . . .*” *Concepcion* at 339 (emphasis added); *see also Allied–Bruce*, 513 U.S. at 281 (“States may regulate contracts, including arbitration clauses,

¹ *Allied–Bruce*, 513 U.S. at 270.

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).²

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

IV. THE ARBITRATION AGREEMENT IS VALID ON ITS FACE.

The Arbitration Agreement is valid on its face: there is nothing within the four corners of the document itself that calls its validity into question.

A. It is not deficient as a matter of form.

The Arbitration Agreement is duly completed and executed, bearing Ms. Washington’s signature on behalf of Mr. Washington, along with Ms. Washington’s express representation that she is authorized to sign for Mr. Washington,³ and it likewise bears Ms. Shuler’s signature on behalf of the Facility.

² To be clear, what the FAA requires is for arbitration agreements to be placed on *at least* equal footing with all other contracts under state law. As explained above, both state and federal policy *favor* arbitration. The FAA prohibits arbitration agreements from being singled out for *disfavored* treatment relative to other contracts, but it does not prohibit the *avored* treatment of arbitration agreements relative to other contracts.

³ In this regard, it should be noted that, by virtue of her signature, Ms. Washington is “presumed to have read, understood, and assented to [the] terms” of the Arbitration Agreement, *Gibson v.*

B. It is duly supported by consideration.

The Arbitration Agreement is duly supported by consideration, containing, as it does, the parties' mutual promises to arbitrate. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997) ("A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement.") (citing *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 304, 468 S.E.2d 292, 300 (1996) ("[T]he exchange of promises qualified as consideration."); see also *Evatt v. Campbell*, 234 S.C. 1, 8, 106 S.E.2d 447, 451 (1959) ("Mutual promises also constitute a good consideration.").

C. It does not omit, or fail to sufficiently state, any material term.

The Arbitration Agreement sets forth the parties' mutual concurrent promises to submit a defined scope of disputes to binding arbitration. It provides that the arbitration will be before an arbitrator who is either agreed upon by the parties themselves or selected by the Court,⁴ in a

Epting, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms."), including, of course, the express representation therein of her authority to act on Mr. Washington's behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract, *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) ("There exists in every contract an implied covenant of good faith and fair dealing."), and Ms. Washington is no less bound by this covenant than the Facility.

⁴ To be clear, if the Court is called upon to select the arbitrator, in doing so, it will not be "writing in" a missing term of the Arbitration Agreement but rather enforcing the terms already set forth therein. And in any event, "the lack of a specified arbiter is not an omission of a material term." *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 82, 749 S.E.2d 139, 147 (Ct. App. 2013); see also FAA § 5 (providing a fallback mechanism for arbitrator selection "if for any other reason there shall be a lapse in the naming of an arbitrator . . . or in filling a vacancy": "If in the [arbitration] agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he

proceeding to be conducted pursuant to the South Carolina ADR Rules,⁵ which will result in a decision that is enforceable in a court of competent jurisdiction. No more is required. *York*, 406 S.C. at 83, 749 S.E.2d at 147 (explaining that matters like discovery rules, cost allocations, or arbitration initiation procedures are not material terms but rather “‘ancillary logistical’ ones” that are “not required within an arbitration agreement”) (citing *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 131–32, 678 S.E.2d 438, 439 (2009)). And to require more simply because an arbitration agreement is in issue would violate the FAA’s requirement that arbitration agreements be placed on equal footing with all other contracts. *Concepcion*, 563 U.S. at 339.

D. It is not unconscionable.

The Arbitration Agreement is not unconscionable. For an agreement to be deemed unconscionable, there must be both (1) an absence of meaningful choice on the part of one party due to one-sided contract provisions and (2) terms that are so oppressive no reasonable person would make them and no fair and honest person would accept them. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). Neither is the case here.

The party alleging that the enforcement of a contract would be unconscionable bears the burden of proving both prongs of the definition. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000); *accord Marzulli v. Tenet S.C., Inc.*, No. 2015-002363, 2018 WL 1531507, at *3 (S.C. Ct. App. Mar. 28, 2018). In this case, Plaintiff bears that burden. “Absence of

or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.”).

⁵ Rule 12 of the SC ADR Rules includes substantive evidentiary and procedural provisions, and by its plain language provides that parties may agree to apply them in binding arbitration, as is the case here. See Rule 12(a), SCADR (“Arbitrations selected by the parties under these rules are deemed non-binding arbitrations *unless otherwise expressly agreed by the parties.*”) (emphasis added); see also Rule 13(a), SCADR (“The arbitrator shall at all times be authorized to control the hearing and the procedures to be followed.”).

meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue.” *Simpson*, 373 S.C. 14, 25, 644 S.E.2d 663, 669. “Meaningful choice” refers specifically to the bargaining process involved in entering into the Arbitration Agreement. The Arbitration Agreement clearly articulates that the resident entering into the Agreement is fully aware of his or her healthcare options and other potential providers of nursing home facilities. The Agreement states:

It is understood by Resident/Representative that he/she is not required to use the aforesaid Health Care Center for Resident's healthcare needs and that there are numerous other health care providers in the State where Health Care Center is located that are qualified to provide such care to Resident. (See Ex. 2, ¶ 2.)

Furthermore, on that same signature page, the Arbitration Agreement states clearly in bold lettering in a separate heading: “**I understand and agree that I am giving up and waiving my right to a jury trial.**” (See Ex. 2, ¶ 6.)

By signing the Arbitration Agreement and Admission Agreement, Ms. Washington, acting on behalf of Mr. Washington, represented that she understood and assented to their terms. *Gibson*, 426 S.C. at 352, 827 S.E.2d at 181. Indeed, she was given the option of entering into the Arbitration Agreement – *or not* – and she freely and voluntarily made the decision to proceed. The Arbitration Agreement by its plain language was not a precondition of admission to the Facility and simply could not have been an adhesion or “take it or leave it” contract. Ms. Washington had the option not to enter into the Arbitration Agreement on behalf of her uncle, yet she voluntarily did so, voluntarily did not retract her agreement thereto, and her uncle stayed at the Facility and received skilled nursing care after admission.

The fact that the Facility is a commercial entity is also not sufficient grounds, standing alone, to prove the absence of a “meaningful choice.” While disparity in bargaining power and relative sophistication are factors to be considered under *Simpson*, the fact that the Facility

unilaterally drafted this agreement and presented it to Mr. Washington's representative for consideration cannot justify a finding of unconscionability. See *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 542 S.E.2d 360, 365 n. 5 (2001) (“[I]nequality of bargaining power alone will not invalidate an arbitration agreement.”).

The Facility gave Mr. Washington the option of entering into the Arbitration Agreement and, acting on his behalf, Ms. Washington made the decision to proceed. She did not have to accept this offer nor has there been any allegation or evidence that the Facility coerced Ms. Washington into signing. Nonetheless, even if Plaintiff could demonstrate that there was an absence of meaningful choice, a finding of unconscionability would still not be warranted in the present case, as Plaintiff must still show that the “terms [of the agreement] are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

The Arbitration Agreement simply binds the parties (both sides) to submit to arbitration. Not only is this not oppressive, “both state and federal policy favor arbitration of disputes.” *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668.⁶ And there is nothing about the Arbitration

⁶ In this regard, the Facility is compelled to address language in our Supreme Court's decision in *Palmetto Construction Group, LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 856 S.E.2d 150 (2021), that “statements [in our appellate jurisprudence] that the law ‘favors’ arbitration”—which are numerous, e.g., *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016) (“The policy of the United States and of South Carolina is to favor arbitration of disputes.”); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (same); *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012) (“There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration.”) (quoting *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999))—“mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions” and that “[t]here is . . . no public policy—federal or state—‘favoring’ arbitration.” *Palmetto Construction Group*, 432 S.C. at 636, 639, 856 S.E.2d at 152, 153. Candidly, it is impossible to square this language in *Palmetto Construction Group* with language in other Supreme Court decisions, for instance, the language in *Zabinski* (which the Court thereafter echoed

Agreement that suggests it is not geared towards achieving an unbiased decision by a neutral decision-maker. *Id.* at 25, 644 S.E.2d at 668 (“In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.”).

Under the terms of the Arbitration Agreement, the parties are to select a third party arbitrator *jointly* “from a panel having experience and knowledge of the health care industry.” (See **Ex. 2.**) If the parties are unable to agree upon such an arbitrator, the agreement vests the Court with authority to make a selection. The selected neutral arbitrator is vested with authority to hear the case and make a decision which is “binding on all parties.” As a result, it can only be said that the Arbitration Agreement allows for complete mutuality of remedies. Neither party is given an advantage by its terms.

