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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2025-000286

William Haynes as Personal Representative of the Estate of Elizabeth Varner,

Respondent,

v.

THI of Charleston LLC d/b/a Riverside Health and Rehab, Fundamental Services LLC, Fundamental Clinical and Operational Services LLC, and Jerrolyn Montgomery-Smalls,

Appellants.

RESPONDENT'S MOTION TO DISMISS APPELLANTS' NOTICE OF APPEAL

PINKSTON LAW FIRM, LLC
Shawn Pinkston, SC Bar No. 79965
856 Lowcountry Blvd., Suite 101
Mount Pleasant, South Carolina 29464
Office: 843-814-5472

Attorney for Respondent

INTRODUCTION

NOW COMES Respondent, William Haynes as Personal Representative of the Estate of Elizabeth Varner, by and through undersigned counsel, pursuant to Rule 240 SCACR, and files this Motion to Dismiss Appellant's Notice of Appeal for the following reasons: 1) Appellants Notice of Appeal is interlocutory in that they are essentially appealing a denial of their Motion for Summary Judgment; 2) Appellants' Motion to Compel Arbitration, which is the basis of their Notice of Appeal, is nothing more than a successive motion to reconsider the denial of summary judgment; 3) Appellants' Motion to Compel Arbitration ignores the law of the case doctrine that prevents the re-litigation of issues previously decided; and 4) The Circuit Court properly recognized Appellants' Motion to Compel Arbitration as an attempt to reconsider another Circuit Court Judge's decision on the same set of facts that formed the basis of their Motion for Summary Judgment. Based on these factors, Respondent requests this Honorable Court DISMISS Appellants' Motion as interlocutory.

FACTS

Respondent's Complaint alleges corporate negligence, joint venture, alter ego/piercing the corporate veil, neglect of a vulnerable adult, wrongful death, and survivorship. **Exhibit A**, *William Haynes, as Personal Representative of the Estate of Elizabeth Varner v. Fundamental Administrative Services, Fundamental Clinical and Operational Services, and Jerrolyn Montgomery-Smalls,* CAFN: 2021CP1002744 ("Case 2744"). The Complaint alleges Appellants Fundamental Administrative Services ("FAS"), Fundamental Clinical and Operational Services ("FCOS"), and Jerrolyn Montgomery-Smalls ("Smalls") were negligent in the management and operations of THI of South Carolina d/b/a Riverside Health and Rehab ("Riverside"). A lawsuit was also filed against Riverside, alleging negligence, wrongful death, and survivorship against the employees of Riverside. **Exhibit B**, *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, CAFN: 2021CP1001437 ("Case 1437"). Appellants acknowledged the claims in Case 2744 were separate from those in Case 1437 yet continue to lump them together in support of their successive motions. "And then the new claims as to Ms. Smalls, FAS, and FCOS were for corporate negligence, joint venture liability, and corporate veil piercing liability." **Exhibit C**, Tr. of Record, Sep. 11, 2024, p. 16: 7-9.

Riverside moved to Compel Arbitration against all claims asserted against it in Case 1437, while FAS and FCOS moved to stay the litigation pending resolution of any court-ordered arbitration. Respondent argued all parties (Riverside, Smalls, FCAS, and FOS) should be included in the arbitration if the Motion to Compel was granted. Appellants FCAS and FOS argued directly against being compelled to arbitrate. Appellant Smalls argued she was entitled to arbitration as to the claims being asserted against Riverside because she was an employee of Riverside and the allegations against the Riverside employees necessarily included her as an employee.

A hearing on these related motions was held on February 10, 2022, before the Honorable Roger M. Young, Sr. During the hearing and in support of their Motions for Stay, counsel for Appellants specifically stated the claims against FAS and FCOS were separate and distinct and not subject to the purported Arbitration Agreement. "Our contention is that the Fundamental defendants are separate and distinct...." **Exhibit D**, Tr. of Record, Feb. 10, 2022, p. 6: 8-9

Judge Young granted Riverside's (and by extension Appellant Smalls as an employee) Motion to Compel Arbitration on February 24, 2022, along with Defendants FAS and FCOS Motions to Stay all matters in the instant lawsuit. The only issues compelled to arbitration were those involving Case No. 1437 and Defendant Smalls was included in her role as an employee of Riverside. "Case 2744 is stayed in favor of arbitration between Plaintiff and Ms. Montgomery-

Smalls, with Plaintiff's claims against FAS and FCOS stayed pending the ultimate outcome of arbitration between Plaintiff, the Facility, and Ms. Montgomery-Smalls." **Exhibit E**, Order Compelling Arbitration, p. 20. Again, the claims in Case No. 1437 involved employee negligence and vicarious liability; the claims in Case 2744 involve corporate negligence claims.

Riverside, Appellant Smalls, and Respondent engaged in arbitration from April 3-6, 2023, that encompassed the allegations of employee negligence and vicarious liability. Proof of ADR was filed on May 23, 2023, and a Final Order was entered by the Honorable Roger M. Young, Sr., on February 12, 2024, regarding arbitration. The Order also lifted the corresponding stays involving this lawsuit. **Exhibit F**.

Appellants have previously argued that particular causes of action (those contained in Case 2744) were excluded from the Arbitration Agreement. In their Petition for a Final Order, Defendants argued "that a **stay of all non-arbitrable claims** remain in effect pending either dismissal of all claims against Riverside and Ms. Montgomery-Smalls pursuant to payment of the arbitration award, or the outcome of any further appeal as it relates to arbitration in this matter." **Exhibit G**, Def. Pet. for Final Order, p. 2. (emphasis added). "Accordingly, the Defendants request that this Court exercise its discretion to maintain **the stay of all non-arbitrable claims** as necessary to avoid duplicative discovery and trials, to avoid piecemeal litigation and the potential for inconsistent obligations, and for the sake of the orderly administration of the Court's own docket." *Id*. (emphasis added). "For these reasons, the **stay of all non-arbitrable claims** should remain in effect pending the conclusion of any subsequent appeal as it relates to arbitration in this matter, or pending the dismissal of the Plaintiff's claims against Riverside and Ms. Montgomery-Smalls pursuant to payment of the arbitration award." *Id.,* p. 3 (emphasis added).

Despite their past arguments to the Court that certain claims were non-arbitrable, Appellants conducted an about-face and filed a Motion for Summary Judgment on June 28, 2024, claiming all causes of action in both lawsuits were arbitrable and should have been raised by Respondent during arbitration. Appellants' Motion, Memorandum, and exhibits are attached collectively as **Exhibit H.** Respondent filed his Memorandum in Opposition to Appellants' Motion for Summary Judgment on September 8, 2024. The Memorandum and exhibits are attached collectively as **Exhibit I.**

In support of their Motion for Summary Judgment, Appellants FCOS, FAS, and Smalls argued res judicata and collateral estoppel applied to all claims in the instant case since they were subject to arbitration and they were entitled to judgment on these claims. In a nutshell, they argued "all the facts alleged in this case are identical to those that were litigated in the arbitration." **Exhibit H**, Def. Memo. in Support of Motion for Summary Judgment, p. 6. "Plaintiff was required to present all of his claims against Defendant Smalls in the arbitration." *Id.,* p. 7.

Appellants' Motion for Summary Judgment was heard before the Honorable William C. McMaster, III, on September 11, 2024, and an Order Denying the Motion was entered on September 20, 2024. **Exhibit J.** Appellants filed a Motion to Reconsider, Alter and/or Amend the Order denying summary judgment on September 30, 2024. The Motion is attached as **Exhibit K**. Respondent filed a Memorandum in Opposition to the Motion to Reconsider, Alter and/or Amend on October 2, 2024. **Exhibit L**. The Motion to Reconsider, Alter and/or Amend was denied on October 4, 2024. **Exhibit M**.

As part of the Order denying Summary Judgment, the Honorable Judge McMaster granted Respondent's Motion to Compel Discovery Responses and ordered Appellants to respond to Respondent's discovery within thirty (30) days. Appellants did not respond within the court-

ordered deadline so Respondent filed a Rule to Show Cause on October 22, 2024. The Motion, Memorandum, and exhibits are collectively attached as **Exhibit N**.

In support of their Motion for Reconsideration, Appellants explicitly argued, "all claims were within the scope of the subject arbitration agreement." **Exhibit K**, Def. Mtn. to Reconsider, p. 3 (emphasis original). Appellants went so far to state, "Contrary to Plaintiff's fallacious argument to this Court, the Defendants have never argued that any cause of action asserted in the present lawsuit should have been excluded from arbitration....[T]he Defendants never argued that any particular cause of action should be excluded from arbitration." *Id.,* p. 2-3. "Accordingly, the Plaintiff had the opportunity to assert corporate negligence, joint venture, and veil piercing claims against Defendant Smalls at arbitration, in addition to the other causes of action that Plaintiff admittedly asserted and that were without question decided at arbitration." *Id.,* p. 3.

Undeterred from the denial of their summary judgment motion, Appellants then filed a Motion to Compel Arbitration on November 14, 2024. The Motion to Compel Arbitration contained the same arguments that were put forth in Appellants' denied Motion for Summary Judgment. The Motion, Memorandum, and exhibits are collectively attached as **Exhibit O**. Respondent filed a Memorandum in Opposition to Appellants' Motion to Compel Arbitration on January 21, 2025. The Memorandum and accompanying exhibits are collectively attached as **Exhibit P**. Appellants filed a Memorandum in Opposition to the Rule to Show Cause on January 26, 2025. The Memorandum and exhibits are collectively attached as **Exhibit Q**.

A hearing before the Honorable Jennifer B. McCoy was conducted on January 27, 2025, on Respondent's Rule to Show Cause and Appellants' Motion to Compel Arbitration. During the hearing, Appellants acknowledged the issues before the Circuit Court were the same as those before the Circuit Court during the Motion for Summary Judgment: "Now, our position at – before

Judge McMaster, was that all claims were already heard at arbitration, and we still contend that all claims asserted in the Complaint against Defendant Smalls were compelled to arbitration by order of Judge Young." **Exhibit R**, Trans, of Record, Jan. 27, 2025, p. 9: 15-19.

Judge McCoy granted Respondent's Rule to Show Cause and ordered Appellants to respond to discovery within fifteen (15) days. Judge McCoy also denied Appellants' Motion to Compel Arbitration. The Order is attached as **Exhibit S**.

Appellants filed a Motion to Reconsider, Alter and/or Amend the Order denying their Motion to Compel Arbitration on February 4, 2025. The Memorandum and accompanying exhibits are collectively attached as **Exhibit T**. Appellants' Motion to Reconsider, Alter and/or Amend was denied on February 7, 2025. **Exhibit U**.

Appellants filed the instant Notice of Appeal on February 18, 2025, seeking to appeal the denial of their Motion to Compel Arbitration.

ARGUMENT AND CITATION TO AUTHORITY

Appellants' Motion for Summary Judgment and Motion to Compel Arbitration are nearly identical in that Appellants argue the underlying claims were subject to Arbitration. Appellants also relied on the same exhibits in both motions. Appellants arguments were first denied by the Circuit Court in their Motion for Summary Judgment, which established the law of the case. Those same arguments were then denied again by the Circuit Court when their Motion to Compel Arbitration was denied. Thus, on four (4) occasions the Circuit Court has heard Appellants' arguments that the arbitration order was applicable to Case 2744 and denied those claims.

Appellants' Motion to Compel Arbitration was based on the same arguments that were denied in their Motion for Summary Judgment. Put another way, the Circuit Court determined the Arbitration Agreement was inapplicable to the claims asserted in Case 2744 and denied summary

judgment on that issue, thereby established the law of the case. Since a denial of summary judgment is interlocutory, Appellants cleverly, but inappropriately, captioned their subsequent motion as a Motion to Compel in order to create an immediate appeal. **Exhibit T**, Def. Memo. in Supp. of Mot. to Reconsider Order Denying Mot. to Compel Arbitration, p. 10. "An order denying a motion for summary judgment, being interlocutory, is not directly appealable." *Gilmore v. Ivey,* 290 S.C. 53, 59 348 S.E.2d 180 (Ct. App. 1986) *citing* (*Mitchell v. Mitchell*, 276 S.C. 44, 275 S.E.2d 1 (1981)). Instead of treating Appellants' Notice of Appeal as one dealing with their Motion to Compel Arbitration, this Court ought to consider it as a thinly disguised motion to appeal the denial of summary judgment and dismiss it as interlocutory.

In their Motion to Compel Arbitration, Appellants specifically asked the Circuit Court to enforce the Arbitration Order previously entered in case 1437. **Exhibit O**, Section II, Defendants' Memo. in Supp. of Mot. to Compel, p. 7. However, they previously filed a Motion for Summary Judgment arguing the exact same thing - the claims in Case 2744 were subject to arbitration. "[T]he facts alleged in this case are identical to those that were litigated in the arbitration. And, pursuant to the Court's order compelling arbitration...and the arbitrator's Arbitration Order..., Plaintiff was required to present all of his claims against Defendant Smalls in the arbitration...." **Exhibit I**, Sec. I, p. 6. When the Motion for Summary Judgment was denied, they filed a Motion to Reconsider, which was also denied. In reality, Appellants have expressly, and correctly, argued the claims involved in the instant case are non-arbitrable and their arguments that they are somehow arbitrable now have been rejected on four (4) separate occasions by the Circuit Court. However, they simply repackaged the same arguments in a mislabeled Motion to Compel Arbitration it in what can only be viewed as a transparent attempt to ignore the law of the case doctrine and to create an immediately appealable decision.

Every argument put forth in their recycled Motion to Compel Arbitration was extensively briefed and argued before the Honorable Judge McMaster in their Motion for Summary Judgment. As outlined above, Appellants argued the claims in this lawsuit were non-arbitrable in pleadings before Judge Young. They then shifted course and argued all claims were arbitrable in their Motion for Summary Judgment – an argument twice rejected by the Circuit Court. Unfazed by the previous rejection of these arguments by the Circuit Court, Appellants again argued the corporate negligence, joint venture, and alter ego/veil-piercing claims were subject to arbitration in their Motion to Compel Arbitration. This approach is nothing more than an end-around the law of the case doctrine in the hopes of creating an appellate issue that will cause more delay, and prejudice, to Respondent.

"The doctrine of the law of the case prohibits issues which have already been decided from being relitigated in the trial court in the same case." *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62 (1995). "The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case....Further, all points decided by the Court or necessarily involved in what was decided, are *res judicata*." *Id., citing Warren v. Raymond*, 17 S.C. 163 (1882). "As most commonly defined, the doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. This rule of practice promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 816 (1998). "Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Flexon v. PHC-Jasper*, 413 S.C. 561, 573 (Ct. App. 2015).

This *Flexon* Court summed up the practical importance of the law of the case rule as follows:

> The "law of the case" rule is based on the sound public policy that litigation should come to an end. It is predicated on the premise that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances of from changes of its members," and that it *would be impossible for an appellate court "to perform its duties satisfactorily and efficiently" and expeditiously "if a question, once considered and decided by it were to be litigated anew in the same case upon any and very subsequent appeal" thereof. Id.* (emphasis original).

The so-called arbitrability of the allegations in Case 2744 were decided when Appellants' Motion for Summary Judgment was denied. Allowing Appellants' Notice of Appeal to move forward would reward their obstinate litigation by allowing them to argue anew an interlocutory order (denial of summary judgment) that they have attempted to convert into an appealable issue (motion to compel arbitration). The arguments made in their Motion to Compel Arbitration are nothing more than the reconsideration of matters already decided in the denial of their Motion for Summary Judgment.

The Honorable Judge Jennfer B. McCoy recognized Appellants were essentially filing a motion to reconsider the Order denying summary judgement. "Okay. All right. I mean, I get that in a way -- it puts me in this odd position of sort of reconsidering another Judge's ruling, which I can't – I can't do either, but I understand -- I think I understand your position. It's tough. It's a tough one." **Exhibit R**, Trans. of Record, Jan. 27, 2025, p. 16: 3-7.

Below is a side-by-side comparison that shows the issues Appellants' Motion to Compel Arbitration was essentially a motion to reconsider the order denying summary judgment:

Appellants' Motion for Summary Judgment and Motion to Reconsider	Appellants' Motion to Compel Arbitration and Motion to Reconsider
Plaintiff was required to present all of his claims against Defendant Smalls in the arbitration." **Exhibit I**, Defs. Memo. in Supp. of Mot. for Summary Judgment, p. 7. Thus, Plaintiff was required to present *all* of his claims against Defendant Smalls in the arbitration, where Defendant Smalls prevailed on the merits. **Exhibit O**, Defs. Memo. in Supp. of Mot. to Compel. p. 5.	Now, our position at – before Judge McMaster, was that all claims were already heard at arbitration, and we still contend that all claims asserted in the Complaint against Defendant Smalls were compelled to arbitration by order of Judge Young. **Exhibit R**, Trans, of Record, Jan. 27, 2025, p. 9: 15-19.
[A]ll claims were within the scope of the subject arbitration agreement. Contrary to Plaintiff's erroneous argument in opposition to Defendants' motion, all claims asserted in the present lawsuit were or should have been raised at arbitration, *including Plaintiff's causes of action for corporate negligence, joint-venture liability, and corporate veil-piercing liability*. **Exhibit K**, Defs. Memo. in Supp. of Mot. for Reconsideration, p. 3 (emphasis original).	[S]ince Plaintiffs claims against the facility and Ms. Montgomery Smalls' are clearly within the scope of the arbitration agreement, they should proceed in arbitration, not litigation. *Id.,* p. 11: 1-4 All the claims against Judge -- against Defendant Smalls and the facility were addressed in arbitration, including the corporate negligence, veil piercing, alter ego claims. I*d.,* p. 11: 18-20. [T]he Arbitration Order expressly compelled Plaintiff to arbitrate *all* of his claims against Defendant Smalls—including Plaintiffs' claims for corporate negligence, joint venture, and alter ego/veil-piercing. **Exhibit O**, Defs. Memo. in Supp. of Mot. to Compel Arb., p. 5.
Accordingly, the Plaintiff had the opportunity to assert corporate negligence, joint venture, and veil piercing claims against Defendant Smalls at arbitration, in addition to the other causes of action that Plaintiff admittedly asserted and that were without question decided at arbitration." *Id.,* p. 4.	All those claims were asserted against Ms. Smalls in the original complaint, and they were all compelled to arbitration. **Exhibit R**, Trans. of Record, Jan. 27, 2025, p. 10: 24-25.

Those claims and issues have already been decided by the arbitrator, Your Honor. **Exhibit C**, Tr. of Record, Sep. 11, 2024, p. 14: 2-3.	The Arbitration Award thus conclusively resolved all of Plaintiff's causes of action against Montgomery-Smalls that were or could have been presented in arbitration. Accordingly, there should be no further claims against Defendants Smalls that are still outstanding. **Exhibit T**, Def. Mot. to Recon. Denying Mot. to Compel Arbitration, p. 6. Arbitration has already been conducted arising from the same facts and circumstances alleged in the present case. *Id.,* p. 9.
[A]ll claims asserted against Ms. Smalls, all claims asserted against Riverside were subject to arbitration, including the claims asserted against Ms. Smalls for corporate negligence, joint venture liability, and corporate veil piercing liability. Those claims were heard in arbitration -- or they were subject to arbitration. *Id.,* p. 16-17: 23-3.	Accordingly, to the extent there are any claims or causes of action asserted against Montgomery-Smalls that were not previously addressed at arbitration, Defendants assert that those claims must be arbitrated pursuant to the parties' agreement, Judge Young's Arbitration Order, and Judge Early's rulings (as arbitrator) as referenced above. **Exhibit T**, Def. Mot. to Recon. Denying Mot. to Compel Arbitration, p. 10.
All the claims asserted against Ms. Smalls are precluded. It could have been tried at arbitration. They're precluded. *Id.,* p. 19: 2-4. All the claims against Defendant Smalls were or should have been presented at arbitration. I*d.,* ap.22: 17-19.	Specifically, as required by the Arbitration Order, this Court should enter a further order compelling Plaintiff to arbitrate, and thus send back to the arbitrator, any remaining claims that the Court intends to allow Plaintiff to pursue against Defendant Smalls in this case. **Exhibit O**, Defs. Memo. in Supp. of Mot. to Compel Arb., p. 8.

To undergird the fact Appellants' Motion to Compel Arbitration is a mislabeled motion to reconsider, below is a comparison of the exhibits used in their Motion for Summary Judgment and their Motion to Compel Arbitration. The exhibits relied upon by Appellants in both motions, along

with the arguments highlighted above, were virtually the same. And the reason is simple – they were the same arguments utilizing the same evidence.

Motion for Summary Judgment	Motion to Compel Arbitration
Ex A – Complaint in Case 1437	Ex A – Complaint in Case 1437
Ex B – Complaint in Case 2744	Ex B – Complaint in Case 2744
Ex C – Answer of Defendant Smalls	Ex C – Answer of Defendant Smalls
Ex D – Order Compelling Arbitration	Ex D – Order Compelling Arbitration
Ex E – Arbitration Agreement	Ex E – Arbitration Agreement
Ex F – Order Appointing Arbitrator	Ex F – Arbitration Order
Ex G – Arbitration Order	Ex G – Supplemental Arbitration Order
Ex H – Supplemental Arbitration Order	Ex H – Check paying Arbitration Award
Ex I – Check paying Arbitration Award	Ex I – Final Order Case 1437
Ex J – Final Order Case 1437	Ex J – Memorandum of Law in Support of Defendants' Motion for Summary Judgment
	Ex K – Plaintiff's Memo in Opposition to Defendants' Motion for Summary Judgment
	Ex L – Order Denying Summary Judgment
	Ex M – Order Denying Motion to Reconsider Order Denying Summary Judgment
	Ex N – Defendants' Motion to Reconsider Order Denying Summary Judgment

Appellant Smalls has already filed a Motion to Compel Arbitration in this case, her arguments were heard, and the Motion was granted in part as it related to certain claims. The other claims, those contained in Case 2744, were stayed. Those claims from Case 1437, and by extension Appellant Smalls, were heard and a Final Order was entered. Defendants FOS and FCAS moved to stay the claims in Case 2744 while arbitration proceeded in Case 1437, which was also granted. Appellants argued these claims were non-arbitrable in previous pleadings. **Exhibit G**, Def. Petition for Final Order. After the stays were lifted and the Circuit Court allowed Case 2744 to move forward, Appellants filed a Motion for Summary Judgment arguing the claims in Case 2744 were subject to arbitration. The Circuit Court denied Appellants' arguments and that decision should continue to govern the same issues in subsequent stages in the same case.

Appellants subsequent Motion to Compel Arbitration is based on the same arguments put forth in the denied Motion for Summary Judgment. Their Notice of Appeal is, for all intents and purposes, an inappropriate attempt to appeal an interlocutory order by disingenuously and inappropriately labeling a successive Rule SCRCP 59 motion as a Motion to Compel Arbitration. This attempt was recognized by the Honorable Jennifer B. McCoy when she stated, "_"[I]t puts me in this odd position of sort of reconsidering another Judge's ruling, which I can't – I can't do either, but I understand -- I think I understand your position. It's tough. It's a tough one." **Exhibit R**, Trans. of Record, Jan. 27, 2025, p. 16: 3-7. Appellants' attempt to skirt the interlocutory nature of the order denying summary judgment and to ignore the law of the case ought to be recognized for what it is – a misguided and futile effort to create an appellate issue.

CONCLUSION

For the reasons stated above, Respondent respectfully requests the Court DISMISS Appellants' Notice of Appeal as interlocutory.

Respectfully submitted,

PINKSTON LAW FIRM, LLC

/s/ Shawn Pinkston
Shawn Pinkston, SC Bar No. 79965
856 Lowcountry Blvd., Suite 101
Mount Pleasant, South Carolina 29464
Office: 843-814-5472

Attorney for Respondent

Mount Pleasant, South Carolina

Dated: April 11, 2025

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2021CP-
	)	
Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner,	)	**SUMMONS** **JURY TRIAL DEMANDED**
Plaintiff,	)	
v.	)	
	)	
Fundamental Administrative Services LLC, And Fundamental Clinical and Operational Services, LLC, and Jerrolyn Montgomery-Smalls	)	
Defendants.	)	

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to this Complaint to the below named subscriber at his office, 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, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

PINKSTON LAW FIRM, LLC

By: **/s/ Shawn Pinkston**

Shawn Pinkston
856 Lowcountry Blvd, Ste. 101
Mount Pleasant, SC 29464
843-814-5472
shawn@pinkstonlawfirm.com

Mount Pleasant, South Carolina

Exhibit A

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CIVIL ACTION NO.: 2021CP-
)	
Williams Haynes, as Personal)	
Representative of the Estate of Elizabeth)	**COMPLAINT**
Varner,)	**JURY TRIAL DEMANDED**
Plaintiff,)	
v.)	
)	
Fundamental Administrative Services LLC,)	
And Fundamental Clinical and Operational)	
Services, LLC, and Jerrolyn)	
Montgomery-Smalls)	
)	
Defendants.)	

COMES NOW William Haynes, as Personal Representative of the Estate of Elizabeth Varner ("Plaintiff), by and through undersigned counsel, and states as follows:

1. Williams Haynes, as the Personal Representative of the Estate of Elizabeth Varner, is a resident of the County of Berkeley, State of South Carolina.

2. Based on information and belief, Defendant Fundamental Administrative Services LLC, ("Defendant FAS"), is a corporation organized and existing under the laws of the State of Delaware and at all times relevant herein, conducted business in Charleston County through its agents, contractors, and employees for the purpose of carrying on its business as a healthcare facility and providing medical care to its patients through its agents and employees at THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab ("Riverside"), located in North Charleston, South Carolina.

3. Based on information and belief, Defendant Fundamental Clinical and Operational Services LLC, ("Defendant FCOS"), is a corporation organized and existing under the laws of the State of Delaware and at all times relevant herein, conducted business in Charleston County through its agents, contractors, and employees for the purpose of carrying on its business as a

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healthcare facility and providing medical care to its patients through its agents and employees at Riverside, located in North Charleston, South Carolina.

4. Based on information and belief, Defendant Jerrolyn Montgomery-Smalls ("Defendant JMS") is a resident of Charleston County and at all times relevant herein was the Administrator of Riverside Health and Rehab.

5. Plaintiff filed a Notice of Intent and all required attachments pursuant to S.C. Code Ann. § 15-36-100.

6. The parties conducted pre-suit mediation on June 7, 2021, which resulted in an impasse. Venue and subject matter jurisdiction are proper within this Court.

7. Personal jurisdiction is proper in this Court because Defendants are situated in Charleston County and conduct business in Charleston County.

8. Upon information and belief, FCOS has or had common ownership and management with THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab and exerts significant control over the operation of Riverside Health, including the development of policies and procedures, training, and instruction for the staff at Riverside.

9. Upon information and belief, through its individual actions and the acts of its agents, and in concert with the other Defendants, FAS engaged in and exerted control in the oversight, management, direction, and operation of Riverside, including the development of budgets, choosing vendors and consultants, and deciding nurse staffing hours per patient days deriving revenue therefrom.

10. The above-named Defendants are jointly and severally liable for all damages alleged in the Complaint since their neglect, gross negligence, reckless and wanton acts and omissions,

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singularly or in combination, are the contributing proximate cause of the Plaintiff's damages, injuries, and losses.

FACTUAL ALLEGATIONS

11. Elizabeth Varner was admitted to Riverside Health and Rehab ("Riverside") on May 20, 2019, and she paid a fee for her care.

12. While a resident at Riverside, Elizabeth Varner required skilled nursing care from the staff at the nursing home as well as assistance with daily living activities.

13. On or about October 6, 2019, Elizabeth Varner was a resident at Defendant's facility.

14. During the afternoon of October 6, 2019, Elizabeth Varner was transferred to the Medical University of South Carolina ("MUSC") with chief complaints of a right knee fracture. The admission records note, "pt coming from riverside with right knee fracture. EMS was not served with XR; per EMS no one at the facility can say what happened. Pt is saying someone fell on her her and that it happened last week; facility reported to EMS that they don't know when this happen [sic]."

15. The medical records also note, "Elizabeth Varner is a 76 y.o. female, who presents with right knee pain. She injured her lower extremity one week ago. She reports a nurse at the nursing home she lives at fell on her leg. She felt immediate onset of pain but reports no XRs were taken until today...She points to her knee as the place that is most sensitive to pressure."

16. Upon examination by medical providers at MUSC, Elizabeth Varner's right knee had "obvious swelling, tenderness palpation diffusely, limited passive range of motion...." An x-ray of her right femur find an "oblique distal fracture metadiaphyseal fracture with no one half shaft's width of posterior displacement of the distal fracture fragment." An x-ray of her right knee noted the same fracture with "no significant degenerative changes. Soft tissue swelling

about the knee." She was discharged on October 6, 2019, with plans to follow up with the orthopedic clinic.

17. Elizabeth Varner was seen by the MUSC Orthopedic Department on October 10, 2019, and "due to continued pain, the decision was made to admit the patient to the hospital for surgery and postoperative evaluation."

18. Elizabeth Varner underwent surgery on October 11, 2019, in which the surgeons inserted a 10mm femoral nail into the right femur. She was discharged from MUSC on October 14, 2019.

19. On October 27, 2019, Elizabeth Varner was transferred from Defendant's facility to MUSC via EMS. The medical records from MUSC notes Plaintiff arrived at approximately 6:57 am with the following HPI, "Per EMS patient was found unresponsive at the nursing facility approximately 12 PM last night and was placed on supplemental oxygen due to pulse ox being in the 70s. Nursing staff waited 2hrs after placing the pt on supplemental oxygen before calling EMS. On arrival to the ER patient was hypotensive 40s/30s, cold t the touch, unresponsive and no pulses were palpable....The pt was hypotensive thus sepsis protocol initiated."

20. Elizabeth Varner suffered cardiac arrest while at MUSC and eventually passed away on October 29, 2019. The Immediate Cause of Death was listed as: Shock, Acute Renal Failure, and Hypoxic Respiratory Failure. Her femur fracture was listed as a significant condition contributing to her death.

21. Elizabeth Varner's Death Certification listed the following causes of death: Acute Respiratory Failure, Acute Renal Failure, Pulseless Electrical Activity Arrest Secondary to Septic Shock.

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FIRST CAUSE OF ACTION
(Negligence, Gross Negligence)

22. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

23. The care providers at Riverside Health and Rehab violated the standard of care in the following ways:

- Failing to take proper precautions to prevent injury to Elizabeth Varner and by failing to protect Elizabeth Varner from injury;
- Failing to investigate the cause of an unknown bone fracture;
- Failing to notify the appropriate regulatory agency following serious incidents, to include fractured bones;
- Failing to timely call EMS and timely transfer Plaintiff to a hospital after a change in condition;
- Failing to have the appropriate number of staff to meet the acuity needs of Plaintiff; and
- Other failures of the applicable standard of care that may be discovered through the course of this lawsuit.

24. The Affidavit of Plaintiff's expert specifying at least one negligent act or omission is attached as Exhibit "A" with said expert being Suzanne Frederick, MSN, RN-BC, CWCN.

25. As a direct and proximate result of Defendant's negligence, negligence per se, gross negligence, recklessness, willfulness and wantonness, Plaintiff suffered injuries, including, but not limited to, substantial physical and mental pain and suffering, mental anguish, mental shock and suffering, and wounded feelings.

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SECOND CAUSE OF ACTION
(Corporate Negligence)

26. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

27. Based upon information and belief, Defendants operated, managed, and/or provided consulting services to THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab before and during Elizabeth Varner's residency.

27. Defendants had a duty of care to residents to discover, to warn, to prevent risks, to take reasonable safety precautions, to eliminate unreasonable risks, and to provide protection from harm.

28. Riverside was negligently administered and managed by Defendants who were working together to manage and operate the facility.

29. The facility was negligently administered in violation of state and federal laws by Defendants FCOS and FAS, who were working together to govern, administer, control, manage, and operate the facility.

30. Defendants, by and through their agents, servants, and employees, were negligent, willful, wanton, reckless, careless, and grossly negligent and deviated from the expected standards of skill, care, and learning in their treatment of Elizabeth Varner. Specifically, Defendants were negligent in the following ways:

- Failing to provide the care, supervision, and monitoring of patients;
- Failing to take proper precautions to prevent injury to Elizabeth Varner and by failing to protect Elizabeth Varner from injury;
- Failing to investigate the cause of an unknown bone fracture;
- Failing to notify the appropriate regulatory agency following serious incidents, to include fractured bones;

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- Failing to timely call EMS and timely transfer Plaintiff to a hospital after a change in condition;
- Failing to have the appropriate number of staff to meet the acuity needs of Plaintiff; and
- Other failures of the applicable standard of care that may be discovered through the course of this lawsuit.

31. As a result of Defendants' actions and/or non-actions, Elizabeth Varner experienced prolonged conscious pain and suffering, mental anguish, incurred substantial medical bills, and suffered a wrongful death. As a further result, her wrongful death beneficiaries suffered the damages and injuries stated above.

32. The aforesaid wrongful acts were the sole and proximate cause of Elizabeth Varner's injuries and wrongful death.

THIRD CAUSE OF ACTION
(Joint Venture)

33. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

34. That a joint venture is an association of two or more individuals engaged in a solitary business enterprise for profit without actual partnership or incorporation.

35. That elements of joint venture in the State of South Carolina are:

an agreement;

- a joint interest in a common business;
- an understanding that profits and losses will be shared, and;
- a right to joint control.

36. That a joint venture exists when there is:

- contribution of resources by both parties;

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- joint proprietorship and control over the subject matter of the property
- engage in the venture;
- sharing of profits by express or implied agreement, and;
- an express or implied contract showing join venture.

37. That Defendants FCOS, FAS, Jerrolyn Montgomery-Smalls, and Riverside were involved in a joint venture.

38. Because of their joint venture, Defendants FCOS and FAS had a joint obligation to sufficiently fund Riverside to ensure that each of their residents received the necessary care and services in order for the residents to attain or maintain the highest practicable physical, mental, and psychosocial well-being, consistent with the residents' comprehensive assessments and plans of care.

39. This joint obligation required Defendants to sufficiently fund Riverside so that there would be enough staff and resources in order to meet the needs of their residents.

40. Riverside was totally dependent on the generosity of Defendants FCOS and FAS in their decision-making process as to whether they would allow them to keep the money they were earning.

41. Defendants negligently failed to fund Riverside so its agents, servants, and employees could provide the necessary skill and care to residents, including Elizabeth Varner.

FOURTH CAUSE OF ACTION
(Alter Ego/Piercing the Corporate Veil)

42. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

43. That, upon information and belief, Riverside was dominated and controlled by Defendants FCOS and FAS before, during, and after Elizabeth Varner's residency. Defendants and its related entities, agents, and managers siphoned profits from the nursing home chain

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through self-dealing between the entities, excessively compensated themselves and other executives, and participated in other methods of divesting the licensee entities of needed capital and assets, while allowing the chain to suffer financial losses and provide uniformly poor care across the country as a result of inadequate capitalization and consequently inadequate supplies, resulting in untold numbers of unnecessary injuries, death and suffering, including that of Elizabeth Varner at the Riverside.

FIFTH CAUSE OF ACTION
(Neglect of a Vulnerable Adult)

44. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

45. According to the South Carolina Adult Protection Act, at all times relevant hereto Plaintiff Elizabeth Varner was considered a vulnerable adult.

46. According to the South Carolina Adult Protection Act, neglect means the failure or omission of a caregiver to provide the care, goods, or services necessary to maintain the health and safety of a vulnerable adult including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services and the failure or omission has caused, or presents a substantial risk of causing, physical or mental injury to the vulnerable adult.

47. Defendants failed to provide care to Plaintiff Elizabeth Varner by causing trauma to Plaintiff's leg, which resulted in an oblique distal fracture metadiaphyseal fracture to the right leg with no one half shaft's width of posterior displacement of the distal fracture fragment.

48. Defendants failed to timely identify that Elizabeth Varner was suffering from a fracture in her right leg.

49. Defendants failed to provide care and medical services to Elizabeth Varner by not transferring her to the hospital in a timely manner after a change of condition.

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50. Defendants failed to recognize or to act timely when Elizabeth Varner was found unresponsive on October 27, 2019.

51. Elizabeth Varner trusted in, confided in and relied upon Defendant to use their expertise and discretion for Plaintiff's care.

52. Defendants accepted Elizabeth Varner's trust and reliance and so became responsible for Elizabeth Varner's health while residing at the nursing home facility.

53. As a result of aforementioned reliance and trust upon Defendant, Elizabeth Varner's physical, mental and emotional health was placed in the hands of Defendant.

54. Defendant received compensation for the care and treatment they were responsible for providing to Elizabeth Varner during her residency but did not provide that care and treatment.

55. As a direct and proximate result of Defendant's negligence, negligence per se, gross negligence, recklessness, willfulness and wantonness, Plaintiff suffered injuries, including, but not limited to, substantial physical and mental pain and suffering, mental anguish, mental shock and suffering, and wounded feelings.

SIXTH CAUSE OF ACTION
(Wrongful Death)

56. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

57. That as a direct and proximate result of Defendants negligent, willful, wanton, reckless, careless and grossly negligent conduct, by and through their agents, servants, and employees, Elizabeth Varner was severely injured in Defendant's facility.

58. The injuries so inflicted on Elizbeth Varner were the cause of Elizabeth Varner's wrongful death on October 29, 2019.

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SEVENTH CAUSE OF ACTION
(Survival Action)

59. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

60. As a direct and proximate cause of Defendants' negligence, willful, reckless and/or grossly negligent actions and inactions, Elizabeth Varner suffered:

- Excruciating pain;
- Prolonged extreme suffering;
- Acute emotional distress;
- Fear and anxiety;
- Medical bills;
- Mental anguish;
- Loss of enjoyment of life; and
- The agony of death.

61. As a direct and proximate cause of Defendants' negligence, willful, reckless and/or grossly negligent actions and inactions, Elizabeth Varner's heirs suffered:

- Loss of companionship;
- Emotional trauma;
- Loss of comfort and support;
- Psychological and emotional distress;
- Loss of enjoyment of life; and
- Loss of their Mother.

WHEREFORE, Plaintiff demands judgment against Defendants for actual and punitive damages, for the cost of this action, and for other such relief the Court deems just, equitable, and proper.

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PINKSTON LAW FIRM, LLC

/s/ Shawn Pinkston
Shawn Pinkston, SC Bar No. 79965
856 Lowcountry Blvd., Suite 101
Mount Pleasant, South Carolina 29464
Office: 843-814-5472
Fax: 843-723-7300
shawnpinkston@me.com

Date: June 11, 2021
Mount Pleasant, South Carolina

ELECTRONICALLY FILED - 2021 Mar 25 12:32 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1001437

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2021 – CP - _____
	)	
Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner,	)	SUMMONS
	)	
	)	JURY TRIAL DEMANDED
Plaintiff,	)	
v.	)	
	)	
THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab,	)	
	)	
Defendant.	)	

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to this Complaint to the below named subscriber at his office, 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, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

PINKSTON LAW FIRM, LLC

By: **/s/ Shawn Pinkston**

Shawn Pinkston
856 Lowcountry Blvd, Ste. 101
Mount Pleasant, SC 29464
843-814-5472
shawn@pinkstonlawfirm.com

Mount Pleasant, South Carolina

Exhibit B

ELECTRONICALLY FILED - 2021 Mar 25 12:32 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1001437

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2020 – CP - _____
	)	
Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner,	)	COMPLAINT
	)	JURY TRIAL DEMANDED
Plaintiff,	)	
v.	)	
	)	
THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab,	)	
	)	
Defendant.	)	

COMES NOW William Haynes, as Personal Representative of the Estate of Elizabeth Varner ("Plaintiff), by and through undersigned counsel, and states as follows:

1. Williams Haynes, as the Personal Representative of the Estate of Elizabeth Varner, is a resident of the County of Berkeley, State of South Carolina.

2. Based on information and belief, Defendant THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab, ("Defendant"), is a corporation organized and existing under the laws of the State of Delaware and at all times relevant herein, conducted business in Charleston County through its agents, contractors, and employees for the purpose of carrying on its business as a healthcare facility and providing medical care to its patients through its agents and employees.

3. The parties engaged in mandatory presuit mediation on October 8, 2020, which resulted in an impasse.

4. On or about October 6, 2019, Elizabeth Varner was a resident at Defendant's facility.

5. During the afternoon of October 6, 2019, Elizabeth Varner was transferred to the Medical University of South Carolina ("MUSC") with chief complaints of a right knee fracture. The

admission records note, "pt coming from riverside with right knee fracture. EMS was not served with XR; per EMS no one at the facility can say what happened. Pt is saying someone fell on her her and that it happened last week; facility reported to EMS that they don't know when this happen [sic]."

6. The medical records also note, "Elizabeth Varner is a 76 y.o. female, who presents with right knee pain. She injured her lower extremity one week ago. She reports a nurse at the nursing home she lives at fell on her leg. She felt immediate onset of pain but reports no XRs were taken until today...She points to her knee as the place that is most sensitive to pressure."

7. Upon examination by medical providers at MUSC, Elizabeth Varner's right knee had "obvious swelling, tenderness palpation diffusely, limited passive range of motion...." An x-ray of her right femur find an "oblique distal fracture metadiaphyseal fracture with no one half shaft's width of posterior displacement of the distal fracture fragment." An x-ray of her right knee noted the same fracture with "no significant degenerative changes. Soft tissue swelling about the knee." She was discharged on October 6, 2019, with plans to follow up with the orthopedic clinic.

8. Elizabeth Varner was seen by the MUSC Orthopedic Department on October 10, 2019, and "due to continued pain, the decision was made to admit the patient to the hospital for surgery and postoperative evaluation."

9. Elizabeth Varner underwent surgery on October 11, 2019, in which the surgeons inserted a 10mm femoral nail into the right femur. She was discharged from MUSC on October 14, 2019.

10. On October 27, 2019, Elizabeth Varner was transferred from Defendant's facility to MUSC via EMS. The medical records from MUSC notes Plaintiff arrived at approximately 6:57

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am with the following HPI, "Per EMS patient was found unresponsive at the nursing facility approximately 12 PM last night and was placed on supplemental oxygen due to pulse ox being in the 70s. Nursing staff waited 2hrs after placing the pt on supplemental oxygen before calling EMS. On arrival to the ER patient was hypotensive 40s/30s, cold t the touch, unresponsive and no pulses were palpable....The pt was hypotensive thus sepsis protocol initiated."

11. Elizabeth Varner suffered cardiac arrest while at MUSC and eventually passed away on October 29, 2019. The Immediate Cause of Death was listed as: Shock, Acute Renal Failure, and Hypoxic Respiratory Failure. Her femur fracture was listed as a significant condition contributing to her death.

12. Elizabeth Varner's Death Certification listed the following causes of death: Acute Respiratory Failure, Acute Renal Failure, Pulseless Electrical Activity Arrest Secondary to Septic Shock.

FIRST CAUSE OF ACTION
(Medical Malpractice, Negligence, Gross Negligence)

13. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

14. The care providers at Riverside Health and Rehab violated the standard of care in the following ways:

- Failing to take proper precautions to prevent injury to Elizabeth Varner and by failing to protect Elizabeth Varner from injury;
- Failing to investigate the cause of an unknown bone fracture;
- Failing to notify the appropriate regulatory agency following serious incidents, to include fractured bones;
- Failing to timely call EMS and timely transfer Plaintiff to a hospital after a change in condition;

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- Failing to have the appropriate number of staff to meet the acuity needs of Plaintiff; and
- Other failures of the applicable standard of care that may be discovered through the course of this lawsuit.

15. The Affidavit of Plaintiff's expert specifying at least one negligent act or omission is attached as Exhibit "A" with said expert being Suzanne Frederick, MSN, RN-BC, CWCN.

16. As a direct and proximate result of Defendant's negligence, negligence per se, gross negligence, recklessness, willfulness and wantonness, Plaintiff suffered injuries, including, but not limited to, substantial physical and mental pain and suffering, mental anguish, mental shock and suffering, and wounded feelings.

SECOND CAUSE OF ACTION
(Neglect of a Vulnerable Adult)

17. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

18. According to the South Carolina Adult Protection Act, at all times relevant hereto Plaintiff Elizabeth Varner was considered a vulnerable adult.

19. According to the South Carolina Adult Protection Act, Neglect means the failure or omission of a caregiver to provide the care, goods, or services necessary to maintain the health and safety of a vulnerable adult including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services and the failure or omission has caused, or presents a substantial risk of causing, physical or mental injury to the vulnerable adult.

20. Defendant failed to provide care to Plaintiff Elizabeth Varner by causing trauma to Plaintiff's leg, which resulted in an oblique distal fracture metadiaphyseal fracture to the right leg with no one half shaft's width of posterior displacement of the distal fracture fragment.

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21. Defendant failed to timely identify that Elizabeth Varner was suffering from a fracture in her right leg.

22. Defendant failed to provide care and medical services to Elizabeth Varner by not transferring her to the hospital in a timely manner after a change of condition.

23. Elizabeth Varner trusted in, confided in and relied upon Defendant to use their expertise and discretion for Plaintiff's care.

24. Defendants accepted Elizabeth Varner's trust and reliance and so became responsible for Elizabeth Varner's health while residing at the nursing home facility.

25. As a result of aforementioned reliance and trust upon Defendant, Elizabeth Varner's physical, mental and emotional health was placed in the hands of Defendant.

26. Defendant received compensation for the care and treatment they were responsible for providing to Elizabeth Varner during her residency but did not provide that care and treatment.

27. As a direct and proximate result of Defendant's negligence, negligence per se, gross negligence, recklessness, willfulness and wantonness, Plaintiff suffered injuries, including, but not limited to, substantial physical and mental pain and suffering, mental anguish, mental shock and suffering, and wounded feelings.

THIRD CAUSE OF ACTION
(Wrongful Death)

28. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

29. That as a direct and proximate result of Defendants negligent, willful, wanton, reckless, careless and grossly negligent conduct, by and through their agents, servants, and employees, Elizabeth Varner was severely injured in Defendant's facility.

30. The injuries so inflicted on Elizbeth Varner were the cause of Elizabeth Varner's wrongful death on October 29, 2019.

ELECTRONICALLY FILED - 2021 Mar 25 12:32 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1001437

FOURTH CAUSE OF ACTION
(Survival Action)

31. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

32. As a direct and proximate cause of Defendant's negligence, willful, reckless and/or grossly negligent actions and inactions, Elizabeth Varner suffered:

- Excruciating pain;
- Prolonged extreme suffering;
- Acute emotional distress;
- Fear and anxiety;
- Medical bills;
- Mental anguish;
- Loss of enjoyment of life; and
- The agony of death.

33. As a direct and proximate cause of Defendant's negligence, willful, reckless and/or grossly negligent actions and inactions, Elizabeth Varner's heirs suffered:

- Loss of companionship;
- Emotional trauma;
- Loss of comfort and support;
- Psychological and emotional distress;
- Loss of enjoyment of life; and
- Loss of their Mother.

WHEREFORE, Plaintiff demands judgment against Defendant for actual and punitive damages, for the cost of this action, and for other such relief the Court deems just, equitable, and proper.

PINKSTON LAW FIRM, LLC

/s/ Shawn Pinkston
Shawn Pinkston, SC Bar No. 79965
856 Lowcountry Blvd., Suite 101
Mount Pleasant, South Carolina 29464
Office: 843-814-5472
Fax: 843-723-7300
shawnpinkston@me.com

Date: March 25, 2021
Mount Pleasant, South Carolina

ELECTRONICALLY FILED - 2021 Mar 25 12:32 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1001437

STATE OF SOUTH CAROLINA

GENERAL SESSIONS

COUNTY OF CHARLESTON

Docket Number
2021-CP-10-02744

WILLIAM HAYNES,

Plaintiff,

vs.

FUNDAMENTAL SERVICES PRODUCTION,

Defendant.

September 11, 2024

MOTION HEARING

B E F O R E:

The Honorable William C. McMaster, III, Presiding Judge.

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

Shawn Pinkston, Esquire
Pinkston Law Firm
856 Lowcountry Blvd., Suite 101
Mount Pleasant, South Carolina 29464

Attorney for the Plaintiff

Matthew Riddle, Esquire
Clement Rivers, LLP
PO Box 993
Charleston, South Carolina 29402

Attorney for the Defendant

Exhibit C

Transcribed by: Barbie Teboe, Transcriber

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P R O C E E D I N G S

(Whereupon, the following proceedings started at 9:30 a.m.)

THE COURT: All right. Good morning. It's 9:30. We're set to start our first hearings.

If you will please unmute your microphones. And we'll start your video.

All right. The first case we have is 2021-CP-100-2744. And that's *William Haynes versus Fundamental Administrative Services, LLC.*

If you'll identify yourself and who you represent, please.

MR. PINKSTON: If it please the Court.

I'm Shawn Pinkston, representing the Plaintiff, Williams Haynes, as a personal representative of the personal state of Elizabeth Varner.

MR. RIDDLE: Good morning, Your Honor. This is Matt Riddle on behalf of the defendants, Jerrolyn Montgomery Smalls and Fundamental Administrative Services and Fundamental Clinical and Operational Services.

THE COURT: All right. Gentlemen, I know we've had a lot of email back and forth, but I wanted to start with -- I know there's a motion that is not on the docket, which is the defendants' Motion to Seal the documents and hearing transcript, that was filed by Mr. Riddle.

Mr. Riddle, I'll be happy to hear from you on that motion

to start with, sir.

MR. RIDDLE: Thank you, Your Honor. May it please the Court.

Again, my name is Matt Riddle. I represent the defendants in this matter.

The motions here today that are on the docket, the defendants' Motion for Summary Judgment and Motion for Protective Order, and the plaintiff's Motion to Compel and Motion for Sanctions, all relate to a prior arbitration proceeding involving the defendant, Jerrolyn Montgomery-Smalls who is in a defendant in this action and a non-party defendant, Riverside Skilled Nursing Facility.

The defendants' arguments in the Motion for Summary of Judgment, Your Honor, are that the claims and issues presented at that arbitration and decided by the arbitrated bar the present claims asserted against Ms. Smalls and the other defendants. And, therefore, you know it's necessary for this Court to address the specifics of the arbitration proceedings and the ruling of the arbitrator. Those proceedings and the arbitrator's decision were confidential as agreed to by the parties and ordered by Judge Early, our arbitrator.

And so there was an expectation on behalf of the parties and on behalf of Judge Early, who's not a party to this case but was our arbitrator, that the proceedings would be confidential.

And so, Your Honor, the defendants are simply requesting under Rule 41.1 that the confidential portions of the defendants' Memoranda in Support of Summary Judgment and in support of the Motion for Protective Order and the related exhibits, that those be sealed along with the transcript of today's hearing as it will involve the details of that confidential proceeding and the rulings of the arbitrator.

We've explained in our motion, Your Honor, why the balance of the public and private interests that's required until Rule 41.1 favors sealing these documents. There's no counter-veiling public interest in access to these documents that are private -- or that arise from a private civil arbitration where the parties agreed and the arbitrator ordered that the documents that -- and proceedings would be confidential, and the award of the arbitrator would be confidential. And as a result, to protect the confidentiality of these documents, we're simply asking that those be sealed for the record.

To the extent that there is some concern about later proceedings, you know, there -- confidential documents are routinely sealed, and there's -- a sealed record is routinely used in appellate court proceedings or trial court proceedings as it relates to confidential documents. There are procedures to address those issues, but for the purposes of our motion here today and the record as it stands now, we're simply

requesting these documents be sealed, as they are confidential according to the expectations of the parties, the agreement of the parties, and the order of the arbitrator, Judge Early. And so we would ask that those documents be sealed, Your Honor.

Thank you.

THE COURT: Thank you.

Mr. Pinkston, I'd be happy to hear from you, sir.

MR. PINKSTON: Yes, Your Honor, thank you, and greetings.

Confidentiality in this case has been waived. The mere fact that the two Fundamental defendants have access to the confidential order shows that it has been waived. They were non-parties to the arbitration. They argued throughout the Motion to Compel arbitration that they were non-parties, that they were separate and distinct, and they weren't bound by the arbitration agreement in this case.

The confidential order was distributed only to the parties of the lawsuit, as well as counsel for -- of the arbitration, only counsel of the arbitration. So it should only have been received and seen by Riverside Health and Rehab and the Smalls. The Fundamental entities should not have received it. They only have received it and reviewed it by really only one of two ways: either Ms. Smalls shared it with the Fundamental corporate entities, which would violate the confidentiality provision, or counsel for the defendants

Fundamental shared it with his clients, which would also breech the confidentiality order.

So, Your Honor, we maintain that any confidentiality that was expected in the arbitration proceedings have been waived by the defendants in this matter.

If it was confidential, again, the Fundamental entities would not have access to it. They would not have any knowledge of the order if Counsel and/or Defendant Smalls did not share it with the Fundamental entities.

The proper procedures for the Fundamental defendants would have been to petition the Court to allow them access to view it and then make decisions on how to move forward. And that clearly did not happen in this case.

Secondly, the Fundamental defendants are using the alleged confidential order in support of their Motions for Summary judgment. They have cited specific provisions in it and presented that to the Court. And that also waives any confidentiality or expectation of confidentiality contained in the order.

Again, Your Honor, the mere fact that the Fundamental entities have access to it when they weren't parties; they weren't part of the arbitration. They should not have it. It's improper for them to have it. And their access to it waives any confidentiality because it was shared with these Fundamental defendants.

Because the confidentiality has been waived, the documents do not need to be sealed. The proceedings do not need to be sealed, based upon simply the waiver of the confidentiality.

I'm happy to answer any questions you have, Your Honor.

THE COURT: All right.

I think --

Mr. Riddle, I -- if you'd like to respond to that, I will be happy to hear from you.

MR. RIDDLE: Thank you, Your Honor.

First of all, Ms. Smalls was a party to the arbitration. And she is a defendant in the present lawsuit. And she is -- and our Motion for Summary Judgment is filed on her behalf in this case.

And, second of all, I represent all the defendants in this matter, Your Honor. And we filed the Motion for Summary Judgment on behalf of all defendants. I'm not sure why the plaintiff in this matter is disputing the confidentiality or disputing the efforts to maintain confidentiality, as the plaintiff was a party to the confidentiality provisions of the arbitration agreement as well. And there's no evidence that I'm aware of that any individual who's an employee of FAS or FCOS has actually seen the order or any individual who was not a party to the arbitration has seen the order or received information about the arbitration proceedings other than Your

Honor and your law clerks and staff.

And so, you know, there hadn't been any waiver. I'm not sure how my view of the arbitration order can be considered a waiver because I represent all parties. And, Your Honor, I don't know why the plaintiff is disputing our efforts to try to maintain confidentiality in this matter, since the plaintiff is a party to the confidential provisions in the arbitration, which, again, are set forth specifically in that exhibit that we filed. It was Exhibit A to our Motion to Seal. It's Exhibit F to the Motion for Summary Judgment. That's the arbitration order that sets forth the procedures and the schedule. And there's a specific provision in there that the parties, which is the plaintiff and the defendant and the arbitrator, who -- you know, there's an expectation on behalf of the arbitrator as well that the confidentiality be maintained. And you know he's not here to argue on his behalf, but the confidentiality provision applies to him as well. And I don't think my view of the order as the attorney for all the defendants in this case somehow waives confidentiality.

So, again, we would just ask that those documents be sealed for purposes of determining the motions before you today.

THE COURT: I'll let you have the last word, Mr. Pinkston, if you'd like.

MR. PINKSTON: Yes, Your Honor.

The defense counsel and his firm should have created the proverbial Chinese wall between the Riverside defendant and the Smalls, who were parties to the arbitration. Again, all he had to do was petition the Court and ask for permission to review and then make a determination at that point.

The question that the defendant has still -- or that the defendants have still not answered is how they received access to and viewed the arbitration order in order to base their arguments upon that confidential arbitration order. And that's the issue before this Court, is we maintain that it was waived by their viewing of it, by defense counsel not maintaining the provisions in discussing the grounds for the Motion for Summary Judgment with this client. Which it doesn't matter that he represents all of them. The fact is that they were separate and distinct. They were not parties to the arbitration. And there is a process in place for defense counsel in any case to review any confidential order, confidential settlement; and that is to petition the Court and get them to allow -- whether it's an in-camera review or, you know, plaintiffs or defendants have to share that relative confidential information, which is something that did not happen here.

So again, Your Honor, we don't dispute what the order compelling the case to arbitration said as it relates to

confidentiality. What we do dispute is that confidentiality still applies based upon the actions of the defendants who were not parties.

And the Motion for Summary Judgment is not just on behalf on Defendant Smalls. It's on behalf of the Fundamental corporate entities based specifically on the arbitration order.

THE COURT: All right.

Thank you very much. I appreciate your arguments. I'm going to deny the motion -- the defendants' Motion to Seal the Documents based on waiver.

So we can go to the next motion, please.

MR. RIDDLE: Your Honor, if I may ask just for clarification for purposes of the record?

THE COURT: Yes.

MR. RIDDLE: And I apologize. But -- so we have filed redacted versions of the documents with the Court.

THE COURT: Yes, sir.

MR. RIDDLE: Okay. And we have submitted unredacted versions to your office via email and in a sealed envelope as it relates to our motion to seal.

THE COURT: Yes, sir.

MR. RIDDLE: Can we request a finding or some documentation on the record that the Court has the ability to review the unredacted versions in-camera and that those have

been provided to the Court, and then have the redacted versions as part of the record? Or is the Court ordering us to file unredacted versions of those exhibits and memoranda?

THE COURT: The Court has reviewed the documents that you have provided, unredacted versions. The Court has reviewed those. I have received them and reviewed them in preparation of today's hearings.

The Court is ordering that you -- then you will need to file unredacted versions at the conclusion of this hearing.

MR. RIDDLE: Okay.

THE COURT: All right?

MR. RIDDLE: Thank you, Your Honor.

THE COURT: Thank you.

All right. How do you all want to proceed now? And I'll let -- these are kind of -- these are in order. They go from the last one filed to the, you know, down to the first one.

The first one file is obviously No. 4 on the docket, the Motion for Summary Judgment. We can start with that if that kind of helps keep everything flowing forward.

I'll defer to you.

MR. RIDDLE: I think all the issues flow from the Motion for Summary Judgment. And that's the basis of the reason that the defendants haven't fully responded to the plaintiff's discovery request at this point, is based on the Motion for Summary Judgment. So I'll be happy to start with that, Your

Honor.

THE COURT: Mr. Pinkston, do you agree with that? It kind of seems like we need to start it there and that kind of will feed the rest.

MR. PINKSTON: Yes, Your Honor. Plaintiff is in agreement.

THE COURT: All right.

Let's start with the Motion for Summary Judgment. Let me just get my notes together for that. And ...

(Pause.)

THE COURT: All right. This is the defendants' motion.

I'd be happy to hear from you, sir. Mr. Riddle?

MR. RIDDLE: Thank you, Your Honor.

Again, this is Matt Riddle with Clement Rivers, on behalf of the defendants, Jerrolyn Montgomery-Smalls, who at the time of the allegations in the complaint was the administrator for Riverside Health and Rehab Skilled Nursing Facility. I also represent the Defendants Fundamental Administrative Services and Fundamental Clinical and Operational Services.

Your Honor, the defendant here today requests that this Court grant Our Motion for Summary Judgment, which was filed pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

Judge, the preclusive effect of the prior arbitration award here -- that we're here to discuss today bars the

plaintiff from pursuing this action against all the defendants. There is no issue as to any material fact. Those claims and issues have already been decided by the arbitrator, Your Honor. The arguments that are in the plaintiff's Memo in Opposition and the case law that the plaintiff has cited are flawed, Your Honor. The plaintiff's arguments are all based upon a fundamental misunderstanding or misstatement about what claims were presented at arbitration and how those claims were decided by the arbitrator. The authority cited by the plaintiff does not apply to support the plaintiff's flawed arguments.

This is a clear case res judicata and collateral estoppel. Judge Early decided the claims and issues at arbitration. Damages, Your Honor, have been determined and were paid by Riverside Skilled Nursing Facility. There's nothing left for a Finder of Fact to decide. And therefore the defendants are entitled to judgment as a matter of law. And we would request that you grant the motion, Your Honor.

We filed a memorandum that we've discussed, Your Honor, already today with Exhibits attached, A through J. We filed redacted versions of these and per Your Honor's order, in response to the motion to seal the record, we'll file unredacted versions of those. And we'll ask that the memo and the -- those exhibits be made part of the record for the purposes of the decision in today's motion, Your Honor.

THE COURT: Again, I am in -- I have your motion in support and I have your exhibits as well. So I have reviewed those.

Mr. Pinkston, I'd be happy to hear from you.

MR. RIDDLE: Your Honor, I do have ---

THE COURT: Oh. I'm sorry.

MR. RIDDLE: I'm sorry. I wasn't quite finished ---

THE COURT: Okay.

MR. RIDDLE: --- (indiscernible).

THE COURT: Okay. Go ahead. Keep going.

MR. RIDDLE: And I apologize. I won't be much longer. I'll get through the rest of this. But I did want to take a step back and just make sure that the Court understands and that's it's clear for the record, what plaintiff's allegations are, what the claims and offenses were that were presented at arbitration, and what the arbitrator actually decided, Your Honor.

THE COURT: All right. Go ahead.

MR. RIDDLE: I just want to clarify what we've stated in our memo and response to the plaintiff's Memo in Opposition.

So the plaintiff's allegations as to Riverside, which was the skilled nursing facility, they alleged cause of action for a negligence, which was a medical malpractice negligence claim, cause of action for neglect of a vulnerable adult, for wrongful death, and for survivorship.

Now, in the present lawsuit, the plaintiff has alleged the identical four causes of action. They didn't use the words "medical malpractice" with the Negligence Cause of Action, but the -- I'll invite the Court to compare the two complaints, and you'll see that the cause of action -- or the allegations in the cause of action are identical, Your Honor.

And then the new claims as to Ms. Smalls, FAS, and FCOS were for corporate negligence, joint venture liability, and corporate veil piercing liability.

Those claims were all alleged against all three defendants, Your Honor, including Ms. Smalls who was a party to the arbitration. The same damages are alleged as to those defendants. There's only set of damages: the injuries to Ms. Warner, the femur fracture; and her alleged wrongful death, which the arbitrator denied the wrongful death. Those are the damages. Those are the damages that were alleged for each of the causes of action asserted in the -- in both complaints.

The Court -- when Judge Young ordered arbitration, the arbitration -- he ruled that the arbitration agreement applies to Ms. Smalls because she was an agent/employee and servant of the facility, Riverside. He cited to the arbitration agreement and stated that all claims are subject to arbitration; all claims asserted against Ms. Smalls, all claims asserted against Riverside were subject to arbitration, including the claims asserted against Ms. Smalls for corporate

negligence, joint venture liability, and corporate veil piercing liability. Those claims were heard in arbitration -- or they were subject to arbitration. And it was up to the plaintiff to present evidence in support of those claims or not. But he doesn't get a chance to come back now and try to present new evidence that he didn't present in arbitration.

There's no language in the order, Your Honor -- there's no language in any of the arguments that this defendant has made to the Court. And there's no language in the arbitration order that Judge Early entered that states that any claims asserted against Ms. Smalls were not included in the -- or not to be included in the arbitration.

The claims against FAS and FCOS were stayed pursuant to Judge Young's order because they're not parties to the arbitration agreement, not because of the subject matter of any of the claims.

The plaintiff had the opportunity to present claims for corporate negligence, joint venture liability, and corporate veil piercing liability. And it's clear, in a reading of his complaint -- I won't go line by line here with you today, Judge. But in a reading of the complaint, all of those were asserted against Ms. Smalls in addition to the other defendants. (Inaudible) the Court that limits the ability of the plaintiff to present those claims at arbitration.

And then as far as what the arbitrator actually decided,

Your Honor, I will draw your attention to the arbitrator's order. And I believe you said you have a copy of that and that you received the unredacted version of it.

Judge Early found that the plaintiff proved by the preponderance of the evidence that Riverside breached the standard of care in regards to the manner in which they transferred Ms. Varner and failed to comply with the care plan they had ordered for her. This deviation was the proximate cause of the fracture she sustained to her femur.

Judge Early awarded the medical bills of $77,000 -- I'm sorry -- $77,007. He awarded pain and suffering damages of $10,000. And Judge Early found that the plaintiff failed to prove by the preponderance of the evidence that Ms. Varner's cardiac arrest and death were proximately by the fracture.

Judge Early found that the plaintiff failed to prove by clear and convincing evidence -- which is the standard for punitive damages -- that any of the defendants acted reckless, willful, or with a conscious disregard of Ms. Varner's care.

And then Judge Early issued a subsequent order as to Ms. Small, specifically finding that plaintiff failed to prove by the preponderance of the evidence that Ms. Smalls deviated from the standard of care and that plaintiff was not entitled to judgment against Ms. Small.

And therefore, Your Honor, as we've set forth in our memo and our -- and the supporting exhibits, the claims that are

asserted in this lawsuit against all defendants are barred by res judicata, which is claim preclusion. All the claims asserted against Ms. Smalls are precluded. It could have been tried at arbitration. They're precluded. And collateral estoppel, which is issue preclusion, as to the defendants who are not a party to the arbitration.

So issue preclusion means the judge determined that the damages already. Damages are a necessary element of all these cause of action that were raised against FAS and FCOS. Judge determined that. The arbitrator determined that already. It's been determined. It's been paid.

FAS -- the plaintiff can't come back now and try to proved new damages. There are no new damages. The damages are the same. There's one set of damages. They've been determined and they've been paid.

The -- and that extinguishes the liability, Your Honor. There's not liability -- and there can't be any claims for punitive damages without a finding of compensatory damages. And the compensatory damages have been determined and have been paid. So that issue is precluded.

The issue of joint venture or corporate veil piercing. Those are imputed liability damages, meaning, the liability of the facility is imputed to the corporate entities if the plaintiff can prove the veil piercing elements.

Here, the damages of the facility have been determined

and paid. There's no other damages to be imputed to any corporate defendant. So there's no -- that claim is precluded.

Wrongful death, Your Honor; wrongful death requires the plaintiff to prove that some negligent actual was the proximate cause of the plaintiff's death. Here, Judge Early determined "yes". Okay. She had a fracture. Something that happened at the facility caused that fracture. But that fracture did not cause Ms. Varner's death. And so now the plaintiff can't come back and say, "No, we're going to prove wrongful death again," or "We get another shot to prove wrongful death."

It's been argued and decided in a final order. And the case that we've cited, Your Honor, you have -- it is clear that arbitration is a final word for purposes of res judicata and collateral estoppel. So the Judge's decision on wrongful death and all these other issues is the law of this case. It can't be re-litigated.

And I do quickly want to address the Morrow case that the plaintiff cites in his brief, Your Honor. The Morrow case states that corporate liability claims and vicarious liability claims can co-exist in a lawsuit, and that a finding of one does not necessarily preclude the finding of another.

That principle has nothing to do with the arguments that we're making before the Court today. There are no new damages

that can be determined related to a vicarious liability versus a direct liability claim.

And, again, punitive damages do no and cannot exist as an independent cause of action, Your Honor. And you know that's a well-established principle of South Carolina case law. There's the case of *Monroe versus Baker's Life and Casualty Company* from 1958 that's kind of the -- is a case -- one of the early cases that establishes that rule of law, stating that "Punitive damages claims cannot exist as an independent cause of action, but such damages are mere incidents to the cause of action and could never constitute the basis thereof.

And, therefore, Your Honor, the plaintiff can't have a separate cause of action for punitive damages without being able to prove compensatory damages. And, again, Your Honor, those damages have already been determined and paid in this case.

The plaintiff also cites to the Boiter case, B-o-i-t-e-r. And it's completely inapplicable here, Your Honor. That case was decided in the context of the tort claims act, which has damages caps. And I'm sure Your Honor is familiar with if there's damages caps on the tort claim act, that the basis of the caps is -- in part relates to how many occurrences there are. So each occurrence has a certain cap. In that Boiter case the Court held that, you know, these separate acts of negligence constituted different occurrence, for purposes of

the caps. But there's no finding or holding that there's different damages related to each different act of negligence. There was one set of damages in that case.

There's -- and there's one set of damages in this case. The damages have been determined and paid. In Boiter, the issue was whether the cap should be applied differently because of the number of occurrences that there were. That's not an issue in this case. So Boiter doesn't apply.

Morrow doesn't apply, Your Honor.

The plaintiff's damages have been determined and paid. That issue is precluded, Your Honor, under collateral estoppel. Wrongful death is precluded. Joint venture, corporate veil piercing, and corporate negligence, Your Honor, have all been decided. And if they weren't decided, you know, the plaintiff had the opportunity to present those claims against -- and evidence in support of those claims against Defendant Smalls at the arbitration. All the claims against Defendant Smalls were or should have been present at arbitration. They're barred against her under res judicata. The claims are barred against FAS and FCOS under collateral estoppel.

And we would ask that you grant a Motion for Summary Judgment, Your Honor.

Thank you.

THE COURT: Thank you.

Yes, sir. Mr. Pinkston?

MR. PINKSTON: Your Honor, may it please the Court.

The -- our Supreme Court reviewed and rejected defendants' exact argument -- these defendants' exact argument in the Morrow case. There's a footnote in the Morrow case, Your Honor, which is worth noting for this Court.

The footnote states that the Counsel for the Fundamental entities -- which was this law firm, Your Honor, stated that defense counsel candidly admitted during oral arguments that the Morrow's claims against the Fundamental entities, that being the nursing home, was unsuccessful. He would argue that based on the bifurcation order, summary judgment on the claims of corporate liability would be proper, which our Supreme Court specifically rejected in the Morrow case. Same argument that the defense is making now, that because there were findings of fact relating to the employees of Riverside, that somehow exonerates them from any corporate negligence. The Morrow case is cited throughout the plaintiff's memo, but it specifically stated, Your Honor, that, "Direct corporate liability attaches to a breach of a duty which runs directly between a parent company and a patient."

So we're talking about duties. Riverside had a duty and these corporate defendants had a duty; separate duties. And those duties from the corporate side, according to Morrow case, include properly funding the hospital that was, did not

leave it underfunded so it's not understaffed, and properly training. And if they fail to do that, then the plaintiff can provide -- or proof the Fundamental entities provided substandard care.

Accordingly, the two theories of vicarious liability and corporate liability can coexist in a lawsuit. And a finding of one does not necessarily preclude a finding in the other. And that's exactly what we have here, Your Honor.

What the defense seems to overlook in this case is that they requested and were granted stays in this case. Those suited all of the allegations contained in this instant case. They argued -- and Your Honor has been provided with the transcript -- that Defendant Smalls, is only subject to (inaudible) agreement as an employee of Riverside. And therefore those claims against Riverside necessarily included any claims against Ms. Montgomery-Smalls as an employee, the administrator, of the facility.

The fact that these cases were stayed, Your Honor -- or that this case was stayed, prevents the plaintiff from bringing forth any evidence in arbitration. Any evidence. Despite the defense's claim that the plaintiff could have and should have brought those arguments in arbitration, it defies legal sense and it defies common sense to argue that when a stay is in place at the request of these defendants, that somehow plaintiff could have brought those in an arbitration

that did not apply to them, allegations that did not apply to them, and then try to use an arbitration order to say that, "Well, he could have brought them. And since he didn't bring them in arbitration -- even though there was a stay, that somehow he is precluded or stopped from now arguing them."

In order to have res judicata and collateral estoppel, the first prong is that it's the same parties. The corporate entities in this case, Fundamental, were not parties to the lawsuit, even provided with the transcript. They made it clear that they were separate and distinct, were not to be part of the arbitration.

Ms. Smalls is only supposed to be part of the arbitration as an employee of the facility. And those claims alleging vicarious liability would apply to Ms. Smalls. That's clear from the transcript. They're now taking a separate tact, Your Honor, which is the basis for a later motion that you're going to hear because their arguments now are in direct opposition and direct contradiction that they made at the motion to compel arbitration. How can a plaintiff pursue a cause of action that has been stayed pursuant to a court order?

The damages are different. When you have different duties, you can have different damages. Again, the duties are funding, training, staffing. And it's a direct duty that runs from the corporate entities to the patient; different duties, different damages.

They want to argument that because punitive damages was decided in the arbitration against the employees of the facility that it precludes damages against them.

And our Supreme Court addressed this exact issue *in Mcgee Versus Bruce Hospital System*, which is 344-SC-466. Whether the prior judgment for compensatory damages may have been paid in full, it is not determinative in deciding the punitive damages may be awarded against defendants.

So even if there has been compensatory damages, in this case only against Riverside, because there's a different duty, different compensatory could be found against these corporate entities. Because different compensatory damages could be found because of the different duties, punitive damages can also be found.

For example, Your Honor, a Fact Finder could determine that, "Hey the -- while the employees may not have been grossly negligent, Fundamental, you were grossly negligent and intentionally under-funding the facility, intentionally not training the facility, and intentionally under-staffing the facility." And those actions can constitute one willful and punitive conduct.

And, again, the Court decided this in McGee. In that case, same thing happened. And the Court said that even if compensatory damages were paid, punitive damages can still be decided against another defendant, even if punitive damages

were not decided against a previous defendant.

The Boiter case that the defense references, the point of the Boiter case is the Court decided that two separate entities with separate duties could both be held responsible and have to pay damages based upon the same harm because they had different duties. And it wasn't double recovery, which is essentially what the defense is arguing. Yes, it was in the context of occurrences, but that's the key thing.

And, here, you're going to have two different occurrences -- or three different occurrences. You're going to have occurrences that were committed by the staff at Riverside, and you're going to have occurrences that a Fact Finder could determine were made against the Fundamental entities. And that's the point of the Boiter case. And that's why it's applicable, because defense's argument is since punitive damages was decided and compensatory damages have been paid, he's precluded from pursuing punitive damages against Fundamental.

And, Your Honor, that is just -- it's wrong based on the Morrow case. It's wrong based on case law here in the state of South Carolina. Separate duties; separate damages; separate actions underlying those duties.

The defense argued that there is nothing left for the Fact Finder to determine. That could not be further from the truth, Your Honor. The Fact Finder did not determine any

allegations relating to the corporate negligence claims. The reason for that is because they were stayed, Your Honor. They were stayed. The defense has not been able to. And they cannot produce any authority that says when a stay issued for parties that are not subject to an arbitration agreement, that those parties can then somehow come back and claim that they are bound by the provision of that arbitration agreement absent some privity. Which, again, they argued they were separate and distinct. They argued they were not bound by the arbitration agreement, yet now they want to seek a benefit from the arbitration agreement.

Again, you have to have the same parties in a prior case, the arbitration, in order to apply -- in order for res judicata to apply. You have to have the same issues determined in order for collateral estoppel to apply. Different duties, different actions. The Morrow case specifically addressed this. The defense wants to distance itself from the holding in Morrow when they were the same corporate defendants and the same law firm who are arguing these same facts in front of our Supreme Court. And the Supreme Court rejected those claims.

The defense point to, in their memo and in argument, that because the Defendant Smalls was found to have not deviated from the standard of care, it's important to realize exactly what the arbitrator ruled. The arbitrator said he was not

negligent in the care of and investigation of the fall. That is her responsibility as an employee of the facility. There is nothing implicit that that somehow applies to any of the corporate negligence claims because there was a stay in place.

And the fact that, again, the defense wants to argue the plaintiff because they were stayed. And our Supreme Court has said that a stay is a stopping. You cannot proceed. You cannot move forward. It simply defies any legal authority to assert that a stay that has been issued in the case and somehow -- a plaintiff could then somehow proceed those claims.

So, Your Honor, summary judgment is inapplicable under these facts based on the Morrow case. They're inapplicable under these facts based on separate individual entities as it relates to the arbitration decision. It does not apply because the issues of employee negligence and direct corporate responsibility are separate. Res judicata does not apply because the arbitration did not involve the same parties. Those claims could not have been brought in arbitration. Collateral estoppel does not apply because the allegations supporting or approving corporate negligence were not actually litigated in the (inaudible) action. They were not directly determined in a prior action. And there is nothing in the arbitration order that would be necessary to support or that the allegations of corporate negligence could have been argued

in order to support the prior judgment because that judgment was solely against the employees of Riverside.

(Pause.)

MR. PINKSTON: And, Your Honor, all of those arguments are laid out in our memo in opposition. We do believe that these motions -- or this Motion for Summary Judgment constitutes a frivolous pleading, as we'll get into in our motions -- in our Motion for Sanctions. And we would just ask that the Defendants' Motion for Summary Judgment, in its entirety, be denied, Your Honor.

THE COURT: All right. Thank you.

I appreciate both your arguments.

I'm going to take this under advisement on the summary judgment. And I should have a ruling hopefully by this weekend. But it may be first of next week on that issue.

MR. RIDDLE: Your Honor, if I may make one point for the record, since there was some new authority cited I believe by the plaintiff that the I wasn't ---

THE COURT: The McGee. Right. Go ahead.

MR. RIDDLE: --- with the McGee case.

THE COURT: Yes.

MR. RIDDLE: I'm not -- I have to admit, Your Honor, I'm not completely familiar with that case. And I don't recall seeing it in plaintiff's memo in opposition that was filed.

But in my quick sort of review of it, that case does not

appear to have involved the issues of res judicata or collateral estoppel in which there was a prior proceeding where issues were determined and then a plaintiff was later trying to assert claims against another defendant.

It appears that that was one proceeding in which all the claims were presented at once and there was some issue about punitive damage as to one defendant versus the other defendants.

I'm not exactly sure, Your Honor, but I did just want to state for the record that, you know, our position to that case is inapplicable here since it doesn't' relate to res judicata or collateral estoppel.

THE COURT: All right.

MR. RIDDLE: And if I may make a couple of other clarifications?

And we can get into this in response to the Motion for Sanctions. But the defense argument is not the same as what we presented in Morrow. That case did not involve res judicata and collateral estoppel.

And, Your Honor, we're arguing res judicata as to defendant Small's. We're not arguing res judicata as to the facility -- as to FAS and FCOS. We are arguing collateral estoppel as to FAS and FCOS. So res judicata applies to Defendant Smalls, who was a party to the arbitration.

And, again, the plaintiff's argument is based on a

misstatement of the nature of the stay and what the stay is. The stay was of the litigation in Circuit Court. And if you look at Judge Young's order and his conclusion on page 20 of the order, Case 1437 is stayed, which is the case against the facility, Riverside. The other case was stayed. That case was stayed in favor of arbitration between plaintiff and the facility.

Case 2477 is stayed. That's this case. Stayed in favor of arbitration between plaintiff and Ms. Montgomery-Smalls. With plaintiff's claims against FAS and FCOS stayed, pending the ultimate outcome of arbitration between plaintiff, facility, and Ms. Montgomery-Smalls. There's nothing there in that conclusion or in any other aspect of the order that states that some claims will be tried at arbitration and some claims will be tried in Circuit Court against Ms. Smalls. All the claims against Ms. Smalls from this case were to be presented at arbitration, Your Honor. The cases -- both cases were stayed. The litigation in Circuit Court was stayed. The claims presented proceeded in arbitration as to Ms. Smalls and to Riverside.

And that's all I wanted to clarify, Your Honor. Thank you.

THE COURT: Thank you.

All right. You-all want to move to the Motion for Protective Order now?

MR. RIDDLE: Certainly, Your Honor.

THE COURT: All right. Let's move to that now.

And, Mr. Riddle, your motion. I'd be happy to hear from you.

MR. RIDDLE: Thank you, Your Honor.

Again, Matt Riddle, on behalf of the defendants. Your Honor, we would ask that you grant our Motion for Protective Order such that the defendants are protected from responding to the plaintiff's voluminous and burdensome discovery request in the present case until Your Honor issues an order determining that the plaintiff has valid cause of action to proceed.

Your Honor, as we have just argued in relation to our motion for summary judgment, the defendants have valid and meritorious arguments, Your Honor, that the relevant claims as to Ms. Montgomery-Smalls and the relevant issues as to FAS and FCOS have been determined. Damages have been determined as to -- and the defendants have paid those damages, Your Honor. And therefore we have valid arguments in support of Motion for Summary Judgment. And we would just ask that this Court issue an order on that motion, to either -- granting the motion or if the Court finds that there is some valid cause of action that the claim -- that the plaintiff can pursue in this case, that the defendants be protected from responding to discovery until Your Honor has ruled that there is a valid cause of

action.

The plaintiff has served each of the defendants in this case with interrogatories and 70 separate requests for production of documents. And Mr. Pinkston did -- has pointed out to the Court that agreed to extensions of time in relation to our initial response to those discovery requests.

The -- you know, we received the requests. And during that time my office was having some staff turnover. The attorney who was primarily handling the discovery issues in this case, you know, left to go work in another firm.

I was, you know, juggling many other matters. And Mr. Pinkston graciously agreed for an extension of time for me to sit down and look at this case and determine how to proceed with my client as to the response to the discovery.

Your Honor, during the course of that time is when we identified the valid grounds that we presented to Your Honor in response to the Motion for Summary Judgment. We filed the motion and we've asked for protection from respondent to the discovery, Your Honor, because we do think it's a valid motion. And it -- we're -- the interest of the client of avoiding the time and expense of responding to the burdensome discovery if the case is going to be dismissed is the reason for the Motion for a Protective Order. And we would ask that you grant that.

If the Court determines there is a valid cause of action

to proceed, you know, we've already had a discussion with Mr. Pinkston about the objections to certain of the 70 requests for production. We're ready, you know, to respond to those.

Your Honor, there hasn't been anything dilatory or frivolous here (inaudible) the defendant that would merit sanctions. The defendants haven't waived any objections, Your Honor. We're ready to proceed with discovery if Your Honor determines that this case may proceed. We're simply asking for protection until you determine the Motion for Summary Judgment.

Thank you, Your Honor.

THE COURT: All right.

Mr. Pinkston, we kind of rolled up all three of those at once, it sounds like. Let's -- but I'm going to let you have the opportunity to -- **obviously** you filed a Motion to Compel. He's got the Motion for the Protective Order. Those kind of work in -- work together. I'll let you respond to those two first. And then we'll go to the Motion for Sanctions last. Okay?

MR. PINKSTON: Yes, Your Honor.

Just briefly ---

THE COURT: All right.

MR. PINKSTON: --- on the motion.

Again, you're right. They're combined. So I think we

can address one while also addressing the other.

THE COURT: Right.

MR. PINKSTON: Discovery in this case was served in February, shortly after the stays were lifted. Counsel gave the defendant two months to respond to the (inaudible). So they require 30 days and then an additional 30 days before plaintiff's counsel inquired about the responses.

As you've seen in the emails, Counsel for Fundamental entities ensured, "I'm working diligently on these. I'm going to get them to you by the end of next week. If you could just grant more time, I'll get these to you next week. We've had staff turnover, but I'm confident we can get these to you."

He asked for even more time. I said, "I'll give you some additional time, but I'm not going to give you an additional 30 days because you're already 90 days past due. And if you don't respond by a certain date, then I'm going to file a Motion to Compel"

That date came and went. And the defense still did not respond, leaving plaintiff's counsel no option other than to file a Motion to Compel. And only after the Motion to Compel was filed did the defendant seek a Motion for Protective Order and put forth, again, what the plaintiff claims are frivolous claims in their Motion for Summary Judgment.

One that the defense said about the order that is very important to all of this hits the nail on the head. And that

is that all claims contained in this lawsuit were stayed. All claims were stayed. That's not ambiguous. That's not uncertain. All claims were stayed, which would eliminate any argument for the collateral estoppel, would eliminate any argument for res judicata, would eliminate any argument that these are meritorious claims, and therefore he's not required to respond to discovery.

And the defense attorney and the defendants were granted extensive time to try to respond. We're now seven months past the time that those discovery responses were due, Your Honor. You've seen the emails. I have been more than reasonable and professional in trying to grant the defendant an opportunity -- or defendants -- an opportunity to respond to discovery with assurances that they were working to respond and that they would have responses by a certain date. Those deadlines just kept coming and going. And then, you know, again, then you have the Motion for Protective Order and the Motion for Summary Judgment filed.

We did have a conversation last week of meet and confer in which certain objections were made. And they're going to be made again. And that's the whole point of the Motion to Compel. The defense's argument was that budgets and financial information all go to punitive damages and we haven't made a prima facie showing.

And that is simply wrong because they have a duty to

properly fund the facility. And the budget would determine if that were true. Did they properly fund the facility? It has nothing to do with punitive damages. It has something to do directly with the element.

So if this Court denies Their Motion for Summary Judgment, which we believe the Court should; and if the Court denies their Motion for a Protective Order, they're going to file objections. And then I'm going to have to file another Motion to Compel. And then we'll be back in front of -- because it has already -- defense counsel has already notified me that he disagrees. He thinks it all goes to punitive damages. Based upon their refusal to reply (inaudible) discovery, we would argue that they've waived any objections, and that they're required to respond in full as we have asked within 10 days of the date of the order.

Mr. Riddle just shook his head. I guess he believes that I'm mis-characterizing the conversation that we had. But we can go through and I can pull up the specific interrogatories in which he said, "Those go to punitive damages." And I maintain that they go to the direct element of proper funding. And we agreed to limited in-time.

Again, these were initially served in 2021 before the cases were stayed. And it said, "From 2018 through the present," which would have included 2018, 2019, 2020, and I guess the beginning of 2021 when the suites were filed.

I agree that those interrogatories that say, "2018 to present" should be limited to 2018, 2019, and 2020 because that shows a pattern of funding for the facility. And the defendants admit in their answer that they provide administrative and operations oversight of the facility. They admit that. (Inaudible) would include the funding.

So, you know, Your Honor, the problem with the protective order in this case is, we're going to be back in front of the Court in however long it takes, another three to four months depending on the Court's ruling, as it relates to these discovery responses because the defense has already put me on notice. And, you know, Mr. Riddle and I did confer. And we just have a disagreement about those specific interrogatories.

Again, I agree to limit it to 2018, 2019, 2020. I believe it's relevant to show a pattern. It's relevant to show the exact funding of the facility which is a direct element of a corporate negligence claim.

So, Your Honor, that's the issue with the Motion for Protective Order and the Motion to Compel as we have combined the two of them. Defendants' tactics, while (inaudible) additionally to get them. Then a Motion to Compel was filed. And only then Motion for Summary Judgment and their Motion for Protective Order was filed. When they -- they could have been on notice of that. It should have been on notice of that from the time the discovery was served in February of this year.

And that's all I have on those particular motions, Your Honor.

THE COURT: All right.

I'm going to get back just to the protective order.

Mr. Riddle you're -- is asking for protection until the Court rules on summary judgment; correct -- and that only; correct?

MR. RIDDLE: Yes, Your Honor.

And if the Court finds that there are valid cause of action to proceed, then we're ready to promptly respond to plaintiff's discovery request and provide, you know, the information that, you know, he's entitled to under the South Carolina Rule of Civil Procedure.

THE COURT: And then -- and I understand that -- Mr. Pinkston, you -- there may be future arguments down the road if -- on the discovery requests and what is produced. And there may be additional motions to compel at that point. But I don't think we're quite there yet. I know you got a preview because you talked. But I don't think we're quite there yet.

Mr. Riddle, I'm going to grant the Defendants' Motion for Protective Order until the Court rules. I'd like you draft a short order and just drop that in my queue for that.

MR. RIDDLE: Yes, Your Honor.

THE COURT: I'm going to take under advisement the Motion

to Compel. At this time, I'll take under advisement the Motion to Compel.

And we'll move on to Motion for Sanctions. I know some of the arguments for sanctions, you alluded to, Mr. Pinkston, just a few minutes ago on the frivolous nature in your opinion of the Motion for Summary Judgment and the Motion for the Protective Order. But I do want to let you have an opportunity to tell the Court anything else you'd like to on the Motion for Sanctions, sir.

MR. PINKSTON: Yes, Your Honor.

We lay it out. And so I want to just reiterate what's in our memorandum. The facts are there. And I think you know them all based upon the previous arguments.

Again, the one thing that I would point out is the court order granting the stays specifically says that, "All claims contained in this lawsuit -- in this lawsuit, are stayed. "

They could not have been brought. They could not have been pursued in arbitration. The only issues pursued in arbitration were those that dealt with Riverside and its employees and THI, which is doing business as Riverside. That's it. The order is clear. There is no confusion. All claims in this lawsuit are stayed pending arbitration.

Again, Your Honor, I'll just get back to the argument I was making in the previous (inaudible). You cannot have collateral -- the issues are not the same. And those issues

could not have been litigated based upon the stay that was requested by these defendants. He provided the transcript in which they said they were separate and distinct in arguments in front of Judge Young. They're now taking an entirely separate argument, which we believe is contrary to the rules of professional conduct, in terms of candor towards the tribunal and maintaining a consistent argument.

And they -- this behavior has to stop, Your Honor. I mean, and the Supreme Court has reminded Circuit Courts of their ability to impose sanctions for discovery abuse, as well as the abuse of filing frivolous proceedings. It's in the statute. And this -- preclusion in res judicata cannot apply when all claims are stayed.

The Defense wants to try to to argue, "Well, since Ms. Smalls was included, you could have brought them."

Those claims against Ms. Smalls in the -- in this current lawsuit, all claims were stayed. And the defense knows it as well. (Inaudible) the holding in Morrow. They tried to distance themselves from Morrow in the proceedings in front of Judge Young and they're continuing to try to distance themselves and say that, "Well, it doesn't stand for what it actually stands for." Which, it can be read in the Supreme Court's language about the preclusive effect of -- one did not apply.

So, Your Honor, we just maintain that all of these

motions have been filed in an effort to engage in unnecessary delay. The discovery and the defense conduct towards discovery has been dilatory and was meant to impede the proper procession of discovery. And, you know, we believe that all of these factors merit sanctions pursuant to the South Carolina frivolous filings statute.

Your Honor, again, we'll rely upon the memo and the exhibits attached to the memo, especially the copies of the transcripts where the arguments can be seen for what they were.

And I -- again, Your Honor, depending upon this Court's ruling, you know, the plaintiff is, again, at a loss for how the defendants can claim with a straight face that when all claims were stayed -- all claims were stayed, that somehow those claims could have been brought and they're entitled to summary judgment, especially in the light of the Morrow case, which says, summary judgment is inappropriate and you're not allowed to pursue summary judgment when the claims -- regardless of the findings as it relates to the findings against the facility, which was specifically rejected by the Supreme Court. But it's not stopping the defendants from coming forward today and filing these motions, even though, again, all claims were stayed. And they're not entitled to pursue summary judgment under the holding in Morrow.

Your Honor, I know we've taken up a lot of your time.

You have the memos. Happy to answer any questions that you might have, but I'll rest on that. And depending upon a ruling on sanctions, we'd be happy to provide the Court with any affidavit of fees relating to the defending against what the plaintiff claims is frivolous motions based upon, you know, the cost incurred in these motions.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Riddle?

MR. RIDDLE: Thank you, Your Honor.

The Motion for Summary Judgment is not a frivolous motion. We haven't made the argument before. We're not making an argument contrary to anything in Morrow or Boiter or any other case that Mr. Pinkston has cited.

This is a clear instance of res judicata and collateral estoppel, Your Honor. You're -- the plaintiff has presented his case in arbitration. And now he's trying to get a second bite of the apple against a -- someone who is a party to the arbitration and other parties to which -- for which issues were decided at arbitration that preclude the claims against them.

These are not -- this is not a frivolous claim. That -- you know, it would be have been, frankly, malpractice to me not to assert these claims on behalf of my clients and try to defend the -- try to defend them.

Your Honor, we've cited the cases: Carolina Renewal, which is 385-SC-550, cited in our brief and I would ask it be made part of this record that collateral estoppel applies here. And then also, Your Honor, the *Palmetto Homes versus Bradley,* 357-SC-485, that res judicata applies, Your Honor, to arbitration proceedings.

These are valid arguments, Your Honor, that we're presenting to the Court -- we're asking the Court to find, that there has been a -- there has -- that the issues were decided by the arbitration and therefore there's no issue for a jury to decide.

And I'll get back again to the fundamental misunderstanding about what a stay is. The Court stayed the litigation in Circuit Court. The Court ordered the arbitration as to Riverside and Ms. Smalls. There's nothing in this order or our arguments before the Court, or Judge Early's arbitration order that says that any claims against Ms. Smalls were precluded from being included in the arbitration. Everything against Ms. Smalls was to be included in arbitration. And those are the same claims that are asserted to FAS and FCOS here.

We -- the stays stayed the litigation in Circuit Court. It didn't stay any particular ability of the plaintiff to pursue a claim at -- in arbitration.

And there haven't -- Your Honor, I just have to say,

there haven't been any tactics. I heard the word "tactic" being used in relation to our response to the discovery and the motions. I mean, frankly, was the -- it's a -- to the extent there that, you know, we didn't immediately answer all the discoveries because, one, there's so much that they're asking for; and, two, it's just the nature of the busy law practice, Your Honor, unfortunately, and the staffing issues that we touched on briefly. I assure you, there hasn't been any intentional conduct on behalf of the defendant to delay this matter.

And it -- there's no grounds for sanctions here under the Frivolous Proceedings Act. There's specific elements of that claim that the plaintiff has to prove, and he hasn't proved -- shown it here, Your Honor. We have valid and meritorious defenses that we've presented to this Court. We're asking the Court to determine those and that there's no grounds for sanctions, Your Honor. We would ask that the motion for sanctions be denied.

Thank you.

THE COURT: All right.

Thank you, both, for your arguments.

I appreciate the -- I will take that under advisement as well. And hopefully I'll have a ruling by the end of the weekend, hopefully, maybe the first of next week, just depending on how the remainder of this week goes.

But thank you, both, for your arguments. And I appreciate you both being on time and the job and the preparation that you-all had for these arguments today.

Thank you, both. Thank you.

MR. RIDDLE: Thank you, Your Honor.

MR. PINKSTON: Yes, sir, Your Honor. And we appreciate your time dealing with all the confidentiality issues. I know that was kind of unrelated to what we were here to argue today. So we appreciate you and apologize for having to burden you with all that.

THE COURT: No, that's all right. I understand.

All right. I appreciate you-all doing -- you-all did a good job for both of your clients. Thank you.

MR. PINKSTON: All right. Thank you, Your Honor.

THE COURT: Thank you.

(At 11:01 a.m., the hearing concluded.)

END OF TRANSCRIPT.

CERTIFICATE OF TRANSCRIBER

State of South Carolina

County of Charleston

I, BARBIE TEBOE, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings and evidence introduced in the trial of the captioned case, relative appeal, in the Court of General Sessions for Charleston County, South Carolina, on the 11th day of September, 2024.

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

January 15, 2025

Barbie K. Teboe

Barbie Teboe,
Transcriber

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON) 2021-CP-10-01437 & 02477

William Haynes, as Personal Representative of the Estate of Elizabeth Varner,

Plaintiff,

vs.

THI of South Carolina at Charleston LLC d/b/a Riverside Health and Rehab,

Defendant.

William Haynes, as Personal Representative of the Estate of Elizabeth Varner,

Plaintiff,

vs.

Fundamental Administrative Service, LLC; Fundamental Clinical and Operational Services, LLC; and Jerrolyn Montgomery-Smalls,

Defendant.

Transcript of Record

February 10, 2022

Exhibit D

B E F O R E:

Honorable Roger M. Young, Sr.
Charleston County Courthouse
Charleston, South Carolina
VIA WEBEX REMOTE HEARING

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

Shawn Pinkston, Esquire
Attorney for Plaintiff

Russell Hines, Esquire
Attorney for Defendants Fundamental Administrative Service, LLC; Fundamental Clinical and Operational Services, LLC; and Jerrolyn Montgomery-Smalls

Sallie Beth Todd
Official Court Reporter

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

THE COURT: All right. This is 2021-CP-10-2744, as well as 1437.

MR. HINES: Yes, Your Honor.

THE COURT: I just wanted to make sure I got that right for the record.

All right. Probably it makes the most sense to let's do this motion to compel arbitration first. I guess if that one is granted then everything else kind of goes to the side.

MR. PINKSTON: Your Honor, if I may? I believe the motion to stay, pending your ruling on that particular issue, might address the motions to compel. And the reason for that, Your Honor, is I have spoken with the defendants on multiple occasions about agreeing to arbitration for all of -- for both cases.

Just for background purposes, the motion to consolidate was originally filed with the agreement that all of the cases would be consolidated and they'd move to arbitration, and then once the consent motion was circulated, the defendants decided that they, the Fundamental entities, wanted a stay based upon the corporate negligence claims and not submit those to arbitration which is really where we are today, is the biggest issue between the plaintiff and defendant is the stay as it relates to the Fundamental entities and the motion to compel. Plaintiff has stated to the defendant and will state to the Court, we are agreeable to arbitration in order to move the

cases forward, they've been pending for quite a long time already in order -- just to get to this stage. So I would request the Court hear arguments as it relates to the motion to stay because that could decide the other motions based upon previous conversations.

THE COURT: I don't think I've ever had a defendant who didn't want arbitration for a particular thing when they wanted it for everything else. It's kind of like they consider arbitration, you know, the hill they want to die on, so anyway.

MR. HINES: Well, Your Honor, I think the issue there, and it's possible I suppose that I've not been privy to all of the conversations that Mr. Pinkston has had with either Jay Davis or Matt Riddle in our office, although I think I understand. I think the sticking point as I understand it is this is a case where in addition to -- I'm going to refer to Riverside Health and Rehab as the facility, just for shorthand. That's the place where the resident actually was. You have these other defendants in the other case, Fundamental Administrative and Fundamental Clinical and Operating Services, there's a major dispute about the relationship between those entities and the facility. The plaintiff alleges that they have this control over the facility, and they are essentially, I guess, alter egos or amalgamated and we deny that and we deny having any relationship in terms of

with the rest in this case, Ms. Varner, and having provided her any care.

So I think one of the problems that we're having, Your Honor, as I understand what plaintiff's counsel is saying is he's saying we will agree to arbitrate, but we want everybody in there together. And one of the problems that we have with that is that we don't concede that everybody is together in the way that the plaintiff alleges. Our contention is that the Fundamental defendants are separate and distinct, and really these claims are misplaced. We're not here to move to dismiss today, I understand that. But I think that's what is going on. And certainly what I know today is I'm not in a position to consent to have the Fundamental defendants lumped in with the facility and the individual defendant, Ms. Montgomery-Smalls, she's the administrator of the facility. So I think that's the reason why we're not able to consent to an arbitration with everyone is because it goes back to this distinction between the Fundamental defendants and their relationship to the facility and a major sticking point about the way the plaintiffs contend that relationship -- what they contend that relationship is and what those defendants say it is.

But as far as the idea of arguing the stay first, I think -- and I don't mean -- well I don't see how we can do that under the circumstances, Your Honor, because the stay question

is really quite easy. It's a bit of a lead pipe sinch if plaintiff, and I don't mean to be cute by this, because I understand if the plaintiff agrees to arbitration, then under the Federal Arbitration Act Section 3, that requires a stay. I can read that verbiage for Your Honor if you will indulge me for a moment, and I don't think there's any dispute here that we're talking about an arbitration agreement that's governed by the Federal Arbitration Act. The reason that is is because the Federal Arbitration Act covers any agreement, arbitration agreement, evidencing a transaction involving interstate commerce.

These nursing home agreements, and we have a particular case in South Carolina called Dean versus Heritage Health Care that makes clear that nursing home -- arbitration agreement in the context that nursing home admission is a contract evidencing a transaction involving interstate commerce. Obviously, the commerce clause has been interpreted for many years now very broadly, and we can get into that, but I've never had an issue with being challenged. Furthermore, the arbitration itself states that the FAA applies. Under FAA Section 3, if the Court will indulge me just a little bit of reading, "If any suit or proceeding be brought in any of the courts in the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending upon

being satisfied that the issue involved in such suit or proceeding is referable to arbitration shall on application for one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement."

Citing that provision in a case called Stokes vs Metro Life, our Court of Appeals flat out said, "the FAA clearly requires a court stay any suit or proceeding pending the arbitration of any issue referable to arbitration under an agreement in writing for such arbitration upon the application of one of the parties." So again, my point is when I said I don't want to be cute, I don't take the plaintiff to mean that the plaintiff is conceding arbitration unless we are willing to have an arbitration that includes everyone. But if you concede that arbitration is in order here, then the stay follows quite clearly under section 3. So it seems like to me that since we have a dispute about it, the thing to take up is the question of arbitration first because everything, I think as Your Honor sort of intuited in the beginning, it really follows from that because that is ---

THE COURT: Well what am I missing here because he just said he's willing to have all of the defendants for both cases, as I understand both cases, go to arbitration which doesn't necessarily mean they become stayed as far as any state court action goes.

MR. PINKSTON: And, Your Honor, the difference is the Morrow case which is cited in the brief. And in that case our Supreme Court specifically addressed the issue of corporate negligence versus vicarious liability and the Court said that it was improper to bifurcate those. That to issue a stay in that case, which is what these very defendants were seeking, so these very defendants appealed this issue to the Supreme Court and the Supreme Court denied it. And the argument is the separate case is corporate negligence, it is alter ego and joint venture. They are separate and distinct from the negligence actions as it relates to THI, which is why they were filed in separate cases. So the corporate negligence cases, either the arbitration agreement applies to all of those which would include the Defendant Smalls. What the defendants are asking is for this Court to carve out an exception or apply it to just one of the defendants, but not all of the defendants. And the corporate negligence claims are separate and distinct, and a plaintiff can pursue those claims pursuant to the Morrow versus THI Fundamental case that our Supreme Court decided and that is detailed extensively in my brief. But in that particular case the Supreme Court said corporate negligence is separate and distinct from any vicarious liability i.e. the negligence of the employees. Direct corporate liability attaches due to a breach of a duty which runs directly between a parent company and a patient

arising from negligence and actions such as leaving the hospital underfunded, understaffed, or undertrained so as to provide substandard care. And again, in that case the Supreme Court specifically said that they can -- the plaintiffs can pursue the corporate negligence claims because they are separate and distinct from the vicarious liability claims. So the THI case focuses on the liability of the employees who provided direct care, whereas the case involving Defendant Smalls and the Fundamental entities involve corporate negligence, they are separate and distinct cases.

The defendants want to say well we disagree with the arbitration applying to corporate negligence claims, using their own argument of it applying to Defendant Smalls as a third-party beneficiary. Then the arbitration agreement would apply to the corporate defendants also as a third-party beneficiary. They admit in their answer that they provide administrative services to the -- to THI, the facility in this case. They acknowledge that and they admit it in their answer, yet they want this Court to have a stay as it relates specifically to the Fundamental Corporate entities on the corporate negligence claim and then issue a stay or compel all of the other cases to arbitration.

So I'm not -- I mean what the defense counsel cited, I don't disagree with that. What I would say is they are separate and distinct so the claims themselves they are either

arbitrable or they are not arbitrable and if they are not, then there's no stay that should be issued in this case and the plaintiff ought to be able to pursue the corporate negligence claims in the separate lawsuit. Or if they are arbitrable, then they should all be compelled to arbitration, the corporate defendants as well as the facility and Defendant Smalls because the separate claim, the case against the Fundamental companies and Defendant Smalls, are all based on corporate liability. They're all based on alter ego, piercing the corporate veil and joint venture. The underlying facts relating to the injuries sustained by Ms. Varner, yes, they are incorporated into that complaint, but the allegations and the causes of action are all separate and distinct. And that's all based on the Morrow case, which is why they were filed separately in this case, Your Honor.

MR. HINES: Your Honor, it occurs to me that we've sort of jumped into things, and it may well be that you've had an opportunity to get very well acquainted with what's going on here in these cases, and if so, thank you very much for that effort. I don't know how in the world you or any other Judge handles the amount of paper that must come your way, digital or hard copy, in terms of switching from motion to motion and being able to get into them. I try to have some sympathy for the Judges I appear in front for just how difficult it must be to get up to speed on everything.

But in case, so forgive me if I'm re-plowing any ground here, but I don't know that anyone has yet said, and granted it took me a little while to get on the call, really what's going on in these cases. I guess we've hinted at it. It's Mr. Haynes, who is suing on behalf of the estate of Ms. Varner. Ms. Varner was admitted as a resident of our facility Riverside. She was admitted in May of 2019. In October of 2019 she was taken from the facility to the hospital complaining of some knee pain, I think it was in her right knee, determined that she had a fracture, and then she had some surgery. She was actually discharged from the hospital and went back to our facility. But ultimately within the month of October of 2019 she passed away, and the contention was that there was deficient care that was given to her in respect to this knee injury, and that that knee injury, the surgery, and the consequences thereof contributed to her death.

Now, we've brought two lawsuits. Each of them bring, I believe, claims, you know, that would include wrongful death and survivor claims. One is the lawsuit against the facility, one is the lawsuit against the other two entities, Fundamental Administrative and Fundamental Consulting. And that lawsuit also includes the same against the individual administrator. So that's the basic set up there.

The reason we're moving to compel arbitration is because

when Ms. Varner was admitted, her daughter-in-law Kimberly Haynes signed an arbitration agreement on her behalf, and that's the arbitration agreement. And if the Court will indulge just another lit bit of reading, the arbitration agreement -- well, I guess one point I need to make clear is that I understood that Mr. Pinkston was, well, making it as if there was no question about who was covered by that arbitration agreement in terms of Fundamental Administrative and Fundamental Clinical. The arbitration agreement, as far as the facility is concerned, it includes its agents, we deny Fundamental, either of the Fundamental entities, is an agent or an employee or a servant. Those are the ones that -- so when he says, well, we're not trying to have it both ways, we're actually trying to -- there are clear lines of distinction between these entities. Now of course, Ms. Montgomery-Smalls is covered by that, she's an employee. There's no doubt about that. These other entities though, and whether or not they are related in the way in which whatever relationship they have, what that legally means, that's all a hot button issue.

So, and I'll say this, I guess I can't claim to be too proud of my efforts in the Morrow case, but I do know what was argued in the Morrow case because I argued it. And that case does not say, respectfully, what Mr. Pinkston says it says. Now, what happened in that case, that case didn't have

anything to do with a stay, it had to with a bifurcation, which to this day I think made a whole heck of a lot of sense with all respect to our Supreme Court. As did Bill Howard, who in all of his infinite wisdom, came up with the idea to ask Judge Cole for it, who granted it.

But the basic idea here is in these cases when you have someone who is a resident of a nursing home and they got a knee injury, the question is did they receive adequate care? Was the standard of care breached? Was there an approximate cause? And that question has to be answered no matter what. I mean this whole idea of what they call corporate negligence, what that wants to get into is a big ole can of worms that has to say who is -- what's the relationship between these upstream entities, then they want to get into discovery about all of their financial situations and all sort of stuff saying -- well, it puts the cart before the horse really because they want to say all of that case is not about whether or not their was negligence, it's about what caused the negligence that was alleged on a clinical level.

In any event, what happened in Morrow is we made a motion says, hey, this case is very unwieldy, can't we bifurcate between clinical and non-clinical issues? Can't we first take a look at the clinical care that this resident received, find out if that care met the standard or if there was proximate cause for any damages because if there was no proximate, you

know, if you can't prove those elements, how will you ever -- there's no clinical case, upstream non-clinical case to be made. If the care that was given was appropriate, then you can't say that, you know, there's no inquiry into why the care was appropriate because that's not a claim.

Anyway, that bifurcation went up to the Supreme Court and the Supreme Court said no you can't do that again. I don't quite understand the Supreme Court's ruling, but for the purposes of our argument today what's important to know is that it doesn't have anything to do with what we're talking about a stay. The Court didn't say anything about there being -- there was no statute involved for instance, for -- I mean I think Mr. Pinkston said he agreed with our interpretation of the statute. That had nothing to do with the Morrow case. The Morrow case was about what the Supreme Court said, that allegedly that this got all into the idea of the plaintiff being the master of the complaint and essentially if we peeled up the upstream non-clinical defendants from the downstream clinical defendants. I think there's a line from the Supreme Court that something like it was a potential summary judgment, it's an interesting idea about a potential summary judgment, anyway, the Supreme Court didn't like it. The bottom line is it has nothing to do with this question of a stay.

Anyway, because Mr. Pinkston has said multiple times now that his corporate negligence claim has -- is a separate and

distinct claim. Well, Your Honor, it's his motion to compel that I'm looking at, excuse me, motion to consolidate which says flat out that the case of Haynes versus Fundamental and the case of Haynes versus the facility "concern the same underlying facts and factual or legal questions in common", that's the motion to consolidate. There's no separate and distinct nature of the claims, and that's not Morrow was saying. In any event, it didn't deal with the Federal statute about the stay, it didn't deal with the motion to compel arbitration. There's just distinctions with a difference abound between those two cases; and I can argue it, but Your Honor has been incredibly indulgent and I feel that we really haven't even gotten to the meat of what we're talking about.

If I can suggest something, if Your Honor could just hear me on our position on arbitration, I can then at least feel like I made the most of my time before the Court in actually explaining why it is that we believe we're entitled to arbitration and who it is that should be part of the arbitration.

THE COURT: Go ahead.

MR. HINES: All right. Thank you, Your Honor. Again, Ms. Haynes, her first name is Kim, she signed the arbitration agreement on behalf of her mother-in-law. Now, there's a couple of different ways to get home on these arbitration cases. The first way would be the cleanest, which would be

having an actual -- and again, we're talking about non-signatories. Now, there's a case called Wilson versus Willis, I'm sure it's in our brief. It recognizes in South Carolina that there are a number of different theories which you can use to enforce an arbitration agreement against a non-signatory. No question here that the resident herself did not sign it. She's a non-signatory, but that doesn't end the inquiry. You could have actual authority, which in fact we have strong argument that we do have.

But even putting aside that, Your Honor, we have a situation where our Courts will recognize merger and equitable estoppel to enforce an arbitration agreement. The case that I would look to there is a case called Coleman versus Mariner Healthcare. Now, in that case the major issue in Coleman had to do with whether or not they used the Adult Healthcare Consent Act to supply a surrogate with consent to waive the right to a jury trial or to agree to arbitration. The Court said he can't do that, that has to do with healthcare decisions. We're not arguing that the Adult Healthcare Consent Act provides authority. But what was important in another argument that was made in Coleman was an argument that had to do with this merger and equitable estoppel. And the Court, although it ruled against the proponents of arbitration in Coleman on the basis -- on a factual basis, it recognized that we have a viable theory to enforce arbitration against a

non-signatory starting with the idea of merger.

What I want to talk to Your Honor about merging is the admission agreement that was signed with the arbitration agreement because at the same time as the resident here was admitted to the facility back in May of 2019, Ms. Varner signed on the resident's behalf not only an arbitration agreement, but an admission agreement. Now, the broad strokes of what I intend to argue to Your Honor is that those two agreements merged and became effectively one agreement. Having merged and becoming effectively one agreement, Ms. Varner, excuse me, Ms. -- well, she's Ms. Varner too, the resident Ms. Varner cannot receive direct benefits under the same contract that includes an arbitration agreement and accept the benefits and deny the arbitration agreement. That's the one two punch, I'll call it, of merger and equitable estoppel. And, you know, there's a lot of ground to plow in trying to make this argument sometimes, but the basic idea is that in Coleman the Court specifically recognized in the context of arbitration agreements that are signed in conjunction with admission agreements to these nursing homes that, yes, when these things are signed at the same time, by the same parties, for the same purpose, and in the course of the same transaction there's a presumption that arises in the favor or merger, the merger of the two documents. Coleman didn't stop there either, Coleman

recognized that in this case, which is very much analogous in a certain respect to this one, is that all of those boxes are checked: same time, same parties, same transaction, same purpose. Everyone of those worked to create the presumption. However, in Coleman under those facts, the Coleman Court found that nonetheless there was still an intent contrary to merger that was there and that prevented merger. Because what we're dealing with here is if you have all of those things, all of those ducks in a row, same time, same parties, same purpose, same transaction, you have a presumption in favor or merger. It can be defeated by evidence contrary to that. And in Coleman, what the Coleman Court cited was there was evidence that a merger clause in the admission agreement, an entire agreement clause, and it referred to the arbitration agreement, according to the Coleman Court, as being a separate document, thus overcoming the presumption and indicating an intent not to merge. It also noted that the arbitration agreement contained a revocation clause in it, which the admission agreement did not which allowed the arbitration to be revoked within 30 days of its execution. Neither of those is present in our case. There is no revocation clause or provision in the arbitration agreement. Not only -- there is an entire agreement provision in the admission agreement, but not only does it not reference the arbitration agreement as something that is separate, it references other materials,

other admission materials as being a part of the admission agreement. Well the arbitration agreement is exactly that, it's another admission material. Now, it was not required for admission, but it was certainly executed in conjunction with the admissions process. In fact, there's a case called Stott versus White Oak Manor where our Court of Appeals seems to recognize implicitly that the arbitration agreement at issue in that case was part of the admissions materials.

But the point is, and Your Honor I know I'm throwing quite a lot at you, but that's -- we're saying that the Coleman case gives us the legal authority to merge these two. We have all of our ducks in a row about the same time, same parties, purpose, and transaction. And then where Coleman went against the proponents of arbitration in that case, we have different facts that give us a merger here of arbitration and admission agreements. Again, there's no -- while there isn't an entire agreement provision in our admission agreement, it's materially different and in fact whereas in Coleman it went against the proponent's arbitration, here it supports our theory, it specifically incorporates other admissions materials which is what the arbitration agreement is, it's another admission material with no revocation.