And, out of an abundance of caution, it cannot be said that there is any incongruity between the arbitration process and the discovery needs in nursing home malpractice cases. First

in *Parsons*) that “[t]he policy of the United States and South Carolina is to *favor arbitration of disputes*.” 346 S.C. at 596, 553 S.E.2d at 118 (emphasis added). More than just recognizing that contractual provisions to arbitrate must be respected and enforced in the same way as other contractual provisions, this plain language expressly recognizes the existence of a public policy—federal and state—that “favor[s]” arbitration *as a method of dispute resolution*. Moreover, the *Zabinski* Court instructs that “[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration;” that, “unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered;” and that “[a] motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute.” *Id.* at 597, 553 S.E.2d at 118–19. These rules do not merely ensure that contractual provisions to arbitrate are respected and enforced in the same way as other contractual provisions: They affirmatively tip the scales in favor of arbitration. Indeed, citing our Supreme Court’s decision in *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 747 S.E.2d 461 (2013), our Court of Appeals has expressly recognized that “[d]ue to the strong South Carolina and federal policy favoring arbitration, arbitration agreements are *presumed valid*.” *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 877 (Ct. App. 2020) (emphasis added) (citing *Cape Romain Contractors*, 405 S.C. at 125, 747 S.E.2d at 466)).

off, this would amount to a wholesale attack on the enforceability of arbitration agreements in the nursing home malpractice context, which violates the FAA. *See Concepcion*, 563 U.S. at 339 (instructing that arbitration agreements must be placed on equal footing with other contracts and that, while a court may set aside arbitration agreements by state-law defenses that govern the validity, revocability, and enforceability of contracts generally, it may not do so “by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue”).

Moreover, there is in fact no cause for any such concern. Again, the Arbitration Agreement calls for arbitration to be conducted under the South Carolina ADR Rules, the South Carolina ADR Rules are required (“shall”) to be “construed to secure the just, speedy, inexpensive and collaborative resolution” of disputes, and an arbitration proceeding that amounts to a trial by ambush and/or would be unduly burdensome in terms of expense would not be consistent with the South Carolina ADR Rules. Coupled with the mandate that they be “construed to secure the just, speedy, inexpensive and collaborative resolution,” the South Carolina ADR Rules—*see, e.g.*, Rule 11(c) (“The parties and their representatives shall cooperate with the arbitrator.”); Rule 12(b)(3) (“The arbitrator shall have the authority of a trial judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all contempt matters to the Chief Judge for Administrative Purposes.”); Rule 13(a) (“The arbitrator shall at all times be authorized to control the hearing and the procedures to be followed.”); Rule 13(b) (“The arbitrator shall define and describe the following to the parties: . . . (2) The duties and responsibilities of the arbitrator and the parties; and (3) The cost of the arbitration hearing.”)—provide all the tools necessary for the proceedings, including discovery therein, to be conducted in a way that affords Plaintiff a substantively and procedurally fair and

meaningful opportunity to present her case in arbitration, with no more limitation thereon than that which is inherent in the arbitration process generally as an alternative to litigation, an alternative, which, again, “both state and federal policy favor” *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668.

Lastly, the United States District Court for the District of South Carolina and trial courts around South Carolina have repeatedly upheld the validity of arbitration agreements nearly identical to the one at issue in this matter. In evaluating these arbitration agreements in the context of nursing home admissions, federal courts in South Carolina have all agreed that these agreements are not unconscionable. *McCutcheon*, *supra*, at *3; *THI of S.C. at Columbia, LLC v. Wiggins*, C/A No. 3:11-888-CMC, 2011 WL 4089435, at *6 (D.S.C. Sept. 13, 2011) (Currie, J.); *Benson*, *supra*. Along similar lines, any holding that the Arbitration Agreement at issue is unconscionable simply because it was executed in the context of an admission to the skilled nursing facility would be in violation of the clear precedent under *Kindred* and the FAA, which instruct that arbitration agreements must be placed on equal footing with all other types of contracts. Accordingly, any argument by Plaintiff that the Arbitration Agreement is unconscionable is unfounded and must be rejected.

V. PLAINTIFF’S CLAIMS ARE WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT.

Without question, Plaintiff’s claims against the Facility are within the scope of the Arbitration Agreement. In pertinent part, the Arbitration Agreement reads as follows:

It is . . . understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility’s Admission Agreement, or breach thereof, or relating in any way to Resident’s stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a

violation of any right or rights granted under State law (collectively “Disputes”), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

This plain language clearly embraces the subject matter of Plaintiff’s claims. And even if there were “any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration” *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) (“[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.”).

VI. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE.

A. The Plain Language of the Agreement Binds Plaintiff.

According to the plain language of the Arbitration Agreement and consistent with her actions during the admissions process, Ms. Washington represented herself to admissions personnel at the Facility as her uncle’s representative with the authority to sign documents and enter agreements on his behalf.⁷ It was clearly Ms. Washington’s intention to bind Mr. Washington according to the terms of the Admission Agreement and Arbitration Agreement. Moreover, Ms. Washington evinced no intentions or directions to the contrary. Accordingly, the plain language of the Arbitration Agreement confirms that Ms. Washington was authorized to enter this Agreement binding her uncle to arbitration, and the Agreement directly applies to the instant dispute. The Court should find this Agreement is valid and enforceable, and the present action must be stayed and compelled to arbitration.

⁷ See **Ex. 2** (“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”)

This Court has recently found the plain language of arbitration agreements to support enforceability in at least two other cases with circumstances nearly identical to the case at bar. *See e.g. Macie Price v. THI of South Carolina at Magnolia Manor Inman, LLC et. Al*, 2018-CP-42-01054 (S.C. Com. Pls. August 7, 2018) (attached hereto as **Exhibit 4**); *Josephine Spears v. Rehab Center of Cheraw, LLC et al.* 2019-CP-13-00308 (January 10, 2020) (attached hereto as **Exhibit 5**). In both cases, the plaintiff was the wife of a resident at a skilled nursing facility in South Carolina. The resident's wife in each case executed an admissions agreement and an arbitration agreement *identical* to the ones in the case at bar, and as here represented to the facility that she had authority to enter these agreements on her husband's behalf. (See **Ex. 4**, p. 2-3; see **Ex. 5**, p. 1). Unlike the present case, the plaintiffs in *Price* and *Spears* later executed contradictory affidavits in opposition to the Defendants' motion to compel arbitration, disclaiming their authority to enter the agreements. Nevertheless, this Court found that the signatory plaintiffs' attestations of authority in the arbitration agreements prevailed over the contradictory affidavits, and bound plaintiffs in both cases to the terms of the agreements. The Court should reach the same conclusion in the present case, and enforce the Arbitration Agreement, particularly in the apparent absence of any affidavits or other evidence to contradict the plain language of the Agreement.

Specifically, this Court determined in *Price* that "the terms of the Arbitration Agreement clearly apply to the instant dispute[.]" because was it clearly the intent of the wife to bind her husband (and herself, as personal representative) according to the plain language terms of the arbitration agreement. (See **Ex. 4**, p. 5). Likewise, in *Spears*, the arbitration agreement at issue contained an express attestation of authority to enter into the agreement on behalf of the resident identical to Plaintiff's attestation in the Arbitration Agreement noted above. As such, this Court

in *Spears* held, in part, that the wife’s authority to sign the arbitration agreement at issue was “valid on its face” by its plain language (and indeed the arbitration agreement as a whole was found to be valid on its face) and that the skilled nursing facility had no obligation whatsoever to inquire as to the signatory plaintiff’s authority beyond her own attestation. (See **Ex. 5**, p. 4). As in *Price* and in *Spears*, Ms. Washington in this matter expressly attested to her own authority to enter into the Arbitration Agreement on behalf of her uncle, Mr. Washington. She has not submitted an affidavit or other evidence disclaiming her authority to enter such an agreement on his behalf. Therefore, the Court should find that Plaintiff is bound by the plain language of the Arbitration Agreement and compel this matter to arbitration.

B. Ms. Washington Possessed the Apparent and Inherent Authority to Execute and Bind Mr. Washington to the Arbitration Agreement and/or Plaintiff Should be Estopped to Deny Ms. Washington’s Authority.

1. Agency Relationship

In addition to representing herself as authorized to enter the Arbitration Agreement on her uncle’s behalf by the plain language of the Arbitration Agreement, Ms. Washington possessed the *apparent and inherent authority* to bind Mr. Washington under this Agreement. A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg’l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal's behalf and subject to the principal's control.” *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)).