And it you'll go with me that far and say that there's a merger -- and one last point I'll make on merger, and we get into all of this in our brief, but it doesn't make any sense

for there not to be a merger here. The arbitration agreement only makes sense together with the admission agreement. The only reason for the arbitration agreement is the admission. The whole point is that the arbitration agreement is to deal with any disputes that arise out of the admission. The idea that it could just stand off on its own two feet, it can't. The admission agreement, it could stand on its own two feet, but the arbitration -- and the arbitration agreement didn't have to be agreed to, and if it hadn't been then it would just be a nullity, but it was in conjunction with the admission and the only reason for its being is the admission. So if you have those two merge then it's pretty simple, you can't have an agreement that you receive benefits under, which Ms. Varner, the resident, did. She received room, she received board, she received care, she received all sorts of stuff during her residency pursuant to the admission agreement. You can't do that and say, yes, I received all of those for the months and months that I've been there, but I'm not going to recognize the arbitration agreement. It's part of the same contract, that's the idea. And, you know, I've had people try to argue, well gosh, some benefits that she received considering how she hurt and knee and didn't treat her right there, well that's all at dispute in the case. Furthermore, to deny that she received direct benefits by virtue of her admission is an allegation that would require you to deny and

discount every single thing that she received, every night that she slept there, every medication she was provided, every meal. The plaintiff doesn't claim that she received nothing while she was there in the form of any benefit, the plaintiff complains about a discrete thing which is in dispute and shouldn't be prejudged and can't be prejudged in the context of this motion. So that's the one two punch for merger and equitable estoppel.

And I noticed in plaintiff's brief in opposition I would note, Your Honor, one of the points they made was that there was no consideration to support the arbitration agreement. I mean there's no question that that is just a legally false premise, I mean, we have mutual promises to arbitrate. There's a case called O'Neil versus Hilton Head Hospital, there's another case called Rickborn versus Liberty Life Insurance, I can get the site. Both of those cases, and just basic contract law, recognizes that mutual and concurrent promises constitute the valid exchange of consideration.

The other thing plaintiff noted, and this is a correct factual observation, but it's inconsequential legally, is that the arbitration agreement does not say on it the name of the -- it's a blank on it which doesn't have the name of Ms. Varner, the resident, on it. It's very clear even just from the four corners of that document that that agreement is being signed on behalf of the resident upon whose behalf Kim Varner

was acting. But furthermore, the admission agreement has the name on it and I'm arguing merger to Your Honor which makes it all one document, so I see that as a non-event.

The other thing that I need to get into, Your Honor, is that a couple of days ago we got some affidavits that were filed in this case that say essentially that our admissions person when these documents were being signed is lying, or was lying, about the process that was followed in terms of things that were explained that wasn't. Well, Your Honor, if Your Honor is going to get into that subject, which of course we deny any sort of falsehoods or any sort of, you know, untoward conduct. But it just occurs to me that that really does sort of open the door to get into one of the things that we've talked about in our motion which is discovery.

You know, these two affidavits that I assume the plaintiff is wanting Your Honor to grant weight to, we've had no opportunity to depose these people and ask them anything about this. We just got them two days ago. So perhaps one way, Your Honor, if there is any thought to table anything, I suppose, for the time being would be to allow us to have the opportunity to take a deposition of those affiants, you know, in a limited way. We're not talking about getting into discovery about the merits of the case, strictly discovery about these issues that would bear on arbitration.

One of the reasons, irrespective of the affidavits that

were recently submitted, one of the reasons why we asked for that and asked for the Court's blessing, unless proposing counsel is prepared to concede that we wouldn't be waiving arbitration rights, is there's always this tension between the proponent of arbitration in our case and not -- and a fear for using the tools of discovery to pursue our arbitration rights and have this sort of catch 22 happen where we would be deemed to have waived them by, you know, hey, you're a proponent of arbitration, you claimed that this shouldn't even be in court and yet you're using the tools of discovery through litigation. So you know when we asked Your Honor in our brief for the ability to do discovery if Your Honor is not prepared to grant the motion on the present record, we do that not only because of the new affidavits, which again we absolutely deny the negative aspects of those, the light that it casts us in is negative, but we certainly, if they're going to be relied on, in fairness we would need the opportunity to depose those folks.

And one thing I would also note about those affidavits is that Ms. Kim Varner in her affidavit said she had no authority whatsoever and she used an odd term or phrase which is unusual for, unless she's a lawyer, for all I know she could be, but she said she specifically told our person she didn't have the right to waive a right to a jury trial, which that's an unusual phrase. But be that as it may, the odds that she

would have said that and had the sophistication to say that in those terms when what we just submitted to the Court ourselves on the 8th is a recorded power of attorney where that same person, Ms. Varner, not just a shade over a year before the admission, she was made an alternate agent of Ms. Varner, her husband William being the primary agent, in a power of attorney that was executed again, I think, in March of 2008 (sic). The admission was in May of 2019, excuse me, March of 2018, admission in 2019. And this document specifically says it takes effect upon the execution of the document, and it specifically says that the power grants the attorney in fact the ability to submit to alternative dispute resolution, settle, or propose, or accept a compromise. And this document is not something that Ms. Varner, Kim Varner, didn't know about, she signed it. I mean she signed it as accepting agent certification of secondary or alternative authority. What she also said in her affidavit that makes her authority actually applicable because according to this, the primary power is granted to William, but then it says that if the primary is unwilling, excuse me, unable or unwilling to serve Kimberly Green Haynes, excuse me, I keep saying Varner, forgive me, Your Honor, I've gotten the names jumbled, but Kimberly is appointed and her powers take effect. Well she said in her affidavit that her husband wasn't there, her husband was waiting to greet his mother upon her arrival to the facility.

So, you know, in her affidavit what she's actually said is she's triggered her power of attorney under this document which wasn't a force at that time based upon its execution and the execution specifically says it takes effect immediately, and it says she has the power to do it. So, you know, I went through all of the issues with merger and equitable estoppel, but all of that can be short circuited if you are going to take Ms. -- her name is Kim Haynes, forgive me, I keep saying Varner when I should say Haynes, but Kim Haynes is the one who signed the admission agreement and the arbitration agreement for the resident, Ms. Varner. She did that while she had authority as the second, you know, the alternate to her husband William under a durable power of attorney that was in force, that gave her the right to do -- to agree to ADR, and it said her power to do that was contingent on the unwillingness or inability of -- unable or unwilling for William to be able to do it, and she said in her affidavit that William as unable because he was down the hall. So, you know, if you're going to follow or allow her affidavit, that in conjunction with this power of attorney, gives her the authority to do what she did, actual authority, you don't even have to consider merger and equitable estoppel.

And, Your Honor, with that, goodness, if you have a question, I'll certainly answer it. All I can say is I thank you very much for this much time, and I'm sorry to have taken

so much of it.

MR. PINKSTON: I can't hear you, Your Honor.

THE COURT: I'm sorry. I muted myself one time when I was coughing.

Do you want to respond to anything while I still have the will to live?

MR. PINKSTON: Just briefly, Your Honor.

In terms of the merger agreement, what the defendants ignore is the provision that says that arbitration is separate and distinct from a contemporaneously signed admission contract when the two are distinct agreements or documents. This has Page 1 of 1 at the bottom, it's clear that this is a separate document. And despite the missing language that the defendant points out, it is clear that it is a separate document, it says Page 1 of 1 here at the bottom. There's no merger that applies in this case.

As it relates to the affidavits that were submitted, it's not a matter of inability or lack of his presence, he was there. And regardless of any of that, when you look at plaintiff's exhibit B, the defendants were on notice of who the power of attorney was and who had authority to sign any documents, it's right there on the face page, the face sheet, and it's highlighted for the Court on Page 3 in which it says responsible party/POA Michael Bennett. And then it also says per POA, patient's daughter or son may complete the admission

paperwork. Mr. Bennett submitted an affidavit in this case in which he talks about that exact thing. They cannot disclaim their own records to suit themselves now when at the time of the admission agreement and at the time of the arbitration agreement, they had performed their due diligence in ascertaining who had the authority and who had the power of attorney in this case. Yet now they want to disclaim it, they want to claim that they need jurisdictional discovery in order to ascertain facts to somehow create agency when their own documents, their own records undercut their argument. So we would request no jurisdictional discovery. If jurisdictional discovery is needed in this case, again, it goes back to the role of the Fundamental entities in terms of their involvement in the facility.

We would argue, again, Your Honor, that even though we believe that the arbitration agreement is unenforceable for the reasons enumerated in our brief, we would agree to arbitration with the same argument that the defendants are using in terms of the third-party beneficiary being the corporate entities on going into arbitration. We don't have an issue with that. We can certainly argue as to why it's unenforceable, it's laid out in our brief. The affidavits show that Michael Bennett was the power of attorney. He did not give anyone the authority to waive his grandmother's jury trial. Mr. Haynes wasn't even there, so when the defendant

submits an affidavit that says she explained it to Mr. Haynes and he seemed to understand it and he gave permission for Kimberly to sign it is a falsehood according to both Kimberly Haynes and William Haynes. Again, that's not open for jurisdictional discovery because their own documents get back to who was the power of attorney and who had authority. They knew it, they ---

THE COURT: Let me ask you a question because maybe I'm just missing something, but you're saying we're willing to go to arbitration with everything, and he's saying make everyone go to arbitration. What am I missing? I'm missing something.

MR. HINES: Your Honor, he's saying to have every defendant involved in the arbitration, we're saying the arbitration should be Mr. Pinkston's clients against the facility and Ms. Montgomery-Smalls, and then outside of that arbitration, not as a part of that arbitration, should be the Fundamental defendants. So that's the difference, Your Honor, is what Mr. Pinkston is proposing is to have every defendant in the arbitration proceedings; what we're saying is that we're not agreeable to that. We'd be agreeable to having the facility and Ms. Montgomery-Smalls in the arbitration, but the Fundamental defendants are separate and the allegations that are made against those defendants, we deny and very strongly dispute the allegations in terms of any role or responsibility that they have in the alleged injuries.

And they're not this whole third-party beneficiary notion that Mr. Pinkston just mentioned is -- it's just incorrect, Your Honor. They're not third-party beneficiaries to this arbitration agreement. The arbitration agreement talks about agents, servants, and employees, they are none of those things. That's why there's a very clear distinction between an employee like Ms. Montgomery-Smalls and these other entities.

But anyways, Your Honor, I was just trying to answer Your Honor's question in a long-winded way. But the distinction is who would be participating in the arbitration.

MR. PINKSTON: And that is the crux, Your Honor, is they admit that they provide administrative services to the facility, they admit it in their answer. So the arbitration agreement, pursuant to its terms and pursuant to what the defendants keep arguing, would apply to the Fundamental Corporate entities as third-party beneficiaries or as servants or agents as it relates to their own admission that they provide administrative services to the facility. I would argue that if the -- if THI, the facility, and defendant Smalls go to arbitration that's fine, but then the plaintiff ought to also be able to pursue its case against corporate negligence in the Court of Common Pleas pursuant to the Morrow case because they are separate and distinct allegations. So if they're going to argue that they're not subject to

arbitration, that's fine, then we ought to be able to pursue those claims separately without a stay. If they want to agree, which they are not agreeing, and an arbitrator can make a determination at some point if they are indeed involved in the care and treatment or the corporate negligence claims are valid, I'm sure that will be brought up in arbitration and they can then move to have it dismissed against the corporate Fundamental entities. That's the crux of the matter. All of the argument about whether it's enforceable or unenforceable, we don't believe it's enforceable, but we're willing to concede to it based upon all of the defendants going into arbitration, Your Honor.

MR. HINES: And, Your Honor, I'm just not able to agree to the Fundamental defendants should do it -- should be included in that arbitration. Your Honor, I suppose, and really this would be a question for Mr. Davis, my colleague, to discuss, you know, up the chain of command. I mean I would happy to relay that to him and ask him to do that report back to the Court, but my ---

MR. PINKSTON: I can report to the Court that I had a conversation with Mr. Riddle just I guess it was Friday before the briefs were filed, the memos were filed, or maybe it was Monday, and he denied that request. So it doesn't need to go up the chain, it's really just up to the Court at this point to make the determination, which has really been a discussion

between myself, Mr. Davis, and Mr. Riddle throughout this case and I can save the Court some time and say that what Mr. Riddle relayed to me was they did not agree to submit the Fundamental entities to arbitration. They would agree to all of the others, but they wouldn't agree to the corporate entities, and they would want a stay. I maintain that either the arbitration agreement -- all of them going to arbitration, or if the defendants Smalls and THI can go into arbitration and then the corporate defendants, that action, the plaintiff ought to be able to pursue its corporate negligence claims in the Court of Common Pleas without a stay. And that's the issue that's really in front of the Court.

MR. HINES: Your Honor, I guess I need to make clear that plaintiff has not moved to compel arbitration. It almost seems as though the plaintiff is arguing this as though the plaintiff has some basis to compel arbitration against the Fundamental defendants. Your Honor, that's not procedurally even before the Court. It's also not correct.

Let's also assume for the sake of this argument that those parties are third-party, the Fundamental defendants are third-party defendants, excuse me, a third-party beneficiary. A third-party beneficiary can assert a contract or its direct beneficiary of the contract, but I've never -- what Mr. Pinkston would be trying to do is to take -- is to assert rights against the third-party beneficiary somehow under that

contract. I don't think that is the way that that works. If you take it out of this contract, so and so is a third-party beneficiary to a contract, they can sue for breach of that contract. What he's saying is that, well, I'm a party to a contract and I'm wanting to go and compel a third-party beneficiary, who is by definition a third-party, to comply with the contract. I'm not familiar with that being a legally viable maneuver. But in any event, they're not third-party beneficiaries to the contract.

I think that he keeps coming back to the point, well, they admitted that they provided some administrative services. Well that hardly establishes any agency or servant or employee relationship, and that analysis is just patently incomplete. I'd have to look at the pleadings to be quite honest with you, I'm not sure to what he's referring and I would certainly defer to what the pleadings say for whatever -- let them speak for themselves, but that's, you know, assuming that exactly what he has represented to the Court is what they say that providing some administrative services. That's not a master/servant or employee/employer or any sort of agency representative relationship that would make them third-party beneficiaries.

So under both things I just understood Mr. Pinkston to argue is that he doesn't oppose arbitration if it's every defendant. He doesn't oppose arbitration if it's the facility

and Montgomery-Smalls so long as the other two are not stayed. If I combine both of those two, I'm hearing no opposition to arbitration. The question is who is participating and what's happening to any that aren't. Obviously, our position is the participants in arbitration should be only the facility and Ms. Montgomery-Smalls. And as for the Fundamental defendants, that the action should be stayed as to them. He has no right to compel them to arbitration, the third-party beneficiary theory doesn't work for two, at least two very significant reasons. One, they're not third-party beneficiaries; two, he doesn't have the ability to compel them to arbitration as third-party beneficiaries; three, there's no motion to do it.

And then one more thing is that the whole business of this case having any relevance or relationship to Morrow is dead wrong. Morrow had nothing, I repeat, nothing to do with the application of Federal Arbitration Act Section 3, and that's that. This whole business of the claims, they can be as separate and distinct as they could ever be, and again, I'm not at all conceding that. In fact, again, the motion to consolidate says that they are not at all separate and distinct, that they concern the same underlying facts and have factual legal questions in common. Basically, to proceed with those claims while -- you'd be setting the state for inconsistent judgment, you know, it doesn't make sense as a matter of judicial economy. But before you get to judicial

economy you get to Section 3 of the FAA which says that there should be a stay, and it doesn't have any carve out for any separate and distinct claims.

THE COURT: All right. Well sometimes when I have these I figure, well, if I just let the lawyers talk long enough I'll get enlightenment, but it hasn't happened yet. So why don't I give y'all, let's see what's today? The 10th. So Monday is the 14th, give me proposed orders by the 21st, middle of the day by the 21st and maybe after I read those I'll have a better idea of what I want to do. I understand it better, I guess, but I don't have an idea as to what the right thing is to do. I know just letting y'all talk is not answering the question right now, so we'll just put it on pause here. Send me proposed orders and maybe I'll have enlightenment in the meantime as to what the correct course of conduct is.

MR. PINKSTON: Your Honor, I have one question about the proposed order. Would the proposed order include the enforceability or the unenforceability of the arbitration provision as well, or is it just as it relates to the stay? Which do you want from the plaintiff?

THE COURT: Tell me how you want me to rule, and that's what you need to write in an order.

MR. PINKSTON: Okay. I want you to rule that the stay is inapplicable, and the others can be compelled to arbitration, so I want to put that in an order. What I don't want to do is

is waive the argument that it's unenforceable because, you know, if any of these issues are appealed then, well, I mean, I don't know that's the conundrum that I face as the plaintiff, Your Honor.

THE COURT: Right. Well, just tell me how you would like me to rule and he'll do the same and I'll figure out if one of them makes sense in a week.

MR. HINES: Thank you, Your Honor. And that's by the 21st, correct?

THE COURT: 21st, yeah, a week from Monday.

MR. HINES: Thank you, Your Honor.

THE COURT: All right. You're welcome.

MR. PINKSTON: Thank you, Your Honor.

(HEARING IS ADJOURNED)

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASES NO. 2021-CP-10-01437 & -02477
WILLIAM HAYNES, as Personal Representative of the Estate of Elizabeth Varner, Plaintiff, vs. THI OF SOUTH CAROLINA AT CHARLESTON, LLC d/b/a Riverside Health and Rehab, Defendant.	)	**ORDER GRANTING MOTIONS TO COMPEL ARBITRATION AND RELATED MOTIONS TO STAY**
WILLIAM HAYNES, as Personal Representative of the Estate of Elizabeth Varner, Plaintiff, vs. FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; FUNDAMENTAL CLINICIAL AND OPERATIONAL SERVICES, LLC; and JERROLYN MONTGOMERY-SMALLS, Defendants.	)	**Exhibit E**

This matter is before the Court on four motions (collectively, the "Subject Motions"): one motion in Case 1437[1], namely, the Facility's[2] motion to compel arbitration, and three motions in

[1] "Case 1437" is *Haynes v. THI of South Carolina at Charleston, LLC*, Case No. 2021-CP-10-01437.

[2] The "Facility" is THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab, the defendant in Case 1437.

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Case 2477[3], namely, Ms. Montgomery-Smalls'[4] motion to compel arbitration and FAS[5] and FCOS's[6] motions to stay. All of the Subject Motions were filed on October 4, 2021, and they were all heard together on February 10, 2022, with all parties' respective counsel appearing before the Court via WebEx.

Chief among the Subject Motions are the Facility and Ms. Montgomery-Smalls' substantively identical motions to compel arbitration of the claims asserted against them in Case 1437 and Case 2477, respectively (collectively, the "Motions to Compel Arbitration"). Secondary to those motions are the substantively identical motions of FAS and FCOS to stay Case 2477 pending the final outcome of the Motions to Compel Arbitration and the arbitration proceedings they seek to compel (collectively, the "Motions to Stay"). After careful consideration, the Court GRANTS the Subject Motions. Its reasoning is set forth below.

I.

BACKGROUND

The Facility is a skilled nursing facility. With the help of her son and daughter-in-law, William Haynes ("William") and Kim Haynes ("Kim"), respectively, Elizabeth Varner ("Ms. Varner") was admitted as a resident of the Facility on May 20, 2019. Kim handled the paperwork in conjunction with Ms. Varner's admission, which included an Admission Agreement and an Arbitration Agreement that Kim signed on Ms. Varner's behalf.

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[3] "Case 2477" is *Haynes v. Fundamental Administrative Services, LLC*, Case No. 2021-CP-10-02477.

[4] "Ms. Montgomery-Smalls" is Jerrolyn Montgomery-Smalls, one of the defendants in Case 2477.

[5] "FAS" is Fundamental Administrative Services, LLC, one of the defendants in Case 2477.

[6] "FCOS" is Fundamental Clinical and Operational Services, LLC, one of the defendants in Case 2477.

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By her signature on the Arbitration Agreement, Kim expressly "represent[ed] that . . . she ha[d] authority to sign on [Ms. Varner's] behalf so as to bind [her] as well as [herself]." And, indeed, pursuant to a Durable Financial Power of Attorney executed March 25, 2018 (the "Power of Attorney"), Kim was Ms. Varner's secondary agent. The Power of Attorney, which was effective "[i]mmediately upon [its] execution" and expressly included the power to "[s]ubmit to alternative dispute resolution," authorized Kim to exercise the powers it conferred to Ms. Varner's primary agent, William, in the event he was "unable or unwilling to serve." According to the affidavits they filed on February 8, 2022, on the day Ms. Varner was admitted to the Facility, Kim and William were initially together with the Facility's representative Chandra Bryant ("Ms. Bryant") in the room that was being assigned to Ms. Varner until Kim went with Ms. Bryant to another location (within the Facility) to sign the paperwork while William stayed behind to await Ms. Varner's arrival.

Plaintiff[7] filed Case 1437 and Case 2477 on March 25, 2021, and June 11, 2021, respectively, asserting claims arising out of alleged deficiencies in Ms. Varner's care/treatment at the Facility. As for the relationship between the subject matter of the two cases, although Plaintiff ended up withdrawing the motion, his motion to consolidate (filed in Case 2477 on August 16, 2021) states that Case 1437 and Case 2477 "concern the same underlying facts and have factual and legal questions in common."

Defendants[8] timely answered the respective lawsuits, subject to and without waiving any right to compel the matter to arbitration, denying the liability Plaintiff alleged and raising a number of affirmative defenses.

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[7] "Plaintiff" is William in his capacity as personal representative of Ms. Varner's estate, who is the plaintiff in both Case 1437 and Case 2477.

[8] "Defendants" are the Facility, FAS, FCOS, and Ms. Montgomery-Smalls, collectively.

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Citing the Arbitration Agreement, the Motions to Compel Arbitration ask the Court to compel Plaintiff's claims against the Facility and Ms. Montgomery-Smalls to arbitration. Citing the Motions to Compel Arbitration, the Motions to Stay ask the Court to stay Case 2477 pending the ultimate outcome of the Motions to Compel Arbitration, i.e., until arbitrability is finally determined and any arbitration proceedings resulting from that determination are themselves finally concluded.

II.

ANALYSIS

A. Re: the Motions to Compel Arbitration

The core question here is this: Is the Arbitration Agreement (which Kim signed for Ms. Varner) enforceable against Ms. Varner's estate (i.e., Plaintiff) even though it was not signed by Ms. Varner herself? For two reasons, the Court answers this question in the affirmative: (1) the Arbitration Agreement was properly signed by Kim for Ms. Varner pursuant to Kim's authority under the Power of Attorney, and (2) the Arbitration Agreement is enforceable against Plaintiff—or, more precisely, Plaintiff is estopped to deny that the Arbitration Agreement is enforceable—by virtue of merger and equitable estoppel. Thus, since Plaintiff's claims against the Facility and Ms. Montgomery-Smalls are clearly within the scope of the Arbitration Agreement, they should proceed in arbitration, not litigation. The Court's findings/analytical steps in reaching this conclusion follow.

1. Both state and federal policy favor arbitration.

There is a "strong South Carolina and federal policy favoring arbitration . . . ." *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 877 (Ct. App. 2020); *see also 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."). Indeed,

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"arbitration agreements are *presumed valid*." *Doe*, 430 S.C. at 607, 846 S.E.2d at 877 (emphasis added).

2. The Arbitration Agreement is governed by the FAA[9].

The Arbitration Agreement is governed by the FAA, not South Carolina's Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10 to -240 (the "SCAA"). 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.

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

[9] The "FAA" is the Federal Arbitration Act, 9 U.S.C §§ 1–16.

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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).

3. 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"[10] and "ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). To that end, the FAA provides that an arbitration 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.*

[10] *Allied–Bruce*, 513 U.S. at 270.

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Concepcion, 563 U.S. 333, 339 (2011)). Under the FAA, "courts *must* place arbitration agreements on *equal footing with other contracts* . . . ." *Concepcion* at 339 (emphasis added); *see also Allied–Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted).[11]

4. The Arbitration Agreement is valid on its face.

The Arbitration Agreement is valid on its face. In other words, there is nothing within the four corners of the document itself that calls its validity into question. It bears Kim's signature on behalf of Ms. Varner, along with her express representation that she is authorized to sign for her.[12] It is countersigned by Ms. Bryant for the Facility. It is duly supported by consideration and sets forth all necessary terms, containing, as it does, the parties' mutual promises to submit a certain

[11] 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 *favored* treatment of arbitration agreements relative to other contracts.

[12] By virtue of her signature, Kim is "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement, *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms."), including, of course, the express representation therein of her authority to act on Ms. Varner'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 Kim is no less bound by this covenant than the Facility.

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defined scope of disputes to binding arbitration[13] before an arbitrator who is either agreed upon by the parties themselves or selected by the Court, in a proceeding to be conducted pursuant to the South Carolina ADR Rules, which will result in a decision that is enforceable in a court of competent jurisdiction.[14] To require more just because an arbitration agreement is in issue would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *Concepcion*, 563 U.S. at 339.

Moreover, the Arbitration Agreement is not unconscionable. For an agreement to be deemed unconscionable, there must be both (1) an absence of meaningful choice on the part of one 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 first part of the test (absence of meaningful choice) is undermined by the express acknowledgement in the Arbitration Agreement itself that the "Resident/Representative is not required to use the . . . Facility for Resident's healthcare needs and . . . 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 undermined by the fact that the Arbitration Agreement itself was not required for admission to the Facility.

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

[14] In this regard, the Court would note that the South Carolina ADR Rules, which do apply to the conduct of arbitration proceedings under the Arbitration Agreement, should not be confused with the SCAA, which, as addressed above (in explaining the applicability of the FAA), does not apply here.

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But even assuming, *arguendo*, the first part of the test were somehow met, the second part (unreasonably oppressive terms) certainly is not. The Arbitration Agreement simply binds the parties (both sides) to resolve disputes via arbitration, which is something that is expressly favored as a matter of both state and federal policy. *Parsons*, 418 S.C. at 6, 791 S.E.2d at 131; *Doe*, 430 S.C. at 607, 846 S.E.2d at 877. And there is nothing about the Arbitration Agreement—which, again, calls for arbitration conducted pursuant to the South Carolina ADR Rules—that would suggest it is not geared towards achieving an unbiased decision by a neutral decision-maker. *Simpson*, 373 S.C. 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."). Indeed, Rule 1 of the South Carolina ADR Rules expressly states, "These rules shall be construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply."

5. Plaintiff's claims are within the scope of the Arbitration Agreement.

Without question, Plaintiff's claims against the Facility and Ms. Montgomery-Smalls 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.

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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.").

6. The Arbitration Agreement covers Plaintiff's claims against both the Facility and Ms. Montgomery-Smalls.

The Arbitration Agreement expressly states that it not only covers the Facility itself but also the Facility's "agents, employees, and servants." Plaintiff's complaint in Case 2477 alleges that, "at all times relevant herein [Ms. Montgomery-Smalls] was the Administrator of [the Facility]." Accordingly, the Arbitration Agreement covers Plaintiff's claims against both the Facility and Ms. Montgomery-Smalls.

7. The Arbitration Agreement is valid and enforceable because it was properly signed by Kim for Ms. Varner pursuant to Kim's authority under the Power of Attorney.

A person possessing contractual capacity, acting as grantor, can authorize another to contract on the grantor's behalf under the specific terms of a power of attorney. *See Gaddy v. Douglass*, 359 S.C. 329, 344–45, 597 S.E.2d 12, 20 (Ct. App. 2004); *see also Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014) ("A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. The written authorization itself is the power of attorney.") (quoting *In re Thames*, 344 S.C. 564, 569, 544 S.E.2d 854, 856 (Ct. App. 2001)) (internal quotation marks omitted). "[T]he holder of

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[the] power of attorney steps into the shoes of the grantor and is basically the alter ego of the grantor." *Bennett v. Carter*, 421 S.C. 374, 382, 807 S.E.2d 197, 201 (2017).

The Power of Attorney was duly executed on March 25, 2018, and became effective immediately upon its execution. The Power of Attorney expressly included the power to "[s]ubmit to alternative dispute resolution." And while, as secondary agent, Kim's authority under the Power of Attorney was contingent upon William being "unable or unwilling to serve," this contingency came to pass due to William's desire to wait in Ms. Varner's room for her arrival. Accordingly, when she signed the Arbitration Agreement for Ms. Varner in May of 2019, Kim was properly acting within the scope of her authority under the Power of Attorney.

8. Plaintiff is precluded from denying the enforceability of the Arbitration Agreement because of merger and equitable estoppel.

Even though Ms. Varner is a nonsignatory to the Arbitration Agreement, i.e., even though she did not actually sign the Arbitration Agreement herself, it is nonetheless enforceable against her/her estate (i.e., Plaintiff).

"South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel." *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (confirming the validity of the general proposition of law on which the appellants based their merger/equitable estoppel argument: "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

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course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.").

Conceptually, the Facility and Ms. Montgomery-Smalls' merger/equitable estoppel argument is not about showing that the Arbitration Agreement is enforceable but about showing that Plaintiff is estopped to deny that the Arbitration Agreement is enforceable. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and, Ms. Varner having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff (who stands in place of Ms. Varner in bringing these actions as the personal representative of her estate) is estopped to deny the enforceability of the Arbitration Agreement with which the Admission Agreement merged. Accordingly, counterarguments aimed at denying the Arbitration Agreement's enforceability (e.g., arguments based on a supposed lack of authority to sign the Arbitration Agreement on behalf of Ms. Varner) are beside the point and unavailing.

As explained below, the Court finds that the Arbitration Agreement is also enforceable against Plaintiff based on merger and equitable estoppel.

Merger

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

> Appellants contend that even if Sister lacked capacity to execute the 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,

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> The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
>
> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction*. *Unless there is a contrary intention, appellants are correct that there was a merger*.

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

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,"[15] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[16] evidence exists 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," 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.

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[15] *Id.* at 355, 755 S.E.2d at 455.

[16] 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 [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).

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It must be remembered that, where, as here, the instruments in question (i.e., the Admission Agreement and the Arbitration Agreement) were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For this presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the circumstances that gave rise to the merger presumption in the first place (same time, parties, purpose, and transaction)—can 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.

Although the Admission Agreement does contain an "Entire Agreement" clause, it does not refer to the Arbitration Agreement as a separate contract but rather expressly states, "other Admissions materials . . . are made a part of this Agreement by reference herein." Clearly, 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) (recognizing "admission documentation" to include an arbitration agreement: "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). This directly contradicts the notion of any intended "separatedness" (in the parlance of the *Coleman* Court[17]) between the Admission Agreement and the Arbitration Agreement.

[17] 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).

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While the Arbitration Agreement was not required for Ms. Varner's admission to the Facility, all this means is that the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become part of the admissions materials once it was in fact executed, which, without question, it was—and under the very circumstances (same time, parties, purpose, and transaction) that give rise to the presumption of merger. In other words, even though the Arbitration Agreement was not a *condition* of admission, it was certainly agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument, governing various interrelated aspects of Ms. Varner's relationship with the Facility: the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission.

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). 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. Unlike the Admission Agreement, which theoretically could have stood on its own in the absence of the Arbitration Agreement—and, of course, had the Arbitration Agreement not been executed, it simply would not exist and no question of merger would have arisen to begin with—the Arbitration Agreement could not have stood on its own: It only makes sense together with, i.e., connected to, the Admission Agreement, which is its sole reason for being.

That the Admission Agreement and the Arbitration Agreement have their own titles and are separately paginated and signed admits of no reasonable inference of an intent contrary to

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merger. To point to such things is to do no more than to observe 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 even assuming, *arguendo*, there is some ambiguity in this regard, to fall back on the idea that it should be construed against the Facility as the drafter is uncalled for in this context. *Merger is the default position*, i.e., it is presumed, and this is so because of the confluence of a particular set of circumstances—the instruments at issue were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these stars align—same time, same parties, same purpose, same transaction—our law instructs the Court to consider and construe the instruments 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.

Equitable Estoppel

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement by virtue of

the direct benefits test our Supreme Court endorsed in *Wilson*. *See* 426 S.C. at 340, 827 S.E.2d at 175 ("Under direct benefits estoppel, '[a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when [the nonsignatory] receives a direct benefit from a contract containing an arbitration clause.'"") (quoting *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012)) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)); *id.* ("'In the arbitration context, the doctrine [of direct benefits estoppel] 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*.'") (emphasis in original) (quoting *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601) (quoting *Int'l Paper*, 206 F.3d at 418).

The *Wilson* Court favorably discussed the application of the direct benefits test in the arbitration agreement context—the Court of Appeals having applied the test in the decision then before the *Wilson* Court on writ of certiorari, which test the Court of Appeals had earlier applied to find a nonsignatory estopped to deny the validity of an arbitration agreement in *Pearson*, 400 S.C. 281, 733 S.E.2d 597, and under which test the Facility and Ms. Montgomery-Smalls contend Plaintiff is estopped to deny the validity of the Arbitration Agreement here. *See 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).

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Without question, Ms. Varner received direct benefits from the Admission Agreement throughout her residency at the Facility, including, without limitation, the room, board, care/treatment she received therein. To deny her receipt of such benefits is illogical and objectively unreasonable and would require wholly discrediting the entirety of her residency: every meal, every instance of care/treatment she received, essentially every moment at the Facility—even Plaintiff's complaints do not go nearly so far as that. Ms. Varner having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff cannot now deny the enforceability of the Arbitration Agreement with which the Admission Agreement merged.

9. Neither the Facility nor Ms. Montgomery-Smalls waived any arbitration rights.

Waiver is the voluntary relinquishment of a known right. When timely answering Plaintiff's complaints, the Facility and Ms. Montgomery-Smalls expressly reserved their arbitration rights. Moreover, Case 2477 was filed some three months after Case 1437, and by virtue of his now-withdrawn motion to consolidate, Plaintiff acknowledges that the cases "concern the same underlying facts and have factual and legal questions in common." There was no undue delay in moving to compel arbitration; nor was there any prejudice from any supposed delay; nor did either the Facility or Ms. Montgomery-Smalls make any use of the tools of litigation inconsistent with their arbitration rights.

B. Re: the Motions to Stay

The relationship between the Motions to Compel Arbitration and the Motions to Stay is such that the grant of the former requires the grant of the latter. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to

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arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.") (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties."). But even assuming, *arguendo*, staying Case 2477 is not mandatory here, for the sake of judicial economy, of avoiding piecemeal litigation and the potential for inconsistent obligations, and of the orderly administration of its own docket, the Court exercises its discretion to impose such a stay. *See State v. Langford*, 400 S.C. 421, 435, 735 S.E.2d 471, 478 (2012) ("[A] court's power to hear and decide cases 'carries with it the inherent power to control the order of its business.'") (quoting *Williams v. Bordon's*, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980)); *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) ("The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement."). Indeed, as stated in Plaintiff's now-withdrawn motion to consolidate Case 1437 with Case 2477, "[i]t is in the interest of efficiency and judicial economy to consolidate these actions as aforesaid and avoid duplicative discovery and trials." These interests likewise support staying Case 2477.

III.

CONCLUSION

The Subject Motions are hereby GRANTED. Case 1437 is stayed in favor of arbitration between Plaintiff and the Facility. Case 2477 is stayed in favor of arbitration between Plaintiff and Ms. Montgomery-Smalls, with Plaintiff's claims against FAS and FCOS stayed pending the ultimate outcome of arbitration between Plaintiff, the Facility, and Ms. Montgomery-Smalls.

IT IS SO ORDERED.

_____

ROGER M. YOUNG, SR., Presiding Judge
Court of Common Pleas
Charleston County

Charleston, South Carolina

Dated: _____

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Charleston Common Pleas

Case Caption: William Haynes , plaintiff, et al VS Thi Of South Carolina At Charleston , defendant, et al

Case Number: 2021CP1001437

Type: Order/Compel

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CASES NO. 2021CP-1001437 & 1002744
)	
Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner,)	**FINAL ORDER**
Plaintiff,)	
v.)	
)	
Fundamental Administrative Services LLC, And Fundamental Clinical and Operational Services, LLC, and Jerrolyn Montgomery-Smalls.)	**Exhibit F**
Defendants.)	
)	
STATE OF SOUTH CAROLINA)	
)	
COUNTY OF CHARLESTON)	
)	
Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner,)	
Plaintiff,)	
v.)	
)	
THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab,)	
)	
Defendant.)	

THIS MATTER is before the Court on a Petition for a Final Order filed by Plaintiff. Based on the Petition and the proof of ADR submitted on May 23, 2023, this Court hereby enters and incorporates by reference the Confidential Arbitration Order issued by Doyet A. Early, III, on May 16, 2023.

THEREFORE, this Court GRANTS Plaintiff's Petition and enters a Final Order in this matter relating to arbitration and lifts the corresponding stays associated with case CAFN: 2021CP1002744.

AND IT IS SO ORDERED.

[*Electronic Signature Page to Follow*]

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Charleston Common Pleas

Case Caption: William Haynes , plaintiff, et al VS Thi Of South Carolina At Charleston , defendant, et al

Case Number: 2021CP1001437

Type: Order/Other

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CASES NO. 2021CP-1001437 & 1002744
)	
Williams Haynes, as Personal)	**DEFENDANTS' PETITION FOR FINAL**
Representative of the Estate of Elizabeth)	**ORDER**
Varner,)	
Plaintiff,)	
v.)	
)	
Fundamental Administrative Services LLC,)	
And Fundamental Clinical and Operational)	
Services, LLC, and Jerrolyn)	
Montgomery-Smalls.)	
)	
Defendants.)	
)	
STATE OF SOUTH CAROLINA)	
)	
COUNTY OF CHARLESTON)	
)	
Williams Haynes, as Personal)	
Representative of the Estate of Elizabeth)	
Varner,)	
Plaintiff,)	
v.)	
)	
THI of South Carolina at Charleston, LLC)	
d/b/a Riverside Health and Rehab,)	
)	
Defendant.)	

Exhibit G

COME NOW the Defendants THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab ("Riverside"), Fundamental Administrative Services LLC, Fundamental Clinical and Operational Services, LLC, and Jerrolyn Montgomery-Smalls (collectively "Defendants"), by and through undersigned counsel, and moves this Court to enter a Final Order incorporating the Confidential Arbitration Order issued by retired Judge Doyet A. Early, III ("Judge Early"), on May 16, 2023. A Proof of ADR was filed with this Court on May 22, 2023, acknowledging the parties complied with this Court's February 24, 2022 order to arbitrate.

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The Plaintiff filed a similar Petition on December 7, 2023. The Defendants consent to the Plaintiff's request for a Final Order, but request, for the sake of judicial economy, that a stay of all non-arbitrable claims remain in effect pending either dismissal of all claims against Riverside and Ms. Montgomery-Smalls pursuant to payment of the arbitration award, or the outcome of any further appeal as it relates to arbitration in this matter.

After the conclusion of the arbitration, Plaintiff attempted to appeal this Court's February 24, 2022 Order, which appeal the Court of Appeals has dismissed. Upon information and belief of undersigned Counsel, Plaintiff intends to again file an appeal, once this Court enters the requested Final Order incorporating the Confidential Arbitration Order. Plaintiff will seek reversal of this Court's February 24, 2022 Order, will request nullification of Judge Early's Confidential Arbitration Order, and will request remand of the claims against Riverside and Ms. Montgomery-Smalls to this Court's docket for a jury trial. The stay of all other claims should remain in effect pending the outcome of any such appeal.

As set forth in this Court's February 24, 2022 Order, the Plaintiffs claims against all Defendants "'*concern the same underlying facts and have factual and legal questions in common*.'" (Order at Page 3, quoting Plaintiff's withdrawn Motion to Consolidate). Accordingly, the Defendants request that this Court exercise its discretion to maintain the stay of all non-arbitrable claims as necessary to avoid duplicative discovery and trials, to avoid piecemeal litigation and the potential for inconsistent obligations, and for the sake of the orderly administration of the Court's own docket. (*See* Order at Page 19, again quoting Plaintiff's withdrawn Motion to Consolidate and citing *State v. Langford*, 400 S.C. 421, 435, 735 S.E.2d 471, 478 (2012) ("[A] court's power to hear and decide cases 'carries with it the inherent power to control the order of its business.'") (quoting *Williams v. Bordon's*, Inc., 274 S.C. 275, 279, 262

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S.E.2d 881, 883 (1980)); *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) ("The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement.")). For these reasons, the stay of all non-arbitrable claims should remain in effect pending the conclusion of any subsequent appeal as it relates to arbitration in this matter, or pending the dismissal of the Plaintiff's claims against Riverside and Ms. Montgomery-Smalls pursuant to payment of the arbitration award.

This Petition is supported by 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 petition, as well as any oral argument to be presented by counsel at a hearing on this matter.

CLEMENT RIVERS, LLP

By: s/ Matthew O. Riddle.
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Russell G. Hines
SC State Bar ID No.: 72100
Matthew O. Riddle
SC State Bar ID No.: 76650
Gaillard T. Dotterer, III
SC State Bar ID No.:103620
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com,
rhines@ycrlaw.com, mriddle@ycrlaw.com,
gdotterer@ycrlaw.com
Attorneys for the Defendants

Charleston, South Carolina

Dated: December 8, 2023

ELECTRONICALLY FILED - 2024 Jun 28 12:19 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
WILLIAM HAYNES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH VARNER, PLAINTIFF, vs. FUNDAMENTAL ADMINISTRATIVE SERVICES LLC, AND FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, AND JERROLYN MONTGOMERY-SMALLS, DEFENDANTS.	)	CASE NO. 2021-CP-10-02744 **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Exhibit H

TO: SHAWN PINKSTON, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that Defendants Jerrolyn Montgomery-Smalls, Fundamental Administrative Services, LLC, and Fundamental Clinical and Operational Services, LLC will move before this Honorable Court pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, at a time and place set by the Court, for an Order granting summary judgment for Defendants.

The grounds for this Motion are that Plaintiff's claims against Defendants are barred by the doctrines of *res judicata* and/or collateral estoppel based on the outcome of a prior arbitration proceeding brought by Plaintiff arising out of the same facts and circumstances alleged in this case. In light of the preclusive effect of the arbitration award, *see, e.g., Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 493-96, 593 S.E.2d 480, 484-86 (Ct. App. 2004); *Graham v. State Farm Fire & Cas. Ins. Co.*, 277 S.C. 389, 390-91, 287 S.E.2d 495, 496 (1982), there are no material facts in dispute and Defendants are entitled to judgment as a matter of law.

This Motion will be supported by the pleadings and motions filed in this case, all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to 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/ Matthew O. Riddle*
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
Russell Grainger Hines
SC State Bar ID No.: 72100
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com, mriddle@ycrlaw.com
Attorneys for the Defendants

Charleston, South Carolina

Dated: June 28, 2024

ELECTRONICALLY FILED - 2024 Jun 28 12:19 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
WILLIAM HAYNES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH VARNER,	)	CASE NO. 2021-CP-10-02744
PLAINTIFF,	)	
vs.	)	**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
FUNDAMENTAL ADMINISTRATIVE SERVICES LLC, AND FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, AND JERROLYN MONTGOMERY-SMALLS,	)	
DEFENDANTS.	)	

TO: SHAWN PINKSTON, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

Defendants Jerrolyn Montgomery-Smalls ("Defendant Smalls"), Fundamental Administrative Services, LLC ("FAS"), and Fundamental Clinical and Operational Services, LLC ("FCOS"), by and through their undersigned counsel, respectfully submit this Memorandum of Law in support of their Motion for Summary Judgment. As explained below, Plaintiff's claims against Defendants are barred by the doctrines of *res judicata* and/or collateral estoppel based on the outcome of a prior arbitration brought by Plaintiff arising out of the same facts and circumstances alleged in this case. In light of the preclusive effect of the arbitration award, there are no material facts in dispute and Defendants are entitled to judgment as a matter of law. Accordingly, Defendants' Motion should be granted.

FACTUAL BACKGROUD

A. The Lawsuits

On March 25, 2021, Plaintiff, in his capacity as the personal representative of the Estate of Elizabeth Varner, filed an action ("*Riverside* Lawsuit") against non-party THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab ("Facility" or "Riverside"), a skilled-nursing facility where Ms. Varner was a resident in October 2019. (Exhibit A ¶¶ 2, 4.) The *Riverside* Lawsuit alleged that on October 6, 2019, Ms. Varner was hospitalized with a fractured femur that she sustained at the Facility and subsequently had to undergo surgery to treat her injury. (Ex. A ¶¶ 5-9.)

The *Riverside* Lawsuit further alleged that in a separate incident, on October 27, 2019, Ms. Varner was hospitalized again after she was found to be nonresponsive at the Facility. (Ex. A ¶ 10.) Ms. Varner suffered cardiac arrest while at the hospital and later died on October 29, 2019. (Ex. A ¶ 11.) The *Riverside* Lawsuit contended that the femur fracture that Ms. Varner sustained at the Facility was a "significant condition contributing to her death." (*Id.*) Plaintiff asserted causes of action against the Facility for medical malpractice, negligence and gross negligence (Count 1); neglect of a vulnerable adult (Count 2); (3) wrongful death (Count 3); and survivorship action (Count 4). (Ex. A ¶¶ 13-33.)

On June 11, 2021, Plaintiff, again acting as the personal representative of Ms. Varner's estate, filed this case against Defendants based on the same factual allegations regarding Ms. Varner's care and treatment at the Facility that were alleged in the *Riverside* Lawsuit. (Exhibit B ¶¶ 11-21.) Defendant Smalls was the Administrator of the Facility during Ms. Varner's residency. (Exhibit C ¶ 18.) Plaintiff alleges that FAS "exerted control in the oversight, management, direction, and operation of Riverside, including the development of budgets, choosing vendors and

consultants, and deciding nurse staffing hours per patient days deriving revenue therefrom." (Ex. B ¶ 9.) Plaintiff avers that FCOS "exerts significant control over the [Facility's] operation," "including the development of policies and procedures, training, and instruction for the staff at Riverside." (Ex. B ¶ 8.)

In this case, Plaintiff asserts the same four causes of action that were asserted in the *Riverside* Lawsuit. (Ex. B ¶¶ 22-25 (negligence/gross negligence (Count 1)); ¶¶ 44-55 (neglect of a vulnerable adult (Count 5)); ¶¶ 56-58 (wrongful death (Count 6)); ¶¶ 59-61 (survivorship action (Count 7)). Plaintiff also asserts claims for corporate negligence (Count 2), joint-venture liability (Count 3) and corporate veil-piercing liability (Count 4). (Ex. B ¶¶ 26-43.) On July 16, 2021, Defendant Smalls filed an Answer denying any liability and raising affirmative defenses, including the right to demand arbitration. (Ex. C ¶ 35.)

B. The Court's Order Compelling Arbitration

On February 24, 2022, the Court in both cases entered an order granting the Facility's and Defendant Smalls' respective motions to compel arbitration (Exhibit D) pursuant to the parties' Arbitration Agreement. (Exhibit E.) The Court ruled that because the Arbitration Agreement applies to the Facility and the Facility's "agents, employees, and servants," "the Arbitration Agreement covers Plaintiff's claims against both the Facility and [Defendant Smalls]." (Ex. D at 10.) The Arbitration Agreement further provides that "[t]he 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." (Ex. E at 1.) In the "interest of efficiency and judicial economy," the Court stayed this lawsuit, including Plaintiff's claims against non-arbitrating Defendants FAS and FCOS, pending the completion of the arbitration of Plaintiff's claims against the Facility and Defendant Smalls. (Ex. D at 18-19.)

C. The Arbitration Order

Plaintiffs' claims against the Facility and Defendant Smalls were consolidated in a single arbitration proceeding. On September 15, 2022, the arbitrator (Hon. Doyet E. Early, III) issued an Arbitration Order memorializing the parties' stipulated procedures governing how the arbitration would be conducted. (Exhibit F.) In the Arbitration Order ¶ 1, the parties agreed to arbitrate "the claims and defenses raised in the complaint[s] and answer[s] filed in the above state court matter[s]." (Ex. F ¶ 1.) The Arbitration Order ¶ 19 also provided that the arbitrator would issue written findings of fact and conclusions of law. (Ex. F ¶ 19.)

D. The Arbitration Award

The arbitration hearing was held from April 3, 2023 to April 6, 2023. (Exhibit G at 1.) On May 16, 2023, the arbitrator issued his award ("Arbitration Award"). In the Arbitration Award, the arbitrator prefaced his ruling by noting that all parties attended the hearing and were represented by counsel; each side presented fact and expert witnesses in support of their respective claims and defenses; and a complete copy of Ms. Varner's relevant medical records was introduced during the arbitration. The arbitrator noted that even though the Arbitration Order ¶ 19 required him to issue written findings of fact and conclusions of law, "the parties by agreement requested a succinct order without these findings." (Ex. G at 1.)

In the Arbitration Award, the arbitrator determined:

(1) The Facility breached the standard of care which proximately caused the fracture that Ms. Varner sustained to her distal femur and the medical care and surgery necessitated by the fracture;

(2) The evidence proved that Ms. Varner incurred $77,007 in medical expenses related to the facture, which Plaintiff was entitled to recover from Riverside;

(3) The only other evidence of compensable damages was for Ms. Varner's pain and suffering from the fracture in the amount of $10,000, which Plaintiff was entitled to recover from Riverside;

(4) Because of Ms. Varner's deteriorated medical condition, there was no evidence of loss of enjoyment of life or emotional distress;

(5) Plaintiff failed to prove by the preponderance of the evidence that Ms. Varner's cardiac arrest and death were proximately caused by the fracture; and

(6) Plaintiff failed to prove by clear and convincing evidence that "any of the Defendants," including Defendant Smalls, acted recklessly, willfully, or with a conscious disregard of Ms. Varner's care; therefore no punitive damages were awarded.

Based on these findings, the arbitrator awarded a total sum of $87,007 in favor of Plaintiff and against Riverside (but not Defendant Smalls). (Ex. G at 1-2.)

On May 26, 2023, the arbitrator, at the request of the parties, supplemented his Arbitration Award, ruling that "Plaintiff is not entitled to a judgment against [Defendant Smalls]." (Ex. H.) The arbitrator found that "Plaintiff failed to prove by a preponderance of the evidence that [Defendant Smalls] deviated from the standard of care in her care of or investigation of [Ms. Varner's] fall." (*Id.*) On April 9, 2024, the Facility paid the award in full. (Exhibit I.)

E. The Court's Final Order

Meanwhile, on February 12, 2024, the Court granted Plaintiff's petition for entry of a Final Order that incorporated the Arbitration Award and lifted the stay of this lawsuit. (Exhibit J.) Even though the preclusive effect of the Arbitration Award bars Plaintiff from pursuing this action against Defendants, Plaintiff is continuing to do so, thus necessitating this Motion.

ARGUMENT

I. DEFENDANT SMALLS IS ENTITLED TO SUMMARY JUDGMENT BASED ON THE DOCTRINE OF *RES JUDICATA*

Defendant Smalls is entitled to summary judgment because the Arbitration Award is *res judicata* and precludes Plaintiff's prosecution of his claims against Defendant Smalls in this case. *Res judicata* "bars subsequent actions by the same parties when the claims arise out of the same

transaction or occurrence that was the subject of a prior action between those parties."[1] *Pye v. Aycock*, 325 S.C. 426, 433, 480 S.E.2d 455, 458 (Ct. App. 1997) (citation omitted). *Res judicata* applies where: (1) the judgment in the prior action was final, valid, and on the merits; (2) both actions involve the same parties; and (3) the second action involved claims properly included in the first action. *See Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995). *Res judicata* applies to arbitration awards and bars a litigant from asserting claims in a later action that were or "could have been arbitrated in the original proceeding." *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 496, 593 S.E.2d 480, 486 (Ct. App. 2004).

Here, all of the *res judicata* requirements are met. *First*, the Arbitration Award "is a final, binding award on the merits." *Palmetto Homes*, 357 S.C. at 494, 593 S.E.2d at 485. This is especially true in this case because the parties' Arbitration Agreement says that the arbitrator's "decision shall be binding on all parties and may be enforced by a court of competent jurisdiction." (Ex. E at 1.) And Plaintiff himself acknowledged the finality of the Arbitration Award by successfully petitioning the Court to incorporate the Arbitration Award into the Final Order. (Ex. J.) The Arbitration Award thus signifies the end, not the commencement of litigation, and "is presumptively correct." *Trident Tech. College v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 111, 333 S.E.2d 781, 788-89 (1985). This satisfies the first *res judicata* requirement.

Second, Plaintiff and Defendant Smalls were parties to the arbitration and are parties to this case, which satisfies the second *res judicata* requirement. *See Palmetto Homes*, 357 S.C. at 494, 593 S.E.2d at 485.

[1] The purpose of *res judicata* is to prevent improper "claim splitting," which Plaintiff seeks to do here. To that end, *res judicata* "prohibits the owner of a single cause of action from either dividing or splitting the cause of action so as to make it the subject of several causes of action . . . ." *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986).

Finally, the facts alleged in this case are identical to those that were litigated in the arbitration. And, pursuant to the Court's order compelling arbitration (Ex. D at 10) and the arbitrator's Arbitration Order ¶ 1 (Ex. F ¶ 1), Plaintiff was required to present all of his claims against Defendant Smalls in the arbitration, where Defendant Smalls prevailed on the merits. *See Pye*, 325 S.C. at 433, 480 S.E.2d at 458 (*res judicata* applies where successive suits involve the same subject matter and causes of action). The Arbitration Award thus conclusively resolved Plaintiff's causes of action against Defendant Smalls. *Res judicata* therefore bars Plaintiff from pursuing those same claims—or any other unasserted causes of action arising out of the same facts—in this case. *See Palmetto Homes*, 357 S.C. at 494-96, 593 S.E.2d at 485-86; *Nunnery*, 289 S.C. at 210-11, 345 S.E.2d at 743-44. Accordingly, the Court should grant summary judgment for Defendant Smalls and dismiss her from this action.

II. FAS AND FCOS ARE ENTITLED TO SUMMARY JUDGMENT BASED ON THE COLLATERAL ESTOPPEL DOCTRINE

Defendants FAS and FCOS are entitled to summary judgment on Plaintiff's claims against them based on the collateral estoppel effect of the Arbitration Award. "Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). Collateral estoppel applies when an issue was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *See id.*

Importantly, collateral estoppel can be used defensively against a plaintiff who was a party in a prior action, even if the defendant was not a party to the prior litigation, so long as the plaintiff "had a full and fair opportunity to previously litigate the issue." *Id.* at 555, 684 S.E.2d at 782 (noting that mutuality is not a requirement of collateral estoppel); *see also Graham v. State Farm*

Fire & Cas. Ins. Co., 277 S.C. 389, 391, 287 S.E.2d 495, 496 (1982) (ruling that plaintiff was barred from re-litigating an issue decided against the plaintiff in a prior suit even though the defendant was not a party to the prior action); *Irby v. Richardson*, 278 S.C. 484, 487, 298 S.E.2d 452, 454 (1982) (same). At bottom, collateral estoppel "rest[s] upon the wholesome principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity." *Graham*, 277 S.C. at 391, 287 S.E.2d at 496.

Plaintiff is estopped from pursuing his claims against FAS and FCOS for at least two reasons. *First*, the full extent of Plaintiff's damages was decided in the arbitration, where the issue was actually litigated and necessary to the Arbitration Award. And, even though FAS and FCOS were not parties to the arbitration, Plaintiff had a full and fair opportunity to litigate his damages in that proceeding. To be sure, in the Arbitration Award, the arbitrator carefully reviewed the evidence, made specific findings regarding the damages that Plaintiff proved, and awarded those damages to Plaintiff. (Ex. G at 2.)

Here, Plaintiff's claims against FAS and FCOS for negligence/gross negligence (Count 1),[2] corporate negligence (Count 2), neglect of a vulnerable adult (Count 5), and survivorship (Count 7) seek the same damages that Plaintiff sought to (and did) recover from the Facility in the *Riverside* Lawsuit, which were determined by the arbitrator. (*Compare* Ex. A ¶¶ 16, 27, 32 (damages alleged in this case), *with* Ex. B ¶¶ 25, 31, 55, 60 (damages alleged in the *Riverside* Lawsuit).) Because the arbitrator already awarded all damages that Plaintiff was entitled to recover, and because the Facility has paid the award, Plaintiff is estopped from seeking additional damages from FAS and FCOS. *See Carolina Renewal*, 385 S.C. at 558, 684 S.E.2d at 784 (plaintiff

[2] Plaintiff's negligence/gross negligence claim also should be dismissed because it is not directed to Defendants. Instead, Plaintiff alleges a claim against "[t]he care providers at *Riverside Health and Rehab* [who] violated the standard of care." (Ex. A ¶ 23.)

estopped from re-litigating damages that were decided in a prior action); *see also, e.g., Johnson v. Lapan*, No. 09-ADMS-70010, 2010 WL 1170254, at *2 (Mass. App. Ct. Sept. 28, 2009) (plaintiff estopped from recovering additional damages from a different defendant after her damages were decided in arbitration and the award was paid); *Murakami v. Wilmington Star News, Inc.*, 528 S.E.2d 68, 71 (N.C. Ct. App. 2000) (arbitration award collaterally estopped the plaintiff from relitigating damages in a subsequent lawsuit against a different defendant). FAS and FCOS therefore should be granted summary judgment on these causes of action.

Second, Plaintiff's joint-venture and alter-ego/veil-piercing claims (Counts 3 and 4, respectively) must be dismissed. In his Complaint, Plaintiff seeks to impute the Facility's liability to FAS and FCOS based on allegations that FAS and FCOS were part of a joint venture that operated Riverside[3] (Ex. B ¶¶ 33-41), and that FAS and FCOS were alter-egos of the Facility. (Ex. B ¶¶ 42-43.) However, the Facility's liability was determined in the arbitration and the Facility has paid the award. (Ex. I.) Thus, the Facility no longer has any "liability" that could be imputed to FAS and FCOS via Plaintiff's joint-venture and alter-ego/veil-piercing theories. The Court therefore should grant summary judgment for FAS and FCOS on these causes of action.

Finally, FAS and FCOS are entitled to summary judgment on Plaintiff's wrongful death claim (Count 5). This cause of action is predicated on Plaintiff's allegations that Ms. Varner "was severely injured in the Defendant's [F]acility" and "[t]he injuries so inflicted" on Ms. Varner "were the cause of her wrongful death on October 29, 2019." (Ex. B ¶¶ 57-58.) As alleged in the

[3] The joint venture claim must be dismissed in any event because it is explicitly premised on Plaintiff's allegation that FAS, FCOS, *Defendant Smalls* and Riverside *collectively* comprised the joint venture. (Ex. B ¶ 37.) The arbitrator determined, however, that "Plaintiff is not entitled to a judgment" on his claims against Defendant Smalls, which necessarily included the joint-venture claim. The arbitrator's implicit determination that Defendant Smalls was *not* part of the joint venture therefore defeats Plaintiff's joint-venture theory.

Complaint, the "injuries" to which Plaintiff refers are the "trauma to [Ms. Varner's] leg," resulting in her fractured right femur. (Ex. B ¶ 47; *see also id.* ¶¶ 14-18.) In the arbitration, however, the arbitrator determined that "Plaintiff failed to prove by the preponderance of the evidence [that] Ms. Varner's cardiac arrest and death were proximately caused by the fracture." (Ex. G at 2.) Plaintiff therefore is collaterally estopped from re-litigating the same issues in this case. *See Graham*, 277 S.C. at 391, 287 S.E.2d at 496 ("This matter having been fully and fairly adjudicated, the [plaintiff] is collaterally estopped by prior judgment from bringing this action to adjudicate the same issue"). Plaintiff's wrongful death claim must be dismissed.

CONCLUSION

For all the foregoing reasons, Defendants' Motion for Summary Judgment should be granted, and the Court should enter an order dismissing this case, with prejudice.

CLEMENT RIVERS, LLP

By:*/s/ Mathew O. Riddle Jr.*
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
Russell Grainger Hines
SC State Bar ID No.: 72100
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com, mriddle@ycrlaw.com
Attorneys for the Defendants

Charleston, South Carolina

Dated: September 6, 2024

Exhibit A

ELECTRONICALLY FILED - 2021 Mar 25 12:32 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1001437

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CIVIL ACTION NO.: 2020 – CP - _____
)	
Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner,)	COMPLAINT
)	
Plaintiff,)	JURY TRIAL DEMANDED
v.)	
)	
THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab,)	
)	
Defendant.)	

COMES NOW William Haynes, as Personal Representative of the Estate of Elizabeth Varner ("Plaintiff), by and through undersigned counsel, and states as follows:

1. Williams Haynes, as the Personal Representative of the Estate of Elizabeth Varner, is a resident of the County of Berkeley, State of South Carolina.

2. Based on information and belief, Defendant THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab, ("Defendant"), is a corporation organized and existing under the laws of the State of Delaware and at all times relevant herein, conducted business in Charleston County through its agents, contractors, and employees for the purpose of carrying on its business as a healthcare facility and providing medical care to its patients through its agents and employees.

3. The parties engaged in mandatory presuit mediation on October 8, 2020, which resulted in an impasse.

4. On or about October 6, 2019, Elizabeth Varner was a resident at Defendant's facility.

5. During the afternoon of October 6, 2019, Elizabeth Varner was transferred to the Medical University of South Carolina ("MUSC") with chief complaints of a right knee fracture. The

admission records note, "pt coming from riverside with right knee fracture. EMS was not served with XR; per EMS no one at the facility can say what happened. Pt is saying someone fell on her her and that it happened last week; facility reported to EMS that they don't know when this happen [sic]."

6. The medical records also note, "Elizabeth Varner is a 76 y.o. female, who presents with right knee pain. She injured her lower extremity one week ago. She reports a nurse at the nursing home she lives at fell on her leg. She felt immediate onset of pain but reports no XRs were taken until today...She points to her knee as the place that is most sensitive to pressure."

7. Upon examination by medical providers at MUSC, Elizabeth Varner's right knee had "obvious swelling, tenderness palpation diffusely, limited passive range of motion...." An x-ray of her right femur find an "oblique distal fracture metadiaphyseal fracture with no one half shaft's width of posterior displacement of the distal fracture fragment." An x-ray of her right knee noted the same fracture with "no significant degenerative changes. Soft tissue swelling about the knee." She was discharged on October 6, 2019, with plans to follow up with the orthopedic clinic.

8. Elizabeth Varner was seen by the MUSC Orthopedic Department on October 10, 2019, and "due to continued pain, the decision was made to admit the patient to the hospital for surgery and postoperative evaluation."

9. Elizabeth Varner underwent surgery on October 11, 2019, in which the surgeons inserted a 10mm femoral nail into the right femur. She was discharged from MUSC on October 14, 2019.

10. On October 27, 2019, Elizabeth Varner was transferred from Defendant's facility to MUSC via EMS. The medical records from MUSC notes Plaintiff arrived at approximately 6:57

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am with the following HPI, "Per EMS patient was found unresponsive at the nursing facility approximately 12 PM last night and was placed on supplemental oxygen due to pulse ox being in the 70s. Nursing staff waited 2hrs after placing the pt on supplemental oxygen before calling EMS. On arrival to the ER patient was hypotensive 40s/30s, cold t the touch, unresponsive and no pulses were palpable....The pt was hypotensive thus sepsis protocol initiated."

11. Elizabeth Varner suffered cardiac arrest while at MUSC and eventually passed away on October 29, 2019. The Immediate Cause of Death was listed as: Shock, Acute Renal Failure, and Hypoxic Respiratory Failure. Her femur fracture was listed as a significant condition contributing to her death.

12. Elizabeth Varner's Death Certification listed the following causes of death: Acute Respiratory Failure, Acute Renal Failure, Pulseless Electrical Activity Arrest Secondary to Septic Shock.

FIRST CAUSE OF ACTION
(Medical Malpractice, Negligence, Gross Negligence)

13. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

14. The care providers at Riverside Health and Rehab violated the standard of care in the following ways:

- Failing to take proper precautions to prevent injury to Elizabeth Varner and by failing to protect Elizabeth Varner from injury;
- Failing to investigate the cause of an unknown bone fracture;
- Failing to notify the appropriate regulatory agency following serious incidents, to include fractured bones;
- Failing to timely call EMS and timely transfer Plaintiff to a hospital after a change in condition;

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- Failing to have the appropriate number of staff to meet the acuity needs of Plaintiff; and
- Other failures of the applicable standard of care that may be discovered through the course of this lawsuit.

15. The Affidavit of Plaintiff's expert specifying at least one negligent act or omission is attached as Exhibit "A" with said expert being Suzanne Frederick, MSN, RN-BC, CWCN.

16. As a direct and proximate result of Defendant's negligence, negligence per se, gross negligence, recklessness, willfulness and wantonness, Plaintiff suffered injuries, including, but not limited to, substantial physical and mental pain and suffering, mental anguish, mental shock and suffering, and wounded feelings.

SECOND CAUSE OF ACTION
(Neglect of a Vulnerable Adult)

17. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

18. According to the South Carolina Adult Protection Act, at all times relevant hereto Plaintiff Elizabeth Varner was considered a vulnerable adult.

19. According to the South Carolina Adult Protection Act, Neglect means the failure or omission of a caregiver to provide the care, goods, or services necessary to maintain the health and safety of a vulnerable adult including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services and the failure or omission has caused, or presents a substantial risk of causing, physical or mental injury to the vulnerable adult.

20. Defendant failed to provide care to Plaintiff Elizabeth Varner by causing trauma to Plaintiff's leg, which resulted in an oblique distal fracture metadiaphyseal fracture to the right leg with no one half shaft's width of posterior displacement of the distal fracture fragment.

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21. Defendant failed to timely identify that Elizabeth Varner was suffering from a fracture in her right leg.

22. Defendant failed to provide care and medical services to Elizabeth Varner by not transferring her to the hospital in a timely manner after a change of condition.

23. Elizabeth Varner trusted in, confided in and relied upon Defendant to use their expertise and discretion for Plaintiff's care.

24. Defendants accepted Elizabeth Varner's trust and reliance and so became responsible for Elizabeth Varner's health while residing at the nursing home facility.

25. As a result of aforementioned reliance and trust upon Defendant, Elizabeth Varner's physical, mental and emotional health was placed in the hands of Defendant.

26. Defendant received compensation for the care and treatment they were responsible for providing to Elizabeth Varner during her residency but did not provide that care and treatment.

27. As a direct and proximate result of Defendant's negligence, negligence per se, gross negligence, recklessness, willfulness and wantonness, Plaintiff suffered injuries, including, but not limited to, substantial physical and mental pain and suffering, mental anguish, mental shock and suffering, and wounded feelings.

THIRD CAUSE OF ACTION
(Wrongful Death)

28. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

29. That as a direct and proximate result of Defendants negligent, willful, wanton, reckless, careless and grossly negligent conduct, by and through their agents, servants, and employees, Elizabeth Varner was severely injured in Defendant's facility.

30. The injuries so inflicted on Elizbeth Varner were the cause of Elizabeth Varner's wrongful death on October 29, 2019.

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FOURTH CAUSE OF ACTION
(Survival Action)

31. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

32. As a direct and proximate cause of Defendant's negligence, willful, reckless and/or grossly negligent actions and inactions, Elizabeth Varner suffered:

- Excruciating pain;
- Prolonged extreme suffering;
- Acute emotional distress;
- Fear and anxiety;
- Medical bills;
- Mental anguish;
- Loss of enjoyment of life; and
- The agony of death.

33. As a direct and proximate cause of Defendant's negligence, willful, reckless and/or grossly negligent actions and inactions, Elizabeth Varner's heirs suffered:

- Loss of companionship;
- Emotional trauma;
- Loss of comfort and support;
- Psychological and emotional distress;
- Loss of enjoyment of life; and
- Loss of their Mother.

WHEREFORE, Plaintiff demands judgment against Defendant for actual and punitive damages, for the cost of this action, and for other such relief the Court deems just, equitable, and proper.

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PINKSTON LAW FIRM, LLC

/s/ Shawn Pinkston
Shawn Pinkston, SC Bar No. 79965
856 Lowcountry Blvd., Suite 101
Mount Pleasant, South Carolina 29464
Office: 843-814-5472
Fax: 843-723-7300
shawnpinkston@me.com

Date: March 25, 2021
Mount Pleasant, South Carolina

Exhibit B

ELECTRONICALLY FILED - 2021 Jun 11 10:36 AM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CIVIL ACTION NO.: 2021CP-
)	
Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner,)	**COMPLAINT** **JURY TRIAL DEMANDED**
Plaintiff,)	
v.)	
)	
Fundamental Administrative Services LLC, And Fundamental Clinical and Operational Services, LLC, and Jerrolyn Montgomery-Smalls)	
Defendants.)	

COMES NOW William Haynes, as Personal Representative of the Estate of Elizabeth Varner ("Plaintiff), by and through undersigned counsel, and states as follows:

1. Williams Haynes, as the Personal Representative of the Estate of Elizabeth Varner, is a resident of the County of Berkeley, State of South Carolina.

2. Based on information and belief, Defendant Fundamental Administrative Services LLC, ("Defendant FAS"), is a corporation organized and existing under the laws of the State of Delaware and at all times relevant herein, conducted business in Charleston County through its agents, contractors, and employees for the purpose of carrying on its business as a healthcare facility and providing medical care to its patients through its agents and employees at THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab ("Riverside"), located in North Charleston, South Carolina.

3. Based on information and belief, Defendant Fundamental Clinical and Operational Services LLC, ("Defendant FCOS"), is a corporation organized and existing under the laws of the State of Delaware and at all times relevant herein, conducted business in Charleston County through its agents, contractors, and employees for the purpose of carrying on its business as a

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healthcare facility and providing medical care to its patients through its agents and employees at Riverside, located in North Charleston, South Carolina.

4. Based on information and belief, Defendant Jerrolyn Montgomery-Smalls ("Defendant JMS") is a resident of Charleston County and at all times relevant herein was the Administrator of Riverside Health and Rehab.

5. Plaintiff filed a Notice of Intent and all required attachments pursuant to S.C. Code Ann. § 15-36-100.

6. The parties conducted pre-suit mediation on June 7, 2021, which resulted in an impasse. Venue and subject matter jurisdiction are proper within this Court.

7. Personal jurisdiction is proper in this Court because Defendants are situated in Charleston County and conduct business in Charleston County.

8. Upon information and belief, FCOS has or had common ownership and management with THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab and exerts significant control over the operation of Riverside Health, including the development of policies and procedures, training, and instruction for the staff at Riverside.

9. Upon information and belief, through its individual actions and the acts of its agents, and in concert with the other Defendants, FAS engaged in and exerted control in the oversight, management, direction, and operation of Riverside, including the development of budgets, choosing vendors and consultants, and deciding nurse staffing hours per patient days deriving revenue therefrom.

10. The above-named Defendants are jointly and severally liable for all damages alleged in the Complaint since their neglect, gross negligence, reckless and wanton acts and omissions,

singularly or in combination, are the contributing proximate cause of the Plaintiff's damages, injuries, and losses.

FACTUAL ALLEGATIONS

11. Elizabeth Varner was admitted to Riverside Health and Rehab ("Riverside") on May 20, 2019, and she paid a fee for her care.

12. While a resident at Riverside, Elizabeth Varner required skilled nursing care from the staff at the nursing home as well as assistance with daily living activities.

13. On or about October 6, 2019, Elizabeth Varner was a resident at Defendant's facility.

14. During the afternoon of October 6, 2019, Elizabeth Varner was transferred to the Medical University of South Carolina ("MUSC") with chief complaints of a right knee fracture. The admission records note, "pt coming from riverside with right knee fracture. EMS was not served with XR; per EMS no one at the facility can say what happened. Pt is saying someone fell on her her and that it happened last week; facility reported to EMS that they don't know when this happen [sic]."

15. The medical records also note, "Elizabeth Varner is a 76 y.o. female, who presents with right knee pain. She injured her lower extremity one week ago. She reports a nurse at the nursing home she lives at fell on her leg. She felt immediate onset of pain but reports no XRs were taken until today...She points to her knee as the place that is most sensitive to pressure."

16. Upon examination by medical providers at MUSC, Elizabeth Varner's right knee had "obvious swelling, tenderness palpation diffusely, limited passive range of motion...." An x-ray of her right femur find an "oblique distal fracture metadiaphyseal fracture with no one half shaft's width of posterior displacement of the distal fracture fragment." An x-ray of her right knee noted the same fracture with "no significant degenerative changes. Soft tissue swelling

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about the knee." She was discharged on October 6, 2019, with plans to follow up with the orthopedic clinic.

17. Elizabeth Varner was seen by the MUSC Orthopedic Department on October 10, 2019, and "due to continued pain, the decision was made to admit the patient to the hospital for surgery and postoperative evaluation."

18. Elizabeth Varner underwent surgery on October 11, 2019, in which the surgeons inserted a 10mm femoral nail into the right femur. She was discharged from MUSC on October 14, 2019.

19. On October 27, 2019, Elizabeth Varner was transferred from Defendant's facility to MUSC via EMS. The medical records from MUSC notes Plaintiff arrived at approximately 6:57 am with the following HPI, "Per EMS patient was found unresponsive at the nursing facility approximately 12 PM last night and was placed on supplemental oxygen due to pulse ox being in the 70s. Nursing staff waited 2hrs after placing the pt on supplemental oxygen before calling EMS. On arrival to the ER patient was hypotensive 40s/30s, cold t the touch, unresponsive and no pulses were palpable....The pt was hypotensive thus sepsis protocol initiated."

20. Elizabeth Varner suffered cardiac arrest while at MUSC and eventually passed away on October 29, 2019. The Immediate Cause of Death was listed as: Shock, Acute Renal Failure, and Hypoxic Respiratory Failure. Her femur fracture was listed as a significant condition contributing to her death.

21. Elizabeth Varner's Death Certification listed the following causes of death: Acute Respiratory Failure, Acute Renal Failure, Pulseless Electrical Activity Arrest Secondary to Septic Shock.

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FIRST CAUSE OF ACTION
(Negligence, Gross Negligence)

22. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

23. The care providers at Riverside Health and Rehab violated the standard of care in the following ways:

- Failing to take proper precautions to prevent injury to Elizabeth Varner and by failing to protect Elizabeth Varner from injury;
- Failing to investigate the cause of an unknown bone fracture;
- Failing to notify the appropriate regulatory agency following serious incidents, to include fractured bones;
- Failing to timely call EMS and timely transfer Plaintiff to a hospital after a change in condition;
- Failing to have the appropriate number of staff to meet the acuity needs of Plaintiff; and
- Other failures of the applicable standard of care that may be discovered through the course of this lawsuit.

24. The Affidavit of Plaintiff's expert specifying at least one negligent act or omission is attached as Exhibit "A" with said expert being Suzanne Frederick, MSN, RN-BC, CWCN.

25. As a direct and proximate result of Defendant's negligence, negligence per se, gross negligence, recklessness, willfulness and wantonness, Plaintiff suffered injuries, including, but not limited to, substantial physical and mental pain and suffering, mental anguish, mental shock and suffering, and wounded feelings.

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SECOND CAUSE OF ACTION
(Corporate Negligence)

26. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

27. Based upon information and belief, Defendants operated, managed, and/or provided consulting services to THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab before and during Elizabeth Varner's residency.

27. Defendants had a duty of care to residents to discover, to warn, to prevent risks, to take reasonable safety precautions, to eliminate unreasonable risks, and to provide protection from harm.

28. Riverside was negligently administered and managed by Defendants who were working together to manage and operate the facility.

29. The facility was negligently administered in violation of state and federal laws by Defendants FCOS and FAS, who were working together to govern, administer, control, manage, and operate the facility.

30. Defendants, by and through their agents, servants, and employees, were negligent, willful, wanton, reckless, careless, and grossly negligent and deviated from the expected standards of skill, care, and learning in their treatment of Elizabeth Varner. Specifically, Defendants were negligent in the following ways:

- Failing to provide the care, supervision, and monitoring of patients;
- Failing to take proper precautions to prevent injury to Elizabeth Varner and by failing to protect Elizabeth Varner from injury;
- Failing to investigate the cause of an unknown bone fracture;
- Failing to notify the appropriate regulatory agency following serious incidents, to include fractured bones;

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- Failing to timely call EMS and timely transfer Plaintiff to a hospital after a change in condition;
- Failing to have the appropriate number of staff to meet the acuity needs of Plaintiff; and
- Other failures of the applicable standard of care that may be discovered through the course of this lawsuit.

31. As a result of Defendants' actions and/or non-actions, Elizabeth Varner experienced prolonged conscious pain and suffering, mental anguish, incurred substantial medical bills, and suffered a wrongful death. As a further result, her wrongful death beneficiaries suffered the damages and injuries stated above.

32. The aforesaid wrongful acts were the sole and proximate cause of Elizabeth Varner's injuries and wrongful death.

THIRD CAUSE OF ACTION
(Joint Venture)

33. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

34. That a joint venture is an association of two or more individuals engaged in a solitary business enterprise for profit without actual partnership or incorporation.

35. That elements of joint venture in the State of South Carolina are:

an agreement;

- a joint interest in a common business;
- an understanding that profits and losses will be shared, and;
- a right to joint control.

36. That a joint venture exists when there is:

- contribution of resources by both parties;

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- joint proprietorship and control over the subject matter of the property
- engage in the venture;
- sharing of profits by express or implied agreement, and;
- an express or implied contract showing join venture.

37. That Defendants FCOS, FAS, Jerrolyn Montgomery-Smalls, and Riverside were involved in a joint venture.

38. Because of their joint venture, Defendants FCOS and FAS had a joint obligation to sufficiently fund Riverside to ensure that each of their residents received the necessary care and services in order for the residents to attain or maintain the highest practicable physical, mental, and psychosocial well-being, consistent with the residents' comprehensive assessments and plans of care.

39. This joint obligation required Defendants to sufficiently fund Riverside so that there would be enough staff and resources in order to meet the needs of their residents.

40. Riverside was totally dependent on the generosity of Defendants FCOS and FAS in their decision-making process as to whether they would allow them to keep the money they were earning.

41. Defendants negligently failed to fund Riverside so its agents, servants, and employees could provide the necessary skill and care to residents, including Elizabeth Varner.

FOURTH CAUSE OF ACTION
(Alter Ego/Piercing the Corporate Veil)

42. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

43. That, upon information and belief, Riverside was dominated and controlled by Defendants FCOS and FAS before, during, and after Elizabeth Varner's residency. Defendants and its related entities, agents, and managers siphoned profits from the nursing home chain

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through self-dealing between the entities, excessively compensated themselves and other executives, and participated in other methods of divesting the licensee entities of needed capital and assets, while allowing the chain to suffer financial losses and provide uniformly poor care across the country as a result of inadequate capitalization and consequently inadequate supplies, resulting in untold numbers of unnecessary injuries, death and suffering, including that of Elizabeth Varner at the Riverside.

FIFTH CAUSE OF ACTION
(Neglect of a Vulnerable Adult)

44. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

45. According to the South Carolina Adult Protection Act, at all times relevant hereto Plaintiff Elizabeth Varner was considered a vulnerable adult.

46. According to the South Carolina Adult Protection Act, neglect means the failure or omission of a caregiver to provide the care, goods, or services necessary to maintain the health and safety of a vulnerable adult including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services and the failure or omission has caused, or presents a substantial risk of causing, physical or mental injury to the vulnerable adult.

47. Defendants failed to provide care to Plaintiff Elizabeth Varner by causing trauma to Plaintiff's leg, which resulted in an oblique distal fracture metadiaphyseal fracture to the right leg with no one half shaft's width of posterior displacement of the distal fracture fragment.

48. Defendants failed to timely identify that Elizabeth Varner was suffering from a fracture in her right leg.

49. Defendants failed to provide care and medical services to Elizabeth Varner by not transferring her to the hospital in a timely manner after a change of condition.

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50. Defendants failed to recognize or to act timely when Elizabeth Varner was found unresponsive on October 27, 2019.

51. Elizabeth Varner trusted in, confided in and relied upon Defendant to use their expertise and discretion for Plaintiff's care.

52. Defendants accepted Elizabeth Varner's trust and reliance and so became responsible for Elizabeth Varner's health while residing at the nursing home facility.

53. As a result of aforementioned reliance and trust upon Defendant, Elizabeth Varner's physical, mental and emotional health was placed in the hands of Defendant.

54. Defendant received compensation for the care and treatment they were responsible for providing to Elizabeth Varner during her residency but did not provide that care and treatment.

55. As a direct and proximate result of Defendant's negligence, negligence per se, gross negligence, recklessness, willfulness and wantonness, Plaintiff suffered injuries, including, but not limited to, substantial physical and mental pain and suffering, mental anguish, mental shock and suffering, and wounded feelings.

SIXTH CAUSE OF ACTION
(Wrongful Death)

56. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

57. That as a direct and proximate result of Defendants negligent, willful, wanton, reckless, careless and grossly negligent conduct, by and through their agents, servants, and employees, Elizabeth Varner was severely injured in Defendant's facility.

58. The injuries so inflicted on Elizbeth Varner were the cause of Elizabeth Varner's wrongful death on October 29, 2019.

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SEVENTH CAUSE OF ACTION
(Survival Action)

59. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

60. As a direct and proximate cause of Defendants' negligence, willful, reckless and/or grossly negligent actions and inactions, Elizabeth Varner suffered:

- Excruciating pain;
- Prolonged extreme suffering;
- Acute emotional distress;
- Fear and anxiety;
- Medical bills;
- Mental anguish;
- Loss of enjoyment of life; and
- The agony of death.

61. As a direct and proximate cause of Defendants' negligence, willful, reckless and/or grossly negligent actions and inactions, Elizabeth Varner's heirs suffered:

- Loss of companionship;
- Emotional trauma;
- Loss of comfort and support;
- Psychological and emotional distress;
- Loss of enjoyment of life; and
- Loss of their Mother.

WHEREFORE, Plaintiff demands judgment against Defendants for actual and punitive damages, for the cost of this action, and for other such relief the Court deems just, equitable, and proper.

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PINKSTON LAW FIRM, LLC

/s/ Shawn Pinkston
Shawn Pinkston, SC Bar No. 79965
856 Lowcountry Blvd., Suite 101
Mount Pleasant, South Carolina 29464
Office: 843-814-5472
Fax: 843-723-7300
shawnpinkston@me.com

Date: June 11, 2021
Mount Pleasant, South Carolina

Exhibit C

ELECTRONICALLY FILED - 2021 Jul 16 4:20 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
WILLIAMS HAYNES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH VARNER,	)	CASE NO. 2021-CP-10-02744
PLAINTIFF,	)	
vs.	)	**DEFENDANT JERROLYN MONTGOMERY-SMALLS' ANSWER TO PLAINTIFF'S COMPLAINT**
FUNDAMENTAL ADMINISTRATIVE SERVICES LLC, AND FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, AND JERROLYN MONTGOMERY-SMALLS,	)	
DEFENDANTS.	)	

TO: SHAWN PINKSTON, ESQUIRE, ATTORNEY FOR PLAINTIFF:

The Defendant Jerrolyn Montgomery-Smalls (hereinafter "this Defendant"), by and through her undersigned counsel, *subject to and without waiving any right to compel this matter to arbitration,* responds to the allegations set forth in Plaintiff's Complaint as follows:

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

2. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations contained in Paragraph 1 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

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

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a response is required, those allegations are denied to the extent they assert or imply liability and/or damages as to this Defendant.

4. In responding to the allegations in Paragraph 4 of the Plaintiff's Complaint, this Defendant admits that she was the Administrator of the Facility at times relevant to Plaintiff's Complaint. Any allegations inconsistent with this response are denied and strict proof is demanded thereof.

5. Answering the allegations set forth in Paragraph 5 of Plaintiff's Complaint, this Defendant admits that Plaintiff filed a Notice of Intent to File Suit and attached an Affidavit of Suzanne Frederick, MSN RN-BC, CWCN. This Defendant denies the sufficiency of said affidavit and denies its contents the extent they allege or imply liability and/or damages as to this Defendant. Any allegations inconsistent with this response are denied and strict proof is demanded thereof.

6. Answering to the allegations set forth in Paragraph 6 of Plaintiff's Complaint, this Defendant admits the parties engaged in mandatory pre-suit mediation on June 7, 2021 that resulted in an impasse. The remainder of the allegations set forth in Paragraph 6 of Plaintiff's Complaint call for legal conclusions and therefore no response is required.

7. This allegations set forth in Paragraph 7 of Plaintiff's Complaint call for legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied to the extent they assert or imply liability and/or damages as to this Defendant.

8. The allegations set forth in Paragraphs 8 and 9 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, those allegations are denied to the extent they assert or imply liability

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and/or damages as to this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care to Ms. Varner. Any allegations inconsistent with this response is denied and strict proof is demanded thereof.

9. This Defendant denies the allegations set forth in Paragraph 10 of Plaintiff's Complaint and demands strict proof thereof. To the extent those allegations are directed at other parties, no response is required.

10. The allegations set forth in Paragraphs 11, 12, and 13 of Plaintiff's Complaint, appear to be directed at other parties and therefore no response is required. To the extent a response is required, as the sole licensee of the skilled nursing facility at issue, THI of South Carolina at Charleston, LLC is the sole provider of skilled nursing care and treatment to its residents, including Ms. Varner, and a fee is provided for services related thereto. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care to Ms. Varner. Further responding, this Defendant would crave reference to Ms. Varner's chart for its contents. Any allegations inconsistent with this response or intended to assert or imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof.

11. Answering the allegations set forth in Paragraphs 14, 15, 16, 17, 18, 19, and 20 of Plaintiff's Complaint, this Defendant would crave reference to Ms. Varner's chart and medical records for their contents. Any allegations inconsistent with those contents or which assert or imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care to Ms. Varner. Any allegations inconsistent with this response or which assert or

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imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof.

12. Answering the allegations set forth in Paragraph 21 of Plaintiff's Complaint, this Defendant would crave reference to the Death Certification cited therein for its contents. Any allegations inconsistent with those contents or which assert or imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof.

13. In responding to the allegations set forth in Paragraph 22 of Plaintiff's Complaint, this Defendant would restate its answers to the Paragraphs above as if set forth herein verbatim.

14. The allegations set forth in Paragraph 23 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, those allegations, including all subparts, are denied and strict proof is demanded thereof.

15. In responding to the allegations set forth in Paragraph 24 of Plaintiff's Complaint, this Defendant admits only that Plaintiff has attached a photocopied affidavit of Suzanne Frederick, MSN, RN-BC, CWCN to the Complaint. This Defendant denies the sufficiency of the affidavit and denies any and all allegations and assertions contained therein to the extent they allege liability or damages against this Defendant.

16. This Defendant denies the allegations set forth in Paragraph 25 of Plaintiff's Complaint and demands strict proof thereof.

17. In responding to the allegations set forth in Paragraph 26 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

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18. Answering the allegations set forth in Paragraph 27 of Plaintiff's Complaint, this Defendant admits that she served as the Administrator for the Facility while Ms. Varner was a resident. Further responding, This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person. This Defendant denies any interaction or relationship with the Plaintiff or Plaintiff's decedent of any kind. Any allegations inconsistent with this response are denied and strict proof is demanded thereof.

19. Answering the allegations set forth in the second Paragraph of Plaintiff's Complaint numbered "27", this Defendant asserts that as the sole licensee of the Riverside Health and Rehab, THI of South Carolina at Charleston, LLC owed a duty of care to its residents including Ms. Varner. This Defendant maintains that the care and treatment provided to Ms. Varner was a tall times in compliance with the appropriate standard of care. Any allegations inconsistent with this response or which assert or imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof.

20. This Defendant denies the allegations set forth in Paragraphs 28, 29, 30, 31, and 32 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

21. In responding to the allegations set forth in Paragraph 33 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

22. The allegations set forth in Paragraphs 34, 35, and 36 of Plaintiff's Complaint, including their subparts, call for legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied to the extent they assert or imply liability as to this Defendant.

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23. This Defendant denies the allegations set forth in Paragraphs 37, 38, 39, 40, and 41 of Plaintiff's Complaint and demands strict proof thereof.

24. In responding to the allegations set forth in Paragraph 42 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

25. This Defendant denies the allegations set forth in Paragraph 43 of Plaintiff's Complaint and demands strict proof thereof.

26. In responding to the allegations set forth in Paragraph 44 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

27. The allegations set forth in Paragraphs 45 and 46 of Plaintiff's Complaint call for legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied to the extent they assert or imply liability as to this Defendant.

28. This Defendant denies the allegations set forth in Paragraphs 47, 48, 49, 50, 51, 52, 53, 54, and 55 of Plaintiff's Complaint and demands strict proof thereof.

29. In responding to the allegations set forth in Paragraph 56 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

30. This Defendant denies the allegations set forth in Paragraphs 57 and 58 of Plaintiff's Complaint and demands strict proof thereof.

31. In responding to the allegations set forth in Paragraph 59 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

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32. This Defendant denies the allegations set forth in Paragraphs 60 and 61 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

33. This Defendant denies the allegations set forth in Plaintiff's Prayer for Relief and demands strict proof thereof.

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

35. This Defendant hereby gives notice that Plaintiff's claims against this Defendant should be submitted to arbitration pursuant to a binding arbitration agreement. This Answer is hereby made subject to all rights set forth therein, as well as in the related filing, including the lack of subject matter jurisdiction of this Court.

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

36. Plaintiff's recovery in the matter, if any, is limited by and subject to the provisions of the South Carolina Noneconomic Damages Awards Act of 2005 which is codified at S.C. Code Ann. §15-32-200 et seq., 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

37. This Defendant hereby gives notice that she intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and

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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 and all defenses asserted by the defendant in the case styled and captioned Williams 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, 2021-CP-10-01437 filed in the Court of Common Pleas, Charleston County, to the extent they are applicable.

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

40. This Defendant would allege, upon information and belief, that any injuries or damages sustained by the Plaintiff were due to, caused and occasioned by a natural disease

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process over which the 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

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

45. This Defendant hereby raises election of remedies as an affirmative defense to Plaintiff's claims.

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

47. This Defendant hereby asserts that the Plaintiff lacks legal standing to pursue the instant claims.

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

[Signature block on the following page]

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CLEMENT RIVERS, LLP

By: */s/ D. Jay Davis, Jr.*
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
Gaillard T. Dotterer, III
SC State Bar ID No.: 103620
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com,
mriddle@ycrlaw.com, gdotterer@ycrlaw.com
Attorneys for the Defendant Jerrolyn Montgomery-Smalls

Charleston, South Carolina

Dated: July 16, 2021

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Exhibit D

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASES NO. 2021-CP-10-01437 & -02477
WILLIAM HAYNES, as Personal Representative of the Estate of Elizabeth Varner, Plaintiff, vs. THI OF SOUTH CAROLINA AT CHARLESTON, LLC d/b/a Riverside Health and Rehab, Defendant.	)	**ORDER GRANTING MOTIONS TO COMPEL ARBITRATION AND RELATED MOTIONS TO STAY**
WILLIAM HAYNES, as Personal Representative of the Estate of Elizabeth Varner, Plaintiff, vs. FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; FUNDAMENTAL CLINICIAL AND OPERATIONAL SERVICES, LLC; and JERROLYN MONTGOMERY-SMALLS, Defendants.	)	

This matter is before the Court on four motions (collectively, the "Subject Motions"): one motion in Case 1437[1], namely, the Facility's[2] motion to compel arbitration, and three motions in

[1] "Case 1437" is *Haynes v. THI of South Carolina at Charleston, LLC*, Case No. 2021-CP-10-01437.

[2] The "Facility" is THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab, the defendant in Case 1437.

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Case 2477[3], namely, Ms. Montgomery-Smalls'[4] motion to compel arbitration and FAS[5] and FCOS's[6] motions to stay. All of the Subject Motions were filed on October 4, 2021, and they were all heard together on February 10, 2022, with all parties' respective counsel appearing before the Court via WebEx.

Chief among the Subject Motions are the Facility and Ms. Montgomery-Smalls' substantively identical motions to compel arbitration of the claims asserted against them in Case 1437 and Case 2477, respectively (collectively, the "Motions to Compel Arbitration"). Secondary to those motions are the substantively identical motions of FAS and FCOS to stay Case 2477 pending the final outcome of the Motions to Compel Arbitration and the arbitration proceedings they seek to compel (collectively, the "Motions to Stay"). After careful consideration, the Court GRANTS the Subject Motions. Its reasoning is set forth below.

I.

BACKGROUND

The Facility is a skilled nursing facility. With the help of her son and daughter-in-law, William Haynes ("William") and Kim Haynes ("Kim"), respectively, Elizabeth Varner ("Ms. Varner") was admitted as a resident of the Facility on May 20, 2019. Kim handled the paperwork in conjunction with Ms. Varner's admission, which included an Admission Agreement and an Arbitration Agreement that Kim signed on Ms. Varner's behalf.

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[3] "Case 2477" is *Haynes v. Fundamental Administrative Services, LLC*, Case No. 2021-CP-10-02477.

[4] "Ms. Montgomery-Smalls" is Jerrolyn Montgomery-Smalls, one of the defendants in Case 2477.

[5] "FAS" is Fundamental Administrative Services, LLC, one of the defendants in Case 2477.

[6] "FCOS" is Fundamental Clinical and Operational Services, LLC, one of the defendants in Case 2477.

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By her signature on the Arbitration Agreement, Kim expressly "represent[ed] that . . . she ha[d] authority to sign on [Ms. Varner's] behalf so as to bind [her] as well as [herself]." And, indeed, pursuant to a Durable Financial Power of Attorney executed March 25, 2018 (the "Power of Attorney"), Kim was Ms. Varner's secondary agent. The Power of Attorney, which was effective "[i]mmediately upon [its] execution" and expressly included the power to "[s]ubmit to alternative dispute resolution," authorized Kim to exercise the powers it conferred to Ms. Varner's primary agent, William, in the event he was "unable or unwilling to serve." According to the affidavits they filed on February 8, 2022, on the day Ms. Varner was admitted to the Facility, Kim and William were initially together with the Facility's representative Chandra Bryant ("Ms. Bryant") in the room that was being assigned to Ms. Varner until Kim went with Ms. Bryant to another location (within the Facility) to sign the paperwork while William stayed behind to await Ms. Varner's arrival.

Plaintiff[7] filed Case 1437 and Case 2477 on March 25, 2021, and June 11, 2021, respectively, asserting claims arising out of alleged deficiencies in Ms. Varner's care/treatment at the Facility. As for the relationship between the subject matter of the two cases, although Plaintiff ended up withdrawing the motion, his motion to consolidate (filed in Case 2477 on August 16, 2021) states that Case 1437 and Case 2477 "concern the same underlying facts and have factual and legal questions in common."

Defendants[8] timely answered the respective lawsuits, subject to and without waiving any right to compel the matter to arbitration, denying the liability Plaintiff alleged and raising a number of affirmative defenses.

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[7] "Plaintiff" is William in his capacity as personal representative of Ms. Varner's estate, who is the plaintiff in both Case 1437 and Case 2477.

[8] "Defendants" are the Facility, FAS, FCOS, and Ms. Montgomery-Smalls, collectively.

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Citing the Arbitration Agreement, the Motions to Compel Arbitration ask the Court to compel Plaintiff's claims against the Facility and Ms. Montgomery-Smalls to arbitration. Citing the Motions to Compel Arbitration, the Motions to Stay ask the Court to stay Case 2477 pending the ultimate outcome of the Motions to Compel Arbitration, i.e., until arbitrability is finally determined and any arbitration proceedings resulting from that determination are themselves finally concluded.

II.

ANALYSIS

A. Re: the Motions to Compel Arbitration

The core question here is this: Is the Arbitration Agreement (which Kim signed for Ms. Varner) enforceable against Ms. Varner's estate (i.e., Plaintiff) even though it was not signed by Ms. Varner herself? For two reasons, the Court answers this question in the affirmative: (1) the Arbitration Agreement was properly signed by Kim for Ms. Varner pursuant to Kim's authority under the Power of Attorney, and (2) the Arbitration Agreement is enforceable against Plaintiff—or, more precisely, Plaintiff is estopped to deny that the Arbitration Agreement is enforceable—by virtue of merger and equitable estoppel. Thus, since Plaintiff's claims against the Facility and Ms. Montgomery-Smalls are clearly within the scope of the Arbitration Agreement, they should proceed in arbitration, not litigation. The Court's findings/analytical steps in reaching this conclusion follow.

1. Both state and federal policy favor arbitration.

There is a "strong South Carolina and federal policy favoring arbitration . . . ." *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 877 (Ct. App. 2020); *see also 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."). Indeed,

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"arbitration agreements are *presumed valid*." *Doe*, 430 S.C. at 607, 846 S.E.2d at 877 (emphasis added).

2. The Arbitration Agreement is governed by the FAA[9].

The Arbitration Agreement is governed by the FAA, not South Carolina's Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10 to -240 (the "SCAA"). 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.

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

[9] The "FAA" is the Federal Arbitration Act, 9 U.S.C §§ 1–16.

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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).

3. 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"[10] and "ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). To that end, the FAA provides that an arbitration 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.*

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[10] *Allied–Bruce*, 513 U.S. at 270.

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Concepcion, 563 U.S. 333, 339 (2011)). Under the FAA, "courts *must* place arbitration agreements on *equal footing with other contracts* . . . ." *Concepcion* at 339 (emphasis added); *see also Allied–Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted).[11]

4. The Arbitration Agreement is valid on its face.

The Arbitration Agreement is valid on its face. In other words, there is nothing within the four corners of the document itself that calls its validity into question. It bears Kim's signature on behalf of Ms. Varner, along with her express representation that she is authorized to sign for her.[12] It is countersigned by Ms. Bryant for the Facility. It is duly supported by consideration and sets forth all necessary terms, containing, as it does, the parties' mutual promises to submit a certain

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[11] 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 *favored* treatment of arbitration agreements relative to other contracts.

[12] By virtue of her signature, Kim is "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement, *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms."), including, of course, the express representation therein of her authority to act on Ms. Varner'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 Kim is no less bound by this covenant than the Facility.

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defined scope of disputes to binding arbitration[13] before an arbitrator who is either agreed upon by the parties themselves or selected by the Court, in a proceeding to be conducted pursuant to the South Carolina ADR Rules, which will result in a decision that is enforceable in a court of competent jurisdiction.[14] To require more just because an arbitration agreement is in issue would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *Concepcion*, 563 U.S. at 339.

Moreover, the Arbitration Agreement is not unconscionable. For an agreement to be deemed unconscionable, there must be both (1) an absence of meaningful choice on the part of one 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 first part of the test (absence of meaningful choice) is undermined by the express acknowledgement in the Arbitration Agreement itself that the "Resident/Representative is not required to use the . . . Facility for Resident's healthcare needs and . . . 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 undermined by the fact that the Arbitration Agreement itself was not required for admission to the Facility.

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

[14] In this regard, the Court would note that the South Carolina ADR Rules, which do apply to the conduct of arbitration proceedings under the Arbitration Agreement, should not be confused with the SCAA, which, as addressed above (in explaining the applicability of the FAA), does not apply here.

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But even assuming, *arguendo*, the first part of the test were somehow met, the second part (unreasonably oppressive terms) certainly is not. The Arbitration Agreement simply binds the parties (both sides) to resolve disputes via arbitration, which is something that is expressly favored as a matter of both state and federal policy. *Parsons*, 418 S.C. at 6, 791 S.E.2d at 131; *Doe*, 430 S.C. at 607, 846 S.E.2d at 877. And there is nothing about the Arbitration Agreement—which, again, calls for arbitration conducted pursuant to the South Carolina ADR Rules—that would suggest it is not geared towards achieving an unbiased decision by a neutral decision-maker. *Simpson*, 373 S.C. 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."). Indeed, Rule 1 of the South Carolina ADR Rules expressly states, "These rules shall be construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply."

5. Plaintiff's claims are within the scope of the Arbitration Agreement.

Without question, Plaintiff's claims against the Facility and Ms. Montgomery-Smalls 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.

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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.").

6. The Arbitration Agreement covers Plaintiff's claims against both the Facility and Ms. Montgomery-Smalls.

The Arbitration Agreement expressly states that it not only covers the Facility itself but also the Facility's "agents, employees, and servants." Plaintiff's complaint in Case 2477 alleges that, "at all times relevant herein [Ms. Montgomery-Smalls] was the Administrator of [the Facility]." Accordingly, the Arbitration Agreement covers Plaintiff's claims against both the Facility and Ms. Montgomery-Smalls.

7. The Arbitration Agreement is valid and enforceable because it was properly signed by Kim for Ms. Varner pursuant to Kim's authority under the Power of Attorney.

A person possessing contractual capacity, acting as grantor, can authorize another to contract on the grantor's behalf under the specific terms of a power of attorney. *See Gaddy v. Douglass*, 359 S.C. 329, 344–45, 597 S.E.2d 12, 20 (Ct. App. 2004); *see also Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014) ("A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. The written authorization itself is the power of attorney.") (quoting *In re Thames*, 344 S.C. 564, 569, 544 S.E.2d 854, 856 (Ct. App. 2001)) (internal quotation marks omitted). "[T]he holder of

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[the] power of attorney steps into the shoes of the grantor and is basically the alter ego of the grantor." *Bennett v. Carter*, 421 S.C. 374, 382, 807 S.E.2d 197, 201 (2017).

The Power of Attorney was duly executed on March 25, 2018, and became effective immediately upon its execution. The Power of Attorney expressly included the power to "[s]ubmit to alternative dispute resolution." And while, as secondary agent, Kim's authority under the Power of Attorney was contingent upon William being "unable or unwilling to serve," this contingency came to pass due to William's desire to wait in Ms. Varner's room for her arrival. Accordingly, when she signed the Arbitration Agreement for Ms. Varner in May of 2019, Kim was properly acting within the scope of her authority under the Power of Attorney.

8. Plaintiff is precluded from denying the enforceability of the Arbitration Agreement because of merger and equitable estoppel.

Even though Ms. Varner is a nonsignatory to the Arbitration Agreement, i.e., even though she did not actually sign the Arbitration Agreement herself, it is nonetheless enforceable against her/her estate (i.e., Plaintiff).

"South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel." *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (confirming the validity of the general proposition of law on which the appellants based their merger/equitable estoppel argument: "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

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course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.").

Conceptually, the Facility and Ms. Montgomery-Smalls' merger/equitable estoppel argument is not about showing that the Arbitration Agreement is enforceable but about showing that Plaintiff is estopped to deny that the Arbitration Agreement is enforceable. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and, Ms. Varner having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff (who stands in place of Ms. Varner in bringing these actions as the personal representative of her estate) is estopped to deny the enforceability of the Arbitration Agreement with which the Admission Agreement merged. Accordingly, counterarguments aimed at denying the Arbitration Agreement's enforceability (e.g., arguments based on a supposed lack of authority to sign the Arbitration Agreement on behalf of Ms. Varner) are beside the point and unavailing.

As explained below, the Court finds that the Arbitration Agreement is also enforceable against Plaintiff based on merger and equitable estoppel.

Merger

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

> Appellants contend that even if Sister lacked capacity to execute the 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,

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> The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
>
> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.*

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

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,"[15] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[16] evidence exists 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," 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.

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15 *Id.* at 355, 755 S.E.2d at 455.

16 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 [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).

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It must be remembered that, where, as here, the instruments in question (i.e., the Admission Agreement and the Arbitration Agreement) were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For this presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the circumstances that gave rise to the merger presumption in the first place (same time, parties, purpose, and transaction)—can 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.

Although the Admission Agreement does contain an "Entire Agreement" clause, it does not refer to the Arbitration Agreement as a separate contract but rather expressly states, "other Admissions materials . . . are made a part of this Agreement by reference herein." Clearly, 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) (recognizing "admission documentation" to include an arbitration agreement: "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). This directly contradicts the notion of any intended "separatedness" (in the parlance of the *Coleman* Court[17]) between the Admission Agreement and the Arbitration Agreement.

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[17] 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).

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While the Arbitration Agreement was not required for Ms. Varner's admission to the Facility, all this means is that the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become part of the admissions materials once it was in fact executed, which, without question, it was—and under the very circumstances (same time, parties, purpose, and transaction) that give rise to the presumption of merger. In other words, even though the Arbitration Agreement was not a *condition* of admission, it was certainly agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument, governing various interrelated aspects of Ms. Varner's relationship with the Facility: the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission.

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). 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. Unlike the Admission Agreement, which theoretically could have stood on its own in the absence of the Arbitration Agreement—and, of course, had the Arbitration Agreement not been executed, it simply would not exist and no question of merger would have arisen to begin with—the Arbitration Agreement could not have stood on its own: It only makes sense together with, i.e., connected to, the Admission Agreement, which is its sole reason for being.

That the Admission Agreement and the Arbitration Agreement have their own titles and are separately paginated and signed admits of no reasonable inference of an intent contrary to

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merger. To point to such things is to do no more than to observe 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 even assuming, *arguendo*, there is some ambiguity in this regard, to fall back on the idea that it should be construed against the Facility as the drafter is uncalled for in this context. *Merger is the default position*, i.e., it is presumed, and this is so because of the confluence of a particular set of circumstances—the instruments at issue were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these stars align—same time, same parties, same purpose, same transaction—our law instructs the Court to consider and construe the instruments 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.

Equitable Estoppel

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement by virtue of

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the direct benefits test our Supreme Court endorsed in *Wilson*. *See* 426 S.C. at 340, 827 S.E.2d at 175 ("Under direct benefits estoppel, '[a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when [the nonsignatory] receives a direct benefit from a contract containing an arbitration clause.'"") (quoting *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012)) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)); *id.* ("'In the arbitration context, the doctrine [of direct benefits estoppel] 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.*'") (emphasis in original) (quoting *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601) (quoting *Int'l Paper*, 206 F.3d at 418).

The *Wilson* Court favorably discussed the application of the direct benefits test in the arbitration agreement context—the Court of Appeals having applied the test in the decision then before the *Wilson* Court on writ of certiorari, which test the Court of Appeals had earlier applied to find a nonsignatory estopped to deny the validity of an arbitration agreement in *Pearson*, 400 S.C. 281, 733 S.E.2d 597, and under which test the Facility and Ms. Montgomery-Smalls contend Plaintiff is estopped to deny the validity of the Arbitration Agreement here. *See 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).

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Without question, Ms. Varner received direct benefits from the Admission Agreement throughout her residency at the Facility, including, without limitation, the room, board, care/treatment she received therein. To deny her receipt of such benefits is illogical and objectively unreasonable and would require wholly discrediting the entirety of her residency: every meal, every instance of care/treatment she received, essentially every moment at the Facility—even Plaintiff's complaints do not go nearly so far as that. Ms. Varner having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff cannot now deny the enforceability of the Arbitration Agreement with which the Admission Agreement merged.

9. Neither the Facility nor Ms. Montgomery-Smalls waived any arbitration rights.

Waiver is the voluntary relinquishment of a known right. When timely answering Plaintiff's complaints, the Facility and Ms. Montgomery-Smalls expressly reserved their arbitration rights. Moreover, Case 2477 was filed some three months after Case 1437, and by virtue of his now-withdrawn motion to consolidate, Plaintiff acknowledges that the cases "concern the same underlying facts and have factual and legal questions in common." There was no undue delay in moving to compel arbitration; nor was there any prejudice from any supposed delay; nor did either the Facility or Ms. Montgomery-Smalls make any use of the tools of litigation inconsistent with their arbitration rights.

B. Re: the Motions to Stay

The relationship between the Motions to Compel Arbitration and the Motions to Stay is such that the grant of the former requires the grant of the latter. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to

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arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.") (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties."). But even assuming, *arguendo*, staying Case 2477 is not mandatory here, for the sake of judicial economy, of avoiding piecemeal litigation and the potential for inconsistent obligations, and of the orderly administration of its own docket, the Court exercises its discretion to impose such a stay. *See State v. Langford*, 400 S.C. 421, 435, 735 S.E.2d 471, 478 (2012) ("[A] court's power to hear and decide cases 'carries with it the inherent power to control the order of its business.'") (quoting *Williams v. Bordon's*, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980)); *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) ("The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement."). Indeed, as stated in Plaintiff's now-withdrawn motion to consolidate Case 1437 with Case 2477, "[i]t is in the interest of efficiency and judicial economy to consolidate these actions as aforesaid and avoid duplicative discovery and trials." These interests likewise support staying Case 2477.

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III.

CONCLUSION

The Subject Motions are hereby GRANTED. Case 1437 is stayed in favor of arbitration between Plaintiff and the Facility. Case 2477 is stayed in favor of arbitration between Plaintiff and Ms. Montgomery-Smalls, with Plaintiff's claims against FAS and FCOS stayed pending the ultimate outcome of arbitration between Plaintiff, the Facility, and Ms. Montgomery-Smalls.

IT IS SO ORDERED.

_____

ROGER M. YOUNG, SR., Presiding Judge
Court of Common Pleas
Charleston County

Charleston, South Carolina

Dated: _____

ELECTRONICALLY FILED - 2022 Feb 24 2:14 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1001437

Charleston Common Pleas

Case Caption: William Haynes , plaintiff, et al VS Thi Of South Carolina At Charleston , defendant, et al

Case Number: 2021CP1001437

Type: Order/Compel

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

Exhibit E

FACILITY - RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT

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

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

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

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

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

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

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

Resident/Representative Signature — Date

Printed Name of Resident/Representative

Authorized Agent of Facility — Date

Riverside Health & Rehab
printed name of facility

Original: Business File • Photocopy: Resident/Representative

Exhibit F

STATE OF SOUTH CAROLINA	)	IN THE MATTER OF ARBITRATION
	)	
COUNTY OF CHARLESTON	)	
	)	
WILLIAM HAYNES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH VARNER,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	**ARBITRATION ORDER**
	)	
THI OF SOUTH CAROLINA AT CHARLESTON, LLC D/B/A RIVERSIDE HEALTH AND REHAB AND JERROLYN MONTGOMERY-SMALLS,	)	
	)	
DEFENDANTS.	)	

It appearing that the Honorable Doyet A. Early, III has been appointed and agreed to serve as arbitrator in this case, and that the above parties have agreed and stipulated to the following items herein, it is hereby ordered as follows:

1. Judge Early shall serve as the arbitrator of the claims and defenses raised in the complaint and answer filed in the above state court matter.

2. The arbitrator shall be paid $350 per hour plus his costs and these shall be split equally between the parties.

3. Judge Early shall be accorded judicial immunity in relation to his role as arbitrator in this matter.

4. The parties will conduct reasonable discovery that is reasonably tailored to the issues of the claim. The parties agree that the arbitrator can look to the South Carolina Rules of Civil Procedure and Evidence for guidance in resolving any disputes between the parties related to procedure or discovery.

5. Plaintiff shall provide an executed HIPAA authorization/release form for medical records to Defendant by September 9, 2022.

6. The parties shall produce to the other side any record they intend to use in the arbitration of this matter or with the examination of any witness to be deposed. Said records shall be produced on or before March 20, 2023, or three days prior to any scheduled deposition, if the documents are to be used in deposition.

7. Plaintiff agrees to provide medical records and bills for the resident and Defendant agrees to provide a copy of the facility chart for the resident including any bills for the resident.

8. All records and documents produced in this matter will be held confidential and only be used for purposes of this arbitration. The parties agree to return, upon written request, any documents produced to them during this arbitration at the conclusion of the arbitration and related appeals, if any. In the absence of any such request for return, the parties agree to destroy all such documents as soon as reasonably practicable and as permitted under applicable law following the conclusion of the arbitration and related appeals, if any. The parties and arbitrator agree that the proceeding, any related discovery, and the decision of the arbitrator shall be treated as confidential. However, during the course of the arbitration of this matter, records and documents may be shared with expert witnesses or other witnesses so long as they are advised of the confidentiality and the person's agreement to be bound to the confidentiality stipulation herein.

9. Plaintiff will disclose his experts by September 12, 2022 and will make those experts available for deposition on or before October 1, 2023.

10. Defendant will disclose its experts by October 20, 2023 and will make those experts available for deposition on or before November 20, 2022.

11. The parties shall bear the costs of their own expert witness fees and all costs related to the preparation for their experts' depositions, as well as the preparation and presentation of their respective cases at the arbitration hearing. Opposing counsel shall bear the costs of expert witness fees incurred for time during expert depositions.

12. Should any disputes arise regarding depositions, discovery, or any other related discovery matters, the parties agree to submit to the arbitrator for resolution. Any dispute regarding these depositions, discovery, or any other related discovery matters, shall be resolved by the arbitrator pursuant to the South Carolina Rules of Civil Procedure, South Carolina law, and the FAA.

13. Subject to the limitations and deadlines set herein, the parties may pursue discovery through the latter of March 20, 2023 or by consent at any time.

14. The parties agree to exchange a list of witnesses to be called live or by deposition at the hearing and a list of any exhibits to be used at the arbitration hearing ten (10) business days in advance of the hearing.

15. The parties may submit pre-hearing briefs to the arbitrator, so long as copies are served on opposing counsel at the same time.

16. On or before March 20, 2023, the parties will have a conference with the arbitrator prior to trial to agree upon the procedures applicable to the arbitration.

17. The parties may agree to amend any deadline, provision, or conduct additional discovery by consent.

18. Arbitration shall be conducted the week of April 3, 2023.

19. The arbitrator shall issue written findings of fact or conclusions of law.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

9-15-22

AND IT IS SO ORDERED

The Honorable Doyet E. Harly, III

We Consent:

PINKSTON LAW FIRM, LLC

By: _____

Shawn Pinkston
856 Lowcountry Blvd., Suite 101
Mount Pleasant, South Carolina 29464
Office: 843-814-5472
Fax: 843-723-7300
shawnpinkston@me.com
Attorney for the Plaintiff

We Consent:

CLEMENT RIVERS, LLP

By: _____

D. Jay Davis, Jr.
James D. Gandy
Matthew O. Riddle
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com; tgandy@ycrlaw.com; mriddle@ycrlaw.com
CLEMENT RIVERS, LLP
Attorneys for Defendants THI of South Carolina, LLC d/b/a Riverside Health and Rehab and Jerrolyn Montgomery-Smalls

Exhibit G

State of South Carolina)
) Arbitration Order
County of Charleston.)