Alternatively, “[a]n agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the

relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties.” *Peoples Fed. Sav. & Loan Ass’n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145-146, 425 S.E.2d 764, 773 (Ct. App. 1992.) The doctrine of apparent authority provides that a principal may be bound by the acts of its agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

In *Carraway v. Beverly Enters. Ala., Inc.*, 978 So. 2d 27 (Ala. 2007), the facts are substantially similar to the case at bar. There, the plaintiff was the brother of a resident of a nursing home facility who executed a number of documents on his sister's behalf upon her admission to the facility, including an arbitration agreement. The brother signed the documents as his sister's authorized representative but did not have a power of attorney for his sister at the time. Nevertheless, as in this case, the admissions agreement in *Carraway* provided that plaintiff was his sister's legal representative for the purposes of admission as he was her next-of-kin and represented himself to be authorized to make health care decisions on her behalf. The arbitration agreement in *Carraway* was a separate document and was not a condition of admission to the facility. *Id.*

When signing the arbitration agreement, the brother in *Carraway* left the resident signature line blank and signed it as the “authorized representative” of his sister. Suit was later filed and the facility moved to compel arbitration, which the trial court granted. On appeal, the Alabama Supreme Court affirmed the trial court's decision holding, relevant here, that the resident's brother possessed the apparent authority to enter into the arbitration agreement on his sister's behalf, as evidenced by the fact that she never objected to him signing on her behalf and

the arbitration agreement specifically provided that any person authorized by the resident may execute it on her behalf. *Id.* See also, *Tenn. Health Mgmt. v. Johnson*, 49 So. 3d 175 (Ala. 2010) (holding that a daughter possessed the apparent authority to enter into an arbitration agreement on her mother's behalf). Notably, the Supreme Court of Alabama's holding in *Carraway* was applied as "persuasive authority" by this Court in *Price, supra.* (**Ex. 4**, p. 8).

Clearly, in this matter, Ms. Washington held herself out as an agent for her uncle without any indication to the contrary when she executed various admission documents on his behalf, including the Arbitration Agreement. Based on Mr. and Ms. Washington's conduct and explicit representations, the Facility believed she possessed the authority to execute all admissions documents on his behalf, including the Arbitration Agreement. It was the Facility's reasonable and justified belief that Ms. Washington was her uncle's authorized representative and had the authority to execute the documents on his behalf.

Moreover, by allowing Ms. Washington to procure his admission to the Facility and, thereafter, by accepting the benefits of the contracts entered into in connection with that admission, Mr. Washington represented that Ms. Washington was his authorized representative to act on his behalf in connection with admission. See *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000) (If a principal holds another out as having the authority to act on his behalf or knowingly permits another to act as his agent, "either **generally** or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances") (emphasis added).

A holding to the contrary would contradict the fundamental concept of apparent agency: *an agency relationship is based on a third party's understanding of a principal's manifestations*

and a reasonable belief that the agent has been authorized to act. The Facility had reason to believe that, by allowing Ms. Washington to sign the admissions paperwork, including the documents providing for Mr. Washington's stay and the skilled nursing care provided at the Facility, Mr. Washington cloaked Ms. Washington with the authority to execute those documents. Further, Neither Mr. Washington nor any other family member repudiated or invalidated Ms. Washington's actions. Instead, Mr. Washington accepted the benefits of the contracts with the Facility by remaining at the Facility and receiving skilled nursing care and services, thereby ratifying his niece's actions. Because no one attempted to repudiate the Arbitration Agreement or even question it, the Facility was further justified in believing Ms. Washington had been authorized to execute it. It is clear that an apparent agency relationship existed such that the Arbitration Agreement should be deemed enforceable.

Even if Ms. Washington lacked the actual or apparent authority to enter into the terms of the Arbitration Agreement, she still possessed sufficient inherent agency powers to render the agreement enforceable. Such powers are recognized by South Carolina courts and are used to enforce agreements where supposed unauthorized actions "accompany or are incidental to transactions which the agent is authorized to conduct..." See, §§ 8A, 161 *Restatement (Second) of Agency* (1958); *Smith v. Fitton & Pittman, Inc.*, 264 S.C. 129, 212 S.E.2d 925 (1975) (*abrogated on unrelated grounds*) (examining whether party had properly demonstrated the existence of inherent agency powers); *Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r*, 309 P.3d 372 (Wash. 2013); *Daly v. Aspen Ctr. for Women's Health, Inc.*, 134 P.3d 450, 452 (Colo. App. 2005); *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210-11 (Ind. 2000); *Cange v. Stotler & Co.*, 826 F.2d 581, 591 (7th Cir. 1987) ("[t]he powers of an agent are, prima facia, coextensive with the business entrusted to his care, and will not be narrowed by limitations

not communicated to the person with whom he deals.”) (citing *Lumbermen's Mut. Ins. Co. v. Slide Rule & Scale Eng'g Co.*, 177 F.2d 305, 309 (7th Cir. 1949)).

The basis for this doctrine is that, as between an equally innocent principal and third party, the third party should prevail. This well-established legal principle follows from one of the cardinal principles of agency law: that third parties, such as the Facility, should not be disadvantaged because they dealt with an agent rather than a principal. As set forth above, there is no dispute as to whether Ms. Washington was authorized to admit her uncle to St. George. To the extent Plaintiff takes issue with her authority to bind Mr. Washington to the Arbitration Agreement and the specific terms therein, such actions merely accompanied and were incidental to Ms. Washington's authority to admit him to the Facility. The Facility should not be disadvantaged for acting in accordance with the express representations of Ms. Washington regarding her authority.

2. Agency by Estoppel

“When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances.” *R & G*, supra, 343 S.C. at 433, 540 S.E.2d at 118. To properly show estoppel in South Carolina, a party must show: “(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.” *Boyd v. Bellsouth Tel.Co.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006).

In *Price, supra*, this Court ruled that the Plaintiff was estopped from denying that she was her sister's authorized agent during the latter's admission to the skilled nursing facility:

In the case at the bar, [the facility] had no knowledge or reason to believe that Plaintiff was not [her husband's] authorized agent for purposes of executing the Arbitration Agreement or and other admissions paperwork. [The facility] relied on the affirmative representations of Plaintiff in admitting her husband to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by [the facility] for years only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, agency by estoppel is present based upon the record before this Court such that the arbitration agreement is similarly enforceable.

(See **Ex. 4**, p. 9). Accordingly, the court concluded that the arbitration agreement was valid and enforceable.

Similarly, in *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011) the United States District Court of South Carolina concluded the plaintiff was estopped from denying he had authority to bind his wife to arbitration. (Attached hereto as **Exhibit 6**). As in the present case, the husband in *McCutcheon* executed a number of documents on his wife's behalf upon her admission to a nursing home facility, including an admissions agreement and an arbitration agreement. As in this case, the admissions agreement in *McCutcheon* provided that the husband was his wife's legal representative for the purposes of admission, as he was her next-of-kin and represented himself as authorized to make health care decisions on her behalf. The court held:

Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, plaintiff takes inconsistent positions regarding these contracts, which were executed by the same parties under the same purported authority. [Accordingly,] [i]t would be inequitable [] to allow plaintiff to assert that Elijah McCutcheon had authority to sign the Admissions Agreement on behalf of [his wife], but lacked such authority to sign the Arbitration Agreement. For these reasons, the court finds that

plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

Id. at *5.

Like in *Price* and *McCutcheon*, it would be disingenuous and inequitable to allow the Plaintiff in this case to assert that she was authorized to sign the Admissions Agreement, and other forms she signed on admission but not the Arbitration Agreement. In the case at bar, the Facility had no knowledge or reason to believe that Ms. Washington was not her uncle's authorized agent for purposes of executing the Arbitration Agreement and other admissions paperwork. The Facility relied on the affirmative representations and conduct of Ms. Washington in admitting her uncle to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by the Facility, only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, Plaintiff should be estopped from denying the validity of the Arbitration Agreement.

C. The Arbitration Agreement and the Admission Agreement Merged (i.e., Should be Construed Together as a Single Contract), and Plaintiff Should Be Estopped from Denying the Enforceability of the Arbitration Agreement.

As an additional ground to compel arbitration, the Admission Agreement and Arbitration Agreement should be construed together (i.e., merged) and, Mr. Washington having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff should be equitably estopped to deny the enforceability of the Arbitration Agreement merged therewith.

1. Merger

Courts in South Carolina construe contemporaneous instruments together; if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of

another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated. *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977). Absent some evidence indicating a contrary intention, when instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will generally consider and construe them together on the theory that the instruments are effectively one instrument or contract. *Id.* See also *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994) (holding that promissory notes and a mortgage agreement executed contemporaneously on the same date, must be construed together). Furthermore, even when instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. See *Plaza Development Services v. Joe Hardin Builder, Inc.*, 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988); accord *Cafe Associates, Ltd v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991).

Indeed, in *Coleman v. Mariner Health Care, Inc.*, even though our Supreme Court found against merger on the particular facts of the case, it nonetheless confirmed the validity of the general proposition of law on which the *Coleman* appellants based their merger/equitable estoppel argument in the very context of nursing home admission agreements and arbitration agreements. 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (“Appellants’ equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. . . . Here, the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.”).