William Hayes, as Personal Representative
of the Estate of Elizabeth Varner, Plaintiff.
vs.
THI of South Carolina at Charleston LLC
D/B/A Riverside Health and Rehab and
Jerrolyn Montgomery-Smalls, Defendants.

By order of the Honorable Roger M. Young,Sr. this case was to be decided by arbitration. By Arbitration Order dated September 15, 2022, the parties agreed I would serve as Arbitrator. The arbitration was conducted on April 3, 2023 and concluded on April 6, 2023. All parties were present and represented by counsel. Each side presented fact and expert witnesses in support of their respective claims and defenses. A complete copy of the relevant medical records were introduced into the proceeding.
Notwithstanding section 19 of the Arbitration Order which required me to issue written findings of facts or conclusions of law, the parties by agreement requested a succinct order without these findings.
I find the Plaintiff proved by the preponderance of the evidence the defendant, THI, breached the standard of care in regards to the manner in which they transferred Mrs.

Varner, failing to comply with the care plan they had ordered for her. This deviation was the proximate cause of the fracture she sustained to her distal femur and the medical care and surgery necessitated by the fracture.

Her estate is entitled to the reasonable and necessary medical expenses associated with the fracture. The evidence proved $77,007.00 of medical expenses related to the fracture. The only other evidence of compensable damages was for pain and suffering from the fracture. Because of her deteriorated medical condition there was no evidence of loss of enjoyment of life or emotional distress. It was difficult to differentiate between pain and suffering caused by the fracture and her overall condition. The fracture occurred on or about October 6, 2019 and she suffered with it until her cardiac arrest on or about October 27, 2019. I award Plaintiff $10,000.00 for pain and suffering.

I find the Plaintiff failed to prove by the preponderance of the evidence Mrs. Varner's cardiac arrest and death were proximately caused by the fracture.

I find the Plaintiff failed to prove by clear and convincing evidence that any of the defendants acted reckless,willful or with a conscious disregard of Mrs. Varner's care, therefore I award no punitive damages.

IT IS THEREFORE ORDERED Plaintiff is awarded judgement against the defendant THI of South Carolina at Charleston LLC D/B/A Riverside Health and Rehab in the amount of $87,007.00.

D.A. EarlyIII
Arbitrator

May16,2023

Exhibit H

-----Original Message-----
From: Jack Early <jackearly1@gmail.com>
Sent: Friday, May 26, 2023 10:51 AM
To: Riddle, Matthew <MRiddle@ycrlaw.com>; shawnpinkston@me.com
Subject: State of South Carolina).

State of South Carolina).

Supplemental
) Arbitration Order
County of Charleston.)

William Hayes, as Personal Representative of the Estate of Elizabeth Varner, Plaintiff.
vs.
THI of South Carolina at Charleston LLC
D/B/A Riverside Health and Rehab and
Jerrolyn Montgomery-Smalls, Defendants.

By order of the Honorable Roger M. Young,Sr. this was to be decided by arbitration. By Arbitration Order dated September 15, 2022, the parties agreed I would serve as Arbitrator. The arbitration was conducted on April 3, 2023 and concluded on April 6, 2023. All parties were present and represented by counsel. Each side presented fact and expert witnesses in support of their respective claims and defenses. A complete copy of the relevant medical records were introduced into the proceeding.
Notwithstanding section 19 of the Arbitration Order which required me to issue written findings of facts or conclusions of law, the parties by agreement requested a succinct order without these findings.
I find the Plaintiff proved by the preponderance of the evidence the defendant, THI, breached the standard of care in regards to the manner in which they transferred Mrs. Varner, failing to comply with the care plan they had ordered for her. This deviation was the proximate cause of the fracture she sustained to her distal femur and the medical care and surgery necessitated by the fracture.
Her estate is entitled to the reasonable and necessary medical expenses associated with the fracture. The evidence proved $77,007.00 of medical expenses related to the fracture. The only other evidence of compensable damages was for pain and suffering from the fracture. Because of her deteriorated medical condition there was no evidence of loss of enjoyment of life or emotional distress. It was difficult to differentiate between pain and suffering caused by the fracture and her overall condition. The fracture occurred on or about October 6, 2019 and she suffered with it until her cardiac arrest on or about October 27, 2019. I award Plaintiff $10,000.00 for pain and suffering.
I find the Plaintiff failed to prove by the preponderance of the evidence Mrs. Varner's cardiac arrest and death were proximately caused by the fracture.
I find the Plaintiff failed to prove by clear and convincing evidence that any of the defendants acted reckless,willful or with a conscious disregard of Mrs. Varner's care, therefore I award no punitive damages.
IT IS THEREFORE ORDERED Plaintiff is awarded judgement against the defendant THI of South Carolina at Charleston LLC D/B/A Riverside Health and Rehab in the amount of $87,007.00.

D.A. EarlyIII
Arbitrator

May16,2023

Subsequent to issuing the original order, the parties requested a specific finding of liability as to the defendant, Jerrolyn Montgomery-Smalls.
I find the Plaintiff failed to prove by the preponderance of the evidence that defendant Montgomery-Smalls deviated from the standard of care in her care of or investigation of the fall.

Therefore Plaintiff is not entitled to judgement against Jerrolyn Montgomery-Smalls.

D.A.Early III
May 26, 2023

Sent from my iPad

Exhibit I

0000292070 PINKSTON LAW FIRM LLC 04-09-2024 0000025087

BU-VOUCHER-ID COMMENT	INVOICE NUMBER	INVOICE DATE	GROSS AMOUNT	FACILITY	DISCOUNT TAKEN	PAID AMOUNT
11004 00060875	1	03-27-2024	87,007.00		0.00	87,007.00
E/O Elizabeth Varner / arbitration award.				11004-Fundamental Administrati		

0001

TOTAL GROSS AMOUNT	TOTAL DISCOUNT TAKEN	TOTAL PAID AMOUNT
87,007.00	0.00	87,007.00

THIS CHECK IS VOID IF GREEN PANTOGRAPH AND MICROPRINTING ARE ABSENT

86-105/1031 **Payable through Bank of Oklahoma, Bartlesville, OK** 0000025087
Transit No. Routing Symbol: 86-105/1031

Pay Date: 04-09-2024 **Pay Amount:** **********$87,007.00

CHECK NOT VALID AFTER 180 DAYS

Pay ****EIGHTY-SEVEN THOUSAND SEVEN AND 00/100 DOLLARS****

To The Order Of

PINKSTON LAW FIRM LLC
SUITE C117
295 SEVEN FARMS DRIVE
CHARLESTON SC 29492

Ken Tabler

⑈0000025087⑈ ⑆103101055⑆309060549⑈

Exhibit J

ELECTRONICALLY FILED - 2024 Feb 12 4:16 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1001437

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner, Plaintiff, v. Fundamental Administrative Services LLC, And Fundamental Clinical and Operational Services, LLC, and Jerrolyn Montgomery-Smalls. Defendants.	IN THE COURT OF COMMON PLEAS CASES NO. 2021CP-1001437 & 1002744 **FINAL ORDER**
STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner, Plaintiff, v. THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab, Defendant.	

THIS MATTER is before the Court on a Petition for a Final Order filed by Plaintiff. Based on the Petition and the proof of ADR submitted on May 23, 2023, this Court hereby enters and incorporates by reference the Confidential Arbitration Order issued by Doyet A. Early, III, on May 16, 2023.

THEREFORE, this Court GRANTS Plaintiff's Petition and enters a Final Order in this matter relating to arbitration and lifts the corresponding stays associated with case CAFN: 2021CP1002744.

AND IT IS SO ORDERED.

[*Electronic Signature Page to Follow*]

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ELECTRONICALLY FILED - 2024 Feb 12 4:16 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1001437

Charleston Common Pleas

Case Caption:	William Haynes , plaintiff, et al VS Thi Of South Carolina At Charleston , defendant, et al
Case Number:	2021CP1001437
Type:	Order/Other

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

ELECTRONICALLY FILED - 2024 Sep 08 4:56 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CIVIL ACTION NO.: 2021CP-1002744
)	
Williams Haynes, as Personal)	
Representative of the Estate of Elizabeth)	**PLAINTIFF'S MEMO IN OPPOSITION**
Varner,)	**TO DEFENDANTS MOTION FOR**
Plaintiff,)	**SUMMARY JUDGMENT**
v.)	
)	
Fundamental Administrative Services, LLC,)	
Fundamental Clinical and Operational)	
Services, LLC, and Jerrolyn)	
Montgomery-Smalls.)	
)	
Defendants.)	

Exhibit I

COMES NOW William Haynes, as Personal Representative of the Estate of Elizabeth Varner ("Plaintiff"), and files this Memorandum in Opposition to Defendants' Motion for Summary Judgment, showing this Court as follows:

STATEMENT OF FACTS

Plaintiff William Haynes ("Plaintiff") is the Personal Representative for the Estate of Elizabeth Varner, who was admitted as a resident at Riverside Health and Rehab ("Riverside") on May 20, 2019. Jerrolyn Montgomery-Smalls ("Defendant Smalls") was the Administrator at the time Elizabeth Varner's residency and throughout her admission. Plaintiff filed the instant lawsuit on June 11, 2021, alleging corporate negligence, joint venture, alter ego/piercing the corporate veil, neglect of a vulnerable adult, wrongful death, and survivorship. The Complaint alleges Fundamental Administrative Services LLC ("Defendant FAS"), Fundamental Clinical and Operational Services LLC ("Defendant FCOS"), and Defendant Smalls were engaged in a joint venture to manage and control the operations of THI of South Carolina d/b/a Riverside Health and Rehab ("Riverside") and that these defendants were negligent in said management and operations. A companion lawsuit was filed against Riverside, alleging negligence, wrongful death, and

ELECTRONICALLY FILED - 2024 Sep 08 4:56 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

survivorship against the employees of Riverside. *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,* CAFN: 2021CP1001437.

Riverside moved to Compel Arbitration against all claims asserted against it while FAS and FCOS moved to stay the litigation pending resolution of any court-ordered arbitration. Plaintiff argued all Defendants (Riverside, Smalls, FCAS, and FOS) should be included in the arbitration if the Motion to Compel was granted. Defendants FCAS and FOS argued directly against being compelled to arbitrate. Defendant Smalls argued she was entitled to arbitration because she was an employee of Riverside and the allegations against Riverside necessarily included her as an employee.

A hearing was held on February 10, 2022, before the Honorable Roger M. Young, Sr. During the hearing and in support of their Motions for Stay, counsel for Defendants specifically stated the allegations against FAS and FCOS were separate and distinct. Judge Young granted Riverside's (and by extension Defendant Smalls as an employee) Motion to Compel Arbitration on February 24, 2022, along with Defendants FAS and FCOS Motions to Stay all matters in the instant lawsuit. The only issues compelled to arbitration were those involving Case No. 1437 and Defendant Smalls in her role as an employee of Riverside. "Case 2477 is stayed in favor of arbitration between Plaintiff and Ms. Montgomery-Smalls, with Plaintiff's claims against FAS and FCOS stayed pending the ultimate outcome of arbitration between Plaintiff, the Facility, and Ms. Montgomery-Smalls." Order Compelling Arbitration, p. 20. Again, the claims in Case No. 1437 involved employee negligence and vicarious liability; the claims in this lawsuit involve corporate negligence claims.

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Riverside, Defendant Smalls, and Plaintiff engaged in arbitration from April 3-6, 2023, that encompassed the allegations of employee negligence and vicarious liability. Proof of ADR was filed on May 23, 2023, and a Final Order was entered by the Honorable Roger M. Young, Sr., on February 12, 2024, regarding arbitration. The Order also lifted the corresponding stays involving this lawsuit.

ARGUMENT AND CITATION TO AUTHORITY

"[A] stay is a stopping." Graham v. Graham, 301 S.C. 128, 130 (Ct. App. 1990). A stay refers to a judicial order to temporarily halt a proceeding. Black's Law Dictionary.

"The Morrows correctly assert that the theory of vicarious liability is different than the theory of direct corporate liability....[T]he two theories of vicarious liability and corporate liability can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other." Morrow v. Fundamental Long-Term Care Holding, LLC, 412 S.C. 534, 538 (2015)

Defendants' central contention is the issues claimed in the instant lawsuit were fully litigated, or could have been litigated, in the arbitration. This argument is contradictory to previous arguments put forth by Defendants to Judge Young, contrary to the holding in Morrow, and legally inconsistent with the stays requested by these Defendants. Essentially, Defendants are arguing they should receive some benefit from the arbitration even though they moved for and were granted stays that excluded their participation in arbitration. Put simply, Defendants' arguments are disingenuous, frivolous, and are an unnecessary waste of Court resources.

I. Summary Judgment is inapplicable to the corporate negligence claims asserted against FCAS, FOS, and necessarily involve Defendant Smalls.

Defendants FOS, FCAS, and Smalls are not entitled to pursue summary judgment on any of the corporate negligence claims for two reasons: 1) Our Supreme Court's holding in Morrow, which specifically rejected Defendants' argument; and 2) The corporate negligence claims asserted

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against these Defendants in the instant case were stayed at Defendants' request and Plaintiff was barred from litigating them at arbitration. In essence, Plaintiff was stopped from proceeding on his corporate negligence claims in this lawsuit. Defendants specifically argued they were not subject to the arbitration agreement, they were separate and distinct entities from Riverside and its employees, they were not third-party beneficiaries of the arbitration agreement, and they were not in privity with the parties to the arbitration agreement.

Based on the grounds asserted by Defendants, the corporate negligence claims in this lawsuit were not subject to arbitration by virtue of the stays. There is no confusion regarding that issue based on the Order Compelling Arbitration – the corporate negligence claims in this lawsuit were stayed pending arbitration of those claims asserted against Riverside and those involving Defendant Smalls as an employee of Riverside. Defendants are essentially arguing that all claims against them could have, and should have, been brought in arbitration. However, the imposition of stays at the request of these Defendants prohibited any of these claims from being brought in arbitration. Alternatively, Defendants are also arguing the arbitration Order effectively gives them the right to pursue summary judgment on the corporate negligence claims even though the issues addressed in arbitration did not involve those claims. This argument is in direct opposition to the holding in Morrow and Defendants' previous arguments to Judge Young.

Our Supreme Court addressed the exact issue argued by these same Defendants in Morrow, where Defendants argued the allegations of corporate negligence were to be bifurcated from allegations of negligence against its skilled nursing facility. Counsel went on to candidly admit that if the allegations against the nursing home were unsuccessful, the corporate entities would be entitled to summary judgment on the corporate negligence claims. Morrow, 412 S.C. at fn.1. This argument was rejected by our Supreme Court:

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The Morrows alleged the Fundamental Entities were vicariously liable for the negligence of Magnolia Place, and furthermore were directly responsible for Lawrence's injuries by way of their conscious disregard for his health in underfunding Magnolia Place, which led to issues with staffing, training, and nutrition.

The Fundamental Entities thereafter filed a motion to bifurcate the trial pursuant to Rule 42(b), SCRCP between the nursing home negligence claims and the corporate negligence claims, and further, to stay discovery related to the corporate negligence claims. The Fundamental Entities argued bifurcation was proper because the issues of nursing home negligence and corporate negligence were distinct, and the Morrows could only move forward on the corporate negligence claims if they were first successful against Magnolia Place.

The Morrows correctly assert that the theory of vicarious liability is different than the theory of direct corporate liability. See Martin C. McWilliams, Jr. & Hamilton E. Russell, III, Hospital Liability for Torts of Independent Contractor Physicians, 47 S.C. L. Rev. 431 (1996). Vicarious liability attaches to a parent company or employer as the result of negligence on behalf of its employees, such as through the doctrine of respondeat superior. Id. at 439. **Conversely, direct corporate liability attaches due to a breach of a duty which runs directly between a parent company and a patient, arising from negligence in actions such as leaving a hospital underfunded, understaffed, or undertrained so as to provide substandard care**. Id. at 462. **Accordingly, the two theories of vicarious liability and corporate liability can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other.** See Scampone v. Highland Park Care Ctr., 618 Pa. 363, 57 A.3d 582, 596–600 (2012) (holding that claims of vicarious liability and direct liability could be brought either concomitantly or alternately in case against nursing home); see also Montgomery Health Care Facility, Inc. v. Ballard, 565 So.2d 221, 225–26 (Ala.1990) (finding parent corporation of nursing home could be held liable for patient's death where corporation controlled day-to-day operations of home); cf. Forsythe v. Clark USA, Inc., 224 Ill.2d 274, 309 Ill.Dec. 361, 864 N.E.2d 227, 237 (2007) (recognizing direct corporate liability as a valid theory of recovery in the context of workplace accidents).

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> The order treats these claims as based solely on vicarious liability that can be tried only after a finding of negligence on the part of Magnolia Place, when instead they are grounded in direct corporate liability which follows independent, albeit interconnected, duties owed to the Morrows. By considering the Morrow's claims against the Fundamental Entities as dependent upon their claim against Magnolia Place, the trial court's order effectively grants the Fundamental Entities potential summary judgment on the issues of direct corporate liability.
>
> The effect of this order is to prevent the Morrows from being architects of their own complaint, and deprives them of bringing their case against the defendant of their own choosing. See Neeltec Enters., Inc., v. Long, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012) ("The right of the plaintiff to choose her defendant is a substantial right within the meaning of [section 14–3330(2)(a)]").

Id. at 536-539(emphasis added).

As our Supreme Court noted in Morrow, the issue of corporate negligence involves separate and distinct duties. For all intents and purposes, the issues of employee negligence and vicarious liability were judicially bifurcated with the arbitration. At the direct request of these Defendants, only those issues involving the negligence of Riverside's employees were included in the arbitration. Likewise, all issues relating to corporate negligence as contained in this lawsuit were stayed at the request of all Defendants in this lawsuit.

It is worth noting Defendants admitted the corporate entities and the issues involved in this lawsuit were separate and distinct from Riverside during the hearing before Judge Young:

> Our contention is that the Fundamental defendants are separate and distinct....
> Exhibit A, Tr. of Record, Feb. 10, 2022, at 6: 8-9
>
> And certainly what I know today is I'm not in a position to consent to have the Fundamental defendants lumped in with the facility and the individual defendant, Ms. Montgomery-Smalls, she's the administrator of the facility.
> Id., at 6: 12-14

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> [W]e're saying the arbitration should be Mr. Pinkston's clients against the facility and Ms. Montgomery-Smalls, and then outside of that arbitration, not as a part of that arbitration, should be the Fundamental defendants.
> Id., at 29: 13-16

> We'd be agreeable to having the facility and Ms. Montgomery-Smalls in the arbitration, but the Fundamental defendants are separate....
> Id., at 29: 20-22

Defendants have now done an about face on their previous arguments made to Judge Young about not being subject to and bound by the arbitration agreement. They are likewise ignoring the holding in Morrow, of which these Defendants are acutely aware since they were the respondents in that case. They have no grounds to pursue summary judgment on any claims contained in the instant lawsuit as those claims were stayed at Defendants' request. Additionally, the parties are separate and distinct, the duties of these corporate defendants are separate and distinct, and the claims asserted against these parties are separate and district from those decided in arbitration.

II. Res judicata does not apply because there was no adjudication of the corporate negligence claims, the actions involve separate parties, and these claims could not have been properly included in arbitration based on the stays.

Res judicata applies where: (1) the judgment in the prior action was final, valid, and on the merits; (2) both actions involve the same parties; and (3) the second action involved claims properly included in the first action. Town of Sullivan's Island v. Felger, 318 S.C. 340, 344 (Ct. App. 1995). "Under the doctrine of *res judicata,* `[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.'" Palmetto Homes Inc. v. Bradley, 357 S.C. 485 (Ct. App. 2003). Res judicata is inapplicable to this lawsuit because the arbitration did not adjudicate any of the corporate

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negligence claims, it did not involve the same parties, and the corporate negligence claims were barred from inclusion due to the stays requested by these Defendants.

Defendants fail to mention or even address the different duties that flow from corporate negligence, the centerpiece of the instant lawsuit. Those duties were addressed in Morrow and discussed above. None of the allegations dealing with the corporate negligence claims were adjudicated or might have been raised in arbitration due to the stays. Defendants' argument that all facts were alleged and litigated in the arbitration is simply without merit based on the stays they requested. It simply defies logic to claim a plaintiff could have or should have litigated claims when s stay entered at a defendant's request prohibited that plaintiff from litigating said claims. The issuance of the stays is fatal to any claim the issues were raised and adjudicated in the arbitration.

III. Collateral estoppel does not apply to FCOS nor FAS because the stays granted at their request prohibited Plaintiff from litigating the claims asserted in this lawsuit, including those claims against Defendant Smalls.

Collateral estoppel applies when an issue was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554 (Ct. App. 2009). Collateral estoppel can be used defensively against a plaintiff who was a party in a prior action, even if the defendant was not a party to the prior litigation, so long as the plaintiff "had a full and fair opportunity to previously litigate the issue." Id. at 555. Defendants' attempted use of defensive collateral fails the first prong because the allegations of corporate negligence were not litigated in the arbitration action. The reason is straightforward: Defendants requested and were granted stays that prohibited Plaintiff from "actually" litigating those claims.

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Defendants are again taking a contradictory position to the one they argued in front of Judge Young. Plaintiff argued every Defendant, including FOS and FCAS, should be compelled to arbitration, which Defense vehemently opposed:

> Your Honor, he's saying to have every defendant involved in the arbitration, we're saying the arbitration should be Mr. Pinkston's clients against the facility and Ms. Montgomery-Smalls, and then outside of that arbitration, not as a part of that arbitration, should be the Fundamental defendants. So that's the difference, Your Honor, is what Mr. Pinkston is proposing is to have every defendant in the arbitration proceedings; what we're saying is that we're not agreeable to that. We'd be agreeable to having the facility and Ms. Montgomery-Smalls in the arbitration, but the Fundamental defendants are separate and the allegations that are made against those defendants, we deny and very strongly dispute the allegations in terms of any role or responsibility that they have in the alleged injuries.
> Exhibit A, Tr. of Record, Feb. 10, 2022, at 29: 12-25
>
> [The Fundamental defendants are] not third-party beneficiaries to this arbitration agreement. The arbitration agreement talks about agents, servants, and employees, they are none of those things. That's why there's a very clear distinction between an employee like Ms. Montgomery-Smalls and these other entities.
> Id., at 30: 3-8
>
> And as for the Fundamental defendants, that the action should be stayed as to them. He has no right to compel them to arbitration, the third-party beneficiary theory doesn't work for two, at least two very significant reasons. One, they're not third-party beneficiaries; two, he doesn't have the ability to compel them to arbitration as third-party beneficiaries; three, there's no motion to do it
> Id., at 34: 6-12.

Despite these past arguments regarding the inapplicability of the arbitration agreement that these Defendants should be excluded from arbitration, Defendants are now arguing collateral estoppel applies because Plaintiff had a full and fair opportunity to previously litigate the issue at arbitration. This is in direct contradiction to their previous position that every claim against them was not proper for arbitration and they could not be compelled to arbitration.

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Finally, it is worth noting the inherently contradictory positions being put forth by Defendants as exemplified by their statement regarding the joint venture claim. Defendants state, "The arbitrator's implicit determination that Defendant Smalls was *not* part of the joint venture therefore defeats Plaintiff's joint-venture theory." Def. Memo. in Support of Mot. for Summary Judgment, fn. 3. The arbitrator could not determine any issue relating to joint venture because that issue was stayed and therefore not part of the arbitration agreement. It was not part of Case No. 1437, which was compelled to arbitration. Therefore, the issue of joint venture with FCAS and FCOS could not have been determined due to the stays requested by these Defendants.

Defendants previously took the position the corporate entities and the claims against them were separate and distinct, they could not be compelled to arbitrate those claims, and there was a very clear distinction between the employees at Riverside and themselves. Yet now they take the position the arbitrator implicitly determined those very allegations even though stays were in place. Defendants' arguments that res judicata and collateral estoppel apply are disingenuous, contradictory, and in direct opposition to their previous arguments.

IV. Collateral estoppel does not apply to damages from two separate tortfeasors.

Defendants claim that collateral estoppel applies to damages, including punitive damages, is likewise without support in case law and subsequently without merit. Morrow conclusively states damages against the corporate defendants for corporate negligence are separate and distinct from those damages stemming from vicarious liability. "[D]irect corporate liability attaches due to a breach of a duty which runs directly between a parent company and a patient, arising from negligence in actions such as leaving a hospital underfunded, understaffed, or undertrained so as to provide substandard care. Accordingly, the two theories of vicarious liability and corporate liability can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of

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the other." Morrow, 412 S.C. at 462. Defendants cannot assert collateral estoppel when two theories of liability can co-exist in a lawsuit and a finding of one does not preclude a finding against the other. Put differently, damages that result from a breach of one duty from one tortfeasor do not preclude a finding for damages that flow from a separate duty relating to a separate tortfeasor.

A case directly on point is Boiter v. South Carolina Dep't of Transp., 393 S.C. 123, 712 S.E.2d 401 (2011). The plaintiff was injured in a car wreck and alleged two separate and distinct acts of negligence, or occurrences, against two defendants. The jury found both defendants negligent and awarded separate verdicts against each. Our Supreme Court affirmed the jury verdict against each individual tortfeasor and determined two independent and separate acts of negligence occurred. The Supreme Court specifically stated, "[H]ad the jury not found SCDOT negligent, the verdict against SCDPS could still stand, and the converse is true." Id, at 407. This is the exact situation presented in this lawsuit. As admitted by Defendants, the allegations against the corporate entities are separate and distinct. A jury could find that Riverside was not negligent and still find the Fundamental corporate entities negligent, or vice versa. Or the jury could determine both were negligent, as in Boiter and contemplated in Morrow, and the individual verdicts would stand.

Regardless of any determination by the arbitrator relating to the allegations of gross negligence as to the care providers at Riverside, any such finding has nothing to do with the actions of Defendants in a corporate negligence setting. A factfinder could find the corporate defendants acted wantonly, wilfully, or in reckless disregard of Plaintiff's rights in underfunding or understaffing the nursing home. Again, the Morrow Court specifically addressed this issue and held the finding of one does not preclude the finding of the other. Taken to its logical conclusion, the arbitrator's determination regarding any punitive conduct against the employees of Riverside

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does not preclude a finding of punitive conduct for or against FOS and FCAS based on the different duties and actions accompanying those duties.

CONCLUSION

For the above stated reasons, Plaintiff respectfully requests Defendants' Motion for Summary Judgment be DENIED.

Respectfully submitted this 8th day of September, 2024.

PINKSTON LAW FIRM, LLC

/s/ Shawn Pinkston
Shawn Pinkston, SC Bar No. 79965
856 Lowcountry Blvd., Suite 101
Mount Pleasant, South Carolina 29464
Office: 843-814-5472
Fax: 843-723-7300
shawnpinkston@me.com

Mount Pleasant, South Carolina

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STATE OF SOUTH CAROLINA) **IN THE COURT OF COMMON PLEAS**

COUNTY OF CHARLESTON) **2021-CP-10-01437 & 02477**

William Haynes, as Personal Representative of the Estate of Elizabeth Varner,

Plaintiff,

vs.

THI of South Carolina at Charleston LLC d/b/a Riverside Health and Rehab,

Defendant.

Transcript of Record

February 10, 2022

William Haynes, as Personal Representative of the Estate of Elizabeth Varner,

Plaintiff,

vs.

Fundamental Administrative Service, LLC; Fundamental Clinical and Operational Services, LLC; and Jerrolyn Montgomery-Smalls,

Defendant.

B E F O R E:

Honorable Roger M. Young, Sr.
Charleston County Courthouse
Charleston, South Carolina
VIA WEBEX REMOTE HEARING

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

Shawn Pinkston, Esquire
Attorney for Plaintiff

Russell Hines, Esquire
Attorney for Defendants Fundamental Administrative Service, LLC; Fundamental Clinical and Operational Services, LLC; and Jerrolyn Montgomery-Smalls

Sallie Beth Todd
Official Court Reporter

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with the rest in this case, Ms. Varner, and having provided her any care.

So I think one of the problems that we're having, Your Honor, as I understand what plaintiff's counsel is saying is he's saying we will agree to arbitrate, but we want everybody in there together. And one of the problems that we have with that is that we don't concede that everybody is together in the way that the plaintiff alleges. Our contention is that the Fundamental defendants are separate and distinct, and really these claims are misplaced. We're not here to move to dismiss today, I understand that. But I think that's what is going on. And certainly what I know today is I'm not in a position to consent to have the Fundamental defendants lumped in with the facility and the individual defendant, Ms. Montgomery-Smalls, she's the administrator of the facility. So I think that's the reason why we're not able to consent to an arbitration with everyone is because it goes back to this distinction between the Fundamental defendants and their relationship to the facility and a major sticking point about the way the plaintiffs contend that relationship -- what they contend that relationship is and what those defendants say it is.

But as far as the idea of arguing the stay first, I think -- and I don't mean -- well I don't see how we can do that under the circumstances, Your Honor, because the stay question

submits an affidavit that says she explained it to Mr. Haynes and he seemed to understand it and he gave permission for Kimberly to sign it is a falsehood according to both Kimberly Haynes and William Haynes. Again, that's not open for jurisdictional discovery because their own documents get back to who was the power of attorney and who had authority. They knew it, they ---

THE COURT: Let me ask you a question because maybe I'm just missing something, but you're saying we're willing to go to arbitration with everything, and he's saying make everyone go to arbitration. What am I missing? I'm missing something.

MR. HINES: Your Honor, he's saying to have every defendant involved in the arbitration, we're saying the arbitration should be Mr. Pinkston's clients against the facility and Ms. Montgomery-Smalls, and then outside of that arbitration, not as a part of that arbitration, should be the Fundamental defendants. So that's the difference, Your Honor, is what Mr. Pinkston is proposing is to have every defendant in the arbitration proceedings; what we're saying is that we're not agreeable to that. We'd be agreeable to having the facility and Ms. Montgomery-Smalls in the arbitration, but the Fundamental defendants are separate and the allegations that are made against those defendants, we deny and very strongly dispute the allegations in terms of any role or responsibility that they have in the alleged injuries.

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And they're not this whole third-party beneficiary notion that Mr. Pinkston just mentioned is -- it's just incorrect, Your Honor. They're not third-party beneficiaries to this arbitration agreement. The arbitration agreement talks about agents, servants, and employees, they are none of those things. That's why there's a very clear distinction between an employee like Ms. Montgomery-Smalls and these other entities.

But anyways, Your Honor, I was just trying to answer Your Honor's question in a long-winded way. But the distinction is who would be participating in the arbitration.

MR. PINKSTON: And that is the crux, Your Honor, is they admit that they provide administrative services to the facility, they admit it in their answer. So the arbitration agreement, pursuant to its terms and pursuant to what the defendants keep arguing, would apply to the Fundamental Corporate entities as third-party beneficiaries or as servants or agents as it relates to their own admission that they provide administrative services to the facility. I would argue that if the -- if THI, the facility, and defendant Smalls go to arbitration that's fine, but then the plaintiff ought to also be able to pursue its case against corporate negligence in the Court of Common Pleas pursuant to the Morrow case because they are separate and distinct allegations. So if they're going to argue that they're not subject to

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and Montgomery-Smalls so long as the other two are not stayed. If I combine both of those two, I'm hearing no opposition to arbitration. The question is who is participating and what's happening to any that aren't. Obviously, our position is the participants in arbitration should be only the facility and Ms. Montgomery-Smalls. And as for the Fundamental defendants, that the action should be stayed as to them. He has no right to compel them to arbitration, the third-party beneficiary theory doesn't work for two, at least two very significant reasons. One, they're not third-party beneficiaries; two, he doesn't have the ability to compel them to arbitration as third-party beneficiaries; three, there's no motion to do it.

And then one more thing is that the whole business of this case having any relevance or relationship to Morrow is dead wrong. Morrow had nothing, I repeat, nothing to do with the application of Federal Arbitration Act Section 3, and that's that. This whole business of the claims, they can be as separate and distinct as they could ever be, and again, I'm not at all conceding that. In fact, again, the motion to consolidate says that they are not at all separate and distinct, that they concern the same underlying facts and have factual legal questions in common. Basically, to proceed with those claims while -- you'd be setting the state for inconsistent judgment, you know, it doesn't make sense as a matter of judicial economy. But before you get to judicial

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1002744

William Haynes et al
PLAINTIFF(S)

Fundamental Administrative Services Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

This matter came before the Court for a hearing on 9/11/2024. The plaintiff was represented by Shawn Travis Pinkston and the defendants were represented by Matthew Oliver Riddle. After hearing arguments from the parties and reviewing the filings in the case, the Court makes the following rulings. Defendants' motion for summary judgment is Denied. Plaintiff's motion to compel discovery is Granted and the Defendants are ordered to comply with discovery within 30 days. Plaintiff's motion for sanctions is Denied. Defendants' motion to seal the record of the proceedings under Rule 41.1 is Denied. Defendants' motion for a protective order until the dispositive summary judgment motion is ruled upon is Granted.

It Is So Ordered.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 09/20/2024 .

Williams Haynes Personal Representative
Elizabeth Varner Estate

Exhibit J

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

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Court Reporter:

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

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Charleston Common Pleas

Case Caption: William Haynes , plaintiff, et al VS Fundamental Administrative Services Llc , defendant, et al

Case Number: 2021CP1002744

Type: Order/Electronic Form 4

So Ordered

William C. McMaster, III

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	NINTH JUDICIAL CIRCUIT
)	
WILLIAM HAYNES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH VARNER,)	CASE NO. 2021-CP-10-02744
)	
PLAINTIFF,)	
)	
vs.)	**DEFENDANT'S MOTION TO ALTER, AMEND, AND/OR RECONSIDER ORDER DENYING MOTION FOR SUMMARY JUDGMENT**
)	
FUNDAMENTAL ADMINISTRATIVE SERVICES LLC, AND FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, AND JERROLYN MONTGOMERY-SMALLS,)	**Exhibit K**
)	
DEFENDANTS.)	
)	

TO: THE HONORABLE WILLIAM C. MCMASTER, III, Presiding Judge, and SHAWN T. PINKSTON, ESQUIRE, Attorney for Plaintiff:

NOW COME Defendants Jerrolyn Montgomery-Smalls, Fundamental Administrative Services, LLC ("FAS") , and Fundamental Clinical and Operational Services, LLC ("FCOS") by and through their undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set forth below, hereby moves this Honorable Court to alter, amend, and/or reconsider its Order, filed September 20, 2024, denying Defendant's motion for summary judgment.

As set forth in the motion filed on June 28, 2024, Plaintiff's claims against the Defendants are barred by the doctrines of *res judicata* and collateral estoppel based on the outcome of a prior arbitration proceeding brought by Plaintiff arising out of exactly the same facts and circumstances alleged in this case. In light of the preclusive effect of the arbitration award, *see, e.g., Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 493-96, 593 S.E.2d 480, 484-86 (Ct. App. 2004); *Graham v. State Farm Fire & Cas. Ins. Co.*, 277 S.C. 389, 390-91, 287 S.E.2d

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495, 496 (1982), there are no material facts in dispute. Defendants therefore request that this court reconsider its Order and grant judgment to Defendants as a matter of law.

1. **Permitting the Plaintiff to relitigate claims and issues that have already been decided at arbitration would create duplicative litigation and would be a waste of judicial resources.**

The present suit involves allegations of nursing home negligence at Riverside Health and Rehab skilled nursing facility ("Facility" or "Riverside"), where Plaintiff's decedent Elizabeth Varner was a resident. Contrary to Plaintiff's erroneous argument to this Court in opposition to the present motion, Judge Roger M. Young, Sr. ordered all of Plaintiff's claims to arbitration, to include all claims raised in the present suit and the Plaintiff's related action against Riverside (C/A No. 2021-CP-10-01437). Judge Young further ordered that Riverside and Defendant Smalls were parties to the arbitration, and that Defendants FAS and FCOS were not parties to the arbitration. Finally, Judge Young ordered a judicial stay as to both the present suit and the suit against Riverside, to promote "efficiency and judicial economy," and to prevent "duplicative discovery and litigation." (*See* Feb. 24, 2022 Order at Page 19).

The parties presented testimony and evidence at arbitration. Retired Judge Doyet E. Early, III served as the arbitrator. Judge Early issued a ruling awarding compensatory damages as to Riverside for Plaintiff's femur fracture, denying punitive damages, and denying any liability as to Defendant Smalls. Judge Early further denied the Plaintiff's wrongful death claim. This court entered an order confirming Judge Early's arbitration award, and Riverside paid the arbitration award.

Judge Early's ruling was a final, binding award on the merits of all claims that were or could have been asserted. As a result, the Plaintiff's present claims against Defendant Jerrolyn Montgomery-Smalls are barred according to the doctrine of *res judicata*. The Plaintiff's claims

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against Defendants FAS and FCOS, who were not parties to the arbitration, are barred by collateral estoppel. Permitting the Plaintiff to relitigate these claims and issues that have already been decided at arbitration would create duplicative discovery and litigation, and would be a complete waste of judicial resources. Accordingly, the Defendants request that this Court reconsider its Order and grant judgment to the Defendants as a matter of law.

2. All of Plaintiff's claims in this lawsuit were or should have been raised at arbitration.

All claims asserted in the present lawsuit arose from the residency of Plaintiff's decedent at Riverside. As a result, all claims were within the scope of the subject arbitration agreement. Contrary to Plaintiff's erroneous argument in opposition to Defendants' motion, all claims asserted in the present lawsuit were or should have been raised at arbitration, *including Plaintiff's causes of action for corporate negligence, joint-venture liability, and corporate veil-piercing liability*. *Res judicata* applies where: (1) the judgment in the prior action was final, valid, and on the merits; (2) both actions involve the same parties; and (3) the second action involved claims properly included in the first action. *See Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995). *Res judicata* applies to arbitration awards and bars a litigant from asserting claims in a later action that were or "*could have been* arbitrated in the original proceeding." *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 496, 593 S.E.2d 480, 486 (Ct. App. 2004). As to Defendant Smalls, these claims are therefore barred by *res judicata*.

Contrary to Plaintiff's fallacious argument to this Court, the Defendants have never argued that any cause of action asserted in the present lawsuit should have been excluded from arbitration. The Defendants argued that FAS and FCOS were not *parties* to the arbitration agreement and therefore should not be *parties* to the arbitration. The Defendants requested a stay

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of all litigation in circuit court pending the outcome of arbitration. However, the Defendants never argued that any particular cause of action should be excluded from arbitration. Indeed, each and every cause of action the Plaintiff asserted against FCOS and FAS he also asserted against Defendant Smalls, who of course *was* a party to the arbitration. Judge Young granted a stay of both lawsuits to promote judicial economy and to avoid duplicative discovery and trials. ***However, nothing in Judge Young's Order or any order of this court or the arbitrator excluded any of Plaintiffs' claims from arbitration.*** Accordingly, the Plaintiff had the opportunity to assert corporate negligence, joint venture, and veil piercing claims against Defendant Smalls at arbitration, in addition to the other causes of action that Plaintiff admittedly asserted and that were without question decided at arbitration. He cannot now reassert these claims in a separate proceeding in circuit court. *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) (holding that *res judicata* "prohibits the owner of a single cause of action from either dividing or splitting the cause of action so as to make it the subject of several causes of action"). The Plaintiffs' claims against Defendant Smalls are therefore clearly barred. Respectfully, the Court must reconsider its Order and grant summary judgment to Defendant Smalls as a matter of law.

3. **The Plaintiff's claims against Defendants FAS and FCOS are barred by the collateral estoppel effect of the arbitration award, and there is no viable legal or equitable theory to the contrary that should allow these claims to proceed.**

As set forth in the Defendants' motion for summary judgment, supporting memorandum of law, and arguments presented at the hearing before this court, issues determined at arbitration were dispositive as to all claims against Defendants FAS and FCOS. As a result, Defendants FAS and FCOS are entitled to summary judgment, based on the collateral estoppel effect of the arbitration award. "Collateral estoppel, also known as issue preclusion, prevents a party from

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relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). Collateral estoppel applies when an issue was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *See id.* All the elements of collateral estoppel are met here as to each cause of action Plaintiff has asserted against the Defendants. As a result, the Court should reconsider its order and grant summary judgment to the Defendants as a matter of law.

First, there can be no dispute that the Plaintiff raised causes of action for negligence/gross negligence, neglect of a vulnerable adult, wrongful death, and survivorship at arbitration, and that these causes of action were determined. The arbitrator determined the Plaintiff's compensatory damages relative to Ms. Varner's femur fracture, and the Facility paid this award. The arbitrator also determined that the Ms. Varner's femur fracture was not the proximate cause of her death. The Plaintiff now asserts these identical claims/causes of action as to Defendants FAS and FCOS. These claims are clearly barred by collateral estoppel. The court should reconsider its Order and grant summary judgment to FAS and FCOS on these claims as a matter of law.

With regard to the joint venture and veil piercing causes of action (Counts 3 and 4 of Plaintiff's Complaint) the only damages that may be awarded for these claims are the imputed liability of the Facility. Again, the liability of the Facility has been determined, and the Facility has paid the arbitrator's award. This liability is therefore extinguished. There is no additional liability of the Facility that may be imputed to these Defendants. As a result, these claims are also barred by collateral estoppel.

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Additionally, as set forth in the Defendants' Memorandum of Law supporting the motion for summary judgment, Plaintiff's claim against FAS and FCOS for corporate negligence also seek the same damages that Plaintiff sought to (and did) recover at arbitration. Because the arbitrator already awarded all damages that Plaintiff was entitled to recover, and because the Facility has paid the award, Plaintiff is estopped from seeking additional damages from FAS and FCOS. *See Carolina Renewal*, 385 S.C. at 558, 684 S.E.2d at 784 (plaintiff estopped from re-litigating damages that were decided in a prior action). Plaintiff's reliance on *Morrow v. Fundamental Long-Term Care Holdings, LLC* is misplaced. . In *Morrow,* 412 S.C. 534, 773 S.E.2d 144 (2015), the S.C. Supreme Court ruled that direct corporate-liability claims and vicarious-liability claims against a nursing home's affiliated entities "can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other." But that principle has nothing to do with the present case. Here, the issue is not whether Plaintiff is bringing direct or vicarious liability claims against FAS/FCOS. For the reasons set forth herein and in the Defendants' prior memorandum, and argued at the hearing, the determination of the various issues raised at arbitration in this case does in fact preclude the present claims against FAS and FCOS.

Furthermore, contrary to Plaintiff's argument in opposition to the motion, the Plaintiff cannot maintain a standalone claim for punitive damages against FAS and FCOS. *Cook v. Atlantic Coast Line R.R. Co.,* 183 S.C. 279, 190 S.E. 923 (1937); see also Monroe v. Bankers Life & Cas. Co., 232 S.C. 363, 367, 102 S.E.2d 207, 208 (1958). The present case is distinguishable from *McGee v. Bruce Hospt. System*, 344 S.C. 466, 545 S.E.2d 286, cited by Plaintiff in support of his argument. *McGee* involved separate allegations of medical malpractice against multiple physicians who performed various procedures, that allegedly causing separate

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and distinct injuries to the Plaintiff's decedent. By contrast, here the Plaintiff alleges a single injury to Plaintiff's decedent (femur fracture) which Plaintiff alleged resulted from nursing negligence. The arbitrator determined Plaintiff's damages related to this femur fracture. The arbitrator further determined there was no willful or wanton conduct on the part of the Facility, or on the part of Defendant Smalls as it relates to the management of the facility, and therefore denied punitive damages. There is therefore no viable theory pursuant to which Plaintiff could seek additional punitive damages as it relates to the FAS and FCOS. The court should reconsider its Order and grant summary judgment to the Defendants.

Finally, as noted above, the Plaintiff had the opportunity to present evidence of corporate negligence and seek punitive damages at arbitration. Defendant Smalls was a party to the arbitration, and the Plaintiff asserted the same claims against Defendant Smalls in the Complaint as he has asserted against FAS and FCOS, including corporate negligence, joint venture, and veil piercing. To grant Defendants' motion would not permit these Defendants to unjustly avoid liability, as Plaintiff has argued. To the contrary, the Plaintiff has "had his day in court," and has had a full and fair opportunity to litigate his claims. *Graham*, 277 S.C. at 391. The Plaintiff is therefore collaterally estopped from asserting the present claims against these Defendants. The Court should reconsider its order and grant summary judgment.

4. **The Defendants request that the Court reconsider and expressly rule on each and every distinct issue/argument raised in support of its motion for summary judgment (whether raised in writing or orally at the motion hearing), all of which Defendants incorporate herein by reference.**

Following the hearing on September 11, 2024, this Court issued a Form 4 Order denying the subject motion. The Court's Form 4 Order did not include reasoning or order instructions. The Defendants therefore request that the Court reconsider its decision and expressly rule on each issue/argument raised in support of Defendants' motion. *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). The Defendants therefore respectfully request a ruling on each distinct issue/argument raised in support of the motion.

This Motion will be supported by the pleadings and motions filed in this case, all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any previous or subsequent memoranda of law, affidavits or other evidence which may be submitted prior to 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/ Matthew O. Riddle*
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
Russell Grainger Hines
SC State Bar ID No.: 72100
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com,
mriddle@ycrlaw.com
Attorneys for the Defendants

Charleston, South Carolina

Dated: September 30, 2024

ELECTRONICALLY FILED - 2024 Sep 30 6:34 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

ELECTRONICALLY FILED - 2024 Oct 02 10:47 AM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CIVIL ACTION NO.: 2021CP1002744
)	
Williams Haynes, as Personal)	
Representative of the Estate of Elizabeth)	**PLAINTIFF'S MEMO IN OPPOSITION**
Varner,)	**TO DEFENDANTS' MOTION TO**
Plaintiff,)	**ALTER, AMEND, AND RECONSIDER**
v.)	
)	
Fundamental Administrative Services, LLC,)	
Fundamental Clinical and Operational)	
Services, LLC, and Jerrolyn)	
Montgomery-Smalls.)	
)	
Defendants.)	

Exhibit L

COMES NOW William Haynes, as Personal Representative of the Estate of Elizabeth Varner ("Plaintiff"), and files this Memorandum in Opposition to Defendants' Motion to Alter, Amend, and/or Reconsider showing this Court as follows:

ARGUMENT AND CITATION TO AUTHORITY

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Defendants' request for this Court to alter, amend, or reconsider its Order denying their Motion for Summary Judgment is improper as the denial did not encompass a decision on the merits. "A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial." Ballenger v. Bowen, 313 S.C. 476 (S.C. 1994).

Further, Defendants' Motion seeks only to reargue the issues on the same basis previously presented to the Court. Defendants are likewise attempting to make new arguments it could have made at the previous hearing of this matter., which is also improper "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson

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Memorial Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E. 2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E. 2d 268 (1993)); See also Arnold v. State, 309 S.C. 157, 172–73, 420 S.E.2d 834, 842 (1992). As it relates to those improper arguments, Plaintiff states the transcript presented to the Court and the Order of Judge Young speak for themselves.

Finally, Defendants request for detailed factual findings and conclusions of law is contrary to the South Carolina Rules of Civil Procedure and unnecessary according to our Supreme Court. "We also take this opportunity to remind the trial bench that it is unnecessary to make findings of fact and conclusions of law in denying motions for summary judgment. Rule 52, SCRCP." Ballenger, 313 S.C. at fn. 1.

CONCLUSION

Defendants' Motion simply argues the same issues presented to this Court in briefings and oral arguments at the hearing conducted on their Motion for Summary Judgment. Additionally, Defendants' request for specific findings of fact and conclusions of law is unnecessary based on the Court's denial of the Motion for Summary Judgment. Accordingly, the Motion to Alter, Amend, and/or Reconsider ought to be DENIED.

Respectfully submitted this 2nd day of October, 2024.

PINKSTON LAW FIRM, LLC

/s/ Shawn Pinkston
Shawn Pinkston
SC Bar No. 79965
856 Lowcountry Blvd., Suite 101
Mount Pleasant, SC 29464
shawn@pinkstonlawfirm.com
Attorney for Plaintiff

Mount Pleasant, South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1002744

William Haynes et al
PLAINTIFF(S)

Fundamental Administrative Services Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

After careful consideration and review of the filings in this case, Defendants' Motion for Reconsideration is Denied.

It Is So Ordered.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 10/04/2024 .

Williams Haynes Personal Representative
Elizabeth Varner Estate

Exhibit M

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

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Court Reporter:

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

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ELECTRONICALLY FILED - 2024 Oct 04 1:33 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

Charleston Common Pleas

Case Caption: William Haynes , plaintiff, et al VS Fundamental Administrative Services Llc , defendant, et al

Case Number: 2021CP1002744

Type: Order/Electronic Form 4

So Ordered

William C. McMaster, III

ELECTRONICALLY FILED - 2024 Oct 22 2:26 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CIVIL ACTION NO.: 2021CP1002744
)	
Williams Haynes, as Personal)	
Representative of the Estate of Elizabeth)	**PLAINTIFF'S NOTICE OF RULE TO SHOW CAUSE**
Varner,)	
Plaintiff,)	
v.)	
)	
Fundamental Administrative Services, LLC,)	
Fundamental Clinical and Operational)	
Services, LLC, and Jerrolyn)	
Montgomery-Smalls.)	
)	
Defendants.)	

Exhibit N

TO: MATTHEW RIDDLE., ATTORNEY FOR THE DEFENDANT.

YOU WILL PLEASE TAKE NOTICE that on the tenth (10th) day after service of this motion or as soon thereafter as practicable, the undersigned will move before the presiding judge of the Charleston County Court of Common Pleas for an order to Show Cause as to why Defendants should not be held in contempt and sanctioned for failing to comply with this Court's Order Granting Plaintiff's Motion to Compel. Plaintiff brings this motion pursuant to Rules 1, 26, 33, 34, and 37 of the South Carolina Rules of Civil Procedure.

Plaintiff's First Interrogatories and Requests for Production of Documents were served on Fundamental Administrative Services and Fundamental Clinical and Operational Services on February 14, 2024, and on Jerrolyn Montgomery-Smalls on February 14, 2024. Plaintiff granted multiple extensions of time for Defendants to provide responses. After failing to receive responses, Plaintiff filed a Motion to Compel on May 29, 2024. Defendants then filed a Motion for Summary Judgment along with a Motion for Protective Order requesting protection until dispositive motions were heard and adjudicated. All motions were heard before the Honorable William C. McMaster, III, on September 11, 2024. On September 20, 2024, Judge McMaster denied Defendants' Motion

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for Summary Judgment and granted Plaintiff's Motion to Compel. Judge McMaster ordered Defendants "to comply with discovery within 30 days." Exhibit A. To date, Defendants have failed to comply with Judge McMaster's order granting Plaintiff's Motion to Compel. Exhibit B.

WHEREFORE the Plaintiff requests this Court schedule a Rule to Show Cause Hearing as to whether this Court's Order Compelling Discovery has been violated.

Respectfully submitted this 22nd day of October, 2024.

PINKSTON LAW FIRM, LLC

/s/ Shawn Pinkston
Shawn Pinkston, SC Bar No. 79965
856 Lowcountry Blvd., Suite 101
Mount Pleasant, South Carolina 29464
Office: 843-814-5472
Fax: 843-723-7300
shawnpinkston@me.com

Mount Pleasant, South Carolina

CERTIFICATE OF SERVICE

I hereby certify a copy of the above referenced *PLAINTIFF'S RULE TO SHOW CUASE* has been delivered to the following counsel of record:

Matthew Riddle
Clement Rivers LLP
25 Calhoun Street – Suite 400
Charleston, S.C. 29401
jdavis@ycrlaw.com

Pinkston Law Firm, LLC

/s/ Shawn Pinkston
Shawn Pinkston

Date: October 22, 2024

ELECTRONICALLY FILED - 2024 Oct 22 2:26 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

ELECTRONICALLY FILED - 2024 Sep 20 3:54 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744
ELECTRONICALLY FILED - 2024 Oct 22 2:26 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1002744

William Haynes et al
PLAINTIFF(S)

Fundamental Administrative Services Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

This matter came before the Court for a hearing on 9/11/2024. The plaintiff was represented by Shawn Travis Pinkston and the defendants were represented by Matthew Oliver Riddle. After hearing arguments from the parties and reviewing the filings in the case, the Court makes the following rulings. Defendants' motion for summary judgment is Denied. Plaintiff's motion to compel discovery is Granted and the Defendants are ordered to comply with discovery within 30 days. Plaintiff's motion for sanctions is Denied. Defendants' motion to seal the record of the proceedings under Rule 41.1 is Denied. Defendants' motion for a protective order until the dispositive summary judgment motion is ruled upon is Granted.

It Is So Ordered.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 09/20/2024 .

Williams Haynes Personal Representative
Elizabeth Varner Estate

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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

ELECTRONICALLY FILED 2024 Sep 20 3:54 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

ELECTRONICALLY FILED - 2024 Sep 20 3:54 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

Charleston Common Pleas

Case Caption:	William Haynes , plaintiff, et al VS Fundamental Administrative Services Llc , defendant, et al
Case Number:	2021CP1002744
Type:	Order/Electronic Form 4

So Ordered

William C. McMaster, III

ELECTRONICALLY FILED - 2024 Sep 20 2:26 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

ELECTRONICALLY FILED - 2024 Oct 22 2:26 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF SHAWN PINKSTON, ESQ.
COUNTY OF CHARLESTON)

PERSONALLY APPEARED before me, Shawn Pinkston, Esq., who after being duly sworn now states as follows:

1. I am over the age of eighteen (18) and am competent to give this affidavit.

2, I am counsel of record in the case of CAFN: 2021CP1002744, Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner v. Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, and Jerrolyn Montgomery-Smalls.

3. The Honorable William C. McMaster, III, granted Plaintiff's Motion to Compel Discovery Responses against all Defendants on September 20, 2024, ordering Defendants "to comply with discovery within 30 days."

4. As of the date of this affidavit, Defendants have willfully failed to comply with Judge McMaster's Order.

FURTHER AFFIANT SAYETH NAUGHT.

Shawn Pinkston, Esq.

Subscribed and sworn to me on this
22 day of October, 2024.

Kathryn W Kellett
Notary Public

KATHRYN W. KELLETT NOTARY PUBLIC SOUTH CAROLINA

My commission expires on:
March 1, 2032

PLAINTIFF'S EXHIBIT B

ELECTRONICALLY FILED - 2024 Nov 14 2:48 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
WILLIAM HAYNES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH VARNER, PLAINTIFF, vs. FUNDAMENTAL ADMINISTRATIVE SERVICES LLC, AND FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, AND JERROLYN MONTGOMERY-SMALLS, DEFENDANTS.	)	CASE NO. 2021-CP-10-02744 **DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS**

Exhibit O

TO: SHAWN PINKSTON, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that Defendants Jerrolyn Montgomery-Smalls, Fundamental Administrative Services, LLC ("FAS"), and Fundamental Clinical and Operational Services, LLC ("FCOS") will move before this Honorable Court pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq*. for a further order (1) compelling Plaintiff to arbitrate any and all claims that he is asserting against Defendant Smalls in this case and (2) staying all proceedings as to Defendants FAS and FCC until any arbitration of Plaintiff's claims against Defendant Smalls is concluded.

Importantly, on February 24, 2022, *this Court already ordered the very relief requested by this Motion*. Thereafter, an arbitrator (Hon. Doyet E. Early III) heard Plaintiff's causes of action in arbitration and entered an award absolving Defendant Smalls of any liability. Even so, Plaintiff now contends that he has remaining claims for corporate negligence, joint venture liability, and alter ego/veil-piercing liability that are directed to Defendant Smalls (and Defendants FAS and

FCOS) which Plaintiff purportedly did not raise against Defendant Smalls in arbitration. Moreover, in denying Defendants' Motion for Summary Judgment based on the *res judicata* and collateral estoppel effect of the arbitration, this Court signaled that it intends to allow Plaintiff to proceed on his corporate negligence, joint venture, and veil-piercing claims as to Defendant Smalls even though the Court's February 24, 2022 order already determined that all of Plaintiff's claims against Defendant Smalls must be arbitrated. Accordingly, to the extent Plaintiff seeks to pursue such arbitrable claims against Defendant Smalls in this Court, those claims must be sent back to the arbitrator for resolution pursuant to the February 24, 2022 order.

In addition, as further required by the Court's February 24, 2022 order, pursuant to FAA § 3 and in the interests of efficiency and judicial economy, Plaintiff's claims against non-arbitrating Defendant FAS and FCOS must be stayed pending the completion of any arbitration of Plaintiff's claims against Defendant Smalls.