As indicated previously, the court in *McCutcheon* analyzed facts almost identical to the case at bar and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011WL6318575 (See **Ex. 6**). Indeed, this Court has cited to *McCutcheon* on numerous occasions in holding that a nursing home arbitration agreement merged with the admission agreement for purposes of equitable estoppel under precisely the same circumstances. See *Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012). (See *Abrams*, *Campsen* attached hereto as **Exhibits 7 and 8, respectively**). More recently, this Court held that an admission agreement and arbitration agreement identical to the ones at the bar which had been signed by a resident's daughter-in-law on admission to a skilled nursing facility, were merged and that the Plaintiff was estopped from denying the validity of the arbitration agreement. *William Haynes as Personal Representative of the Estate of Elizabeth Varner vs. THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab et al*, Case Nos. 2021- CP-10- 01437 and 02477. S. C. Com. Pls. Feb. 24, 2022)(attached hereto as **Exhibit 9**).

Here, the Admission Agreement and the Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction.⁸

⁸ To be clear, *Coleman* unequivocally answers the question of whether the Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly observed regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), “the documents *were* executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction.” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

They should be considered merged, i.e., they should be considered and construed together as effectively one contract.

2. Equitable Estoppel of Merged Agreement

“South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including . . . estoppel.” *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019). “Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.” *Int’l Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). “A nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause.’” *Id.* (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)); *see also Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290–297, 733 S.E.2d 597, 601–605 (Ct. App. 2012) (applying the direct benefits test as set forth in *International Paper Co.* to reverse the circuit court’s denial of a motion to compel arbitration); *Wilson*, 426 S.C. 326, 339–345, 827 S.E.2d 167, 174–177 (favorably discussing the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals’ earlier decision in *Pearson*, 400 S.C. 281, 733 S.E.2d 597, and under which the Facility contends Plaintiff is estopped to deny the enforceability of the Arbitration Agreement here, where Mr. Washington received direct benefits (in the form of his admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement merged); *see also id.* at 340, 827 S.E.2d at 175 n. 6 (while expressing no opinion on the petitioner’s alternative argument based on the application of the

state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added).

Because of the doctrine of merger referenced above, this legal principle is properly applied in this case. The doctrine of equitable estoppel "exists to prevent a litigant from unfairly receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the contract, namely the contractual arbitration provision." *S. Ill. Bev., Inc. v. Hansen Bev. Co.*, 2007 U.S. Dist. LEXIS 76229 (S.D. Ill. 2007). Moreover, the Fourth Circuit has held that "no party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein." *United States v. Bankers Ins. Co.*, 245 F.3d 315, 323 (4th Cir. 2001).

"Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract." *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates. S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001)(citing *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)). As noted by the Federal District Court in *Jackson v. Iris.com*:

It is an axiomatic rule of contract law that a party may not rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.

....

[W]here . . . a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he

receives a direct benefit from a contract containing an arbitration clause.

524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007) (quoting in part *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bide. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981) (citing in part *Int'l Paper Co.*, 206 F.3d at 416) (internal quotations omitted)).⁹

Of note, this Court applied this precise reasoning in *Spears*, referenced above. (See **Ex. 5**, pg. 9). In that case and as discussed above, a woman admitted her husband to a skilled nursing facility and in connection with his admission, executed admission and arbitration agreements *identical* to the ones here. The agreements were both executed by the woman and a representative of the skilled nursing facility at the same time. This Court considered the agreements as merged and held that the plaintiff was estopped from refusing to comply with the arbitration agreement where, like here, the resident received “direct benefits from the Admission Agreement in the form of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein.” *Id.*, pg. 10 (footnote omitted).

The Court in *Haynes*, referenced above, also applied the same reasoning in holding that the Plaintiff was estopped from denying the validity of an arbitration agreement, where the resident received “direct benefits from the Admission Agreement throughout her residency at the facility, including, without limitation, the room, board, care/treatment she received therein.” (**Ex.**

⁹ See also *THI of S.C. at Columbia, LLC v. Wiggins*, C/A No. 3:11-888-CMC, 2011 WL 4089435, at *6 (D.S.C. Sept.13, 2011) (“Hall's care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate.”); accord *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. 7:13-CV-2929-BHH, 2014 WL 6863550, at *4 (D.S.C. Oct. 31, 2014), report and recommendation adopted, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. Mar. 19, 2015).

9 at 18). The Court went on to explain that the resident “effectively embraced and directly benefited from the Admission Agreement” and therefore the Plaintiff could not deny the enforceability of the arbitration agreement, which had merged with the admission agreement. (*id.*).

The key to determining when direct benefits estoppel may be applied is whether the contractual benefits flowing to the nonsignatory, i.e., the party to be estopped, are direct or indirect. *See Wilson*, 426 S.C. at 343, 827 S.E.2d at 176 (“It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.”) (internal citations omitted). Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration clause while at the same time denying that the arbitration clause is enforceable.

Here, Mr. Washington embraced all aspects of the Admission Agreement with the Facility. Indeed, his receipt of direct benefits under the Admission Agreement (with which the Arbitration Agreement merged) cannot reasonably be denied. Undoubtedly, Mr. Washington received direct benefits (in the form of room, board, various amenities/services, and the care/treatment he received at the Facility about which Plaintiff does not complain). To deny his receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of his residency: every night’s stay, every meal, every amenity/service

provided, every instance of care/treatment, essentially every moment at the Facility—even Plaintiff’s complaint does not go nearly so far as that. (*See generally* Compl.)

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

As described, the Plaintiff’s allegations fall within the scope of the Arbitration Agreement. In accordance with the foregoing law, Plaintiff cannot assert claims against the Facility based upon certain terms of the Admission Agreement while repudiating the Arbitration Agreement and should be prevented from doing so pursuant to the doctrine of equitable estoppel. Pursuant to numerous orders of this Court and numerous other courts on essentially identical facts and concerning identical arbitration agreements, where a non-signatory receives the benefits of the contract, which Mr. Washington certainly did here, he must be prevented from refusing to comply with the Arbitration Agreement merely because he did not sign it.

3. *Coleman, Thompson, Hodge are Distinguishable.*

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

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

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

Unlike the arbitration agreements in *Coleman*, *Thompson*, and *Hodge*, the Arbitration Agreement and Admission Agreement in the case at bar should not be considered “separate” for purposes of denying merger. Unlike *Coleman*, *Thompson*, and *Hodge*, the Arbitration

Agreement in this case does not state that it can be revoked after it has been signed. Further, it did not have to be agreed to as a precondition to admission to the Facility.

Instead, in the present case, the agreements “were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction” and, therefore, the documents merged. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts, supra*, 268 S.C. at 88, 232 S.E.2d at 24).¹⁰ Specifically, the Admission and Arbitration Agreements were signed by Ms. Washington, on her uncle’s behalf, and the Facility on October 13, 2017. The documents were signed by the exact same people: Ms. Washington and Ms. Shuler. The documents were signed for the same purpose and in the same transaction of admitting Mr. Washington to the Facility.

Unlike the arbitration agreements at issue in *Coleman*, *Thompson*, and *Hodge*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. Moreover, while the Admission Agreement in this case does contain an “Entire Agreement” clause, unlike the admission agreements in those other cases, the provision in this case does not separately reference the Arbitration Agreement (in fact, it doesn’t refer to it at all). Indeed, directly contradicting the idea

¹⁰ To be clear, even though the *Coleman* Court found evidence of an intent contrary to merger on the particular facts before it, it nonetheless recognized as *correct* the general proposition of law on which the *Coleman* Appellants’ based their merger argument, i.e., the *Coleman* Court expressly observed that the admission agreements and arbitration agreements before it (which, in this respect, are no different than the instant agreements—though that is not the case in regard to the material facts bearing on the question of merger), “the documents were [indeed] executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction.” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

of “separatedness” (in the parlance of the *Coleman* Court¹¹), the “Entire Agreement” clause in the instant Admission Agreement expressly states that “other Admissions materials” are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed “separatedness.” And without question, the Arbitration Agreement is among these other admissions materials. See *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) (“The same day as Decedent’s admission to White Oak, Stott, acting as Decedent’s authorized representative, signed White Oak’s admission documentation—including the Arbitration Agreement.”) (emphasis added) (internal footnote omitted).

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

Similarly, the termination provisions provide no evidence of “separatedness.” Again, the only reason for the Arbitration Agreement is the Admission Agreement—the only point of the

¹¹ 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike in the instant case—the “Entire Agreement” clause expressly referred to a separate arbitration agreement and, thus, “recognize[d] the ‘separatedness’ of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.”) (emphasis added).

Arbitration Agreement is to cover disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still *connected* to the Admission Agreement even after the termination of the Admission Agreement. This is simply how agreements to arbitrate work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

The merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”¹² as indeed the admission and arbitration agreements were here, there is evidence to upset the *default presumption* that the contracting parties intended the instruments to be construed together as effectively one contract. As a practical matter, if this presumption is to mean anything, upsetting it must require actual evidence of sufficient probity that, notwithstanding the concurrence of all the circumstances that must come together for the presumption of merger to even arise in the first place—i.e., same time, parties, purpose, and transaction—a reasonable, non-speculative inference can be drawn that the parties’ possessed a contrary intention. *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. It does not even make sense that the parties would not have intended the Admission Agreement and the Arbitration Agreement to merge.

¹² *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

Such superficial things as the fact that the admission arbitration agreements have their own titles, are separately paginated, and/or are separately signed cannot suffice to show evidence of intent contrary to merger. To point to such things is really to do no more than to point out that the admission agreement and arbitration agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. The very nature of merger is to *merge* separate documents.

And to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that, as a matter of law, *merger is the default position*, i.e., it is *presumed*, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger presumption to be upset based on evidence that is merely ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention,

but at most might (or might not) reflect a contrary intention—is to allow the exception to devour the rule.

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

It matters not whether the Arbitration Agreement was a condition of admission, only that it was in fact agreed to in conjunction with admission; and, here, there can be no question that the Arbitration Agreement—once agreed upon—was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument, governing various interrelated aspects of Mr. Washington's relationship with the Facility. Indeed, this conclusion finds direct support in the Admission Agreement's "Entire Agreement" provision, which states, "[t]he undersigned further acknowledges that he/she has received and read the Admission Handbook and other Admissions materials and understand that these

documents are made a part of this Agreement by reference herein.” (Ex. 2, p. 12 (emphasis added)). Had the Arbitration Agreement not been executed, it would not constitute admissions material, but, of course, it was executed, and it does constitute admissions material; most respectfully, to conclude otherwise simply does not make sense.

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

VII. SHOULD THE COURT DECIDE TO DENY THE MOTIONS, THE PARTIES SHOULD BE PERMITTED TO CONDUCT ADDITIONAL DISCOVERY.

If the Court is not inclined to grant the instant motion on the grounds contained in this memorandum, this Defendant requests that the parties be permitted to conduct additional discovery on the issues raised herein, and in particular, the nature of Ms. Washington’s agency relationship with her uncle and the circumstances surrounding the admissions process.

In a case involving similar issues, the Honorable Perry Gravely allowed the parties to conduct additional discovery on the issue of a mother’s authority to execute an Arbitration Agreement on her son’s behalf in connection with his admission to a skilled nursing facility. See *James Boyd v. THI of South Carolina, LLC d/b/a at Magnolia Place-Greenville, et. Al*, 2018-CP-23-01934 (S.C. Com. Pls. July 9, 2018)(attached hereto as **Exhibit 10**). Critical to the court’s decision in that case was whether the son’s conduct and admissions director’s understanding of that conduct created apparent agency so as to bind the son to an arbitration agreement. The court permitted the parties to take the depositions of the mother, the son, the admissions coordinator for the skilled nursing facility, and the case manager for the hospital the son was transferred from. After considering the testimony of those individuals, the court found there was evidence to support a finding of apparent agency.

Likewise, the Honorable Alison Lee allowed the parties to conduct additional discovery on a wife's authority to execute an arbitration agreement on behalf of her husband. *See Priscilla Brown, as Personal Representative of the Estate of James Brown v. THI of South Carolina at Columbia at Magnolia Manor d/b/a Midlands Health and Rehabilitation Center*, 2017-CP-40-00516 (S.C. Com. Pls. Nov. 7, 2019) (attached hereto as **Exhibit 11**). The case at the bar involves Ms. Washington's own authority to execute the Arbitration Agreement and the circumstances surrounding its execution. As in *Boyd and Brown*, if the Court determines the record is insufficient to properly rule on the issues before it, additional discovery should be permitted as necessary.

Most respectfully, if the Court should make such a determination, it is only fair to allow this Defendant to engage in some appropriately limited discovery to attempt to protect its arbitration rights. It must be remembered that this Defendant moved to compel arbitration under a facially valid arbitration agreement. This Defendant firmly believes Ms. Washington had the authority to execute the Arbitration Agreement on behalf of her uncle. Nevertheless, neither Plaintiff nor Mr. Washington ever called Ms. Washington's authority to enter into the Arbitration Agreement into question until now. This Defendant had no reason to conduct discovery until this dispute arose, and even then, it still maintain its primary position that the Arbitration Agreement was enforceable based on the record as is. If further development of the record is needed on any point material to arbitrability, the Court should expressly allow this Defendant to protect its legitimate interests through discovery into the relevant subject matter without exposing itself to a claim of waiver by Plaintiff, i.e., without having to expose themselves to a potential Catch-22 where they could be said to have waived their arbitration rights simply by endeavoring to prove them.

CONCLUSION

For the reasons set forth herein, this Defendant respectfully requests that this Court enter an Order dismissing or staying the pending action and compelling arbitration. Alternatively, and if the Court is not inclined to grant the instant motions on any of the grounds asserted above, this Defendant requests that the parties be permitted to conduct additional discovery. This Defendant also requests permission to be heard after such discovery is conducted and requests that they be permitted to submit supplemental memoranda along with any additional evidence procured.

CLEMENT RIVERS, LLP

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LLC d/b/a St. George Health Care Center

Charleston, South Carolina

May 18, 2022

ADMISSION AGREEMENT - SOUTH CAROLINA

RESIDENT NAME: Walter Washington
 RESIDENT NUMBER: 250766-01
 DATE OF ADMISSION: 10/13/17

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among St. George Healthcare ("Facility"), Walter Washington ("Resident") and/or Shirley Washington ("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

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

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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

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Page 2 of 12

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

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

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10. Accept full responsibility for, absolve and release Facility, its agents, Medical Director and/or attending physicians from any liability for any event, including but not limited to, injury, illness, accident, or deterioration of medical condition suffered by Resident when Resident is not on Facility premises and is not under the care, custody and/or supervision of Facility and its staff.
11. Abide by Facility's policies and procedures as amended from time to time and outlined in the *Admission Handbook* and other Admissions materials, which are made a part of this Agreement by reference herein, as well as the Resident Rights under applicable state law and any future amendments. Facility's rules, regulations, policies and procedures shall not be construed as imposing contractual obligations on Facility and are subject to change.
12. Cooperate with Facility in securing third-party payments, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments.
13. In the event Resident is transferred or discharged, Resident and/or Representative will be responsible for collecting and moving Resident's personal property within forty-eight (48) hours of the transfer/discharge. If the property is not moved, Facility will remove all property from the Resident's room and store same at Resident's and/or Representative's cost and risk. Facility is not responsible for any damage, theft or loss to Resident's property during this period of time. Unclaimed property will be disposed of in accordance with applicable state law.
14. Resident and/or Representative will be responsible for any damage caused to Facility property by Resident or his/her guests beyond normal wear and tear and will pay for such damage, based on the actual charge to Facility for repair or replacement.
15. Resident and/or Representative will be responsible for obtaining adequate information from Resident's attending physician before any extraordinary treatment. Absent knowledge that the consent was not informed, Facility staff may rely upon the physician's written order as evidence that the physician secured informed consent.
16. Resident and/or Representative will be responsible for any damages or injuries caused by Resident to other persons, and will indemnify and hold Facility harmless from any claims, actions or proceedings against Facility resulting from Resident's actions or omissions.
17. In the event of Resident's death, Representative agrees to authorize Facility to notify the person(s) designated by Resident and/or Representative. Additionally, Facility is authorized to transfer Resident's body to the designated funeral home. If Resident has not designated a funeral home, Resident's family will be consulted and Resident's body will be transferred in accordance with their wishes. All costs associated with the transfer and funeral expenses will be the responsibility of Resident's estate.
18. In the event Resident becomes incapable of making medical decisions and no guardian, proxy, surrogate or agent under a valid durable power of attorney for health care or no person qualified under the South Carolina Adult Health Code Consent Act is available, Facility is authorized to seek court appointment of a legal guardian. All associated costs and attorneys' fees will be borne by Resident or Resident's estate.
19. Resident and/or Representative agree that they will present grievances in an orderly manner. Information on Facility's Grievance Procedure can be found in the *Admission Handbook* and the *Resident Rights* under applicable state law. Nothing herein will preclude Resident or any other party from filing a complaint with any governmental agency, but will be ancillary thereto. Facility will review and investigate all complaints in a timely manner.

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

III. FINANCIAL AGREEMENT

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

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

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

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

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

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state and federal law. Any personal property belonging to Resident in Facility at the time of Resident's discharge or death will be released in accordance Section 11-B-13 herein.