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

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CLEMENT RIVERS, LLP

By:*/s/ Matthew O. Riddle*
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com,
mriddle@ycrlaw.com

Attorneys for the Defendants Jerrolyn Montgomery-Smalls, Fundamental Administrative Services, LLC, and Fundamental Clinical and Operational Services, LLC

Charleston, South Carolina

Dated: November 14, 2024

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
WILLIAM HAYNES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH VARNER, PLAINTIFF, vs. FUNDAMENTAL ADMINISTRATIVE SERVICES LLC, AND FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, AND JERROLYN MONTGOMERY-SMALLS, DEFENDANTS.	)	CASE NO. 2021-CP-10-02744 **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS'
MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS

On February 24, 2022, this Court issued an order ("Arbitration Order") compelling Plaintiff to arbitrate *all* of his claims against Defendant Jerrolyn Montgomery-Smalls ("Defendant Smalls") in this case and staying all proceedings against non-arbitrating Defendants Fundamental Administrative Services, LLC ("FAS") and Fundamental Clinical and Operational Services, LLC ("FCOS") pending the outcome of the arbitration between Plaintiff and Defendant Smalls. After the arbitration between Plaintiff and Defendant Smalls was completed, the arbitrator (Hon. Doyet E. Early, III) entered an award absolving Defendant Smalls of any liability. Now, Plaintiff attempts to continue pursuing claims in this Court against Defendant Smalls for corporate negligence, joint venture, and veil-piercing liability—all of which this Court previously ordered Plaintiff to arbitrate—because Plaintiff says those claims were not raised or decided in the arbitration.

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On September 20, 2024, this Court entered a Form 4 Order denying Defendants' Motion for Summary Judgment, which argued, in part, that the *res judicata* effect of the arbitration award precluded Plaintiff from bringing any claims against Defendant Smalls in this lawsuit. Although the Form 4 order provided no explanation for the Court's ruling, it signaled the Court's intention to allow Plaintiff to continue to pursue claims against Defendant Smalls for corporate negligence, joint venture, and alter ego/veil-piercing liability, notwithstanding the arbitrator's decision in favor of Defendant Smalls. Because the Arbitration Agreement continues to apply to Defendant Smalls, the Arbitration Order should be enforced, and to the extent there are any remaining claims against Defendant Smalls, they must be referred to the arbitrator. Likewise, in accordance with the Arbitration Order, Plaintiff's claims against non-arbitrating Defendant FAS and FCOS must be stayed pending the completion of any further arbitration of Plaintiff's claims against Defendant Smalls. Accordingly, this Motion should be granted.

FACTUAL BACKGROUD

A. Plaintiff's Lawsuit

On March 25, 2021, Plaintiff, as the personal representative of the Estate of Elizabeth Varner, brought a personal injury and wrongful-death lawsuit ("*Riverside* Lawsuit") against non-party THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab ("Facility" or "Riverside"), a skilled-nursing facility where Ms. Varner was a resident in October 2019. (Declaration of Matthew O. Riddle, Esq. ("Decl.") ¶ 2, Exhibit A ¶¶ 2, 4.)

On June 11, 2021, Plaintiff filed this case against Defendants Smalls, FAS, and FCOS based on the same factual allegations regarding Ms. Varner's care and treatment at the Facility that were alleged in the *Riverside* Lawsuit. (Decl. ¶ 3, Exhibit B ¶¶ 11-21.) Defendant Smalls was the

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Administrator of the Facility. (Decl. ¶ 4, Exhibit C ¶ 18.) Plaintiff alleges that FAS and FCOS provided various consulting services to the Facility. (Decl. ¶ 3 Ex. B ¶¶ 8, 9.)

In his complaint, Plaintiff asserted claims against all Defendants for negligence/gross negligence (Count 1) (Decl. ¶ 3, Ex. B ¶¶ 22-25); corporate negligence (Count 2) (Decl. ¶ 3, Ex. B ¶¶ 26-32); joint venture (Count 3) (Decl. ¶ 3, Ex. B ¶¶ 33-41); alter ego/piercing the corporate veil (Count 4) (Decl. ¶ 3, Ex. B ¶¶ 42-43); neglect of a vulnerable adult (Count 5) (Decl. ¶ 3, Ex. B ¶¶ 44-55); wrongful death (Count 6) (Decl. ¶ 3, Ex. B ¶¶ 56-58); and, survivorship action (Count 6) (Decl. ¶ 3, Ex. B ¶¶ 59-61). On July 16, 2021, Defendant Smalls filed an Answer denying any liability and affirmatively asserting the right to demand arbitration. (Decl. ¶ 4, Ex. C ¶ 35.)

B. The Court's Order Compelling Arbitration

On February 24, 2022, the Court in both cases entered an order granting the Facility's and Defendant Smalls' respective motions to compel arbitration (Decl. ¶ 5, Exhibit D) pursuant to the parties' Arbitration Agreement. (Decl. ¶ 6, Exhibit E.) The Court specifically ruled that because the Arbitration Agreement is valid on its face and applies to both the Facility and the Facility's "agents, employees, and servants," "the Arbitration Agreement covers Plaintiff's claims against both the Facility and [Defendant Smalls]." (Decl. ¶ 5, Ex. D at 10.) In the "interest of efficiency and judicial economy," the Court also stayed Plaintiff's claims against Defendants FAS and FCOS (which are non-parties to the Arbitration Agreement), pending the completion of the arbitration of Plaintiff's claims against the Facility *and Defendant Smalls*. (Decl. ¶ 5, Ex. D at 18-20.)

C. The Arbitration Award

The arbitration hearing was held from April 3, 2023 to April 6, 2023. (Decl. ¶ 7, Exhibit F at 1.) On May 16, 2023, the arbitrator issued his award ("Arbitration Award") in which he awarded $87,007 in compensatory damages against Riverside (but not Defendant Smalls) for

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injuries that Ms. Varner sustained but rejected Plaintiff's claims for wrongful death and Plaintiff's request for punitive damages. (Decl. ¶ 7, Ex. F at 1-2.) In addition, on May 26, 2024, the arbitrator, at the request of the parties, specifically determined that "Plaintiff is not entitled to a judgment against [Defendant] Smalls." (Decl. ¶ 8, Ex. G.) On April 9, 2024, the Facility paid the award in full. (Decl. ¶ 9, Exhibit H.)

D. The Court's "Final Order"

Meanwhile, on February 12, 2024, the Court granted Plaintiff's petition for entry of a Final Order that incorporated the Arbitration Award and lifted the stay of this lawsuit. (Decl. ¶ 10, Exhibit I.)

E. The Court Denies Defendants' Motion for Summary Judgment

After Plaintiff indicated that he wanted to continue pursuing this case against Defendants—including Defendant Smalls—notwithstanding the outcome of the arbitration, on June 28, 2024, Defendants moved for summary judgment. In their summary judgment motion, Defendants argued, in part, that the Arbitration Award is *res judicata* and precluded Plaintiff from pursuing further claims against Defendant Smalls in this case. (Decl. ¶ 11, Exhibit J.) In response, Plaintiff argued incorrectly that *res judicata* did not bar his claims for corporate negligence, joint venture, and alter ego-veil/piercing liability against Defendant Smalls because Plaintiff was prevented from raising those claims against Defendant Smalls in the arbitration in light of the Court's stay of this case against non-arbitrating Defendants FAS and FCOS. (Decl. ¶ 12, Exhibit K.)

On September 20, 2024, the Court entered a Form 4 order denying Defendants' Motion for Summary Judgment. (Decl. ¶ 13, Exhibit L.) While the Form 4 order contained no explanation for the Court's ruling, it signaled the Court's intention to allow Plaintiff to continue pursuing claims against Defendant Smalls for corporate negligence, joint venture, and alter ego/veil-

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piercing liability notwithstanding the Arbitration Award that absolved her of any liability. On September 30, 2024, Defendant Smalls asked the Court to reconsider the denial of her motion for summary judgment because: (1) the Arbitration Order required Plaintiff to arbitrate all of his claims against Defendant Smalls, and (2) nothing about the Court's stay of proceedings as to non-arbitrating Defendants FAS and FCOS prevented Plaintiff from litigating his corporate negligence, joint venture, and alter ego/veil-piercing claims against Defendant Smalls in the already-concluded arbitration. (Decl. ¶ 15, Exhibit N at 2-4.) On October 4, 2024, the Court issued another Form 4 order (Decl. ¶ 14, Exhibit M) denying Defendants' Motion for Reconsideration.

ARGUMENT

I. THE COURT SHOULD ENFORCE THE ARITRATION ORDER AND COMPEL ARBITRATION OF PLAINTIFF'S CLAIMS AGAINST DEFENDANT SMALLS

Because the Court's recent Form 4 orders permit Plaintiff to continue pursuing his corporate negligence, joint venture, and alter-ego/veil-piercing claims against Defendant Smalls, the Court should compel arbitration of all such arbitrable claims, as previously required by this Court's Arbitration Order.[1]

[1] In his prior briefing, Plaintiff has argued that his corporate negligence, joint venture, and alter ego/veil-piercing claims against Defendants Smalls (and Defendants FAS and FCOS) somehow were excluded from the now-concluded arbitration due to the stay of proceedings as to FAS and FCOS. (*See, e.g.,* Decl. ¶ 12, Ex. K at 3-4 ("The corporate negligence claims asserted against [Defendants Smalls, FAS, and FCOS] in the instant case were stayed at Defendants' request and Plaintiff was barred from litigating them at arbitration."); *id.* at 10 ("The arbitrator could not determine any issue relating to joint venture because that issue was stayed and therefore not part of the arbitration agreement.").) The Arbitration Order, however, says no such thing. Rather, the Arbitration Order expressly compelled Plaintiff to arbitrate *all* of his claims against Defendant Smalls—including Plaintiffs' claims for corporate negligence, joint venture, and alter ego/veil-piercing; the Arbitration Order stayed only "Plaintiff's claims against FAS and FCOS [] pending the ultimate outcome of arbitration between Plaintiff, the Facility, and [Defendant Smalls]." (Decl. ¶ 5, Ex. D at 20.) Thus, Plaintiff was required to present *all* of his claims against Defendant Smalls in the arbitration, where Defendant Smalls prevailed on the merits. (*See* Decl. ¶ 8, Ex. G.) The Arbitration Award thus conclusively resolved all of Plaintiff's causes of action against Defendant Smalls that were or could have been presented in arbitration. Accordingly, there should be no

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The Arbitration Order could not be clearer: The parties' Arbitration Agreement is governed by the Federal Arbitration Act ("FAA") (Decl. ¶ 5, Ex. D at 5), the Arbitration Agreement is valid and enforceable (Decl. ¶ 5, Ex. D at 7), and "[w]ithout question, Plaintiff's claims against . . . [Defendant] Smalls are within the scope of the Arbitration Agreement." (Decl. ¶ 5, Ex. D at 9.) Under the Arbitration Order, Plaintiff therefore is required to assert *all* of his claims against Defendant Smalls in arbitration.

Plaintiff's contention that he could not raise his corporate negligence, joint venture, and alter ego/veil-piercing claims as to Defendant Smalls in the first arbitration in light of the stay of proceedings as to non-arbitrating Defendants FAS and FCOS wrongly presumes that because these claims are asserted against all three Defendants (Smalls, FAS and FCOS), they only can be adjudicated in a forum in which all three Defendants are present. (*E.g.,* Decl. ¶ 12, Ex. K at 8 ("the corporate negligence claims were barred from inclusion [in the arbitration] due to the stays requested by these Defendants.").) Indeed, the United States Supreme Court specifically has held the FAA "leaves no place for the exercise of discretion" by the courts; "when a complaint contains both arbitrable and nonarbitrable claims, the [FAA] requires courts to 'compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.'" *KPMG LLP v. Cocchi*, 565 U.S. 1, 4 (2011) (per curiam) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985)); *see id.* at 1 ("The [FAA] has been interpreted to require that if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation.").

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further claims against Defendants Smalls that are still outstanding. To the extent the Court thinks otherwise, however, any remaining claims against Defendant Smalls should be sent back to the arbitrator for resolution.

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In his complaint, every cause of action that Plaintiff has asserted against Defendants FAS and FCOS also is asserted against Defendant Smalls—including Plaintiff's claims for corporate negligence, joint venture, and alter ego/veil-piercing liability. (Decl. ¶ 3, Ex. B ¶¶ 26-43.) Thus, under *Cocchi* and *Dean Witter*, to the extent those claims are asserted against Defendant Smalls, they are arbitrable claims and must be arbitrated. By the same token, to the extent those claims are asserted against non-arbitrating Defendants FAS and FCOS (which are non-parties to the Arbitration Agreement), they are non-arbitrable and must be stayed under the Arbitration Order (as explained below). Accordingly, the Court should grant Defendant Smalls' request for a further order compelling Plaintiff to arbitrate any remaining claims that the Court intends to permit Plaintiff to pursue against Defendant Smalls, so that those claims can be sent back to the arbitrator for final resolution.

II. THE COURT SHOULD ENFORCE THE ARITRATION ORDER AND STAY PLAINTIFF'S CLAIMS AGAINST DEFENDANTS FAS AND FCOS

In the Arbitration Order, the Court ruled that pursuant to FAA § 3 and in the interests of efficiency and judicial economy, all proceedings against non-arbitrating Defendants FAS and FCOS in this case must be stayed pending the ultimate outcome of arbitration between Plaintiff and Defendant Smalls. (Decl. ¶ 5, Ex. D at 20.) This aspect of the Court's Arbitration Order must be enforced as well.

CONCLUSION

For all the foregoing reasons, Defendants' Motion to Compel Arbitration and Stay Proceedings should be granted. Specifically, as required by the Arbitration Order, this Court should enter a further order compelling Plaintiff to arbitrate, and thus send back to the arbitrator, any remaining claims that the Court intends to allow Plaintiff to pursue against Defendant Smalls in this case. In the meantime, the Court should enforce the Arbitration Order by entering a stay of

proceedings as to all of Plaintiff's claims against non-arbitrating Defendants FAS and FCOS pending the completion of any arbitration between Plaintiff and Defendant Smalls.

CLEMENT RIVERS, LLP

By:*/s/ Matthew O. Riddle*
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com, mriddle@ycrlaw.com
Attorneys for the Defendants Jerrolyn Montgomery-Smalls, Fundamental Administrative Services, LLC, and Fundamental Clinical and Operational Services, LLC

Charleston, South Carolina

Dated: November 14, 2024

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Exhibit A

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CIVIL ACTION NO.: 2020 – CP - _____
)	
Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner,)	COMPLAINT
)	JURY TRIAL DEMANDED
Plaintiff,)	
v.)	
)	
THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab,)	
)	
Defendant.)	

COMES NOW William Haynes, as Personal Representative of the Estate of Elizabeth Varner ("Plaintiff), by and through undersigned counsel, and states as follows:

1. Williams Haynes, as the Personal Representative of the Estate of Elizabeth Varner, is a resident of the County of Berkeley, State of South Carolina.

2. Based on information and belief, Defendant THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab, ("Defendant"), is a corporation organized and existing under the laws of the State of Delaware and at all times relevant herein, conducted business in Charleston County through its agents, contractors, and employees for the purpose of carrying on its business as a healthcare facility and providing medical care to its patients through its agents and employees.

3. The parties engaged in mandatory presuit mediation on October 8, 2020, which resulted in an impasse.

4. On or about October 6, 2019, Elizabeth Varner was a resident at Defendant's facility.

5. During the afternoon of October 6, 2019, Elizabeth Varner was transferred to the Medical University of South Carolina ("MUSC") with chief complaints of a right knee fracture. The

admission records note, "pt coming from riverside with right knee fracture. EMS was not served with XR; per EMS no one at the facility can say what happened. Pt is saying someone fell on her her and that it happened last week; facility reported to EMS that they don't know when this happen [sic]."

6. The medical records also note, "Elizabeth Varner is a 76 y.o. female, who presents with right knee pain. She injured her lower extremity one week ago. She reports a nurse at the nursing home she lives at fell on her leg. She felt immediate onset of pain but reports no XRs were taken until today...She points to her knee as the place that is most sensitive to pressure."

7. Upon examination by medical providers at MUSC, Elizabeth Varner's right knee had "obvious swelling, tenderness palpation diffusely, limited passive range of motion...." An x-ray of her right femur find an "oblique distal fracture metadiaphyseal fracture with no one half shaft's width of posterior displacement of the distal fracture fragment." An x-ray of her right knee noted the same fracture with "no significant degenerative changes. Soft tissue swelling about the knee." She was discharged on October 6, 2019, with plans to follow up with the orthopedic clinic.

8. Elizabeth Varner was seen by the MUSC Orthopedic Department on October 10, 2019, and "due to continued pain, the decision was made to admit the patient to the hospital for surgery and postoperative evaluation."

9. Elizabeth Varner underwent surgery on October 11, 2019, in which the surgeons inserted a 10mm femoral nail into the right femur. She was discharged from MUSC on October 14, 2019.

10. On October 27, 2019, Elizabeth Varner was transferred from Defendant's facility to MUSC via EMS. The medical records from MUSC notes Plaintiff arrived at approximately 6:57

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am with the following HPI, "Per EMS patient was found unresponsive at the nursing facility approximately 12 PM last night and was placed on supplemental oxygen due to pulse ox being in the 70s. Nursing staff waited 2hrs after placing the pt on supplemental oxygen before calling EMS. On arrival to the ER patient was hypotensive 40s/30s, cold t the touch, unresponsive and no pulses were palpable....The pt was hypotensive thus sepsis protocol initiated."

11. Elizabeth Varner suffered cardiac arrest while at MUSC and eventually passed away on October 29, 2019. The Immediate Cause of Death was listed as: Shock, Acute Renal Failure, and Hypoxic Respiratory Failure. Her femur fracture was listed as a significant condition contributing to her death.

12. Elizabeth Varner's Death Certification listed the following causes of death: Acute Respiratory Failure, Acute Renal Failure, Pulseless Electrical Activity Arrest Secondary to Septic Shock.

FIRST CAUSE OF ACTION
(Medical Malpractice, Negligence, Gross Negligence)

13. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

14. The care providers at Riverside Health and Rehab violated the standard of care in the following ways:

- Failing to take proper precautions to prevent injury to Elizabeth Varner and by failing to protect Elizabeth Varner from injury;
- Failing to investigate the cause of an unknown bone fracture;
- Failing to notify the appropriate regulatory agency following serious incidents, to include fractured bones;
- Failing to timely call EMS and timely transfer Plaintiff to a hospital after a change in condition;

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- Failing to have the appropriate number of staff to meet the acuity needs of Plaintiff; and
- Other failures of the applicable standard of care that may be discovered through the course of this lawsuit.

15. The Affidavit of Plaintiff's expert specifying at least one negligent act or omission is attached as Exhibit "A" with said expert being Suzanne Frederick, MSN, RN-BC, CWCN.

16. As a direct and proximate result of Defendant's negligence, negligence per se, gross negligence, recklessness, willfulness and wantonness, Plaintiff suffered injuries, including, but not limited to, substantial physical and mental pain and suffering, mental anguish, mental shock and suffering, and wounded feelings.

SECOND CAUSE OF ACTION
(Neglect of a Vulnerable Adult)

17. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

18. According to the South Carolina Adult Protection Act, at all times relevant hereto Plaintiff Elizabeth Varner was considered a vulnerable adult.

19. According to the South Carolina Adult Protection Act, Neglect means the failure or omission of a caregiver to provide the care, goods, or services necessary to maintain the health and safety of a vulnerable adult including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services and the failure or omission has caused, or presents a substantial risk of causing, physical or mental injury to the vulnerable adult.

20. Defendant failed to provide care to Plaintiff Elizabeth Varner by causing trauma to Plaintiff's leg, which resulted in an oblique distal fracture metadiaphyseal fracture to the right leg with no one half shaft's width of posterior displacement of the distal fracture fragment.

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21. Defendant failed to timely identify that Elizabeth Varner was suffering from a fracture in her right leg.

22. Defendant failed to provide care and medical services to Elizabeth Varner by not transferring her to the hospital in a timely manner after a change of condition.

23. Elizabeth Varner trusted in, confided in and relied upon Defendant to use their expertise and discretion for Plaintiff's care.

24. Defendants accepted Elizabeth Varner's trust and reliance and so became responsible for Elizabeth Varner's health while residing at the nursing home facility.

25. As a result of aforementioned reliance and trust upon Defendant, Elizabeth Varner's physical, mental and emotional health was placed in the hands of Defendant.

26. Defendant received compensation for the care and treatment they were responsible for providing to Elizabeth Varner during her residency but did not provide that care and treatment.

27. As a direct and proximate result of Defendant's negligence, negligence per se, gross negligence, recklessness, willfulness and wantonness, Plaintiff suffered injuries, including, but not limited to, substantial physical and mental pain and suffering, mental anguish, mental shock and suffering, and wounded feelings.

THIRD CAUSE OF ACTION
(Wrongful Death)

28. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

29. That as a direct and proximate result of Defendants negligent, willful, wanton, reckless, careless and grossly negligent conduct, by and through their agents, servants, and employees, Elizabeth Varner was severely injured in Defendant's facility.

30. The injuries so inflicted on Elizbeth Varner were the cause of Elizabeth Varner's wrongful death on October 29, 2019.

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FOURTH CAUSE OF ACTION
(Survival Action)

31. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

32. As a direct and proximate cause of Defendant's negligence, willful, reckless and/or grossly negligent actions and inactions, Elizabeth Varner suffered:

- Excruciating pain;
- Prolonged extreme suffering;
- Acute emotional distress;
- Fear and anxiety;
- Medical bills;
- Mental anguish;
- Loss of enjoyment of life; and
- The agony of death.

33. As a direct and proximate cause of Defendant's negligence, willful, reckless and/or grossly negligent actions and inactions, Elizabeth Varner's heirs suffered:

- Loss of companionship;
- Emotional trauma;
- Loss of comfort and support;
- Psychological and emotional distress;
- Loss of enjoyment of life; and
- Loss of their Mother.

WHEREFORE, Plaintiff demands judgment against Defendant for actual and punitive damages, for the cost of this action, and for other such relief the Court deems just, equitable, and proper.

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PINKSTON LAW FIRM, LLC

/s/ Shawn Pinkston
Shawn Pinkston, SC Bar No. 79965
856 Lowcountry Blvd., Suite 101
Mount Pleasant, South Carolina 29464
Office: 843-814-5472
Fax: 843-723-7300
shawnpinkston@me.com

Date: March 25, 2021
Mount Pleasant, South Carolina

Exhibit B

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CIVIL ACTION NO.: 2021CP-
)	
Williams Haynes, as Personal)	
Representative of the Estate of Elizabeth)	**COMPLAINT**
Varner,)	**JURY TRIAL DEMANDED**
Plaintiff,)	
v.)	
)	
Fundamental Administrative Services LLC,)	
And Fundamental Clinical and Operational)	
Services, LLC, and Jerrolyn)	
Montgomery-Smalls)	
)	
Defendants.)	

COMES NOW William Haynes, as Personal Representative of the Estate of Elizabeth Varner ("Plaintiff), by and through undersigned counsel, and states as follows:

1. Williams Haynes, as the Personal Representative of the Estate of Elizabeth Varner, is a resident of the County of Berkeley, State of South Carolina.

2. Based on information and belief, Defendant Fundamental Administrative Services LLC, ("Defendant FAS"), is a corporation organized and existing under the laws of the State of Delaware and at all times relevant herein, conducted business in Charleston County through its agents, contractors, and employees for the purpose of carrying on its business as a healthcare facility and providing medical care to its patients through its agents and employees at THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab ("Riverside"), located in North Charleston, South Carolina.

3. Based on information and belief, Defendant Fundamental Clinical and Operational Services LLC, ("Defendant FCOS"), is a corporation organized and existing under the laws of the State of Delaware and at all times relevant herein, conducted business in Charleston County through its agents, contractors, and employees for the purpose of carrying on its business as a

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healthcare facility and providing medical care to its patients through its agents and employees at Riverside, located in North Charleston, South Carolina.

4. Based on information and belief, Defendant Jerrolyn Montgomery-Smalls ("Defendant JMS") is a resident of Charleston County and at all times relevant herein was the Administrator of Riverside Health and Rehab.

5. Plaintiff filed a Notice of Intent and all required attachments pursuant to S.C. Code Ann. § 15-36-100.

6. The parties conducted pre-suit mediation on June 7, 2021, which resulted in an impasse. Venue and subject matter jurisdiction are proper within this Court.

7. Personal jurisdiction is proper in this Court because Defendants are situated in Charleston County and conduct business in Charleston County.

8. Upon information and belief, FCOS has or had common ownership and management with THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab and exerts significant control over the operation of Riverside Health, including the development of policies and procedures, training, and instruction for the staff at Riverside.

9. Upon information and belief, through its individual actions and the acts of its agents, and in concert with the other Defendants, FAS engaged in and exerted control in the oversight, management, direction, and operation of Riverside, including the development of budgets, choosing vendors and consultants, and deciding nurse staffing hours per patient days deriving revenue therefrom.

10. The above-named Defendants are jointly and severally liable for all damages alleged in the Complaint since their neglect, gross negligence, reckless and wanton acts and omissions,

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singularly or in combination, are the contributing proximate cause of the Plaintiff's damages, injuries, and losses.

FACTUAL ALLEGATIONS

11. Elizabeth Varner was admitted to Riverside Health and Rehab ("Riverside") on May 20, 2019, and she paid a fee for her care.

12. While a resident at Riverside, Elizabeth Varner required skilled nursing care from the staff at the nursing home as well as assistance with daily living activities.

13. On or about October 6, 2019, Elizabeth Varner was a resident at Defendant's facility.

14. During the afternoon of October 6, 2019, Elizabeth Varner was transferred to the Medical University of South Carolina ("MUSC") with chief complaints of a right knee fracture. The admission records note, "pt coming from riverside with right knee fracture. EMS was not served with XR; per EMS no one at the facility can say what happened. Pt is saying someone fell on her her and that it happened last week; facility reported to EMS that they don't know when this happen [sic]."

15. The medical records also note, "Elizabeth Varner is a 76 y.o. female, who presents with right knee pain. She injured her lower extremity one week ago. She reports a nurse at the nursing home she lives at fell on her leg. She felt immediate onset of pain but reports no XRs were taken until today...She points to her knee as the place that is most sensitive to pressure."

16. Upon examination by medical providers at MUSC, Elizabeth Varner's right knee had "obvious swelling, tenderness palpation diffusely, limited passive range of motion...." An x-ray of her right femur find an "oblique distal fracture metadiaphyseal fracture with no one half shaft's width of posterior displacement of the distal fracture fragment." An x-ray of her right knee noted the same fracture with "no significant degenerative changes. Soft tissue swelling

about the knee." She was discharged on October 6, 2019, with plans to follow up with the orthopedic clinic.

17. Elizabeth Varner was seen by the MUSC Orthopedic Department on October 10, 2019, and "due to continued pain, the decision was made to admit the patient to the hospital for surgery and postoperative evaluation."

18. Elizabeth Varner underwent surgery on October 11, 2019, in which the surgeons inserted a 10mm femoral nail into the right femur. She was discharged from MUSC on October 14, 2019.

19. On October 27, 2019, Elizabeth Varner was transferred from Defendant's facility to MUSC via EMS. The medical records from MUSC notes Plaintiff arrived at approximately 6:57 am with the following HPI, "Per EMS patient was found unresponsive at the nursing facility approximately 12 PM last night and was placed on supplemental oxygen due to pulse ox being in the 70s. Nursing staff waited 2hrs after placing the pt on supplemental oxygen before calling EMS. On arrival to the ER patient was hypotensive 40s/30s, cold t the touch, unresponsive and no pulses were palpable....The pt was hypotensive thus sepsis protocol initiated."

20. Elizabeth Varner suffered cardiac arrest while at MUSC and eventually passed away on October 29, 2019. The Immediate Cause of Death was listed as: Shock, Acute Renal Failure, and Hypoxic Respiratory Failure. Her femur fracture was listed as a significant condition contributing to her death.

21. Elizabeth Varner's Death Certification listed the following causes of death: Acute Respiratory Failure, Acute Renal Failure, Pulseless Electrical Activity Arrest Secondary to Septic Shock.

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FIRST CAUSE OF ACTION
(Negligence, Gross Negligence)

22. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

23. The care providers at Riverside Health and Rehab violated the standard of care in the following ways:

- Failing to take proper precautions to prevent injury to Elizabeth Varner and by failing to protect Elizabeth Varner from injury;
- Failing to investigate the cause of an unknown bone fracture;
- Failing to notify the appropriate regulatory agency following serious incidents, to include fractured bones;
- Failing to timely call EMS and timely transfer Plaintiff to a hospital after a change in condition;
- Failing to have the appropriate number of staff to meet the acuity needs of Plaintiff; and
- Other failures of the applicable standard of care that may be discovered through the course of this lawsuit.

24. The Affidavit of Plaintiff's expert specifying at least one negligent act or omission is attached as Exhibit "A" with said expert being Suzanne Frederick, MSN, RN-BC, CWCN.

25. As a direct and proximate result of Defendant's negligence, negligence per se, gross negligence, recklessness, willfulness and wantonness, Plaintiff suffered injuries, including, but not limited to, substantial physical and mental pain and suffering, mental anguish, mental shock and suffering, and wounded feelings.

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SECOND CAUSE OF ACTION
(Corporate Negligence)

26. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

27. Based upon information and belief, Defendants operated, managed, and/or provided consulting services to THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab before and during Elizabeth Varner's residency.

27. Defendants had a duty of care to residents to discover, to warn, to prevent risks, to take reasonable safety precautions, to eliminate unreasonable risks, and to provide protection from harm.

28. Riverside was negligently administered and managed by Defendants who were working together to manage and operate the facility.

29. The facility was negligently administered in violation of state and federal laws by Defendants FCOS and FAS, who were working together to govern, administer, control, manage, and operate the facility.

30. Defendants, by and through their agents, servants, and employees, were negligent, willful, wanton, reckless, careless, and grossly negligent and deviated from the expected standards of skill, care, and learning in their treatment of Elizabeth Varner. Specifically, Defendants were negligent in the following ways:

- Failing to provide the care, supervision, and monitoring of patients;
- Failing to take proper precautions to prevent injury to Elizabeth Varner and by failing to protect Elizabeth Varner from injury;
- Failing to investigate the cause of an unknown bone fracture;
- Failing to notify the appropriate regulatory agency following serious incidents, to include fractured bones;

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- Failing to timely call EMS and timely transfer Plaintiff to a hospital after a change in condition;
- Failing to have the appropriate number of staff to meet the acuity needs of Plaintiff; and
- Other failures of the applicable standard of care that may be discovered through the course of this lawsuit.

31. As a result of Defendants' actions and/or non-actions, Elizabeth Varner experienced prolonged conscious pain and suffering, mental anguish, incurred substantial medical bills, and suffered a wrongful death. As a further result, her wrongful death beneficiaries suffered the damages and injuries stated above.

32. The aforesaid wrongful acts were the sole and proximate cause of Elizabeth Varner's injuries and wrongful death.

THIRD CAUSE OF ACTION
(Joint Venture)

33. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

34. That a joint venture is an association of two or more individuals engaged in a solitary business enterprise for profit without actual partnership or incorporation.

35. That elements of joint venture in the State of South Carolina are:

an agreement;

- a joint interest in a common business;
- an understanding that profits and losses will be shared, and;
- a right to joint control.

36. That a joint venture exists when there is:

- contribution of resources by both parties;

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- joint proprietorship and control over the subject matter of the property
- engage in the venture;
- sharing of profits by express or implied agreement, and;
- an express or implied contract showing join venture.

37. That Defendants FCOS, FAS, Jerrolyn Montgomery-Smalls, and Riverside were involved in a joint venture.

38. Because of their joint venture, Defendants FCOS and FAS had a joint obligation to sufficiently fund Riverside to ensure that each of their residents received the necessary care and services in order for the residents to attain or maintain the highest practicable physical, mental, and psychosocial well-being, consistent with the residents' comprehensive assessments and plans of care.

39. This joint obligation required Defendants to sufficiently fund Riverside so that there would be enough staff and resources in order to meet the needs of their residents.

40. Riverside was totally dependent on the generosity of Defendants FCOS and FAS in their decision-making process as to whether they would allow them to keep the money they were earning.

41. Defendants negligently failed to fund Riverside so its agents, servants, and employees could provide the necessary skill and care to residents, including Elizabeth Varner.

FOURTH CAUSE OF ACTION
(Alter Ego/Piercing the Corporate Veil)

42. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

43. That, upon information and belief, Riverside was dominated and controlled by Defendants FCOS and FAS before, during, and after Elizabeth Varner's residency. Defendants and its related entities, agents, and managers siphoned profits from the nursing home chain

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through self-dealing between the entities, excessively compensated themselves and other executives, and participated in other methods of divesting the licensee entities of needed capital and assets, while allowing the chain to suffer financial losses and provide uniformly poor care across the country as a result of inadequate capitalization and consequently inadequate supplies, resulting in untold numbers of unnecessary injuries, death and suffering, including that of Elizabeth Varner at the Riverside.

FIFTH CAUSE OF ACTION
(Neglect of a Vulnerable Adult)

44. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

45. According to the South Carolina Adult Protection Act, at all times relevant hereto Plaintiff Elizabeth Varner was considered a vulnerable adult.

46. According to the South Carolina Adult Protection Act, neglect means the failure or omission of a caregiver to provide the care, goods, or services necessary to maintain the health and safety of a vulnerable adult including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services and the failure or omission has caused, or presents a substantial risk of causing, physical or mental injury to the vulnerable adult.

47. Defendants failed to provide care to Plaintiff Elizabeth Varner by causing trauma to Plaintiff's leg, which resulted in an oblique distal fracture metadiaphyseal fracture to the right leg with no one half shaft's width of posterior displacement of the distal fracture fragment.

48. Defendants failed to timely identify that Elizabeth Varner was suffering from a fracture in her right leg.

49. Defendants failed to provide care and medical services to Elizabeth Varner by not transferring her to the hospital in a timely manner after a change of condition.

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50. Defendants failed to recognize or to act timely when Elizabeth Varner was found unresponsive on October 27, 2019.

51. Elizabeth Varner trusted in, confided in and relied upon Defendant to use their expertise and discretion for Plaintiff's care.

52. Defendants accepted Elizabeth Varner's trust and reliance and so became responsible for Elizabeth Varner's health while residing at the nursing home facility.

53. As a result of aforementioned reliance and trust upon Defendant, Elizabeth Varner's physical, mental and emotional health was placed in the hands of Defendant.

54. Defendant received compensation for the care and treatment they were responsible for providing to Elizabeth Varner during her residency but did not provide that care and treatment.

55. As a direct and proximate result of Defendant's negligence, negligence per se, gross negligence, recklessness, willfulness and wantonness, Plaintiff suffered injuries, including, but not limited to, substantial physical and mental pain and suffering, mental anguish, mental shock and suffering, and wounded feelings.

SIXTH CAUSE OF ACTION
(Wrongful Death)

56. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

57. That as a direct and proximate result of Defendants negligent, willful, wanton, reckless, careless and grossly negligent conduct, by and through their agents, servants, and employees, Elizabeth Varner was severely injured in Defendant's facility.

58. The injuries so inflicted on Elizbeth Varner were the cause of Elizabeth Varner's wrongful death on October 29, 2019.

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SEVENTH CAUSE OF ACTION
(Survival Action)

59. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.

60. As a direct and proximate cause of Defendants' negligence, willful, reckless and/or grossly negligent actions and inactions, Elizabeth Varner suffered:

- Excruciating pain;
- Prolonged extreme suffering;
- Acute emotional distress;
- Fear and anxiety;
- Medical bills;
- Mental anguish;
- Loss of enjoyment of life; and
- The agony of death.

61. As a direct and proximate cause of Defendants' negligence, willful, reckless and/or grossly negligent actions and inactions, Elizabeth Varner's heirs suffered:

- Loss of companionship;
- Emotional trauma;
- Loss of comfort and support;
- Psychological and emotional distress;
- Loss of enjoyment of life; and
- Loss of their Mother.

WHEREFORE, Plaintiff demands judgment against Defendants for actual and punitive damages, for the cost of this action, and for other such relief the Court deems just, equitable, and proper.

PINKSTON LAW FIRM, LLC

/s/ Shawn Pinkston
Shawn Pinkston, SC Bar No. 79965
856 Lowcountry Blvd., Suite 101
Mount Pleasant, South Carolina 29464
Office: 843-814-5472
Fax: 843-723-7300
shawnpinkston@me.com

Date: June 11, 2021
Mount Pleasant, South Carolina

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Exhibit C

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
WILLIAMS HAYNES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH VARNER,	)	CASE NO. 2021-CP-10-02744
PLAINTIFF,	)	
vs.	)	**DEFENDANT JERROLYN MONTGOMERY-SMALLS' ANSWER TO PLAINTIFF'S COMPLAINT**
FUNDAMENTAL ADMINISTRATIVE SERVICES LLC, AND FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, AND JERROLYN MONTGOMERY-SMALLS,	)	
DEFENDANTS.	)	

TO: SHAWN PINKSTON, ESQUIRE, ATTORNEY FOR PLAINTIFF:

The Defendant Jerrolyn Montgomery-Smalls (hereinafter "this Defendant"), by and through her undersigned counsel, *subject to and without waiving any right to compel this matter to arbitration,* responds to the allegations set forth in Plaintiff's Complaint as follows:

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

2. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations contained in Paragraph 1 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

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

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a response is required, those allegations are denied to the extent they assert or imply liability and/or damages as to this Defendant.

4. In responding to the allegations in Paragraph 4 of the Plaintiff's Complaint, this Defendant admits that she was the Administrator of the Facility at times relevant to Plaintiff's Complaint. Any allegations inconsistent with this response are denied and strict proof is demanded thereof.

5. Answering the allegations set forth in Paragraph 5 of Plaintiff's Complaint, this Defendant admits that Plaintiff filed a Notice of Intent to File Suit and attached an Affidavit of Suzanne Frederick, MSN RN-BC, CWCN. This Defendant denies the sufficiency of said affidavit and denies its contents the extent they allege or imply liability and/or damages as to this Defendant. Any allegations inconsistent with this response are denied and strict proof is demanded thereof.

6. Answering to the allegations set forth in Paragraph 6 of Plaintiff's Complaint, this Defendant admits the parties engaged in mandatory pre-suit mediation on June 7, 2021 that resulted in an impasse. The remainder of the allegations set forth in Paragraph 6 of Plaintiff's Complaint call for legal conclusions and therefore no response is required.

7. This allegations set forth in Paragraph 7 of Plaintiff's Complaint call for legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied to the extent they assert or imply liability and/or damages as to this Defendant.

8. The allegations set forth in Paragraphs 8 and 9 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, those allegations are denied to the extent they assert or imply liability

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and/or damages as to this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care to Ms. Varner. Any allegations inconsistent with this response is denied and strict proof is demanded thereof.

9. This Defendant denies the allegations set forth in Paragraph 10 of Plaintiff's Complaint and demands strict proof thereof. To the extent those allegations are directed at other parties, no response is required.

10. The allegations set forth in Paragraphs 11, 12, and 13 of Plaintiff's Complaint, appear to be directed at other parties and therefore no response is required. To the extent a response is required, as the sole licensee of the skilled nursing facility at issue, THI of South Carolina at Charleston, LLC is the sole provider of skilled nursing care and treatment to its residents, including Ms. Varner, and a fee is provided for services related thereto. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care to Ms. Varner. Further responding, this Defendant would crave reference to Ms. Varner's chart for its contents. Any allegations inconsistent with this response or intended to assert or imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof.

11. Answering the allegations set forth in Paragraphs 14, 15, 16, 17, 18, 19, and 20 of Plaintiff's Complaint, this Defendant would crave reference to Ms. Varner's chart and medical records for their contents. Any allegations inconsistent with those contents or which assert or imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care to Ms. Varner. Any allegations inconsistent with this response or which assert or

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imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof.

12. Answering the allegations set forth in Paragraph 21 of Plaintiff's Complaint, this Defendant would crave reference to the Death Certification cited therein for its contents. Any allegations inconsistent with those contents or which assert or imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof.

13. In responding to the allegations set forth in Paragraph 22 of Plaintiff's Complaint, this Defendant would restate its answers to the Paragraphs above as if set forth herein verbatim.

14. The allegations set forth in Paragraph 23 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, those allegations, including all subparts, are denied and strict proof is demanded thereof.

15. In responding to the allegations set forth in Paragraph 24 of Plaintiff's Complaint, this Defendant admits only that Plaintiff has attached a photocopied affidavit of Suzanne Frederick, MSN, RN-BC, CWCN to the Complaint. This Defendant denies the sufficiency of the affidavit and denies any and all allegations and assertions contained therein to the extent they allege liability or damages against this Defendant.

16. This Defendant denies the allegations set forth in Paragraph 25 of Plaintiff's Complaint and demands strict proof thereof.

17. In responding to the allegations set forth in Paragraph 26 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

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18. Answering the allegations set forth in Paragraph 27 of Plaintiff's Complaint, this Defendant admits that she served as the Administrator for the Facility while Ms. Varner was a resident. Further responding, This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person. This Defendant denies any interaction or relationship with the Plaintiff or Plaintiff's decedent of any kind. Any allegations inconsistent with this response are denied and strict proof is demanded thereof.

19. Answering the allegations set forth in the second Paragraph of Plaintiff's Complaint numbered "27", this Defendant asserts that as the sole licensee of the Riverside Health and Rehab, THI of South Carolina at Charleston, LLC owed a duty of care to its residents including Ms. Varner. This Defendant maintains that the care and treatment provided to Ms. Varner was a tall times in compliance with the appropriate standard of care. Any allegations inconsistent with this response or which assert or imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof.

20. This Defendant denies the allegations set forth in Paragraphs 28, 29, 30, 31, and 32 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

21. In responding to the allegations set forth in Paragraph 33 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

22. The allegations set forth in Paragraphs 34, 35, and 36 of Plaintiff's Complaint, including their subparts, call for legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied to the extent they assert or imply liability as to this Defendant.

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23. This Defendant denies the allegations set forth in Paragraphs 37, 38, 39, 40, and 41 of Plaintiff's Complaint and demands strict proof thereof.

24. In responding to the allegations set forth in Paragraph 42 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

25. This Defendant denies the allegations set forth in Paragraph 43 of Plaintiff's Complaint and demands strict proof thereof.

26. In responding to the allegations set forth in Paragraph 44 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

27. The allegations set forth in Paragraphs 45 and 46 of Plaintiff's Complaint call for legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied to the extent they assert or imply liability as to this Defendant.

28. This Defendant denies the allegations set forth in Paragraphs 47, 48, 49, 50, 51, 52, 53, 54, and 55 of Plaintiff's Complaint and demands strict proof thereof.

29. In responding to the allegations set forth in Paragraph 56 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

30. This Defendant denies the allegations set forth in Paragraphs 57 and 58 of Plaintiff's Complaint and demands strict proof thereof.

31. In responding to the allegations set forth in Paragraph 59 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

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32. This Defendant denies the allegations set forth in Paragraphs 60 and 61 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

33. This Defendant denies the allegations set forth in Plaintiff's Prayer for Relief and demands strict proof thereof.

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

35. This Defendant hereby gives notice that Plaintiff's claims against this Defendant should be submitted to arbitration pursuant to a binding arbitration agreement. This Answer is hereby made subject to all rights set forth therein, as well as in the related filing, including the lack of subject matter jurisdiction of this Court.

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

36. Plaintiff's recovery in the matter, if any, is limited by and subject to the provisions of the South Carolina Noneconomic Damages Awards Act of 2005 which is codified at S.C. Code Ann. §15-32-200 et seq., 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

37. This Defendant hereby gives notice that she intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and

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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 and all defenses asserted by the defendant in the case styled and captioned Williams 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, 2021-CP-10-01437 filed in the Court of Common Pleas, Charleston County, to the extent they are applicable.

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

40. This Defendant would allege, upon information and belief, that any injuries or damages sustained by the Plaintiff were due to, caused and occasioned by a natural disease

process over which the 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

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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45. This Defendant hereby raises election of remedies as an affirmative defense to Plaintiff's claims.

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

47. This Defendant hereby asserts that the Plaintiff lacks legal standing to pursue the instant claims.

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

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CLEMENT RIVERS, LLP

By: */s/ D. Jay Davis, Jr.*
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
Gaillard T. Dotterer, III
SC State Bar ID No.: 103620
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com,
mriddle@ycrlaw.com, gdotterer@ycrlaw.com
Attorneys for the Defendant Jerrolyn Montgomery-Smalls

Charleston, South Carolina

Dated: July 16, 2021

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Exhibit D

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASES NO. 2021-CP-10-01437 & -02477
WILLIAM HAYNES, as Personal Representative of the Estate of Elizabeth Varner, Plaintiff, vs. THI OF SOUTH CAROLINA AT CHARLESTON, LLC d/b/a Riverside Health and Rehab, Defendant.	**ORDER GRANTING MOTIONS TO COMPEL ARBITRATION AND RELATED MOTIONS TO STAY**
WILLIAM HAYNES, as Personal Representative of the Estate of Elizabeth Varner, Plaintiff, vs. FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; FUNDAMENTAL CLINICIAL AND OPERATIONAL SERVICES, LLC; and JERROLYN MONTGOMERY-SMALLS, Defendants.	

This matter is before the Court on four motions (collectively, the "Subject Motions"): one motion in Case 1437[1], namely, the Facility's[2] motion to compel arbitration, and three motions in

[1] "Case 1437" is *Haynes v. THI of South Carolina at Charleston, LLC*, Case No. 2021-CP-10-01437.

[2] The "Facility" is THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab, the defendant in Case 1437.

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Case 2477[3], namely, Ms. Montgomery-Smalls'[4] motion to compel arbitration and FAS[5] and FCOS's[6] motions to stay. All of the Subject Motions were filed on October 4, 2021, and they were all heard together on February 10, 2022, with all parties' respective counsel appearing before the Court via WebEx.

Chief among the Subject Motions are the Facility and Ms. Montgomery-Smalls' substantively identical motions to compel arbitration of the claims asserted against them in Case 1437 and Case 2477, respectively (collectively, the "Motions to Compel Arbitration"). Secondary to those motions are the substantively identical motions of FAS and FCOS to stay Case 2477 pending the final outcome of the Motions to Compel Arbitration and the arbitration proceedings they seek to compel (collectively, the "Motions to Stay"). After careful consideration, the Court GRANTS the Subject Motions. Its reasoning is set forth below.

I.

BACKGROUND

The Facility is a skilled nursing facility. With the help of her son and daughter-in-law, William Haynes ("William") and Kim Haynes ("Kim"), respectively, Elizabeth Varner ("Ms. Varner") was admitted as a resident of the Facility on May 20, 2019. Kim handled the paperwork in conjunction with Ms. Varner's admission, which included an Admission Agreement and an Arbitration Agreement that Kim signed on Ms. Varner's behalf.

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[3] "Case 2477" is *Haynes v. Fundamental Administrative Services, LLC*, Case No. 2021-CP-10-02477.

[4] "Ms. Montgomery-Smalls" is Jerrolyn Montgomery-Smalls, one of the defendants in Case 2477.

[5] "FAS" is Fundamental Administrative Services, LLC, one of the defendants in Case 2477.

[6] "FCOS" is Fundamental Clinical and Operational Services, LLC, one of the defendants in Case 2477.

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By her signature on the Arbitration Agreement, Kim expressly "represent[ed] that . . . she ha[d] authority to sign on [Ms. Varner's] behalf so as to bind [her] as well as [herself]." And, indeed, pursuant to a Durable Financial Power of Attorney executed March 25, 2018 (the "Power of Attorney"), Kim was Ms. Varner's secondary agent. The Power of Attorney, which was effective "[i]mmediately upon [its] execution" and expressly included the power to "[s]ubmit to alternative dispute resolution," authorized Kim to exercise the powers it conferred to Ms. Varner's primary agent, William, in the event he was "unable or unwilling to serve." According to the affidavits they filed on February 8, 2022, on the day Ms. Varner was admitted to the Facility, Kim and William were initially together with the Facility's representative Chandra Bryant ("Ms. Bryant") in the room that was being assigned to Ms. Varner until Kim went with Ms. Bryant to another location (within the Facility) to sign the paperwork while William stayed behind to await Ms. Varner's arrival.

Plaintiff[7] filed Case 1437 and Case 2477 on March 25, 2021, and June 11, 2021, respectively, asserting claims arising out of alleged deficiencies in Ms. Varner's care/treatment at the Facility. As for the relationship between the subject matter of the two cases, although Plaintiff ended up withdrawing the motion, his motion to consolidate (filed in Case 2477 on August 16, 2021) states that Case 1437 and Case 2477 "concern the same underlying facts and have factual and legal questions in common."

Defendants[8] timely answered the respective lawsuits, subject to and without waiving any right to compel the matter to arbitration, denying the liability Plaintiff alleged and raising a number of affirmative defenses.

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[7] "Plaintiff" is William in his capacity as personal representative of Ms. Varner's estate, who is the plaintiff in both Case 1437 and Case 2477.

[8] "Defendants" are the Facility, FAS, FCOS, and Ms. Montgomery-Smalls, collectively.

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Citing the Arbitration Agreement, the Motions to Compel Arbitration ask the Court to compel Plaintiff's claims against the Facility and Ms. Montgomery-Smalls to arbitration. Citing the Motions to Compel Arbitration, the Motions to Stay ask the Court to stay Case 2477 pending the ultimate outcome of the Motions to Compel Arbitration, i.e., until arbitrability is finally determined and any arbitration proceedings resulting from that determination are themselves finally concluded.

II.

ANALYSIS

A. Re: the Motions to Compel Arbitration

The core question here is this: Is the Arbitration Agreement (which Kim signed for Ms. Varner) enforceable against Ms. Varner's estate (i.e., Plaintiff) even though it was not signed by Ms. Varner herself? For two reasons, the Court answers this question in the affirmative: (1) the Arbitration Agreement was properly signed by Kim for Ms. Varner pursuant to Kim's authority under the Power of Attorney, and (2) the Arbitration Agreement is enforceable against Plaintiff—or, more precisely, Plaintiff is estopped to deny that the Arbitration Agreement is enforceable—by virtue of merger and equitable estoppel. Thus, since Plaintiff's claims against the Facility and Ms. Montgomery-Smalls are clearly within the scope of the Arbitration Agreement, they should proceed in arbitration, not litigation. The Court's findings/analytical steps in reaching this conclusion follow.

1. Both state and federal policy favor arbitration.

There is a "strong South Carolina and federal policy favoring arbitration . . . ." *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 877 (Ct. App. 2020); *see also 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."). Indeed,

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"arbitration agreements are *presumed valid*." *Doe*, 430 S.C. at 607, 846 S.E.2d at 877 (emphasis added).

2. The Arbitration Agreement is governed by the FAA[9].

The Arbitration Agreement is governed by the FAA, not South Carolina's Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10 to -240 (the "SCAA"). 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.

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

[9] The "FAA" is the Federal Arbitration Act, 9 U.S.C §§ 1–16.

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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).

3. 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"[10] and "ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). To that end, the FAA provides that an arbitration 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.*

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[10] *Allied–Bruce*, 513 U.S. at 270.

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Concepcion, 563 U.S. 333, 339 (2011)). Under the FAA, "courts *must* place arbitration agreements on *equal footing with other contracts* . . . ." *Concepcion* at 339 (emphasis added); *see also Allied–Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted).[11]

4. The Arbitration Agreement is valid on its face.

The Arbitration Agreement is valid on its face. In other words, there is nothing within the four corners of the document itself that calls its validity into question. It bears Kim's signature on behalf of Ms. Varner, along with her express representation that she is authorized to sign for her.[12] It is countersigned by Ms. Bryant for the Facility. It is duly supported by consideration and sets forth all necessary terms, containing, as it does, the parties' mutual promises to submit a certain

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[11] 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 *favored* treatment of arbitration agreements relative to other contracts.

[12] By virtue of her signature, Kim is "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement, *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms."), including, of course, the express representation therein of her authority to act on Ms. Varner'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 Kim is no less bound by this covenant than the Facility.

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defined scope of disputes to binding arbitration[13] before an arbitrator who is either agreed upon by the parties themselves or selected by the Court, in a proceeding to be conducted pursuant to the South Carolina ADR Rules, which will result in a decision that is enforceable in a court of competent jurisdiction.[14] To require more just because an arbitration agreement is in issue would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *Concepcion*, 563 U.S. at 339.

Moreover, the Arbitration Agreement is not unconscionable. For an agreement to be deemed unconscionable, there must be both (1) an absence of meaningful choice on the part of one 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 first part of the test (absence of meaningful choice) is undermined by the express acknowledgement in the Arbitration Agreement itself that the "Resident/Representative is not required to use the . . . Facility for Resident's healthcare needs and . . . 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 undermined by the fact that the Arbitration Agreement itself was not required for admission to the Facility.

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

[14] In this regard, the Court would note that the South Carolina ADR Rules, which do apply to the conduct of arbitration proceedings under the Arbitration Agreement, should not be confused with the SCAA, which, as addressed above (in explaining the applicability of the FAA), does not apply here.

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But even assuming, *arguendo*, the first part of the test were somehow met, the second part (unreasonably oppressive terms) certainly is not. The Arbitration Agreement simply binds the parties (both sides) to resolve disputes via arbitration, which is something that is expressly favored as a matter of both state and federal policy. *Parsons*, 418 S.C. at 6, 791 S.E.2d at 131; *Doe*, 430 S.C. at 607, 846 S.E.2d at 877. And there is nothing about the Arbitration Agreement—which, again, calls for arbitration conducted pursuant to the South Carolina ADR Rules—that would suggest it is not geared towards achieving an unbiased decision by a neutral decision-maker. *Simpson*, 373 S.C. 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."). Indeed, Rule 1 of the South Carolina ADR Rules expressly states, "These rules shall be construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply."

5. Plaintiff's claims are within the scope of the Arbitration Agreement.

Without question, Plaintiff's claims against the Facility and Ms. Montgomery-Smalls 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.

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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.").

6. The Arbitration Agreement covers Plaintiff's claims against both the Facility and Ms. Montgomery-Smalls.

The Arbitration Agreement expressly states that it not only covers the Facility itself but also the Facility's "agents, employees, and servants." Plaintiff's complaint in Case 2477 alleges that, "at all times relevant herein [Ms. Montgomery-Smalls] was the Administrator of [the Facility]." Accordingly, the Arbitration Agreement covers Plaintiff's claims against both the Facility and Ms. Montgomery-Smalls.

7. The Arbitration Agreement is valid and enforceable because it was properly signed by Kim for Ms. Varner pursuant to Kim's authority under the Power of Attorney.

A person possessing contractual capacity, acting as grantor, can authorize another to contract on the grantor's behalf under the specific terms of a power of attorney. *See Gaddy v. Douglass*, 359 S.C. 329, 344–45, 597 S.E.2d 12, 20 (Ct. App. 2004); *see also Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014) ("A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. The written authorization itself is the power of attorney.") (quoting *In re Thames*, 344 S.C. 564, 569, 544 S.E.2d 854, 856 (Ct. App. 2001)) (internal quotation marks omitted). "[T]he holder of

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[the] power of attorney steps into the shoes of the grantor and is basically the alter ego of the grantor." *Bennett v. Carter*, 421 S.C. 374, 382, 807 S.E.2d 197, 201 (2017).

The Power of Attorney was duly executed on March 25, 2018, and became effective immediately upon its execution. The Power of Attorney expressly included the power to "[s]ubmit to alternative dispute resolution." And while, as secondary agent, Kim's authority under the Power of Attorney was contingent upon William being "unable or unwilling to serve," this contingency came to pass due to William's desire to wait in Ms. Varner's room for her arrival. Accordingly, when she signed the Arbitration Agreement for Ms. Varner in May of 2019, Kim was properly acting within the scope of her authority under the Power of Attorney.

8. Plaintiff is precluded from denying the enforceability of the Arbitration Agreement because of merger and equitable estoppel.

Even though Ms. Varner is a nonsignatory to the Arbitration Agreement, i.e., even though she did not actually sign the Arbitration Agreement herself, it is nonetheless enforceable against her/her estate (i.e., Plaintiff).

"South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel." *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (confirming the validity of the general proposition of law on which the appellants based their merger/equitable estoppel argument: "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

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course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.").

Conceptually, the Facility and Ms. Montgomery-Smalls' merger/equitable estoppel argument is not about showing that the Arbitration Agreement is enforceable but about showing that Plaintiff is estopped to deny that the Arbitration Agreement is enforceable. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and, Ms. Varner having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff (who stands in place of Ms. Varner in bringing these actions as the personal representative of her estate) is estopped to deny the enforceability of the Arbitration Agreement with which the Admission Agreement merged. Accordingly, counterarguments aimed at denying the Arbitration Agreement's enforceability (e.g., arguments based on a supposed lack of authority to sign the Arbitration Agreement on behalf of Ms. Varner) are beside the point and unavailing.