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

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

IV. TERMINATION

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

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

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

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

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

V. MEDICAID BENEFICIARIES

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

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

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

3. **Non-Covered Services.**

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

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

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

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

VI. MEDICARE BENEFICIARIES

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

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

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

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

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

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

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

VII. PRIVATE PAY/INSURANCE

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

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

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

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

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

VIII. NOTICES

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

St. George Healthcare
905 Dulles St.
St. George SC 29477
843-563-4602

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

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

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IX. GOVERNING LAW

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

X. SEVERABILITY

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

XI. CAPTIONS

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

XII. MODIFICATIONS

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

XIII. WAIVER

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

XIV. RESIDENT

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

XV. ASSIGNABILITY

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

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XVI. INFORMATION RELEASE/BILLING AUTHORIZATION

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

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

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

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

XVII. MISCELLANEOUS

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

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

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

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

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

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

XVIII. ENTIRE AGREEMENT

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

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

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

Signature of Resident	Date	<u>Walter Washington</u>
		Printed Name of Resident

Resident Social Security Number

Witness Signature	Date	Printed Name of Witness
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OR <u>Gabriele Washit</u>	Date <u>10/13/17</u>	<u>Gabriele Washington</u>
		Printed Name of Representative

Witness Signature	Date	Printed Name of Witness
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Representative Social Security No. (Voluntary Info.)

<u>Tana Shuler</u>	<u>Tana Shuler LPh, AP</u>
Signature of Facility Official	Printed Name of Facility Official & Title
<u>10/13/17</u>	
Date	

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON	)	CASE NO. 2021-CP-15-00516
GABRIELLE WASHINGTON	)	
as Personal Representative	)	
of the Estate of Walter Washington, Jr.,	)	
	)	
Plaintiff,	)	THE FACILITY’S¹
	)	MOTION TO ALTER, AMEND, AND/OR
vs.	)	RECONSIDER ORDER DENYING
	)	MOTION TO COMPEL ARBITRATION
ST. GEORGE HEALTH CARE, LLC,	)	
d/b/a St. George Healthcare Center and	)	
WALTERBORO COMMUNITY HOSPITAL,	)	
INC., d/b/a Colleton Medical Center,	)	
	)	
Defendants.	)	

TO: THE HONORABLE BENTLEY D. PRICE, Presiding Judge, and LEE D. COPE, ESQUIRE, and JOHN E. PARKER, JR., ESQUIRE, of PARKER LAW GROUP, LLP, and SHANE M. BURROUGHS, ESQUIRE, of LANIER & BURROUGHS, LLC, Attorneys for Plaintiff

NOW COMES the Facility, by and through its undersigned counsel, pursuant to Rule 59(e), SCRCF, and, on the grounds set forth below, hereby moves this Honorable Court to alter, amend, and/or reconsider its Order filed December 7, 2022, denying the Facility’s motion to compel arbitration (the “Subject Order”).

¹ The “Facility” refers to Defendant St. George Health Care, LLC, d/b/a St. George Healthcare Center.

1. **The Facility asks the Court to (re)consider and expressly rule on each and every distinct issue/argument it raised in support of the Underlying Motion,² i.e., each and every distinct issue/argument set forth in the Underlying Motion itself, in the Memo in Support of the Underlying Motion,³ and/or via oral argument, all of which is/are hereby incorporated herein by reference.**

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

² The “Underlying Motion” refers to the motion that was decided via the Subject Order, i.e., the Facility’s motion to compel arbitration, filed December 2, 2021.

³ The “Memo in Support of the Underlying Motion” refers to the Facility’s supporting memorandum filed May 20, 2022. To be clear, this filing was inadvertently titled “Defendant St. George Health Care, LLC d/b/a St. George Health Care Center’s Motion to Compel Arbitration,” but, as stated therein on the first page, it is in fact a “Memorandum in Support,” not a motion.

2. **The merger/equitable estoppel analysis in the Subject Order is erroneous, to include, without limitation, the Court's citation to irrelevant authority that pertains to the wrong test for equitable estoppel. The Court should have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Washington⁴ effectively embraced and directly benefitted from the Admission Agreement, he and, in turn, Plaintiff (his estate) is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.**
 - (a) **The Subject Order reflects the Court's misapprehension of the Facility's merger/equitable estoppel argument, as evidenced by the following incorrect and/or inapplicable statements therein:**
 - (i) **"The basis of [the Facility's] Motion is that a valid and enforceable arbitration agreement exists between the parties."⁵**
 - (ii) **"Since Ms. Washington lacked legal authority, the Arbitration Agreement is void an unenforceable."⁶**
 - (iii) **"[T]he Court must determine (1) if the Arbitration Agreement merged with and was a part of the Admission Agreement such that Plaintiff in her capacity as personal representative would be equitably estopped from denying the Arbitration Agreement's validity, and (2) if Ms. Washington had actual or apparent authority to enter the Arbitration Agreement on behalf of [Mr. Washington]."⁷**

The Facility's merger/equitable estoppel argument is a standalone argument. It does not depend on any showing of authority (actual or apparent or otherwise) on the part of Ms. Washington or otherwise on the existence of any valid and enforceable agreement between the parties. *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) ("South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including . . . estoppel."); *see also Coleman v. Mariner*

⁴ "Mr. Washington" refers to Plaintiff's decedent, Walter Washington, Jr. "Plaintiff" refers to Plaintiff, Gabrielle Washington ("Ms. Washington"), as Personal Representative of the Estate of Walter Washington, Jr.

⁵ (Subject Order p. 2.)

⁶ (Subject Order p. 5.)

⁷ (Subject Order p. 3.)

Health Care, Inc., 407 S.C. 346, 354–55, 755 S.E.2d 450, 455 (2014) (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel); *id.* (explaining that “Appellants’ equitable estoppel argument,” which “[wa]s premised on [Appellants’] contention that, under state law, the admission agreements and the [arbitration agreements] merged,” as follows: “Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] . . . , she is nevertheless *equitably estopped to deny the [arbitration agreement’s] enforceability.*”) (emphasis added).

Conceptually, the Facility’s merger/equitable estoppel argument is *not* an argument for the *enforceability* of the Admission Agreement/Arbitration Agreement *but rather* an argument for *Mr. Washington and, in turn, Plaintiff (his 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 Mr. Washington having effectively embraced and directly benefitted from the Admission Agreement, his estate is now estopped to deny the enforceability not only of the Admission Agreement but also the Arbitration Agreement merged therewith. And by its very nature, i.e., because the Facility’s argument in favor of direct benefits estoppel is based on the direct benefits Mr. Washington received under the Admission Agreement (with which the Arbitration merged), this argument applies with equal force to estop Plaintiff, i.e., Mr. Washington’s estate, from denying the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.

Accordingly, as to the Facility’s merger/equitable estoppel argument, any analysis by the Court regarding the Admission Agreement/Arbitration Agreement’s supposed lack of enforceability—e.g., that Ms. Washington lacked authority to sign the Admission

Agreement/Arbitration Agreement on behalf of Mr. Washington under the law of agency⁸ and/or under the South Carolina Adult Health Care Consent Act (the “AHCCA”), S.C. Code Ann. §§ 44-66-10 to -80,⁹ and/or because Ms. Washington lacked power of attorney or guardianship over Mr. Washington¹⁰—is beside the point and unavailing to refute the Facility’s merger/equitable estoppel argument, which, again, turns not on the question of whether the Arbitration Agreement is enforceable but whether Mr. Washington and, in turn, Plaintiff (his estate) is estopped to deny its enforceability.

(b) The Court’s merger analysis is erroneous.

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

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

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

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

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

⁸ (See Subject Order pp. 8–9 (regarding principles of agency).)

⁹ (See Subject Order pp. 3–6, 8 (regarding the AHCCA).)

¹⁰ (See Subject Order pp. 2, 5–6 (regarding power of attorney and guardianship).)

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

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

Here, the Court has erred in rejecting the Facility’s merger argument, failing to recognize material differences between the facts and arguments involved in the instant case and those that controlled (or were simply not addressed in) *Coleman* and its progeny, *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

The Subject Order wrongfully concludes that the Admission Agreement and the Arbitration Agreement are separate contacts that do not merge¹¹ and, likewise, that there is ambiguity as to merger. (Subject Order p. 5 (“While the Admission Agreement purports to incorporate admissions materials into itself ‘by reference herein’, when viewed alongside the other details of the agreements, it creates at best ambiguity as to merger when taken in context of the totality of the circumstances, and ‘the law is clear that any ambiguity in such a clause is construed against the drafter’, i.e., [the Facility].”).) 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,”¹² as indeed the Admission Agreement and the Arbitration Agreement were here,¹³

¹¹ (Subject Order p. 7 (“[T]he Admission Agreement and optional Arbitration Agreement are separate documents that did not merge.”).)