As explained below, the Court finds that the Arbitration Agreement is also enforceable against Plaintiff based on merger and equitable estoppel.

Merger

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

> Appellants contend that even if Sister lacked capacity to execute the 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,

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> The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
>
> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.*

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

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,"[15] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[16] evidence exists 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," 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.

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15 *Id.* at 355, 755 S.E.2d at 455.

16 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 [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).

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It must be remembered that, where, as here, the instruments in question (i.e., the Admission Agreement and the Arbitration Agreement) were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For this presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the circumstances that gave rise to the merger presumption in the first place (same time, parties, purpose, and transaction)—can 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.

Although the Admission Agreement does contain an "Entire Agreement" clause, it does not refer to the Arbitration Agreement as a separate contract but rather expressly states, "other Admissions materials . . . are made a part of this Agreement by reference herein." Clearly, 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) (recognizing "admission documentation" to include an arbitration agreement: "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). This directly contradicts the notion of any intended "separatedness" (in the parlance of the *Coleman* Court[17]) between the Admission Agreement and the Arbitration Agreement.

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[17] 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).

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While the Arbitration Agreement was not required for Ms. Varner's admission to the Facility, all this means is that the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become part of the admissions materials once it was in fact executed, which, without question, it was—and under the very circumstances (same time, parties, purpose, and transaction) that give rise to the presumption of merger. In other words, even though the Arbitration Agreement was not a *condition* of admission, it was certainly agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument, governing various interrelated aspects of Ms. Varner's relationship with the Facility: the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission.

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). 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. Unlike the Admission Agreement, which theoretically could have stood on its own in the absence of the Arbitration Agreement—and, of course, had the Arbitration Agreement not been executed, it simply would not exist and no question of merger would have arisen to begin with—the Arbitration Agreement could not have stood on its own: It only makes sense together with, i.e., connected to, the Admission Agreement, which is its sole reason for being.

That the Admission Agreement and the Arbitration Agreement have their own titles and are separately paginated and signed admits of no reasonable inference of an intent contrary to

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merger. To point to such things is to do no more than to observe 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 even assuming, *arguendo*, there is some ambiguity in this regard, to fall back on the idea that it should be construed against the Facility as the drafter is uncalled for in this context. *Merger is the default position*, i.e., it is presumed, and this is so because of the confluence of a particular set of circumstances—the instruments at issue were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these stars align—same time, same parties, same purpose, same transaction—our law instructs the Court to consider and construe the instruments 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.

Equitable Estoppel

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement by virtue of

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the direct benefits test our Supreme Court endorsed in *Wilson*. *See* 426 S.C. at 340, 827 S.E.2d at 175 ("Under direct benefits estoppel, '[a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when [the nonsignatory] receives a direct benefit from a contract containing an arbitration clause.'"") (quoting *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012)) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)); *id.* ("'In the arbitration context, the doctrine [of direct benefits estoppel] 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*.'") (emphasis in original) (quoting *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601) (quoting *Int'l Paper*, 206 F.3d at 418).

The *Wilson* Court favorably discussed the application of the direct benefits test in the arbitration agreement context—the Court of Appeals having applied the test in the decision then before the *Wilson* Court on writ of certiorari, which test the Court of Appeals had earlier applied to find a nonsignatory estopped to deny the validity of an arbitration agreement in *Pearson*, 400 S.C. 281, 733 S.E.2d 597, and under which test the Facility and Ms. Montgomery-Smalls contend Plaintiff is estopped to deny the validity of the Arbitration Agreement here. *See 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).

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Without question, Ms. Varner received direct benefits from the Admission Agreement throughout her residency at the Facility, including, without limitation, the room, board, care/treatment she received therein. To deny her receipt of such benefits is illogical and objectively unreasonable and would require wholly discrediting the entirety of her residency: every meal, every instance of care/treatment she received, essentially every moment at the Facility—even Plaintiff's complaints do not go nearly so far as that. Ms. Varner having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff cannot now deny the enforceability of the Arbitration Agreement with which the Admission Agreement merged.

9. Neither the Facility nor Ms. Montgomery-Smalls waived any arbitration rights.

Waiver is the voluntary relinquishment of a known right. When timely answering Plaintiff's complaints, the Facility and Ms. Montgomery-Smalls expressly reserved their arbitration rights. Moreover, Case 2477 was filed some three months after Case 1437, and by virtue of his now-withdrawn motion to consolidate, Plaintiff acknowledges that the cases "concern the same underlying facts and have factual and legal questions in common." There was no undue delay in moving to compel arbitration; nor was there any prejudice from any supposed delay; nor did either the Facility or Ms. Montgomery-Smalls make any use of the tools of litigation inconsistent with their arbitration rights.

B. Re: the Motions to Stay

The relationship between the Motions to Compel Arbitration and the Motions to Stay is such that the grant of the former requires the grant of the latter. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to

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arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.") (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties."). But even assuming, *arguendo*, staying Case 2477 is not mandatory here, for the sake of judicial economy, of avoiding piecemeal litigation and the potential for inconsistent obligations, and of the orderly administration of its own docket, the Court exercises its discretion to impose such a stay. *See State v. Langford*, 400 S.C. 421, 435, 735 S.E.2d 471, 478 (2012) ("[A] court's power to hear and decide cases 'carries with it the inherent power to control the order of its business.'") (quoting *Williams v. Bordon's*, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980)); *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) ("The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement."). Indeed, as stated in Plaintiff's now-withdrawn motion to consolidate Case 1437 with Case 2477, "[i]t is in the interest of efficiency and judicial economy to consolidate these actions as aforesaid and avoid duplicative discovery and trials." These interests likewise support staying Case 2477.

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III.

CONCLUSION

The Subject Motions are hereby GRANTED. Case 1437 is stayed in favor of arbitration between Plaintiff and the Facility. Case 2477 is stayed in favor of arbitration between Plaintiff and Ms. Montgomery-Smalls, with Plaintiff's claims against FAS and FCOS stayed pending the ultimate outcome of arbitration between Plaintiff, the Facility, and Ms. Montgomery-Smalls.

IT IS SO ORDERED.

_____

ROGER M. YOUNG, SR., Presiding Judge
Court of Common Pleas
Charleston County

Charleston, South Carolina

Dated: _____

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Charleston Common Pleas

Case Caption: William Haynes , plaintiff, et al VS Thi Of South Carolina At Charleston , defendant, et al

Case Number: 2021CP1001437

Type: Order/Compel

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

Exhibit E

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FACILITY - RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT

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

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

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

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

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

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

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

Kimberly Haynes 11/10/23
Resident/Representative Signature Date

Kimberly Haynes
Printed Name of Resident/Representative

Cassandra Bryan
Authorized Agent of Facility Date

Riverside Health & Rehab
printed name of facility

Original: Business File • Photocopy: Resident/Representative

Exhibit F

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State of South Carolina)
) Arbitration Order
County of Charleston.)

William Hayes, as Personal Representative
of the Estate of Elizabeth Varner, Plaintiff.
vs.
THI of South Carolina at Charleston LLC
D/B/A Riverside Health and Rehab and
Jerrolyn Montgomery-Smalls, Defendants.

By order of the Honorable Roger M. Young,Sr. this case was to be decided by arbitration. By Arbitration Order dated September 15, 2022, the parties agreed I would serve as Arbitrator. The arbitration was conducted on April 3, 2023 and concluded on April 6, 2023. All parties were present and represented by counsel. Each side presented fact and expert witnesses in support of their respective claims and defenses. A complete copy of the relevant medical records were introduced into the proceeding.
Notwithstanding section 19 of the Arbitration Order which required me to issue written findings of facts or conclusions of law, the parties by agreement requested a succinct order without these findings.
I find the Plaintiff proved by the preponderance of the evidence the defendant, THI, breached the standard of care in regards to the manner in which they transferred Mrs.

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Varner, failing to comply with the care plan they had ordered for her. This deviation was the proximate cause of the fracture she sustained to her distal femur and the medical care and surgery necessitated by the fracture.

Her estate is entitled to the reasonable and necessary medical expenses associated with the fracture. The evidence proved $77,007.00 of medical expenses related to the fracture. The only other evidence of compensable damages was for pain and suffering from the fracture. Because of her deteriorated medical condition there was no evidence of loss of enjoyment of life or emotional distress. It was difficult to differentiate between pain and suffering caused by the fracture and her overall condition. The fracture occurred on or about October 6, 2019 and she suffered with it until her cardiac arrest on or about October 27, 2019. I award Plaintiff $10,000.00 for pain and suffering.

I find the Plaintiff failed to prove by the preponderance of the evidence Mrs. Varner's cardiac arrest and death were proximately caused by the fracture.

I find the Plaintiff failed to prove by clear and convincing evidence that any of the defendants acted reckless,willful or with a conscious disregard of Mrs. Varner's care, therefore I award no punitive damages.

IT IS THEREFORE ORDERED Plaintiff is awarded judgement against the defendant THI of South Carolina at Charleston LLC D/B/A Riverside Health and Rehab in the amount of $87,007.00.

D.A. EarlyIII
Arbitrator

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May16,2023

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Exhibit G

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-----Original Message-----
From: Jack Early <jackearly1@gmail.com>
Sent: Friday, May 26, 2023 10:51 AM
To: Riddle, Matthew <MRiddle@ycrlaw.com>; shawnpinkston@me.com
Subject: State of South Carolina).

State of South Carolina).

Supplemental
) Arbitration Order
County of Charleston.)

William Hayes, as Personal Representative of the Estate of Elizabeth Varner, Plaintiff.
vs.
THI of South Carolina at Charleston LLC
D/B/A Riverside Health and Rehab and
Jerrolyn Montgomery-Smalls, Defendants.

By order of the Honorable Roger M. Young,Sr. this was to be decided by arbitration. By Arbitration Order dated September 15, 2022, the parties agreed I would serve as Arbitrator. The arbitration was conducted on April 3, 2023 and concluded on April 6, 2023. All parties were present and represented by counsel. Each side presented fact and expert witnesses in support of their respective claims and defenses. A complete copy of the relevant medical records were introduced into the proceeding.
Notwithstanding section 19 of the Arbitration Order which required me to issue written findings of facts or conclusions of law, the parties by agreement requested a succinct order without these findings.
I find the Plaintiff proved by the preponderance of the evidence the defendant, THI, breached the standard of care in regards to the manner in which they transferred Mrs. Varner, failing to comply with the care plan they had ordered for her. This deviation was the proximate cause of the fracture she sustained to her distal femur and the medical care and surgery necessitated by the fracture.
Her estate is entitled to the reasonable and necessary medical expenses associated with the fracture. The evidence proved $77,007.00 of medical expenses related to the fracture. The only other evidence of compensable damages was for pain and suffering from the fracture. Because of her deteriorated medical condition there was no evidence of loss of enjoyment of life or emotional distress. It was difficult to differentiate between pain and suffering caused by the fracture and her overall condition. The fracture occurred on or about October 6, 2019 and she suffered with it until her cardiac arrest on or about October 27, 2019. I award Plaintiff $10,000.00 for pain and suffering.
I find the Plaintiff failed to prove by the preponderance of the evidence Mrs. Varner's cardiac arrest and death were proximately caused by the fracture.
I find the Plaintiff failed to prove by clear and convincing evidence that any of the defendants acted reckless,willful or with a conscious disregard of Mrs. Varner's care, therefore I award no punitive damages.
IT IS THEREFORE ORDERED Plaintiff is awarded judgement against the defendant THI of South Carolina at Charleston LLC D/B/A Riverside Health and Rehab in the amount of $87,007.00.

D.A. EarlyIII
Arbitrator

May16,2023

Subsequent to issuing the original order, the parties requested a specific finding of liability as to the defendant, Jerrolyn Montgomery-Smalls.
I find the Plaintiff failed to prove by the preponderance of the evidence that defendant Montgomery-Smalls deviated from the standard of care in her care of or investigation of the fall.

Therefore Plaintiff is not entitled to judgement against Jerrolyn Montgomery-Smalls.

D.A.Early III
May 26, 2023

Sent from my iPad

Exhibit H

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0000292070	PINKSTON LAW FIRM LLC	04-09-2024	0000025087

BU-VOUCHER-ID / COMMENT	INVOICE NUMBER	INVOICE DATE	GROSS AMOUNT	DISCOUNT TAKEN	PAID AMOUNT
11004 00060875	1	03-27-2024	87,007.00	0.00	87,007.00
E/O Elizabeth Varner / arbitration award.			FACILITY: 11004-Fundamental Administrati		

TOTAL GROSS AMOUNT	TOTAL DISCOUNT TAKEN	TOTAL PAID AMOUNT
87,007.00	0.00	87,007.00

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THIS CHECK IS VOID IF GREEN PANTOGRAPH AND MICROPRINTING ARE ABSENT

86-105/1031 **Payable through Bank of Oklahoma, Bartlesville, OK**
Transit No. Routing Symbol: 86-105/1031

0000025087

Pay Date: 04-09-2024 **Pay Amount:** **********$87,007.00**

CHECK NOT VALID AFTER 180 DAYS

Pay ****EIGHTY-SEVEN THOUSAND SEVEN AND 00/100 DOLLARS****

To The Order Of

PINKSTON LAW FIRM LLC
SUITE C117
295 SEVEN FARMS DRIVE
CHARLESTON SC 29492

Ken Tabler

⑈0000025087⑈ ⑆103101055⑆309060549⑈

Exhibit I

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ELECTRONICALLY FILED - 2024 Feb 12 4:16 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1001437

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner, Plaintiff, v. Fundamental Administrative Services LLC, And Fundamental Clinical and Operational Services, LLC, and Jerrolyn Montgomery-Smalls. Defendants.	IN THE COURT OF COMMON PLEAS CASES NO. 2021CP-1001437 & 1002744 **FINAL ORDER**
STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner, Plaintiff, v. THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab, Defendant.	

THIS MATTER is before the Court on a Petition for a Final Order filed by Plaintiff. Based on the Petition and the proof of ADR submitted on May 23, 2023, this Court hereby enters and incorporates by reference the Confidential Arbitration Order issued by Doyet A. Early, III, on May 16, 2023.

THEREFORE, this Court GRANTS Plaintiff's Petition and enters a Final Order in this matter relating to arbitration and lifts the corresponding stays associated with case CAFN: 2021CP1002744.

AND IT IS SO ORDERED.

[*Electronic Signature Page to Follow*]

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ELECTRONICALLY FILED - 2024 Feb 12 4:16 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1001437

ELECTRONICALLY FILED - 2024 Nov 14 2:48 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744
ELECTRONICALLY FILED - 2024 Feb 12 4:16 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1001437

Charleston Common Pleas

Case Caption: William Haynes , plaintiff, et al VS Thi Of South Carolina At Charleston , defendant, et al

Case Number: 2021CP1001437

Type: Order/Other

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

Exhibit J

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ELECTRONICALLY FILED - 2024 Sep 09 1:10 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744
ELECTRONICALLY FILED - 2024 Nov 14 2:48 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
WILLIAM HAYNES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH VARNER,	)	CASE NO. 2021-CP-10-02744
PLAINTIFF,	)	
vs.	)	**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
FUNDAMENTAL ADMINISTRATIVE SERVICES LLC, AND FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, AND JERROLYN MONTGOMERY-SMALLS,	)	
DEFENDANTS.	)	

TO: SHAWN PINKSTON, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

Defendants Jerrolyn Montgomery-Smalls ("Defendant Smalls"), Fundamental Administrative Services, LLC ("FAS"), and Fundamental Clinical and Operational Services, LLC ("FCOS"), by and through their undersigned counsel, respectfully submit this Memorandum of Law in support of their Motion for Summary Judgment. As explained below, Plaintiff's claims against Defendants are barred by the doctrines of *res judicata* and/or collateral estoppel based on the outcome of a prior arbitration brought by Plaintiff arising out of the same facts and circumstances alleged in this case. In light of the preclusive effect of the arbitration award, there are no material facts in dispute and Defendants are entitled to judgment as a matter of law. Accordingly, Defendants' Motion should be granted.

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FACTUAL BACKGROUD

A. The Lawsuits

On March 25, 2021, Plaintiff, in his capacity as the personal representative of the Estate of Elizabeth Varner, filed an action ("*Riverside* Lawsuit") against non-party THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab ("Facility" or "Riverside"), a skilled-nursing facility where Ms. Varner was a resident in October 2019. (Exhibit A ¶¶ 2, 4.) The *Riverside* Lawsuit alleged that on October 6, 2019, Ms. Varner was hospitalized with a fractured femur that she sustained at the Facility and subsequently had to undergo surgery to treat her injury. (Ex. A ¶¶ 5-9.)

The *Riverside* Lawsuit further alleged that in a separate incident, on October 27, 2019, Ms. Varner was hospitalized again after she was found to be nonresponsive at the Facility. (Ex. A ¶ 10.) Ms. Varner suffered cardiac arrest while at the hospital and later died on October 29, 2019. (Ex. A ¶ 11.) The *Riverside* Lawsuit contended that the femur fracture that Ms. Varner sustained at the Facility was a "significant condition contributing to her death." (*Id.*) Plaintiff asserted causes of action against the Facility for medical malpractice, negligence and gross negligence (Count 1); neglect of a vulnerable adult (Count 2); (3) wrongful death (Count 3); and survivorship action (Count 4). (Ex. A ¶¶ 13-33.)

On June 11, 2021, Plaintiff, again acting as the personal representative of Ms. Varner's estate, filed this case against Defendants based on the same factual allegations regarding Ms. Varner's care and treatment at the Facility that were alleged in the *Riverside* Lawsuit. (Exhibit B ¶¶ 11-21.) Defendant Smalls was the Administrator of the Facility during Ms. Varner's residency. (Exhibit C ¶ 18.) Plaintiff alleges that FAS "exerted control in the oversight, management, direction, and operation of Riverside, including the development of budgets, choosing vendors and

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consultants, and deciding nurse staffing hours per patient days deriving revenue therefrom." (Ex. B ¶ 9.) Plaintiff avers that FCOS "exerts significant control over the [Facility's] operation," "including the development of policies and procedures, training, and instruction for the staff at Riverside." (Ex. B ¶ 8.)

In this case, Plaintiff asserts the same four causes of action that were asserted in the *Riverside* Lawsuit. (Ex. B ¶¶ 22-25 (negligence/gross negligence (Count 1)); ¶¶ 44-55 (neglect of a vulnerable adult (Count 5)); ¶¶ 56-58 (wrongful death (Count 6)); ¶¶ 59-61 (survivorship action (Count 7)). Plaintiff also asserts claims for corporate negligence (Count 2), joint-venture liability (Count 3) and corporate veil-piercing liability (Count 4). (Ex. B ¶¶ 26-43.) On July 16, 2021, Defendant Smalls filed an Answer denying any liability and raising affirmative defenses, including the right to demand arbitration. (Ex. C ¶ 35.)

B. The Court's Order Compelling Arbitration

On February 24, 2022, the Court in both cases entered an order granting the Facility's and Defendant Smalls' respective motions to compel arbitration (Exhibit D) pursuant to the parties' Arbitration Agreement. (Exhibit E.) The Court ruled that because the Arbitration Agreement applies to the Facility and the Facility's "agents, employees, and servants," "the Arbitration Agreement covers Plaintiff's claims against both the Facility and [Defendant Smalls]." (Ex. D at 10.) The Arbitration Agreement further provides that "[t]he 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." (Ex. E at 1.) In the "interest of efficiency and judicial economy," the Court stayed this lawsuit, including Plaintiff's claims against non-arbitrating Defendants FAS and FCOS, pending the completion of the arbitration of Plaintiff's claims against the Facility and Defendant Smalls. (Ex. D at 18-19.)

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C. The Arbitration Order

Plaintiffs' claims against the Facility and Defendant Smalls were consolidated in a single arbitration proceeding. On September 15, 2022, the arbitrator (Hon. Doyet E. Early, III) issued an Arbitration Order memorializing the parties' stipulated procedures governing how the arbitration would be conducted. (Exhibit F.) In the Arbitration Order ¶ 1, the parties agreed to arbitrate "the claims and defenses raised in the complaint[s] and answer[s] filed in the above state court matter[s]." (Ex. F ¶ 1.) The Arbitration Order ¶ 19 also provided that the arbitrator would issue written findings of fact and conclusions of law. (Ex. F ¶ 19.)

D. The Arbitration Award

The arbitration hearing was held from April 3, 2023 to April 6, 2023. (Exhibit G at 1.) On May 16, 2023, the arbitrator issued his award ("Arbitration Award"). In the Arbitration Award, [redacted]. The arbitrator noted that [redacted] (Ex. G at 1.)

In the Arbitration Award, the arbitrator determined:

(1) [redacted]

(2) [redacted];

(3) [redacted];

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(4) [redacted];

(5) [redacted]

(6) [redacted].

Based on these findings, the arbitrator [redacted]. (Ex. G at 1-2.)

On May 26, 2023, the arbitrator, at the request of the parties, supplemented his Arbitration Award, ruling that [redacted] (Ex. H.) The arbitrator found that [redacted]

E. The Court's Final Order

Meanwhile, on February 12, 2024, the Court granted Plaintiff's petition for entry of a Final Order that incorporated the Arbitration Award and lifted the stay of this lawsuit. (Exhibit J.) Even though the preclusive effect of the Arbitration Award bars Plaintiff from pursuing this action against Defendants, Plaintiff is continuing to do so, thus necessitating this Motion.

ARGUMENT

I. DEFENDANT SMALLS IS ENTITLED TO SUMMARY JUDGMENT BASED ON THE DOCTRINE OF *RES JUDICATA*

Defendant Smalls is entitled to summary judgment because the Arbitration Award is *res judicata* and precludes Plaintiff's prosecution of his claims against Defendant Smalls in this case. *Res judicata* "bars subsequent actions by the same parties when the claims arise out of the same

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transaction or occurrence that was the subject of a prior action between those parties."[1] *Pye v. Aycock*, 325 S.C. 426, 433, 480 S.E.2d 455, 458 (Ct. App. 1997) (citation omitted). *Res judicata* applies where: (1) the judgment in the prior action was final, valid, and on the merits; (2) both actions involve the same parties; and (3) the second action involved claims properly included in the first action. *See Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995). *Res judicata* applies to arbitration awards and bars a litigant from asserting claims in a later action that were or "could have been arbitrated in the original proceeding." *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 496, 593 S.E.2d 480, 486 (Ct. App. 2004).

Here, all of the *res judicata* requirements are met. *First*, the Arbitration Award "is a final, binding award on the merits." *Palmetto Homes*, 357 S.C. at 494, 593 S.E.2d at 485. This is especially true in this case because the parties' Arbitration Agreement says that the arbitrator's "decision shall be binding on all parties and may be enforced by a court of competent jurisdiction." (Ex. E at 1.) And Plaintiff himself acknowledged the finality of the Arbitration Award by successfully petitioning the Court to incorporate the Arbitration Award into the Final Order. (Ex. J.) The Arbitration Award thus signifies the end, not the commencement of litigation, and "is presumptively correct." *Trident Tech. College v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 111, 333 S.E.2d 781, 788-89 (1985). This satisfies the first *res judicata* requirement.

Second, Plaintiff and Defendant Smalls were parties to the arbitration and are parties to this case, which satisfies the second *res judicata* requirement. *See Palmetto Homes*, 357 S.C. at 494, 593 S.E.2d at 485.

[1] The purpose of *res judicata* is to prevent improper "claim splitting," which Plaintiff seeks to do here. To that end, *res judicata* "prohibits the owner of a single cause of action from either dividing or splitting the cause of action so as to make it the subject of several causes of action . . . ." *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986).

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Finally, the facts alleged in this case are identical to those that were litigated in the arbitration. And, pursuant to the Court's order compelling arbitration (Ex. D at 10) and the arbitrator's Arbitration Order ¶ 1 (Ex. F ¶ 1), Plaintiff was required to present all of his claims against Defendant Smalls in the arbitration, [redacted]. *See Pye*, 325 S.C. at 433, 480 S.E.2d at 458 (*res judicata* applies where successive suits involve the same subject matter and causes of action). The Arbitration Award thus conclusively resolved Plaintiff's causes of action against Defendant Smalls. *Res judicata* therefore bars Plaintiff from pursuing those same claims—or any other unasserted causes of action arising out of the same facts—in this case. *See Palmetto Homes*, 357 S.C. at 494-96, 593 S.E.2d at 485-86; *Nunnery*, 289 S.C. at 210-11, 345 S.E.2d at 743-44. Accordingly, the Court should grant summary judgment for Defendant Smalls and dismiss her from this action.

II. FAS AND FCOS ARE ENTITLED TO SUMMARY JUDGMENT BASED ON THE COLLATERAL ESTOPPEL DOCTRINE

Defendants FAS and FCOS are entitled to summary judgment on Plaintiff's claims against them based on the collateral estoppel effect of the Arbitration Award. "Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). Collateral estoppel applies when an issue was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *See id.*

Importantly, collateral estoppel can be used defensively against a plaintiff who was a party in a prior action, even if the defendant was not a party to the prior litigation, so long as the plaintiff "had a full and fair opportunity to previously litigate the issue." *Id.* at 555, 684 S.E.2d at 782 (noting that mutuality is not a requirement of collateral estoppel); *see also Graham v. State Farm*

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Fire & Cas. Ins. Co., 277 S.C. 389, 391, 287 S.E.2d 495, 496 (1982) (ruling that plaintiff was barred from re-litigating an issue decided against the plaintiff in a prior suit even though the defendant was not a party to the prior action); *Irby v. Richardson*, 278 S.C. 484, 487, 298 S.E.2d 452, 454 (1982) (same). At bottom, collateral estoppel "rest[s] upon the wholesome principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity." *Graham*, 277 S.C. at 391, 287 S.E.2d at 496.

Plaintiff is estopped from pursuing his claims against FAS and FCOS for at least two reasons. *First*, the full extent of Plaintiff's damages was decided in the arbitration, where the issue was actually litigated and necessary to the Arbitration Award. And, even though FAS and FCOS were not parties to the arbitration, Plaintiff had a full and fair opportunity to litigate his damages in that proceeding. To be sure, in the Arbitration Award, the arbitrator [redacted]. (Ex. G at 2.)

Here, Plaintiff's claims against FAS and FCOS for negligence/gross negligence (Count 1),[2] corporate negligence (Count 2), neglect of a vulnerable adult (Count 5), and survivorship (Count 7) seek the same damages that Plaintiff [redacted]. (*Compare* Ex. A ¶¶ 16, 27, 32 (damages alleged in this case), *with* Ex. B ¶¶ 25, 31, 55, 60 (damages alleged in the *Riverside* Lawsuit).) Because the arbitrator already [redacted], Plaintiff is estopped from seeking additional damages from FAS and FCOS. *See Carolina Renewal*, 385 S.C. at 558, 684 S.E.2d at 784 (plaintiff

[2] Plaintiff's negligence/gross negligence claim also should be dismissed because it is not directed to Defendants. Instead, Plaintiff alleges a claim against "[t]he care providers at *Riverside Health and Rehab* [who] violated the standard of care." (Ex. A ¶ 23.)

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estopped from re-litigating damages that were decided in a prior action); *see also, e.g., Johnson v. Lapan*, No. 09-ADMS-70010, 2010 WL 1170254, at *2 (Mass. App. Ct. Sept. 28, 2009) (plaintiff estopped from recovering additional damages from a different defendant after her damages were decided in arbitration and the award was paid); *Murakami v. Wilmington Star News, Inc.*, 528 S.E.2d 68, 71 (N.C. Ct. App. 2000) (arbitration award collaterally estopped the plaintiff from relitigating damages in a subsequent lawsuit against a different defendant). FAS and FCOS therefore should be granted summary judgment on these causes of action.

Second, Plaintiff's joint-venture and alter-ego/veil-piercing claims (Counts 3 and 4, respectively) must be dismissed. In his Complaint, Plaintiff seeks to impute the Facility's liability to FAS and FCOS based on allegations that FAS and FCOS were part of a joint venture that operated Riverside[3] (Ex. B ¶¶ 33-41), and that FAS and FCOS were alter-egos of the Facility. (Ex. B ¶¶ 42-43.) However, the [redacted] (Ex. I.) Thus, the Facility [redacted].

The Court therefore should grant summary judgment for FAS and FCOS on these causes of action.

Finally, FAS and FCOS are entitled to summary judgment on Plaintiff's wrongful death claim (Count 5). This cause of action is predicated on Plaintiff's allegations that Ms. Varner "was severely injured in the Defendant's [F]acility" and "[t]he injuries so inflicted" on Ms. Varner "were the cause of her wrongful death on October 29, 2019." (Ex. B ¶¶ 57-58.) As alleged ~~in the~~

[3] The joint venture claim must be dismissed in any event because it is explicitly premised on Plaintiff's allegation that FAS, FCOS, *Defendant Smalls* and Riverside *collectively* comprised the joint venture. (Ex. B ¶ 37.) The arbitrator determined, however, that [redacted] therefore defeats Plaintiff's joint-venture theory.

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Complaint, the "injuries" to which Plaintiff refers are the "trauma to [Ms. Varner's] leg," resulting in her fractured right femur. (Ex. B ¶ 47; *see also id.* ¶¶ 14-18.) In the arbitration, however, the arbitrator determined that "[redacted]." (Ex. G at 2.) Plaintiff therefore is collaterally estopped from re-litigating the same issues in this case. *See Graham*, 277 S.C. at 391, 287 S.E.2d at 496 ("This matter having been fully and fairly adjudicated, the [plaintiff] is collaterally estopped by prior judgment from bringing this action to adjudicate the same issue"). Plaintiff's wrongful death claim must be dismissed.

CONCLUSION

For all the foregoing reasons, Defendants' Motion for Summary Judgment should be granted, and the Court should enter an order dismissing this case, with prejudice.

CLEMENT RIVERS, LLP

By:*/s/ Mathew O. Riddle Jr.*
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
Russell Grainger Hines
SC State Bar ID No.: 72100
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com, mriddle@ycrlaw.com
Attorneys for the Defendants

Charleston, South Carolina

Dated: September 6, 2024

Exhibit K

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CIVIL ACTION NO.: 2021CP-1002744
)	
Williams Haynes, as Personal)	
Representative of the Estate of Elizabeth)	**PLAINTIFF'S MEMO IN OPPOSITION**
Varner,)	**TO DEFENDANTS MOTION FOR**
Plaintiff,)	**SUMMARY JUDGMENT**
v.)	
)	
Fundamental Administrative Services, LLC,)	
Fundamental Clinical and Operational)	
Services, LLC, and Jerrolyn)	
Montgomery-Smalls.)	
)	
Defendants.)	

COMES NOW William Haynes, as Personal Representative of the Estate of Elizabeth Varner ("Plaintiff"), and files this Memorandum in Opposition to Defendants' Motion for Summary Judgment, showing this Court as follows:

STATEMENT OF FACTS

Plaintiff William Haynes ("Plaintiff") is the Personal Representative for the Estate of Elizabeth Varner, who was admitted as a resident at Riverside Health and Rehab ("Riverside") on May 20, 2019. Jerrolyn Montgomery-Smalls ("Defendant Smalls") was the Administrator at the time Elizabeth Varner's residency and throughout her admission. Plaintiff filed the instant lawsuit on June 11, 2021, alleging corporate negligence, joint venture, alter ego/piercing the corporate veil, neglect of a vulnerable adult, wrongful death, and survivorship. The Complaint alleges Fundamental Administrative Services LLC ("Defendant FAS"), Fundamental Clinical and Operational Services LLC ("Defendant FCOS"), and Defendant Smalls were engaged in a joint venture to manage and control the operations of THI of South Carolina d/b/a Riverside Health and Rehab ("Riverside") and that these defendants were negligent in said management and operations. A companion lawsuit was filed against Riverside, alleging negligence, wrongful death, and

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survivorship against the employees of Riverside. *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,* CAFN: 2021CP1001437.

Riverside moved to Compel Arbitration against all claims asserted against it while FAS and FCOS moved to stay the litigation pending resolution of any court-ordered arbitration. Plaintiff argued all Defendants (Riverside, Smalls, FCAS, and FOS) should be included in the arbitration if the Motion to Compel was granted. Defendants FCAS and FOS argued directly against being compelled to arbitrate. Defendant Smalls argued she was entitled to arbitration because she was an employee of Riverside and the allegations against Riverside necessarily included her as an employee.

A hearing was held on February 10, 2022, before the Honorable Roger M. Young, Sr. During the hearing and in support of their Motions for Stay, counsel for Defendants specifically stated the allegations against FAS and FCOS were separate and distinct. Judge Young granted Riverside's (and by extension Defendant Smalls as an employee) Motion to Compel Arbitration on February 24, 2022, along with Defendants FAS and FCOS Motions to Stay all matters in the instant lawsuit. The only issues compelled to arbitration were those involving Case No. 1437 and Defendant Smalls in her role as an employee of Riverside. "Case 2477 is stayed in favor of arbitration between Plaintiff and Ms. Montgomery-Smalls, with Plaintiff's claims against FAS and FCOS stayed pending the ultimate outcome of arbitration between Plaintiff, the Facility, and Ms. Montgomery-Smalls." Order Compelling Arbitration, p. 20. Again, the claims in Case No. 1437 involved employee negligence and vicarious liability; the claims in this lawsuit involve corporate negligence claims.

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Riverside, Defendant Smalls, and Plaintiff engaged in arbitration from April 3-6, 2023, that encompassed the allegations of employee negligence and vicarious liability. Proof of ADR was filed on May 23, 2023, and a Final Order was entered by the Honorable Roger M. Young, Sr., on February 12, 2024, regarding arbitration. The Order also lifted the corresponding stays involving this lawsuit.

ARGUMENT AND CITATION TO AUTHORITY

"[A] stay is a stopping." Graham v. Graham, 301 S.C. 128, 130 (Ct. App. 1990). A stay refers to a judicial order to temporarily halt a proceeding. Black's Law Dictionary.

"The Morrows correctly assert that the theory of vicarious liability is different than the theory of direct corporate liability....[T]he two theories of vicarious liability and corporate liability can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other." Morrow v. Fundamental Long-Term Care Holding, LLC, 412 S.C. 534, 538 (2015)

Defendants' central contention is the issues claimed in the instant lawsuit were fully litigated, or could have been litigated, in the arbitration. This argument is contradictory to previous arguments put forth by Defendants to Judge Young, contrary to the holding in Morrow, and legally inconsistent with the stays requested by these Defendants. Essentially, Defendants are arguing they should receive some benefit from the arbitration even though they moved for and were granted stays that excluded their participation in arbitration. Put simply, Defendants' arguments are disingenuous, frivolous, and are an unnecessary waste of Court resources.

I. Summary Judgment is inapplicable to the corporate negligence claims asserted against FCAS, FOS, and necessarily involve Defendant Smalls.

Defendants FOS, FCAS, and Smalls are not entitled to pursue summary judgment on any of the corporate negligence claims for two reasons: 1) Our Supreme Court's holding in Morrow, which specifically rejected Defendants' argument; and 2) The corporate negligence claims asserted

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against these Defendants in the instant case were stayed at Defendants' request and Plaintiff was barred from litigating them at arbitration. In essence, Plaintiff was stopped from proceeding on his corporate negligence claims in this lawsuit. Defendants specifically argued they were not subject to the arbitration agreement, they were separate and distinct entities from Riverside and its employees, they were not third-party beneficiaries of the arbitration agreement, and they were not in privity with the parties to the arbitration agreement.

Based on the grounds asserted by Defendants, the corporate negligence claims in this lawsuit were not subject to arbitration by virtue of the stays. There is no confusion regarding that issue based on the Order Compelling Arbitration – the corporate negligence claims in this lawsuit were stayed pending arbitration of those claims asserted against Riverside and those involving Defendant Smalls as an employee of Riverside. Defendants are essentially arguing that all claims against them could have, and should have, been brought in arbitration. However, the imposition of stays at the request of these Defendants prohibited any of these claims from being brought in arbitration. Alternatively, Defendants are also arguing the arbitration Order effectively gives them the right to pursue summary judgment on the corporate negligence claims even though the issues addressed in arbitration did not involve those claims. This argument is in direct opposition to the holding in Morrow and Defendants' previous arguments to Judge Young.

Our Supreme Court addressed the exact issue argued by these same Defendants in Morrow, where Defendants argued the allegations of corporate negligence were to be bifurcated from allegations of negligence against its skilled nursing facility. Counsel went on to candidly admit that if the allegations against the nursing home were unsuccessful, the corporate entities would be entitled to summary judgment on the corporate negligence claims. Morrow, 412 S.C. at fn.1. This argument was rejected by our Supreme Court:

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The Morrows alleged the Fundamental Entities were vicariously liable for the negligence of Magnolia Place, and furthermore were directly responsible for Lawrence's injuries by way of their conscious disregard for his health in underfunding Magnolia Place, which led to issues with staffing, training, and nutrition.

The Fundamental Entities thereafter filed a motion to bifurcate the trial pursuant to Rule 42(b), SCRCP between the nursing home negligence claims and the corporate negligence claims, and further, to stay discovery related to the corporate negligence claims. The Fundamental Entities argued bifurcation was proper because the issues of nursing home negligence and corporate negligence were distinct, and the Morrows could only move forward on the corporate negligence claims if they were first successful against Magnolia Place.

The Morrows correctly assert that the theory of vicarious liability is different than the theory of direct corporate liability. See Martin C. McWilliams, Jr. & Hamilton E. Russell, III, Hospital Liability for Torts of Independent Contractor Physicians, 47 S.C. L. Rev. 431 (1996). Vicarious liability attaches to a parent company or employer as the result of negligence on behalf of its employees, such as through the doctrine of respondeat superior. Id. at 439. **Conversely, direct corporate liability attaches due to a breach of a duty which runs directly between a parent company and a patient, arising from negligence in actions such as leaving a hospital underfunded, understaffed, or undertrained so as to provide substandard care.** Id. at 462. **Accordingly, the two theories of vicarious liability and corporate liability can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other.** See Scampone v. Highland Park Care Ctr., 618 Pa. 363, 57 A.3d 582, 596–600 (2012) (holding that claims of vicarious liability and direct liability could be brought either concomitantly or alternately in case against nursing home); see also Montgomery Health Care Facility, Inc. v. Ballard, 565 So.2d 221, 225–26 (Ala.1990) (finding parent corporation of nursing home could be held liable for patient's death where corporation controlled day-to-day operations of home); cf. Forsythe v. Clark USA, Inc., 224 Ill.2d 274, 309 Ill.Dec. 361, 864 N.E.2d 227, 237 (2007) (recognizing direct corporate liability as a valid theory of recovery in the context of workplace accidents).

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> The order treats these claims as based solely on vicarious liability that can be tried only after a finding of negligence on the part of Magnolia Place, when instead they are grounded in direct corporate liability which follows independent, albeit interconnected, duties owed to the Morrows. By considering the Morrow's claims against the Fundamental Entities as dependent upon their claim against Magnolia Place, the trial court's order effectively grants the Fundamental Entities potential summary judgment on the issues of direct corporate liability.
>
> The effect of this order is to prevent the Morrows from being architects of their own complaint, and deprives them of bringing their case against the defendant of their own choosing. See Neeltec Enters., Inc., v. Long, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012) ("The right of the plaintiff to choose her defendant is a substantial right within the meaning of [section 14–3330(2)(a)]").

Id. at 536-539(emphasis added).

As our Supreme Court noted in Morrow, the issue of corporate negligence involves separate and distinct duties. For all intents and purposes, the issues of employee negligence and vicarious liability were judicially bifurcated with the arbitration. At the direct request of these Defendants, only those issues involving the negligence of Riverside's employees were included in the arbitration. Likewise, all issues relating to corporate negligence as contained in this lawsuit were stayed at the request of all Defendants in this lawsuit.

It is worth noting Defendants admitted the corporate entities and the issues involved in this lawsuit were separate and distinct from Riverside during the hearing before Judge Young:

> Our contention is that the Fundamental defendants are separate and distinct....
> Exhibit A, Tr. of Record, Feb. 10, 2022, at 6: 8-9
>
> And certainly what I know today is I'm not in a position to consent to have the Fundamental defendants lumped in with the facility and the individual defendant, Ms. Montgomery-Smalls, she's the administrator of the facility.
> Id., at 6: 12-14

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> [W]e're saying the arbitration should be Mr. Pinkston's clients against the facility and Ms. Montgomery-Smalls, and then outside of that arbitration, not as a part of that arbitration, should be the Fundamental defendants.
> Id., at 29: 13-16
>
> We'd be agreeable to having the facility and Ms. Montgomery-Smalls in the arbitration, but the Fundamental defendants are separate....
> Id., at 29: 20-22

Defendants have now done an about face on their previous arguments made to Judge Young about not being subject to and bound by the arbitration agreement. They are likewise ignoring the holding in Morrow, of which these Defendants are acutely aware since they were the respondents in that case. They have no grounds to pursue summary judgment on any claims contained in the instant lawsuit as those claims were stayed at Defendants' request. Additionally, the parties are separate and distinct, the duties of these corporate defendants are separate and distinct, and the claims asserted against these parties are separate and district from those decided in arbitration.

II. Res judicata does not apply because there was no adjudication of the corporate negligence claims, the actions involve separate parties, and these claims could not have been properly included in arbitration based on the stays.

Res judicata applies where: (1) the judgment in the prior action was final, valid, and on the merits; (2) both actions involve the same parties; and (3) the second action involved claims properly included in the first action. Town of Sullivan's Island v. Felger, 318 S.C. 340, 344 (Ct. App. 1995). "Under the doctrine of *res judicata,* `[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.'" Palmetto Homes Inc. v. Bradley, 357 S.C. 485 (Ct. App. 2003). Res judicata is inapplicable to this lawsuit because the arbitration did not adjudicate any of the corporate

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negligence claims, it did not involve the same parties, and the corporate negligence claims were barred from inclusion due to the stays requested by these Defendants.

Defendants fail to mention or even address the different duties that flow from corporate negligence, the centerpiece of the instant lawsuit. Those duties were addressed in Morrow and discussed above. None of the allegations dealing with the corporate negligence claims were adjudicated or might have been raised in arbitration due to the stays. Defendants' argument that all facts were alleged and litigated in the arbitration is simply without merit based on the stays they requested. It simply defies logic to claim a plaintiff could have or should have litigated claims when s stay entered at a defendant's request prohibited that plaintiff from litigating said claims. The issuance of the stays is fatal to any claim the issues were raised and adjudicated in the arbitration.

III. Collateral estoppel does not apply to FCOS nor FAS because the stays granted at their request prohibited Plaintiff from litigating the claims asserted in this lawsuit, including those claims against Defendant Smalls.

Collateral estoppel applies when an issue was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554 (Ct. App. 2009). Collateral estoppel can be used defensively against a plaintiff who was a party in a prior action, even if the defendant was not a party to the prior litigation, so long as the plaintiff "had a full and fair opportunity to previously litigate the issue." Id. at 555. Defendants' attempted use of defensive collateral fails the first prong because the allegations of corporate negligence were not litigated in the arbitration action. The reason is straightforward: Defendants requested and were granted stays that prohibited Plaintiff from "actually" litigating those claims.

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Defendants are again taking a contradictory position to the one they argued in front of Judge Young. Plaintiff argued every Defendant, including FOS and FCAS, should be compelled to arbitration, which Defense vehemently opposed:

> Your Honor, he's saying to have every defendant involved in the arbitration, we're saying the arbitration should be Mr. Pinkston's clients against the facility and Ms. Montgomery-Smalls, and then outside of that arbitration, not as a part of that arbitration, should be the Fundamental defendants. So that's the difference, Your Honor, is what Mr. Pinkston is proposing is to have every defendant in the arbitration proceedings; what we're saying is that we're not agreeable to that. We'd be agreeable to having the facility and Ms. Montgomery-Smalls in the arbitration, but the Fundamental defendants are separate and the allegations that are made against those defendants, we deny and very strongly dispute the allegations in terms of any role or responsibility that they have in the alleged injuries.
> Exhibit A, Tr. of Record, Feb. 10, 2022, at 29: 12-25
>
> [The Fundamental defendants are] not third-party beneficiaries to this arbitration agreement. The arbitration agreement talks about agents, servants, and employees, they are none of those things. That's why there's a very clear distinction between an employee like Ms. Montgomery-Smalls and these other entities.
> Id., at 30: 3-8
>
> And as for the Fundamental defendants, that the action should be stayed as to them. He has no right to compel them to arbitration, the third-party beneficiary theory doesn't work for two, at least two very significant reasons. One, they're not third-party beneficiaries; two, he doesn't have the ability to compel them to arbitration as third-party beneficiaries; three, there's no motion to do it
> Id., at 34: 6-12.

Despite these past arguments regarding the inapplicability of the arbitration agreement that these Defendants should be excluded from arbitration, Defendants are now arguing collateral estoppel applies because Plaintiff had a full and fair opportunity to previously litigate the issue at arbitration. This is in direct contradiction to their previous position that every claim against them was not proper for arbitration and they could not be compelled to arbitration.

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Finally, it is worth noting the inherently contradictory positions being put forth by Defendants as exemplified by their statement regarding the joint venture claim. Defendants state, "The arbitrator's implicit determination that Defendant Smalls was *not* part of the joint venture therefore defeats Plaintiff's joint-venture theory." Def. Memo. in Support of Mot. for Summary Judgment, fn. 3. The arbitrator could not determine any issue relating to joint venture because that issue was stayed and therefore not part of the arbitration agreement. It was not part of Case No. 1437, which was compelled to arbitration. Therefore, the issue of joint venture with FCAS and FCOS could not have been determined due to the stays requested by these Defendants.

Defendants previously took the position the corporate entities and the claims against them were separate and distinct, they could not be compelled to arbitrate those claims, and there was a very clear distinction between the employees at Riverside and themselves. Yet now they take the position the arbitrator implicitly determined those very allegations even though stays were in place. Defendants' arguments that res judicata and collateral estoppel apply are disingenuous, contradictory, and in direct opposition to their previous arguments.

IV. Collateral estoppel does not apply to damages from two separate tortfeasors.

Defendants claim that collateral estoppel applies to damages, including punitive damages, is likewise without support in case law and subsequently without merit. Morrow conclusively states damages against the corporate defendants for corporate negligence are separate and distinct from those damages stemming from vicarious liability. "[D]irect corporate liability attaches due to a breach of a duty which runs directly between a parent company and a patient, arising from negligence in actions such as leaving a hospital underfunded, understaffed, or undertrained so as to provide substandard care. Accordingly, the two theories of vicarious liability and corporate liability can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of

the other." Morrow, 412 S.C. at 462. Defendants cannot assert collateral estoppel when two theories of liability can co-exist in a lawsuit and a finding of one does not preclude a finding against the other. Put differently, damages that result from a breach of one duty from one tortfeasor do not preclude a finding for damages that flow from a separate duty relating to a separate tortfeasor.

A case directly on point is Boiter v. South Carolina Dep't of Transp., 393 S.C. 123, 712 S.E.2d 401 (2011). The plaintiff was injured in a car wreck and alleged two separate and distinct acts of negligence, or occurrences, against two defendants. The jury found both defendants negligent and awarded separate verdicts against each. Our Supreme Court affirmed the jury verdict against each individual tortfeasor and determined two independent and separate acts of negligence occurred. The Supreme Court specifically stated, "[H]ad the jury not found SCDOT negligent, the verdict against SCDPS could still stand, and the converse is true." Id, at 407. This is the exact situation presented in this lawsuit. As admitted by Defendants, the allegations against the corporate entities are separate and distinct. A jury could find that Riverside was not negligent and still find the Fundamental corporate entities negligent, or vice versa. Or the jury could determine both were negligent, as in Boiter and contemplated in Morrow, and the individual verdicts would stand.

Regardless of any determination by the arbitrator relating to the allegations of gross negligence as to the care providers at Riverside, any such finding has nothing to do with the actions of Defendants in a corporate negligence setting. A factfinder could find the corporate defendants acted wantonly, wilfully, or in reckless disregard of Plaintiff's rights in underfunding or understaffing the nursing home. Again, the Morrow Court specifically addressed this issue and held the finding of one does not preclude the finding of the other. Taken to its logical conclusion, the arbitrator's determination regarding any punitive conduct against the employees of Riverside

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does not preclude a finding of punitive conduct for or against FOS and FCAS based on the different duties and actions accompanying those duties.

CONCLUSION

For the above stated reasons, Plaintiff respectfully requests Defendants' Motion for Summary Judgment be DENIED.

Respectfully submitted this 8th day of September, 2024.

PINKSTON LAW FIRM, LLC

/s/ Shawn Pinkston
Shawn Pinkston, SC Bar No. 79965
856 Lowcountry Blvd., Suite 101
Mount Pleasant, South Carolina 29464
Office: 843-814-5472
Fax: 843-723-7300
shawnpinkston@me.com

Mount Pleasant, South Carolina

Exhibit L

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1002744

William Haynes et al
PLAINTIFF(S)

Fundamental Administrative Services Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

This matter came before the Court for a hearing on 9/11/2024. The plaintiff was represented by Shawn Travis Pinkston and the defendants were represented by Matthew Oliver Riddle. After hearing arguments from the parties and reviewing the filings in the case, the Court makes the following rulings. Defendants' motion for summary judgment is Denied. Plaintiff's motion to compel discovery is Granted and the Defendants are ordered to comply with discovery within 30 days. Plaintiff's motion for sanctions is Denied. Defendants' motion to seal the record of the proceedings under Rule 41.1 is Denied. Defendants' motion for a protective order until the dispositive summary judgment motion is ruled upon is Granted.

It Is So Ordered.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 09/20/2024 .

Williams Haynes Personal Representative
Elizabeth Varner Estate

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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

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Charleston Common Pleas

Case Caption: William Haynes , plaintiff, et al VS Fundamental Administrative Services Llc , defendant, et al

Case Number: 2021CP1002744

Type: Order/Electronic Form 4

So Ordered

William C. McMaster, III

Exhibit M

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1002744

William Haynes et al
PLAINTIFF(S)

Fundamental Administrative Services Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

After careful consideration and review of the filings in this case, Defendants' Motion for Reconsideration is Denied.

It Is So Ordered.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 10/04/2024 .

Williams Haynes Personal Representative
Elizabeth Varner Estate

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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

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Charleston Common Pleas

Case Caption: William Haynes , plaintiff, et al VS Fundamental Administrative Services Llc , defendant, et al

Case Number: 2021CP1002744

Type: Order/Electronic Form 4

So Ordered

William C. McMaster, III

Exhibit N

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON WILLIAM HAYNES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH VARNER, PLAINTIFF, vs. FUNDAMENTAL ADMINISTRATIVE SERVICES LLC, AND FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, AND JERROLYN MONTGOMERY-SMALLS, DEFENDANTS.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO. 2021-CP-10-02744 **DEFENDANT'S MOTION TO ALTER, AMEND, AND/OR RECONSIDER ORDER DENYING MOTION FOR SUMMARY JUDGMENT**

TO: THE HONORABLE WILLIAM C. MCMASTER, III, Presiding Judge, and SHAWN T. PINKSTON, ESQUIRE, Attorney for Plaintiff:

NOW COME Defendants Jerrolyn Montgomery-Smalls, Fundamental Administrative Services, LLC ("FAS") , and Fundamental Clinical and Operational Services, LLC ("FCOS") by and through their undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set forth below, hereby moves this Honorable Court to alter, amend, and/or reconsider its Order, filed September 20, 2024, denying Defendant's motion for summary judgment.

As set forth in the motion filed on June 28, 2024, Plaintiff's claims against the Defendants are barred by the doctrines of *res judicata* and collateral estoppel based on the outcome of a prior arbitration proceeding brought by Plaintiff arising out of exactly the same facts and circumstances alleged in this case. In light of the preclusive effect of the arbitration award, *see, e.g., Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 493-96, 593 S.E.2d 480, 484-86 (Ct. App. 2004); *Graham v. State Farm Fire & Cas. Ins. Co.*, 277 S.C. 389, 390-91, 287 S.E.2d

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495, 496 (1982), there are no material facts in dispute. Defendants therefore request that this court reconsider its Order and grant judgment to Defendants as a matter of law.

1. **Permitting the Plaintiff to relitigate claims and issues that have already been decided at arbitration would create duplicative litigation and would be a waste of judicial resources.**

The present suit involves allegations of nursing home negligence at Riverside Health and Rehab skilled nursing facility ("Facility" or "Riverside"), where Plaintiff's decedent Elizabeth Varner was a resident. Contrary to Plaintiff's erroneous argument to this Court in opposition to the present motion, Judge Roger M. Young, Sr. ordered all of Plaintiff's claims to arbitration, to include all claims raised in the present suit and the Plaintiff's related action against Riverside (C/A No. 2021-CP-10-01437). Judge Young further ordered that Riverside and Defendant Smalls were parties to the arbitration, and that Defendants FAS and FCOS were not parties to the arbitration. Finally, Judge Young ordered a judicial stay as to both the present suit and the suit against Riverside, to promote "efficiency and judicial economy," and to prevent "duplicative discovery and litigation." (*See* Feb. 24, 2022 Order at Page 19).

The parties presented testimony and evidence at arbitration. Retired Judge Doyet E. Early, III served as the arbitrator. Judge Early issued a ruling awarding compensatory damages as to Riverside for Plaintiff's femur fracture, denying punitive damages, and denying any liability as to Defendant Smalls. Judge Early further denied the Plaintiff's wrongful death claim. This court entered an order confirming Judge Early's arbitration award, and Riverside paid the arbitration award.

Judge Early's ruling was a final, binding award on the merits of all claims that were or could have been asserted. As a result, the Plaintiff's present claims against Defendant Jerrolyn Montgomery-Smalls are barred according to the doctrine of *res judicata*. The Plaintiff's claims

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against Defendants FAS and FCOS, who were not parties to the arbitration, are barred by collateral estoppel. Permitting the Plaintiff to relitigate these claims and issues that have already been decided at arbitration would create duplicative discovery and litigation, and would be a complete waste of judicial resources. Accordingly, the Defendants request that this Court reconsider its Order and grant judgment to the Defendants as a matter of law.

2. **All of Plaintiff's claims in this lawsuit were or should have been raised at arbitration.**

All claims asserted in the present lawsuit arose from the residency of Plaintiff's decedent at Riverside. As a result, all claims were within the scope of the subject arbitration agreement. Contrary to Plaintiff's erroneous argument in opposition to Defendants' motion, all claims asserted in the present lawsuit were or should have been raised at arbitration, *including Plaintiff's causes of action for corporate negligence, joint-venture liability, and corporate veil-piercing liability*. *Res judicata* applies where: (1) the judgment in the prior action was final, valid, and on the merits; (2) both actions involve the same parties; and (3) the second action involved claims properly included in the first action. *See Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995). *Res judicata* applies to arbitration awards and bars a litigant from asserting claims in a later action that were or "*could have been* arbitrated in the original proceeding." *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 496, 593 S.E.2d 480, 486 (Ct. App. 2004). As to Defendant Smalls, these claims are therefore barred by *res judicata*.

Contrary to Plaintiff's fallacious argument to this Court, the Defendants have never argued that any cause of action asserted in the present lawsuit should have been excluded from arbitration. The Defendants argued that FAS and FCOS were not *parties* to the arbitration agreement and therefore should not be *parties* to the arbitration. The Defendants requested a stay

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of all litigation in circuit court pending the outcome of arbitration. However, the Defendants never argued that any particular cause of action should be excluded from arbitration. Indeed, each and every cause of action the Plaintiff asserted against FCOS and FAS he also asserted against Defendant Smalls, who of course *was* a party to the arbitration. Judge Young granted a stay of both lawsuits to promote judicial economy and to avoid duplicative discovery and trials. ***However, nothing in Judge Young's Order or any order of this court or the arbitrator excluded any of Plaintiffs' claims from arbitration.*** Accordingly, the Plaintiff had the opportunity to assert corporate negligence, joint venture, and veil piercing claims against Defendant Smalls at arbitration, in addition to the other causes of action that Plaintiff admittedly asserted and that were without question decided at arbitration. He cannot now reassert these claims in a separate proceeding in circuit court. *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) (holding that *res judicata* "prohibits the owner of a single cause of action from either dividing or splitting the cause of action so as to make it the subject of several causes of action"). The Plaintiffs' claims against Defendant Smalls are therefore clearly barred. Respectfully, the Court must reconsider its Order and grant summary judgment to Defendant Smalls as a matter of law.

3. **The Plaintiff's claims against Defendants FAS and FCOS are barred by the collateral estoppel effect of the arbitration award, and there is no viable legal or equitable theory to the contrary that should allow these claims to proceed.**

As set forth in the Defendants' motion for summary judgment, supporting memorandum of law, and arguments presented at the hearing before this court, issues determined at arbitration were dispositive as to all claims against Defendants FAS and FCOS. As a result, Defendants FAS and FCOS are entitled to summary judgment, based on the collateral estoppel effect of the arbitration award. "Collateral estoppel, also known as issue preclusion, prevents a party from

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relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). Collateral estoppel applies when an issue was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *See id.* All the elements of collateral estoppel are met here as to each cause of action Plaintiff has asserted against the Defendants. As a result, the Court should reconsider its order and grant summary judgment to the Defendants as a matter of law.