¹² *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

¹³ 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

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

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

Unlike the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (*See* Arbitration Agreement.) Moreover, while the instant Admission Agreement does contain an "Entire Agreement" clause, it does not reference the Arbitration Agreement as a separate contract. (Admission Agreement p. 12.) Indeed,

documents were [indeed] executed at *the same time, by the same parties, for the same purposes, and in the course of the same transaction.*" 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

directly contradicting the idea of “separatedness” (in the parlance of the *Coleman* Court¹⁴), the “Entire Agreement” clause in the instant Admission Agreement expressly states that “other Admissions materials” are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed “separatedness.” (Admission Agreement p. 12.) Without question, the Arbitration Agreement is among these other Admissions materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) (“The same day as Decedent’s admission to White Oak, Stott, acting as Decedent’s authorized representative, signed White Oak’s *admission documentation—including the Arbitration Agreement.*”) (emphasis added) (internal footnote omitted); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 (“Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement.*”) (emphasis added)). The Court’s conclusory finding that there is ambiguity in this regard is unsupported and erroneous.

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

¹⁴ 407 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).

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

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

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

Similarly, and contrary to the view expressed in the Subject Order,¹⁵ the survival of the Arbitration Agreement is no evidence of “separatedness.” The only reason for the Arbitration Agreement is the Admission Agreement, i.e., the Arbitration Agreement covers disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America*,

¹⁵ (Subject Order p. 5 (“Further, the Arbitration Agreement by its very language distinguishes between itself and the Admission Agreement, stating that the Arbitration Agreement will survive any ‘breach of this Agreement or the Admission Agreement.’”).)

Inc. v. Phillips, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things, as the Subject Order does,¹⁶ is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

And—besides the fact, explained elsewhere, that there is no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement—to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that *merger is the default position*, i.e., it is presumed, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our 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

¹⁶ (Subject Order p. 4.)

intention.” 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger presumption to be upset based on evidence that is merely ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention, but at most might (or might not) reflect a contrary intention—is to allow the exception to devour the rule.

Respectfully, the Court’s finding against merger relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties’ intent. It must be remembered that the presumption of merger arises only where all the four elements of time, parties, purpose, and transaction coincide—as they do here. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. If even one of these is lacking there is no merger. This is why, for the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). The merger presumption is “earned,” so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

The Court should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Mr. Washington’s admission to the Facility and would not have been done at all but for his admission

to the Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent.

(c) The Court's equitable estoppel analysis is erroneous.

(i) Direct benefits estoppel applies.

The view of equitable estoppel reflected in the Subject Order misapprehends our Supreme Court's decision in *Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel). The *Wilson* Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals' earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which the Facility contends Mr. Washington and, in turn, Plaintiff (his estate) is estopped from refusing to comply with the Arbitration Agreement here, where Mr. Washington received direct benefits (in the form of his admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement was merged. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added). In other words, *Wilson* supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration case like this, without any resort to another test for equitable estoppel, such as that addressed in the *Kelly* and *Binkley* cases cited in the Subject Order. (Subject Opinion pp. 5–6 ("Further, Plaintiff cannot be equitably estopped from

denying enforcement of the Arbitration Agreement. ‘Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements.’ *Kelly v. Logan, Jolley & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). [The Facility] has not and cannot meet its burden to establish these elements, primarily because [the Facility] cannot prove it lacked the means of knowledge of the truth of the facts in question.”); *id.* at 6 (“A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 70–71, 558 S.E.2d 902, 908–09 (Ct. App. 2001).”).¹⁷

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

[A]s the Supreme Court explained in *Wilson*, to successfully assert direct benefits estoppel, the arbitration agreement must be a clause within the larger admissions agreement, and the plaintiff must be seeking to assert causes of action that arise from and are created by the contract. Here, as explained above and below, the Admission Agreement and optional Arbitration Agreement are separate documents that did not merge. Second, Plaintiff does not assert breach of contract, or a violation of contractual duties, and instead has brought her lawsuit under a negligence theory arising from common law duties.

(Subject Order pp. 7–8.)

What *Wilson* actually explains is that the key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability but whether benefits to the nonsignatory are direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 (“Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with

¹⁷ To be clear, neither *Kelly* nor *Binkley* was an arbitration case, and both cases relied on the traditional six-factor test for estoppel, not the direct benefits test. *Kelly*, 383 S.C. at 638, 682 S.E.2d at 7; *Binkley*, 348 S.C. at 70, 558 S.E.2d at 09; *id.* at n. 15.

an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause. In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. Stated another way, [u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement’) (internal citations and quotation marks omitted); *id.* at 343, 827 S.E.2d at 176 (“It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.”) (internal citations omitted). Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration clause (which is the case here because the Admission Agreement and the Arbitration Agreement merge) while at the same time denying that the arbitration clause is enforceable.

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

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

- (ii) **The Subject Order violates the FAA's "equal footing" rule by charging the Facility with a heightened duty to determine the existence Ms. Washington's authority that does not exist under South Carolina's general contract law and, at the same time, disregards applicable state law in respect of the legal significance of Ms. Washington's act of signing the Arbitration Agreement and her duty of good faith and fair dealing.**

The Subject Order states, "Ms. Washington in her individual capacity had no legal authority to sign the Arbitration Agreement, and [the Facility] knew or should have known this fact, as she did not present [it] with documentation demonstrating power of attorney or guardianship." (Subject Order p. 5; *see also id.* at 6 ("[The Facility] had the ability to determine whether [Ms. Washington] had authority to sign an arbitration agreement on Mr. Washington's behalf. . . . It should be clear to health care entities such as [the Facility] that a niece without a recorded general durable power of attorney at best only has authority to make healthcare decisions and does not have authority to waive other rights when a potential resident lacks capacity."); *id.* at 6 ("[The Facility] is a sophisticated business entity frequently interacting with residents and their families during the rehabilitation center admission process. [The Facility] is or should be familiar with the legal concepts of guardianship and powers-of-attorney.")) This violates the FAA's "equal footing" rule by charging the Facility with a heightened duty to determine the existence

Ms. Washington's authority that does not exist under South Carolina's general contract law. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (Under the FAA, "courts *must* place arbitration agreements on *equal footing with other contracts*"); *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (While a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not do so based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.") (citing *Concepcion*, 563 U.S. at 339); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("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)).

At the same time, the Subject Order disregards applicable state law in respect of the legal significance of Ms. Washington's act of signing the Arbitration Agreement and her duty of good faith and fair dealing. The Arbitration Agreement itself reflects (by virtue of her signature upon it) Ms. Washington's express representation to the Facility that she had all due authority to sign it for Mr. Washington. (Arbitration Agreement ("By . . . her signature below, the executing party [(i.e., Ms. Washington)] represents that . . . she has the authority to sign on [Mr. Washington's] behalf so as to bind [Mr. Washington] as well as [herself].").) There is no question raised as to Ms. Washington's competency. She is thus "presumed to have read, understood, and assented to

[the] terms” of the Arbitration Agreement,¹⁸ including, of course, the terms whereby she represented herself to the Facility as having authority to act on Mr. Washington’s behalf. Moreover, the covenant of good faith and fair dealing implied in every contract¹⁹ is no less binding on Ms. Washington than the Facility.

3. The Court erroneously asserts that, at most, the Arbitration Agreement would be enforceable as to the survival claim and would not be enforceable as to the wrongful death claim.²⁰

The Arbitration Agreement applies with equal force to the wrongful death claim. A wrongful death claim does not belong to the wrongful death beneficiaries. It belongs to the decedent’s personal representative, and a specific rule prohibiting enforcement of otherwise valid agreements to arbitrate wrongful death claims would violate the FAA’s requirement that arbitration agreements be placed on equal footing with other contracts,²¹ as indeed our Supreme Court has already recognized in *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 389, 759 S.E.2d 727, 737 n.3 (2014) (“[C]ourts *may not* refuse to compel arbitration simply because a wrongful death claim is involved.”) (emphasis added).

“The right of action for wrongful death is purely statutory and did not exist at common law” *Glenn v. E. I. DuPont Nemours & Co.*, 254 S.C. 128, 133, 174 S.E.2d 155, 157 (1970). Per the plain language of the wrongful death statute, a wrongful death claim must be a claim that, had the decedent lived, they could have maintained themselves. S.C. Code Ann. § 15-51-10 (“Whenever the death of a person shall be caused by the wrongful act, neglect or default of another

¹⁸ *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) (“[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.”).

¹⁹ *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995) (South Carolina law implies a covenant of good faith and fair dealing in every contract).

²⁰ (Subject Order pp. 9–11.)

²¹ *See Concepcion*, 563 U.S. at 339.

and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.”) (emphasis added); *see also Maxey v. Sauls*, 242 S.C. 247, 250, 130 S.E.2d 570, 572 (1963) (“[T]he right to maintain the [wrongful death] action is based upon the condition that ‘the act, neglect or default’ must be ‘such as would, if death had not ensued, have entitled the person injured to maintain an action and recover damage in respect thereof.’ In other words, ‘if the deceased never had a cause of action, none accrues under the wrongful death statute.’”) (discussing prior statutory language that is identical to that in present § 15-51-10) (quoting *Scott v. Greenville Pharmacy*, 212 S.C. 485, 489, 48 S.E. 324, 326 (1948) (emphasis added). Accordingly, a claim of wrongful death is derivative in nature, in that it derives from (and does not arise without) a cause of action arising in favor of the *decedent*. *See Id.*; *see also* 26 S.C. Jur. Limitation of Actions § 32 (“A wrongful death action is derivative in nature”); *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 942 (D.S.C. 1988) (“If the decedent never had a cause of action, none accrues under the wrongful death statute. Furthermore, anything that would have defeated the decedent’s recovery had he survived the accident, such as contributory negligence, a valid release, or similar acts on his part, would defeat the right of recovery in behalf of his family in case of his death. It follows logically that the decedent’s failure to file a timely claim . . . is an act, or omission, on his part which should defeat the right of recovery of his personal representative.”) (internal citations and quotation marks omitted); *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010) (“*Quattlebaum* was correctly decided and adheres to the principle that a decedent’s estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived.”).

“[T]he substantive right to bring . . . a wrongful death action . . . is determined by the Probate Code.” *Fisher on behalf of estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 240, 811 S.E.2d 739, 742 (2018); *see also id.* at 242, 811 S.E.2d at 743 (“The Probate Code defines who may act on behalf of the estate of a deceased person. The Probate Code, therefore, is the substantive law by which the identity of the ‘*real party in interest*’ is determined for all civil actions *brought on behalf of the estate of a deceased person.*”) (emphasis added). “Under the Probate Code . . . wrongful death actions must be brought by the personal representative . . .” *Id.* (emphasis added); *see also* S.C. Code Ann. § 15-51-20 (“Every [wrongful death] action shall be brought by or in the name of the executor or administrator of [the] person [whose death was wrongfully caused].”);²² *Glenn*, 254 S.C. at 134, 174 S.E.2d at 158 (“If an action for wrongful death is instituted by one other than the personal representative of a decedent, duly appointed by the Probate Court, it should be dismissed.”).

Even though it is for their “benefit,” a wrongful death claim does not belong to the wrongful death beneficiaries themselves. It is a claim that is brought on behalf of the estate of the deceased person. The substantive right to bring the claim belongs to decedent’s personal representative, who must bring the claim and is the real party in interest under South Carolina law. Consistent with Judge Anderson’s correct analysis in *Quattlebaum* (which explains that anything that would have defeated the decedent’s recovery had he survived, such as, for instance, a valid release, will

²² As explained by the *Fisher* Court, “Under the Probate Code . . . the terms ‘executor’ and ‘administrator’ do not have separate meaning, but are included within the defined term ‘personal representative.’” 422 S.C. at 240, 811 S.E.2d at 742 (citing S.C. Code Ann. § 62-1-201(33) (defining “Personal representative” to “include[] executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.”)). “Therefore, wrongful death actions must be brought by the personal representative, despite the language ‘shall be brought by . . . the executor or administrator’ that still appears in section 15-51-20.” *Id.*

apply to the wrongful death claim), it follows logically that a valid arbitration agreement must also apply to the wrongful death claim, and the Subject Order erroneously states otherwise.

4. **The Subject Order incorrectly states—in conclusory fashion, without actually citing any legal or factual support—that “the only relevant and necessary evidence for the Court to make its determination is already available for the Court’s review. Any further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, waste judicial resources, and increase costs for both parties unnecessarily.”²³**

A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg’l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal's behalf and subject to the principal’s control.” *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). “An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties.” *Peoples Fed. Sav. & Loan Ass’n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145–46, 425 S.E.2d 764, 773 (Ct. App. 1992).

These principles relating to the law of agency may potentially provide an additional, independent basis on which to grant the Underlying Motion. Their application is fact dependent; therefore, it cannot be said “that the only relevant and necessary evidence for the Court to make its determination [thereon] is already available for the Court’s review” such that “further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation,

²³ (Subject Order p. 11.)

waste judicial resources, and increase costs for both parties unnecessarily.” The allowance of discovery into Mr. Washington and Ms. Washington’s course of dealing and the potential creation of an agency relationship between them is only reasonable.

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 Motion, in writing and/or via oral argument, all of which the Facility incorporates by reference herein and asks the Court to (re)consider and expressly rule upon in full—the Facility asks that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Underlying Motion.

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

Respectfully submitted,
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St. George Healthcare Center

Charleston, South Carolina

December 19, 2022

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

Appeal from Colleton County
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2021-CP-15-00516

Gabrielle Washington
as Personal Representative of the Estate of Walter Washington, Jr.,

Respondent,

v.

St. George Health Care, LLC, d/b/a St. George Healthcare Center and
Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center,

Defendants,

Of which St. George Health Care, LLC, d/b/a St. George Healthcare Center is

Appellant.

NOTICE OF APPEAL

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*Attorneys for Defendant
Walterboro Community Hospital, Inc.,
d/b/a Colleton Medical Center*

Defendant/Appellant St. George Health Care, LLC, d/b/a St. George Healthcare Center (“St. George”), hereby appeals the following orders of the Honorable Bentley D. Price, Circuit Court Judge:

- **Order [Denying St. George’s Motion to Compel Arbitration]**, filed December 7, 2022, and
- **Order Denying Facility’s Motion to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration**, filed July 11, 2023.

Copies of the appealed orders are attached hereto and incorporated herein by reference. St. George received written notice of entry of the most recent order on July 11, 2023.

Respectfully submitted,
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August 10, 2023

RECEIVED

Aug 10 2023

SC Court of Appeals

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

Appeal from Colleton County

Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2021-CP-15-00516

Gabrielle Washington

as Personal Representative of the Estate of Walter Washington, Jr.,

Respondent,

v.

St. George Health Care, LLC, d/b/a St. George Healthcare Center and
Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center,

Defendants,

Of which St. George Health Care, LLC, d/b/a St. George Healthcare Center is

Appellant.

PROOF OF SERVICE

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Attorneys for Appellant

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellant, hereby certify that Appellant's **NOTICE OF APPEAL** was served on Respondent and on Defendant Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center, on August 10, 2023, by emailing (see attached email) a copy of the same to their following counsel of record:

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I also certify that a copy of Appellant's **NOTICE OF APPEAL** was today, August 10, 2023, E-Filed with the lower court (see attached NEF), which also, i.e., in addition to service by email, effected service of the notice today on the above-identified counsel of record via the E-Filing System.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,
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Attorneys for Appellant

Charleston, South Carolina

August 10, 2023

From: [Hines, Russell](#)
To: [Lee Cope](#); [Jay Parker](#); "[shane@landblawfirm.com](#)"; "[weldon@basilaw.com](#)"; "[emily@basilaw.com](#)"; "[creasie@basilaw.com](#)"
Cc: [Shanna Jarrell](#); "[Brown, Steve](#)"; [Davis, Jay](#); [Gandy, III, James D. \(Tripp\)](#); [Dotterer III, Gaillard T. \(Gilly\)](#); [Wakeham, Rebecca \(Becky\)](#); [Peterson, Susan](#); [Justman, Aimee](#); [Bell, Pollyana \(Polly\)](#)
Subject: Washington v. St. George (Case No. 2021-CP-15-00516) -- Notice of Appeal
Date: Thursday, August 10, 2023 12:53:47 AM
Attachments: [image001.png](#)
[Washington v. St. George \(Case No. 2021-CP-15-00516\) -- Notice of Appeal.pdf](#)
[Appealed Order No. 1 -- Filed 12-7-22 -- Order Denying Motion to Compel Arbitration.pdf](#)
[Appealed Order No. 2 -- Filed 7-11-23 -- Order Denying Motion to Reconsider.pdf](#)

Attached for service in the above-referenced matter please find our **Notice of Appeal** and copies of the **appealed orders** attached thereto.

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

A filing has been submitted to the court RE: 2021CP1500516

Official File Stamp: 08-10-2023 12:57:41 AM
Court: CIRCUIT COURT
Common Pleas
Colleton
Case Caption: Gabrielle Washington , plaintiff, et al VS St George Health Care Llc , defendant, et al
Document(s) Submitted: Appeal/Notice of Appeal to Court of Appeals
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
Filed by or on behalf of: Russell Grainger Hines

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

The following people were served electronically:

Edward K. Pritchard, III
Melvin Wayne Cockrell, III
Russell Grainger Hines for St George Health Care Llc, St George Healthcare Center
John Elliott Parker, Jr. for Gabrielle Washington et al
Donald Jay Davis, Jr. for St George Health Care Llc, St George Healthcare Center
Emily Collins Brown for Colleton Medical Center, Walterboro Community Hospital Inc
Weldon R. Johnson for Colleton Medical Center, Walterboro Community Hospital Inc
Creasie Parrott Schlachter for Colleton Medical Center, Walterboro Community Hospital Inc
Shane Morris Burroughs for Gabrielle Washington, Walter Washington, Jr
Lee Deer Cope for Gabrielle Washington, Walter Washington, Jr

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

CERTIFICATE OF COUNSEL

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

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April 8, 2024