First, there can be no dispute that the Plaintiff raised causes of action for negligence/gross negligence, neglect of a vulnerable adult, wrongful death, and survivorship at arbitration, and that these causes of action were determined. The arbitrator determined the Plaintiff's compensatory damages relative to Ms. Varner's femur fracture, and the Facility paid this award. The arbitrator also determined that the Ms. Varner's femur fracture was not the proximate cause of her death. The Plaintiff now asserts these identical claims/causes of action as to Defendants FAS and FCOS. These claims are clearly barred by collateral estoppel. The court should reconsider its Order and grant summary judgment to FAS and FCOS on these claims as a matter of law.

With regard to the joint venture and veil piercing causes of action (Counts 3 and 4 of Plaintiff's Complaint) the only damages that may be awarded for these claims are the imputed liability of the Facility. Again, the liability of the Facility has been determined, and the Facility has paid the arbitrator's award. This liability is therefore extinguished. There is no additional liability of the Facility that may be imputed to these Defendants. As a result, these claims are also barred by collateral estoppel.

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Additionally, as set forth in the Defendants' Memorandum of Law supporting the motion for summary judgment, Plaintiff's claim against FAS and FCOS for corporate negligence also seek the same damages that Plaintiff sought to (and did) recover at arbitration. Because the arbitrator already awarded all damages that Plaintiff was entitled to recover, and because the Facility has paid the award, Plaintiff is estopped from seeking additional damages from FAS and FCOS. *See Carolina Renewal*, 385 S.C. at 558, 684 S.E.2d at 784 (plaintiff estopped from re-litigating damages that were decided in a prior action). Plaintiff's reliance on *Morrow v. Fundamental Long-Term Care Holdings, LLC* is misplaced. . In *Morrow,* 412 S.C. 534, 773 S.E.2d 144 (2015), the S.C. Supreme Court ruled that direct corporate-liability claims and vicarious-liability claims against a nursing home's affiliated entities "can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other." But that principle has nothing to do with the present case. Here, the issue is not whether Plaintiff is bringing direct or vicarious liability claims against FAS/FCOS. For the reasons set forth herein and in the Defendants' prior memorandum, and argued at the hearing, the determination of the various issues raised at arbitration in this case does in fact preclude the present claims against FAS and FCOS.

Furthermore, contrary to Plaintiff's argument in opposition to the motion, the Plaintiff cannot maintain a standalone claim for punitive damages against FAS and FCOS. *Cook v. Atlantic Coast Line R.R. Co.,* 183 S.C. 279, 190 S.E. 923 (1937); see also Monroe v. Bankers Life & Cas. Co., 232 S.C. 363, 367, 102 S.E.2d 207, 208 (1958). The present case is distinguishable from *McGee v. Bruce Hospt. System*, 344 S.C. 466, 545 S.E.2d 286, cited by Plaintiff in support of his argument. *McGee* involved separate allegations of medical malpractice against multiple physicians who performed various procedures, that allegedly causing separate

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and distinct injuries to the Plaintiff's decedent. By contrast, here the Plaintiff alleges a single injury to Plaintiff's decedent (femur fracture) which Plaintiff alleged resulted from nursing negligence. The arbitrator determined Plaintiff's damages related to this femur fracture. The arbitrator further determined there was no willful or wanton conduct on the part of the Facility, or on the part of Defendant Smalls as it relates to the management of the facility, and therefore denied punitive damages. There is therefore no viable theory pursuant to which Plaintiff could seek additional punitive damages as it relates to the FAS and FCOS. The court should reconsider its Order and grant summary judgment to the Defendants.

Finally, as noted above, the Plaintiff had the opportunity to present evidence of corporate negligence and seek punitive damages at arbitration. Defendant Smalls was a party to the arbitration, and the Plaintiff asserted the same claims against Defendant Smalls in the Complaint as he has asserted against FAS and FCOS, including corporate negligence, joint venture, and veil piercing. To grant Defendants' motion would not permit these Defendants to unjustly avoid liability, as Plaintiff has argued. To the contrary, the Plaintiff has "had his day in court," and has had a full and fair opportunity to litigate his claims. *Graham*, 277 S.C. at 391. The Plaintiff is therefore collaterally estopped from asserting the present claims against these Defendants. The Court should reconsider its order and grant summary judgment.

4. **The Defendants request that the Court reconsider and expressly rule on each and every distinct issue/argument raised in support of its motion for summary judgment (whether raised in writing or orally at the motion hearing), all of which Defendants incorporate herein by reference.**

Following the hearing on September 11, 2024, this Court issued a Form 4 Order denying the subject motion. The Court's Form 4 Order did not include reasoning or order instructions. The Defendants therefore request that the Court reconsider its decision and expressly rule on each issue/argument raised in support of Defendants' motion. *See Elam v. S.C. Dep't of Transp.*,

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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). The Defendants therefore respectfully request a ruling on each distinct issue/argument raised in support of the motion.

This Motion will be supported by the pleadings and motions filed in this case, all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any previous or subsequent memoranda of law, affidavits or other evidence which may be submitted prior to 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/ Matthew O. Riddle*
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
Russell Grainger Hines
SC State Bar ID No.: 72100
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com,
mriddle@ycrlaw.com
Attorneys for the Defendants

Charleston, South Carolina

Dated: September 30, 2024

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CIVIL ACTION NO.: 2021CP1002744
)	
Williams Haynes, as Personal)	
Representative of the Estate of Elizabeth)	**PLAINTIFF'S MEMO IN OPPOSITION**
Varner,)	**TO DEFENDANTS' INCORRECTLY**
Plaintiff,)	**TITLED MOTION TO COMPEL**
v.)	**ARBITRATION**
)	
Fundamental Administrative Services, LLC,)	
Fundamental Clinical and Operational)	
Services, LLC, and Jerrolyn)	
Montgomery-Smalls.)	
)	
Defendants.)	

Exhibit J

COMES NOW William Haynes, as Personal Representative of the Estate of Elizabeth Varner ("Plaintiff"), and files this Memorandum in Opposition to Defendants' incorrectly titled Motion to Compel Arbitration, which is an artfully crafted Motion to Reconsider and/or Motion to Enforce a previous Order in this matter, showing this Court as follows:

STATEMENT OF FACTS

Plaintiff William Haynes ("Plaintiff") is the Personal Representative for the Estate of Elizabeth Varner, who was admitted as a resident at Riverside Health and Rehab ("Riverside") on May 20, 2019. Jerrolyn Montgomery-Smalls ("Defendant Smalls") was the Administrator at the time Elizabeth Varner's residency and throughout her admission. Plaintiff filed the instant lawsuit on June 11, 2021, alleging corporate negligence, joint venture, alter ego/piercing the corporate veil, neglect of a vulnerable adult, wrongful death, and survivorship. The Complaint alleges Defendants Fundamental Administrative Services ("Defendant FAS"), Fundamental Clinical and Operational Services ("Defendant FCOS"), and Jerrolyn Montgomery-Smalls ("Defendant Smalls") were negligent in the management and operations of THI of South Carolina d/b/a Riverside Health and Rehab ("Riverside"). A companion lawsuit was filed against Riverside,

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alleging negligence, wrongful death, and survivorship against the employees of Riverside. *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,* CAFN: 2021CP1001437.

Riverside moved to Compel Arbitration against all claims asserted against it while FAS and FCOS moved to stay the litigation pending resolution of any court-ordered arbitration. Plaintiff argued all Defendants (Riverside, Smalls, FCAS, and FOS) should be included in the arbitration if the Motion to Compel was granted. Defendants FCAS and FOS argued directly against being compelled to arbitrate. Defendant Smalls argued she was entitled to arbitration as to the claims being asserted against Riverside because she was an employee of Riverside and the allegations against the Riverside employees necessarily included her as an employee.

A hearing was held on February 10, 2022, before the Honorable Roger M. Young, Sr. During the hearing and in support of their Motions for Stay, counsel for Defendants specifically stated the claims against FAS and FCOS were separate and distinct and not subject to the purported Arbitration Agreement. Judge Young granted Riverside's (and by extension Defendant Smalls as an employee) Motion to Compel Arbitration on February 24, 2022, along with Defendants FAS and FCOS Motions to Stay all matters in the instant lawsuit. The only issues compelled to arbitration were those involving Case No. 1437 and Defendant Smalls was included in her role as an employee of Riverside. "Case 2477 is stayed in favor of arbitration between Plaintiff and Ms. Montgomery-Smalls, with Plaintiff's claims against FAS and FCOS stayed pending the ultimate outcome of arbitration between Plaintiff, the Facility, and Ms. Montgomery-Smalls." Exhibit A, Order Compelling Arbitration, p. 20. Again, the claims in Case No. 1437 involved employee negligence and vicarious liability; the claims in this lawsuit involve corporate negligence claims.

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Riverside, Defendant Smalls, and Plaintiff engaged in arbitration from April 3-6, 2023, that encompassed the allegations of employee negligence and vicarious liability. Proof of ADR was filed on May 23, 2023, and a Final Order was entered by the Honorable Roger M. Young, Sr., on February 12, 2024, regarding arbitration. The Order also lifted the corresponding stays involving this lawsuit. Exhibit B.

Defendants have previously argued that particular causes of action (those contained in this lawsuit) were excluded from the Arbitration Agreement. In their Petition for a Final Order, Defendants argued "that a **stay of all non-arbitrable claims** remain in effect pending either dismissal of all claims against Riverside and Ms. Montgomery-Smalls pursuant to payment of the arbitration award, or the outcome of any further appeal as it relates to arbitration in this matter." Exhibit C, Def. Pet. for Final Order, p. 2. (emphasis added). "Accordingly, the Defendants request that this Court exercise its discretion to maintain **the stay of all non-arbitrable claims** as necessary to avoid duplicative discovery and trials, to avoid piecemeal litigation and the potential for inconsistent obligations, and for the sake of the orderly administration of the Court's own docket." Id. (emphasis added). "For these reasons, the **stay of all non-arbitrable claims** should remain in effect pending the conclusion of any subsequent appeal as it relates to arbitration in this matter, or pending the dismissal of the Plaintiff's claims against Riverside and Ms. Montgomery-Smalls pursuant to payment of the arbitration award." Id., p. 3 (emphasis added). Judge Young denied the request for the stays to remain in place and entered a Final Order allowing this case to move forward. Exhibit C.

Despite their past arguments to the Court that certain claims were non-arbitrable, Defendants conducted an about-face and filed a Motion for Summary Judgment on June 28, 2024, claiming all causes of action in both lawsuits were arbitrable and should have been raised by

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Plaintiff during arbitration. In support of their Motion for Summary Judgment, Defendants FCOS, FAS, and Smalls argued res judicata and collateral estoppel applied to all claims in the instant case since they were subject to arbitration and they were entitled to judgment on these claims. In a nutshell, they argued "all the facts alleged in this case are identical to those that were litigated in the arbitration." Exhibit D, Def. Memo. in Support of Motion for Summary Judgment, p. 6. "Plaintiff was required to present all of his claims against Defendant Smalls in the arbitration." Id., at p. 7.

The Honorable William C. McMaster, III, presided over Defendants' Motion for Summary Judgment on September 11, 2024. On September 20, 2024, Judge McMaster denied Defendants' Motion for Summary Judgment. Exhibit E. Defendants then filed a Motion to Reconsider on September 30, 2024.

In support of their Motion for Reconsideration, Defendants explicitly argued, "all claims were within the scope of the subject arbitration agreement." Exhibit F, Def. Mtn. to Reconsider, p. 3 (emphasis original). Defendants went so far as to state, "Contrary to Plaintiff's fallacious argument to this Court, the Defendants have never argued that any cause of action asserted in the present lawsuit should have been excluded from arbitration....[T]he Defendants never argued that any particular cause of action should be excluded from arbitration." Id., at 2-3. "Accordingly, the Plaintiff had the opportunity to assert corporate negligence, joint venture, and veil piercing claims against Defendant Smalls at arbitration, in addition to the other causes of action that Plaintiff admittedly asserted and that were without question decided at arbitration." Id., at 3. These arguments were again rejected by this Court on October 4, 2024. Exhibit G.

The parties were notified on October 16, 2024, that this case would appear on the jury roster meeting for the week of November 18, 2024, with a roster meeting scheduled for November

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15, 2024. The day before the jury roster meeting (November 14, 2024), Defendants filed a Motion to Compel Arbitration – nine (9) months to the day after the initial discovery responses were served. Their Motion rests on the same arguments previously made in support of their denied Motion for Summary Judgment.

ARGUMENT AND CITATION TO AUTHORITY

Defendants Motion to Compel Arbitration is yet another attempt to have this Court reconsider the arguments that were denied in their Motion for Summary Judgment. Instead of treating it as a Motion to Compel Arbitration, the Court ought to consider it as a successive Motion to Reconsider or a Motion to Enforce a previous Order in this Court. Defendants specifically ask this Court to enforce the Arbitration Order previously entered in this case. See Section II, Defendants' Memo. in Supp., p. 7. However, they previously filed a Motion for Summary Judgment arguing these claims were subject to arbitration. When the Motion for Summary Judgment was denied, they filed a Motion to Reconsider, which was also denied. In reality, Defendants have expressly argued these claims are non-arbitrable and their arguments that they are arbitrable have already been twice rejected by this Court. However, they have mislabeled the current motion it in what can only be viewed as a transparent attempt to ignore the doctrine of the law of the case and to create an immediately appealable decision by this Court since these arguments have already been rejected by this Court in its previous Orders.

Every argument put forth in their mislabeled Motion to Compel Arbitration was extensively briefed and argued before the Honorable Judge McMaster. As outlined above, Defendants initially argued the claims in this lawsuit were non-arbitrable in pleadings before Judge Young. They then shifted course and argued all claims were arbitrable in their Motion for Summary Judgment – an argument twice rejected by this Court. Despite the previous rejection of

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these arguments by this Court, Defendants are yet again arguing the corporate negligence, joint venture, and alter ego/veil-piercing claims are subject to arbitration. This approach is an attempted end-around the law of the case doctrine.

"The doctrine of the law of the case prohibits issues which have already been decided from being relitigated in the trial court in the same case." Ross v. Med. Univ. of S.C., 328 S.C. 51, 62 (1995). "The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case....Further, all points decided by the Court or necessarily involved in what was decided, are *res judicata*." Id., citing Warren v. Raymond, 17 S.C. 163 (1882). "As most commonly defined, the doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. This rule of practice promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1998). "Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." Flexon v. PHC-Jasper, 413 S.C. 561, 573 (Ct. App. 2015).

Plaintiff does not wish to rehash the entirety of the arguments made at the hearing; however, some excerpts are included below that demonstrate the arguments now being made, which were rejected twice by this Court, are nothing more than the reconsideration of matters already decided during the course of this lawsuit:

> Plaintiff was required to present all of his claims against Defendant Smalls in the arbitration." Exhibit D, Defs. Memo. in Supp. of Mot. for Summary Judgment, at 7.
>
> [A]ll claims were within the scope of the subject arbitration agreement. Contrary to Plaintiff's erroneous argument in opposition to Defendants' motion, all claims asserted in the present lawsuit were or should have been raised at arbitration, *including Plaintiff's*

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causes of action for corporate negligence, joint-venture liability, and corporate veil-piercing liability. Exhibit "F," Defs. Memo. in Supp. of Mot. for Reconsideration, at 3 (emphasis original).

Contrary to Plaintiff's fallacious argument to this Court, the Defendants have never argued that any cause of action asserted in the present lawsuit should have been excluded from arbitration. The Defendants argued that FAS and FCOS were not *parties* to the arbitration agreement and therefore should not be *parties* to the arbitration....However, the Defendants never argued that any particular cause of action should be excluded from arbitration." Id., at 3-4 (emphasis original).

Accordingly, the Plaintiff had the opportunity to assert corporate negligence, joint venture, and veil piercing claims against Defendant Smalls at arbitration, in addition to the other causes of action that Plaintiff admittedly asserted and that were without question decided at arbitration." Id., at 4.

Finally, as noted above, the Plaintiff had the opportunity to present evidence of corporate negligence and seek punitive damages at arbitration. Defendant Smalls was a party to the arbitration, and the Plaintiff asserted the same claims against Defendant Smalls in the Complaint as he has asserted against FAS and FCOS, including corporate negligence, joint venture, and veil piercing." Id., at 7.

Those claims and issues have already been decided by the arbitrator, Your Honor. Exhibit H, Tr. of Record, Sep. 11, 2024, at 14: 2-3.

And then the new claims as to Ms. Smalls, FAS, and FCOS were for corporate negligence, joint venture liability, and corporate veil piercing liability. Id., at 16: 7-9.

[A]ll claims asserted against Ms. Smalls, all claims asserted against Riverside were subject to arbitration, including the claims asserted against Ms. Smalls for corporate negligence, joint venture liability, and corporate veil piercing liability. Those claims were heard in arbitration -- or they were subject to arbitration. Id., at 16-17: 23-3.

All the claims asserted against Ms. Smalls are precluded. It could have been tried at arbitration. They're precluded. Id., at 19: 2-4.

All the claims against Defendant Smalls were or should have been presented at arbitration. Id., at 22: 17-19.

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Defendant Smalls has already filed a Motion to Compel Arbitration in this case, her arguments were heard, and the Motion was granted as it related to certain claims. The other claims, those contained in this lawsuit, were stayed. Those claims involving THI, and by extension Defendant Smalls, were heard and a Final Order was entered. Defendants FOS and FCAS moved to stay the claims in this lawsuit while arbitration proceeded in the companion case, which was also granted. Defendants argued these claims were non-arbitrable in previous pleadings. Exhibit C. Then after the stays were lifted and this Court allowed the instant case to move forward, all Defendants filed a Motion for Summary Judgment arguing the claims in this lawsuit were subject to arbitration. This Court has already decided these claims were not subject to arbitration and that decision should continue to govern the same issues in subsequent stages in the same case. The argument being put forth by Defendants in their incorrectly labeled Motion to Compel Arbitration have twice been denied by this Court, making it the law of the case.

CONCLUSION

For the above stated reasons, Plaintiff respectfully prays this Court consider Defendants' Motion to Compel Arbitration as either a successive Motion to Reconsider or a Motion to Enforce an Order and DENY it due to this Court's previous Orders establishing the law of this case relating to the claims contained in this lawsuit.

Respectfully submitted this 21st day of January, 2025.

PINKSTON LAW FIRM, LLC

/s/ Shawn Pinkston
Shawn Pinkston, SC Bar No. 79965
856 Lowcountry Blvd., Suite 101
Mount Pleasant, South Carolina 29464
Office: 843-814-5472
Fax: 843-723-7300
shawnpinkston@me.com

Mount Pleasant, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASES NO. 2021-CP-10-01437 & -02477
WILLIAM HAYNES, as Personal Representative of the Estate of Elizabeth Varner, Plaintiff, vs. THI OF SOUTH CAROLINA AT CHARLESTON, LLC d/b/a Riverside Health and Rehab, Defendant.	**ORDER GRANTING MOTIONS TO COMPEL ARBITRATION AND RELATED MOTIONS TO STAY**
WILLIAM HAYNES, as Personal Representative of the Estate of Elizabeth Varner, Plaintiff, vs. FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; FUNDAMENTAL CLINICIAL AND OPERATIONAL SERVICES, LLC; and JERROLYN MONTGOMERY-SMALLS, Defendants.	Plaintiff's Exhibit A

This matter is before the Court on four motions (collectively, the "Subject Motions"): one motion in Case 1437[1], namely, the Facility's[2] motion to compel arbitration, and three motions in

[1] "Case 1437" is *Haynes v. THI of South Carolina at Charleston, LLC*, Case No. 2021-CP-10-01437.

[2] The "Facility" is THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab, the defendant in Case 1437.

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Case 2477[3], namely, Ms. Montgomery-Smalls'[4] motion to compel arbitration and FAS[5] and FCOS's[6] motions to stay. All of the Subject Motions were filed on October 4, 2021, and they were all heard together on February 10, 2022, with all parties' respective counsel appearing before the Court via WebEx.

Chief among the Subject Motions are the Facility and Ms. Montgomery-Smalls' substantively identical motions to compel arbitration of the claims asserted against them in Case 1437 and Case 2477, respectively (collectively, the "Motions to Compel Arbitration"). Secondary to those motions are the substantively identical motions of FAS and FCOS to stay Case 2477 pending the final outcome of the Motions to Compel Arbitration and the arbitration proceedings they seek to compel (collectively, the "Motions to Stay"). After careful consideration, the Court GRANTS the Subject Motions. Its reasoning is set forth below.

I.

BACKGROUND

The Facility is a skilled nursing facility. With the help of her son and daughter-in-law, William Haynes ("William") and Kim Haynes ("Kim"), respectively, Elizabeth Varner ("Ms. Varner") was admitted as a resident of the Facility on May 20, 2019. Kim handled the paperwork in conjunction with Ms. Varner's admission, which included an Admission Agreement and an Arbitration Agreement that Kim signed on Ms. Varner's behalf.

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[3] "Case 2477" is *Haynes v. Fundamental Administrative Services, LLC*, Case No. 2021-CP-10-02477.

[4] "Ms. Montgomery-Smalls" is Jerrolyn Montgomery-Smalls, one of the defendants in Case 2477.

[5] "FAS" is Fundamental Administrative Services, LLC, one of the defendants in Case 2477.

[6] "FCOS" is Fundamental Clinical and Operational Services, LLC, one of the defendants in Case 2477.

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By her signature on the Arbitration Agreement, Kim expressly "represent[ed] that . . . she ha[d] authority to sign on [Ms. Varner's] behalf so as to bind [her] as well as [herself]." And, indeed, pursuant to a Durable Financial Power of Attorney executed March 25, 2018 (the "Power of Attorney"), Kim was Ms. Varner's secondary agent. The Power of Attorney, which was effective "[i]mmediately upon [its] execution" and expressly included the power to "[s]ubmit to alternative dispute resolution," authorized Kim to exercise the powers it conferred to Ms. Varner's primary agent, William, in the event he was "unable or unwilling to serve." According to the affidavits they filed on February 8, 2022, on the day Ms. Varner was admitted to the Facility, Kim and William were initially together with the Facility's representative Chandra Bryant ("Ms. Bryant") in the room that was being assigned to Ms. Varner until Kim went with Ms. Bryant to another location (within the Facility) to sign the paperwork while William stayed behind to await Ms. Varner's arrival.

Plaintiff[7] filed Case 1437 and Case 2477 on March 25, 2021, and June 11, 2021, respectively, asserting claims arising out of alleged deficiencies in Ms. Varner's care/treatment at the Facility. As for the relationship between the subject matter of the two cases, although Plaintiff ended up withdrawing the motion, his motion to consolidate (filed in Case 2477 on August 16, 2021) states that Case 1437 and Case 2477 "concern the same underlying facts and have factual and legal questions in common."

Defendants[8] timely answered the respective lawsuits, subject to and without waiving any right to compel the matter to arbitration, denying the liability Plaintiff alleged and raising a number of affirmative defenses.

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[7] "Plaintiff" is William in his capacity as personal representative of Ms. Varner's estate, who is the plaintiff in both Case 1437 and Case 2477.

[8] "Defendants" are the Facility, FAS, FCOS, and Ms. Montgomery-Smalls, collectively.

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Citing the Arbitration Agreement, the Motions to Compel Arbitration ask the Court to compel Plaintiff's claims against the Facility and Ms. Montgomery-Smalls to arbitration. Citing the Motions to Compel Arbitration, the Motions to Stay ask the Court to stay Case 2477 pending the ultimate outcome of the Motions to Compel Arbitration, i.e., until arbitrability is finally determined and any arbitration proceedings resulting from that determination are themselves finally concluded.

II.

ANALYSIS

A. Re: the Motions to Compel Arbitration

The core question here is this: Is the Arbitration Agreement (which Kim signed for Ms. Varner) enforceable against Ms. Varner's estate (i.e., Plaintiff) even though it was not signed by Ms. Varner herself? For two reasons, the Court answers this question in the affirmative: (1) the Arbitration Agreement was properly signed by Kim for Ms. Varner pursuant to Kim's authority under the Power of Attorney, and (2) the Arbitration Agreement is enforceable against Plaintiff—or, more precisely, Plaintiff is estopped to deny that the Arbitration Agreement is enforceable—by virtue of merger and equitable estoppel. Thus, since Plaintiff's claims against the Facility and Ms. Montgomery-Smalls are clearly within the scope of the Arbitration Agreement, they should proceed in arbitration, not litigation. The Court's findings/analytical steps in reaching this conclusion follow.

1. Both state and federal policy favor arbitration.

There is a "strong South Carolina and federal policy favoring arbitration . . . ." *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 877 (Ct. App. 2020); *see also 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."). Indeed,

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"arbitration agreements are *presumed valid*." *Doe*, 430 S.C. at 607, 846 S.E.2d at 877 (emphasis added).

2. The Arbitration Agreement is governed by the FAA[9].

The Arbitration Agreement is governed by the FAA, not South Carolina's Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10 to -240 (the "SCAA"). 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.

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

[9] The "FAA" is the Federal Arbitration Act, 9 U.S.C §§ 1–16.

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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).

3. 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"[10] and "ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). To that end, the FAA provides that an arbitration 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.*

[10] *Allied–Bruce*, 513 U.S. at 270.

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Concepcion, 563 U.S. 333, 339 (2011)). Under the FAA, "courts *must* place arbitration agreements on *equal footing with other contracts* . . . ." *Concepcion* at 339 (emphasis added); *see also Allied–Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted).[11]

4. The Arbitration Agreement is valid on its face.

The Arbitration Agreement is valid on its face. In other words, there is nothing within the four corners of the document itself that calls its validity into question. It bears Kim's signature on behalf of Ms. Varner, along with her express representation that she is authorized to sign for her.[12] It is countersigned by Ms. Bryant for the Facility. It is duly supported by consideration and sets forth all necessary terms, containing, as it does, the parties' mutual promises to submit a certain

[11] 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 *favored* treatment of arbitration agreements relative to other contracts.

[12] By virtue of her signature, Kim is "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement, *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms."), including, of course, the express representation therein of her authority to act on Ms. Varner'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 Kim is no less bound by this covenant than the Facility.

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defined scope of disputes to binding arbitration[13] before an arbitrator who is either agreed upon by the parties themselves or selected by the Court, in a proceeding to be conducted pursuant to the South Carolina ADR Rules, which will result in a decision that is enforceable in a court of competent jurisdiction.[14] To require more just because an arbitration agreement is in issue would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *Concepcion*, 563 U.S. at 339.

Moreover, the Arbitration Agreement is not unconscionable. For an agreement to be deemed unconscionable, there must be both (1) an absence of meaningful choice on the part of one 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 first part of the test (absence of meaningful choice) is undermined by the express acknowledgement in the Arbitration Agreement itself that the "Resident/Representative is not required to use the . . . Facility for Resident's healthcare needs and . . . 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 undermined by the fact that the Arbitration Agreement itself was not required for admission to the Facility.

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

[14] In this regard, the Court would note that the South Carolina ADR Rules, which do apply to the conduct of arbitration proceedings under the Arbitration Agreement, should not be confused with the SCAA, which, as addressed above (in explaining the applicability of the FAA), does not apply here.

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But even assuming, *arguendo*, the first part of the test were somehow met, the second part (unreasonably oppressive terms) certainly is not. The Arbitration Agreement simply binds the parties (both sides) to resolve disputes via arbitration, which is something that is expressly favored as a matter of both state and federal policy. *Parsons*, 418 S.C. at 6, 791 S.E.2d at 131; *Doe*, 430 S.C. at 607, 846 S.E.2d at 877. And there is nothing about the Arbitration Agreement—which, again, calls for arbitration conducted pursuant to the South Carolina ADR Rules—that would suggest it is not geared towards achieving an unbiased decision by a neutral decision-maker. *Simpson*, 373 S.C. 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."). Indeed, Rule 1 of the South Carolina ADR Rules expressly states, "These rules shall be construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply."

5. Plaintiff's claims are within the scope of the Arbitration Agreement.

Without question, Plaintiff's claims against the Facility and Ms. Montgomery-Smalls 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.

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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.").

6. The Arbitration Agreement covers Plaintiff's claims against both the Facility and Ms. Montgomery-Smalls.

The Arbitration Agreement expressly states that it not only covers the Facility itself but also the Facility's "agents, employees, and servants." Plaintiff's complaint in Case 2477 alleges that, "at all times relevant herein [Ms. Montgomery-Smalls] was the Administrator of [the Facility]." Accordingly, the Arbitration Agreement covers Plaintiff's claims against both the Facility and Ms. Montgomery-Smalls.

7. The Arbitration Agreement is valid and enforceable because it was properly signed by Kim for Ms. Varner pursuant to Kim's authority under the Power of Attorney.

A person possessing contractual capacity, acting as grantor, can authorize another to contract on the grantor's behalf under the specific terms of a power of attorney. *See Gaddy v. Douglass*, 359 S.C. 329, 344–45, 597 S.E.2d 12, 20 (Ct. App. 2004); *see also Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014) ("A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. The written authorization itself is the power of attorney.") (quoting *In re Thames*, 344 S.C. 564, 569, 544 S.E.2d 854, 856 (Ct. App. 2001)) (internal quotation marks omitted). "[T]he holder of

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[the] power of attorney steps into the shoes of the grantor and is basically the alter ego of the grantor." *Bennett v. Carter*, 421 S.C. 374, 382, 807 S.E.2d 197, 201 (2017).

The Power of Attorney was duly executed on March 25, 2018, and became effective immediately upon its execution. The Power of Attorney expressly included the power to "[s]ubmit to alternative dispute resolution." And while, as secondary agent, Kim's authority under the Power of Attorney was contingent upon William being "unable or unwilling to serve," this contingency came to pass due to William's desire to wait in Ms. Varner's room for her arrival. Accordingly, when she signed the Arbitration Agreement for Ms. Varner in May of 2019, Kim was properly acting within the scope of her authority under the Power of Attorney.

8. Plaintiff is precluded from denying the enforceability of the Arbitration Agreement because of merger and equitable estoppel.

Even though Ms. Varner is a nonsignatory to the Arbitration Agreement, i.e., even though she did not actually sign the Arbitration Agreement herself, it is nonetheless enforceable against her/her estate (i.e., Plaintiff).

"South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel." *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (confirming the validity of the general proposition of law on which the appellants based their merger/equitable estoppel argument: "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

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course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.").

Conceptually, the Facility and Ms. Montgomery-Smalls' merger/equitable estoppel argument is not about showing that the Arbitration Agreement is enforceable but about showing that Plaintiff is estopped to deny that the Arbitration Agreement is enforceable. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and, Ms. Varner having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff (who stands in place of Ms. Varner in bringing these actions as the personal representative of her estate) is estopped to deny the enforceability of the Arbitration Agreement with which the Admission Agreement merged. Accordingly, counterarguments aimed at denying the Arbitration Agreement's enforceability (e.g., arguments based on a supposed lack of authority to sign the Arbitration Agreement on behalf of Ms. Varner) are beside the point and unavailing.

As explained below, the Court finds that the Arbitration Agreement is also enforceable against Plaintiff based on merger and equitable estoppel.

Merger

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

> Appellants contend that even if Sister lacked capacity to execute the 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,

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> The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
>
> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction*. *Unless there is a contrary intention, appellants are correct that there was a merger*.

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

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,"[15] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[16] evidence exists 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," 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.

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[15] *Id.* at 355, 755 S.E.2d at 455.

[16] 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 [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).

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It must be remembered that, where, as here, the instruments in question (i.e., the Admission Agreement and the Arbitration Agreement) were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For this presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the circumstances that gave rise to the merger presumption in the first place (same time, parties, purpose, and transaction)—can 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.

Although the Admission Agreement does contain an "Entire Agreement" clause, it does not refer to the Arbitration Agreement as a separate contract but rather expressly states, "other Admissions materials . . . are made a part of this Agreement by reference herein." Clearly, 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) (recognizing "admission documentation" to include an arbitration agreement: "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). This directly contradicts the notion of any intended "separatedness" (in the parlance of the *Coleman* Court[17]) between the Admission Agreement and the Arbitration Agreement.

[17] 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).

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While the Arbitration Agreement was not required for Ms. Varner's admission to the Facility, all this means is that the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become part of the admissions materials once it was in fact executed, which, without question, it was—and under the very circumstances (same time, parties, purpose, and transaction) that give rise to the presumption of merger. In other words, even though the Arbitration Agreement was not a *condition* of admission, it was certainly agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument, governing various interrelated aspects of Ms. Varner's relationship with the Facility: the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission.

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). 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. Unlike the Admission Agreement, which theoretically could have stood on its own in the absence of the Arbitration Agreement—and, of course, had the Arbitration Agreement not been executed, it simply would not exist and no question of merger would have arisen to begin with—the Arbitration Agreement could not have stood on its own: It only makes sense together with, i.e., connected to, the Admission Agreement, which is its sole reason for being.

That the Admission Agreement and the Arbitration Agreement have their own titles and are separately paginated and signed admits of no reasonable inference of an intent contrary to

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merger. To point to such things is to do no more than to observe 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 even assuming, *arguendo*, there is some ambiguity in this regard, to fall back on the idea that it should be construed against the Facility as the drafter is uncalled for in this context. *Merger is the default position*, i.e., it is presumed, and this is so because of the confluence of a particular set of circumstances—the instruments at issue were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these stars align—same time, same parties, same purpose, same transaction—our law instructs the Court to consider and construe the instruments 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.

Equitable Estoppel

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement by virtue of

the direct benefits test our Supreme Court endorsed in *Wilson*. *See* 426 S.C. at 340, 827 S.E.2d at 175 ("Under direct benefits estoppel, '[a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when [the nonsignatory] receives a direct benefit from a contract containing an arbitration clause.'"") (quoting *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012)) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)); *id.* ("'In the arbitration context, the doctrine [of direct benefits estoppel] 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*.'") (emphasis in original) (quoting *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601) (quoting *Int'l Paper*, 206 F.3d at 418).

The *Wilson* Court favorably discussed the application of the direct benefits test in the arbitration agreement context—the Court of Appeals having applied the test in the decision then before the *Wilson* Court on writ of certiorari, which test the Court of Appeals had earlier applied to find a nonsignatory estopped to deny the validity of an arbitration agreement in *Pearson*, 400 S.C. 281, 733 S.E.2d 597, and under which test the Facility and Ms. Montgomery-Smalls contend Plaintiff is estopped to deny the validity of the Arbitration Agreement here. *See 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).

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Without question, Ms. Varner received direct benefits from the Admission Agreement throughout her residency at the Facility, including, without limitation, the room, board, care/treatment she received therein. To deny her receipt of such benefits is illogical and objectively unreasonable and would require wholly discrediting the entirety of her residency: every meal, every instance of care/treatment she received, essentially every moment at the Facility—even Plaintiff's complaints do not go nearly so far as that. Ms. Varner having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff cannot now deny the enforceability of the Arbitration Agreement with which the Admission Agreement merged.

9. Neither the Facility nor Ms. Montgomery-Smalls waived any arbitration rights.

Waiver is the voluntary relinquishment of a known right. When timely answering Plaintiff's complaints, the Facility and Ms. Montgomery-Smalls expressly reserved their arbitration rights. Moreover, Case 2477 was filed some three months after Case 1437, and by virtue of his now-withdrawn motion to consolidate, Plaintiff acknowledges that the cases "concern the same underlying facts and have factual and legal questions in common." There was no undue delay in moving to compel arbitration; nor was there any prejudice from any supposed delay; nor did either the Facility or Ms. Montgomery-Smalls make any use of the tools of litigation inconsistent with their arbitration rights.

B. Re: the Motions to Stay

The relationship between the Motions to Compel Arbitration and the Motions to Stay is such that the grant of the former requires the grant of the latter. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to

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arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.") (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties."). But even assuming, *arguendo*, staying Case 2477 is not mandatory here, for the sake of judicial economy, of avoiding piecemeal litigation and the potential for inconsistent obligations, and of the orderly administration of its own docket, the Court exercises its discretion to impose such a stay. *See State v. Langford*, 400 S.C. 421, 435, 735 S.E.2d 471, 478 (2012) ("[A] court's power to hear and decide cases 'carries with it the inherent power to control the order of its business.'") (quoting *Williams v. Bordon's*, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980)); *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) ("The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement."). Indeed, as stated in Plaintiff's now-withdrawn motion to consolidate Case 1437 with Case 2477, "[i]t is in the interest of efficiency and judicial economy to consolidate these actions as aforesaid and avoid duplicative discovery and trials." These interests likewise support staying Case 2477.

III.

CONCLUSION

The Subject Motions are hereby GRANTED. Case 1437 is stayed in favor of arbitration between Plaintiff and the Facility. Case 2477 is stayed in favor of arbitration between Plaintiff and Ms. Montgomery-Smalls, with Plaintiff's claims against FAS and FCOS stayed pending the ultimate outcome of arbitration between Plaintiff, the Facility, and Ms. Montgomery-Smalls.

IT IS SO ORDERED.

_____

ROGER M. YOUNG, SR., Presiding Judge
Court of Common Pleas
Charleston County

Charleston, South Carolina

Dated: _____

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Charleston Common Pleas

Case Caption: William Haynes , plaintiff, et al VS Thi Of South Carolina At Charleston , defendant, et al

Case Number: 2021CP1001437

Type: Order/Compel

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

ELECTRONICALLY FILED - 2024 Feb 12 4:16 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1001437

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CASES NO. 2021CP-1001437 & 1002744
)	
Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner,)	**FINAL ORDER**
Plaintiff,)	
v.)	
)	
Fundamental Administrative Services LLC, And Fundamental Clinical and Operational Services, LLC, and Jerrolyn Montgomery-Smalls.)	
)	
Defendants.)	
)	
STATE OF SOUTH CAROLINA)	
)	
COUNTY OF CHARLESTON)	
)	
Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner,)	
Plaintiff,)	
v.)	
)	
THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab,)	
)	
Defendant.)	

THIS MATTER is before the Court on a Petition for a Final Order filed by Plaintiff. Based on the Petition and the proof of ADR submitted on May 23, 2023, this Court hereby enters and incorporates by reference the Confidential Arbitration Order issued by Doyet A. Early, III, on May 16, 2023.

THEREFORE, this Court GRANTS Plaintiff's Petition and enters a Final Order in this matter relating to arbitration and lifts the corresponding stays associated with case CAFN: 2021CP1002744.

Plaintiff's Exhibit B

AND IT IS SO ORDERED.

[*Electronic Signature Page to Follow*]

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ELECTRONICALLY FILED - 2024 Feb 12 4:16 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1001437

Charleston Common Pleas

Case Caption: William Haynes , plaintiff, et al VS Thi Of South Carolina At Charleston , defendant, et al

Case Number: 2021CP1001437

Type: Order/Other

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

ELECTRONICALLY FILED - 2023 Dec 08 1:20 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1001437

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CASES NO. 2021CP-1001437 & 1002744
)	
Williams Haynes, as Personal)	
Representative of the Estate of Elizabeth)	**DEFENDANTS' PETITION FOR FINAL ORDER**
Varner,)	
Plaintiff,)	
v.)	
)	
Fundamental Administrative Services LLC,)	
And Fundamental Clinical and Operational)	
Services, LLC, and Jerrolyn)	
Montgomery-Smalls.)	
)	
Defendants.)	
)	
STATE OF SOUTH CAROLINA)	
)	
COUNTY OF CHARLESTON)	
)	
Williams Haynes, as Personal)	
Representative of the Estate of Elizabeth)	
Varner,)	
Plaintiff,)	
v.)	
)	
THI of South Carolina at Charleston, LLC)	
d/b/a Riverside Health and Rehab,)	
)	
Defendant.)	

Plaintiff's Exhibit C

COME NOW the Defendants THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab ("Riverside"), Fundamental Administrative Services LLC, Fundamental Clinical and Operational Services, LLC, and Jerrolyn Montgomery-Smalls (collectively "Defendants"), by and through undersigned counsel, and moves this Court to enter a Final Order incorporating the Confidential Arbitration Order issued by retired Judge Doyet A. Early, III ("Judge Early"), on May 16, 2023. A Proof of ADR was filed with this Court on May 22, 2023, acknowledging the parties complied with this Court's February 24, 2022 order to arbitrate.

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The Plaintiff filed a similar Petition on December 7, 2023. The Defendants consent to the Plaintiff's request for a Final Order, but request, for the sake of judicial economy, that a stay of all non-arbitrable claims remain in effect pending either dismissal of all claims against Riverside and Ms. Montgomery-Smalls pursuant to payment of the arbitration award, or the outcome of any further appeal as it relates to arbitration in this matter.

After the conclusion of the arbitration, Plaintiff attempted to appeal this Court's February 24, 2022 Order, which appeal the Court of Appeals has dismissed. Upon information and belief of undersigned Counsel, Plaintiff intends to again file an appeal, once this Court enters the requested Final Order incorporating the Confidential Arbitration Order. Plaintiff will seek reversal of this Court's February 24, 2022 Order, will request nullification of Judge Early's Confidential Arbitration Order, and will request remand of the claims against Riverside and Ms. Montgomery-Smalls to this Court's docket for a jury trial. The stay of all other claims should remain in effect pending the outcome of any such appeal.

As set forth in this Court's February 24, 2022 Order, the Plaintiffs claims against all Defendants "'*concern the same underlying facts and have factual and legal questions in common*.'" (Order at Page 3, quoting Plaintiff's withdrawn Motion to Consolidate). Accordingly, the Defendants request that this Court exercise its discretion to maintain the stay of all non-arbitrable claims as necessary to avoid duplicative discovery and trials, to avoid piecemeal litigation and the potential for inconsistent obligations, and for the sake of the orderly administration of the Court's own docket. (*See* Order at Page 19, again quoting Plaintiff's withdrawn Motion to Consolidate and citing *State v. Langford*, 400 S.C. 421, 435, 735 S.E.2d 471, 478 (2012) ("[A] court's power to hear and decide cases 'carries with it the inherent power to control the order of its business.'") (quoting *Williams v. Bordon's*, Inc., 274 S.C. 275, 279, 262

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S.E.2d 881, 883 (1980)); *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) ("The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement.")). For these reasons, the stay of all non-arbitrable claims should remain in effect pending the conclusion of any subsequent appeal as it relates to arbitration in this matter, or pending the dismissal of the Plaintiff's claims against Riverside and Ms. Montgomery-Smalls pursuant to payment of the arbitration award.

This Petition is supported by 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 petition, as well as any oral argument to be presented by counsel at a hearing on this matter.

CLEMENT RIVERS, LLP

By: s/ Matthew O. Riddle.
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Russell G. Hines
SC State Bar ID No.: 72100
Matthew O. Riddle
SC State Bar ID No.: 76650
Gaillard T. Dotterer, III
SC State Bar ID No.:103620
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com,
rhines@ycrlaw.com, mriddle@ycrlaw.com,
gdotterer@ycrlaw.com
Attorneys for the Defendants

Charleston, South Carolina

Dated: December 8, 2023

ELECTRONICALLY FILED - 2024 Sep 09 1:10 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	NINTH JUDICIAL CIRCUIT
)	
WILLIAM HAYNES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH VARNER,)	CASE NO. 2021-CP-10-02744
)	
PLAINTIFF,)	
)	
vs.)	**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
)	
FUNDAMENTAL ADMINISTRATIVE SERVICES LLC, AND FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, AND JERROLYN MONTGOMERY-SMALLS,)	
)	
DEFENDANTS.)	
)	

TO: SHAWN PINKSTON, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

Defendants Jerrolyn Montgomery-Smalls ("Defendant Smalls"), Fundamental Administrative Services, LLC ("FAS"), and Fundamental Clinical and Operational Services, LLC ("FCOS"), by and through their undersigned counsel, respectfully submit this Memorandum of Law in support of their Motion for Summary Judgment. As explained below, Plaintiff's claims against Defendants are barred by the doctrines of *res judicata* and/or collateral estoppel based on the outcome of a prior arbitration brought by Plaintiff arising out of the same facts and circumstances alleged in this case. In light of the preclusive effect of the arbitration award, there are no material facts in dispute and Defendants are entitled to judgment as a matter of law. Accordingly, Defendants' Motion should be granted.

Plaintiff's Exhibit D

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FACTUAL BACKGROUD

A. The Lawsuits

On March 25, 2021, Plaintiff, in his capacity as the personal representative of the Estate of Elizabeth Varner, filed an action ("*Riverside* Lawsuit") against non-party THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab ("Facility" or "Riverside"), a skilled-nursing facility where Ms. Varner was a resident in October 2019. (Exhibit A ¶¶ 2, 4.) The *Riverside* Lawsuit alleged that on October 6, 2019, Ms. Varner was hospitalized with a fractured femur that she sustained at the Facility and subsequently had to undergo surgery to treat her injury. (Ex. A ¶¶ 5-9.)

The *Riverside* Lawsuit further alleged that in a separate incident, on October 27, 2019, Ms. Varner was hospitalized again after she was found to be nonresponsive at the Facility. (Ex. A ¶ 10.) Ms. Varner suffered cardiac arrest while at the hospital and later died on October 29, 2019. (Ex. A ¶ 11.) The *Riverside* Lawsuit contended that the femur fracture that Ms. Varner sustained at the Facility was a "significant condition contributing to her death." (*Id.*) Plaintiff asserted causes of action against the Facility for medical malpractice, negligence and gross negligence (Count 1); neglect of a vulnerable adult (Count 2); (3) wrongful death (Count 3); and survivorship action (Count 4). (Ex. A ¶¶ 13-33.)

On June 11, 2021, Plaintiff, again acting as the personal representative of Ms. Varner's estate, filed this case against Defendants based on the same factual allegations regarding Ms. Varner's care and treatment at the Facility that were alleged in the *Riverside* Lawsuit. (Exhibit B ¶¶ 11-21.) Defendant Smalls was the Administrator of the Facility during Ms. Varner's residency. (Exhibit C ¶ 18.) Plaintiff alleges that FAS "exerted control in the oversight, management, direction, and operation of Riverside, including the development of budgets, choosing vendors and

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consultants, and deciding nurse staffing hours per patient days deriving revenue therefrom." (Ex. B ¶ 9.) Plaintiff avers that FCOS "exerts significant control over the [Facility's] operation," "including the development of policies and procedures, training, and instruction for the staff at Riverside." (Ex. B ¶ 8.)

In this case, Plaintiff asserts the same four causes of action that were asserted in the *Riverside* Lawsuit. (Ex. B ¶¶ 22-25 (negligence/gross negligence (Count 1)); ¶¶ 44-55 (neglect of a vulnerable adult (Count 5)); ¶¶ 56-58 (wrongful death (Count 6)); ¶¶ 59-61 (survivorship action (Count 7)). Plaintiff also asserts claims for corporate negligence (Count 2), joint-venture liability (Count 3) and corporate veil-piercing liability (Count 4). (Ex. B ¶¶ 26-43.) On July 16, 2021, Defendant Smalls filed an Answer denying any liability and raising affirmative defenses, including the right to demand arbitration. (Ex. C ¶ 35.)

B. The Court's Order Compelling Arbitration

On February 24, 2022, the Court in both cases entered an order granting the Facility's and Defendant Smalls' respective motions to compel arbitration (Exhibit D) pursuant to the parties' Arbitration Agreement. (Exhibit E.) The Court ruled that because the Arbitration Agreement applies to the Facility and the Facility's "agents, employees, and servants," "the Arbitration Agreement covers Plaintiff's claims against both the Facility and [Defendant Smalls]." (Ex. D at 10.) The Arbitration Agreement further provides that "[t]he 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." (Ex. E at 1.) In the "interest of efficiency and judicial economy," the Court stayed this lawsuit, including Plaintiff's claims against non-arbitrating Defendants FAS and FCOS, pending the completion of the arbitration of Plaintiff's claims against the Facility and Defendant Smalls. (Ex. D at 18-19.)

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C. The Arbitration Order

Plaintiffs' claims against the Facility and Defendant Smalls were consolidated in a single arbitration proceeding. On September 15, 2022, the arbitrator (Hon. Doyet E. Early, III) issued an Arbitration Order memorializing the parties' stipulated procedures governing how the arbitration would be conducted. (Exhibit F.) In the Arbitration Order ¶ 1, the parties agreed to arbitrate "the claims and defenses raised in the complaint[s] and answer[s] filed in the above state court matter[s]." (Ex. F ¶ 1.) The Arbitration Order ¶ 19 also provided that the arbitrator would issue written findings of fact and conclusions of law. (Ex. F ¶ 19.)

D. The Arbitration Award

The arbitration hearing was held from April 3, 2023 to April 6, 2023. (Exhibit G at 1.) On May 16, 2023, the arbitrator issued his award ("Arbitration Award"). In the Arbitration Award, [redacted]. The arbitrator noted that [redacted] (Ex. G at 1.)

In the Arbitration Award, the arbitrator determined:

(1) [redacted]

(2) [redacted];

(3) [redacted];

(4) [redacted];

(5) [redacted]

(6) [redacted].

Based on these findings, the arbitrator [redacted]. (Ex. G at 1-2.)

On May 26, 2023, the arbitrator, at the request of the parties, supplemented his Arbitration Award, ruling that [redacted] (Ex. H.) The arbitrator found that [redacted]

E. The Court's Final Order

Meanwhile, on February 12, 2024, the Court granted Plaintiff's petition for entry of a Final Order that incorporated the Arbitration Award and lifted the stay of this lawsuit. (Exhibit J.) Even though the preclusive effect of the Arbitration Award bars Plaintiff from pursuing this action against Defendants, Plaintiff is continuing to do so, thus necessitating this Motion.

ARGUMENT

I. DEFENDANT SMALLS IS ENTITLED TO SUMMARY JUDGMENT BASED ON THE DOCTRINE OF *RES JUDICATA*

Defendant Smalls is entitled to summary judgment because the Arbitration Award is *res judicata* and precludes Plaintiff's prosecution of his claims against Defendant Smalls in this case. *Res judicata* "bars subsequent actions by the same parties when the claims arise out of the same

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transaction or occurrence that was the subject of a prior action between those parties."[1] *Pye v. Aycock*, 325 S.C. 426, 433, 480 S.E.2d 455, 458 (Ct. App. 1997) (citation omitted). *Res judicata* applies where: (1) the judgment in the prior action was final, valid, and on the merits; (2) both actions involve the same parties; and (3) the second action involved claims properly included in the first action. *See Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995). *Res judicata* applies to arbitration awards and bars a litigant from asserting claims in a later action that were or "could have been arbitrated in the original proceeding." *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 496, 593 S.E.2d 480, 486 (Ct. App. 2004).

Here, all of the *res judicata* requirements are met. *First*, the Arbitration Award "is a final, binding award on the merits." *Palmetto Homes*, 357 S.C. at 494, 593 S.E.2d at 485. This is especially true in this case because the parties' Arbitration Agreement says that the arbitrator's "decision shall be binding on all parties and may be enforced by a court of competent jurisdiction." (Ex. E at 1.) And Plaintiff himself acknowledged the finality of the Arbitration Award by successfully petitioning the Court to incorporate the Arbitration Award into the Final Order. (Ex. J.) The Arbitration Award thus signifies the end, not the commencement of litigation, and "is presumptively correct." *Trident Tech. College v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 111, 333 S.E.2d 781, 788-89 (1985). This satisfies the first *res judicata* requirement.

Second, Plaintiff and Defendant Smalls were parties to the arbitration and are parties to this case, which satisfies the second *res judicata* requirement. *See Palmetto Homes*, 357 S.C. at 494, 593 S.E.2d at 485.

[1] The purpose of *res judicata* is to prevent improper "claim splitting," which Plaintiff seeks to do here. To that end, *res judicata* "prohibits the owner of a single cause of action from either dividing or splitting the cause of action so as to make it the subject of several causes of action . . . ." *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986).

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Finally, the facts alleged in this case are identical to those that were litigated in the arbitration. And, pursuant to the Court's order compelling arbitration (Ex. D at 10) and the arbitrator's Arbitration Order ¶ 1 (Ex. F ¶ 1), Plaintiff was required to present all of his claims against Defendant Smalls in the arbitration, [redacted]. *See Pye*, 325 S.C. at 433, 480 S.E.2d at 458 (*res judicata* applies where successive suits involve the same subject matter and causes of action). The Arbitration Award thus conclusively resolved Plaintiff's causes of action against Defendant Smalls. *Res judicata* therefore bars Plaintiff from pursuing those same claims—or any other unasserted causes of action arising out of the same facts—in this case. *See Palmetto Homes*, 357 S.C. at 494-96, 593 S.E.2d at 485-86; *Nunnery*, 289 S.C. at 210-11, 345 S.E.2d at 743-44. Accordingly, the Court should grant summary judgment for Defendant Smalls and dismiss her from this action.

II. FAS AND FCOS ARE ENTITLED TO SUMMARY JUDGMENT BASED ON THE COLLATERAL ESTOPPEL DOCTRINE

Defendants FAS and FCOS are entitled to summary judgment on Plaintiff's claims against them based on the collateral estoppel effect of the Arbitration Award. "Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). Collateral estoppel applies when an issue was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *See id.*

Importantly, collateral estoppel can be used defensively against a plaintiff who was a party in a prior action, even if the defendant was not a party to the prior litigation, so long as the plaintiff "had a full and fair opportunity to previously litigate the issue." *Id.* at 555, 684 S.E.2d at 782 (noting that mutuality is not a requirement of collateral estoppel); *see also Graham v. State Farm*

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Fire & Cas. Ins. Co., 277 S.C. 389, 391, 287 S.E.2d 495, 496 (1982) (ruling that plaintiff was barred from re-litigating an issue decided against the plaintiff in a prior suit even though the defendant was not a party to the prior action); *Irby v. Richardson*, 278 S.C. 484, 487, 298 S.E.2d 452, 454 (1982) (same). At bottom, collateral estoppel "rest[s] upon the wholesome principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity." *Graham*, 277 S.C. at 391, 287 S.E.2d at 496.

Plaintiff is estopped from pursuing his claims against FAS and FCOS for at least two reasons. *First*, the full extent of Plaintiff's damages was decided in the arbitration, where the issue was actually litigated and necessary to the Arbitration Award. And, even though FAS and FCOS were not parties to the arbitration, Plaintiff had a full and fair opportunity to litigate his damages in that proceeding. To be sure, in the Arbitration Award, the arbitrator [redacted]. (Ex. G at 2.)

Here, Plaintiff's claims against FAS and FCOS for negligence/gross negligence (Count 1),[2] corporate negligence (Count 2), neglect of a vulnerable adult (Count 5), and survivorship (Count 7) seek the same damages that Plaintiff [redacted]. (*Compare* Ex. A ¶¶ 16, 27, 32 (damages alleged in this case), *with* Ex. B ¶¶ 25, 31, 55, 60 (damages alleged in the *Riverside* Lawsuit).) Because the arbitrator already [redacted], Plaintiff is estopped from seeking additional damages from FAS and FCOS. *See Carolina Renewal*, 385 S.C. at 558, 684 S.E.2d at 784 (plaintiff

[2] Plaintiff's negligence/gross negligence claim also should be dismissed because it is not directed to Defendants. Instead, Plaintiff alleges a claim against "[t]he care providers at *Riverside Health and Rehab* [who] violated the standard of care." (Ex. A ¶ 23.)

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estopped from re-litigating damages that were decided in a prior action); *see also, e.g., Johnson v. Lapan*, No. 09-ADMS-70010, 2010 WL 1170254, at *2 (Mass. App. Ct. Sept. 28, 2009) (plaintiff estopped from recovering additional damages from a different defendant after her damages were decided in arbitration and the award was paid); *Murakami v. Wilmington Star News, Inc.*, 528 S.E.2d 68, 71 (N.C. Ct. App. 2000) (arbitration award collaterally estopped the plaintiff from relitigating damages in a subsequent lawsuit against a different defendant). FAS and FCOS therefore should be granted summary judgment on these causes of action.

Second, Plaintiff's joint-venture and alter-ego/veil-piercing claims (Counts 3 and 4, respectively) must be dismissed. In his Complaint, Plaintiff seeks to impute the Facility's liability to FAS and FCOS based on allegations that FAS and FCOS were part of a joint venture that operated Riverside[3] (Ex. B ¶¶ 33-41), and that FAS and FCOS were alter-egos of the Facility. (Ex. B ¶¶ 42-43.) However, the [redacted] (Ex. I.) Thus, the Facility [redacted]. The Court therefore should grant summary judgment for FAS and FCOS on these causes of action.

Finally, FAS and FCOS are entitled to summary judgment on Plaintiff's wrongful death claim (Count 5). This cause of action is predicated on Plaintiff's allegations that Ms. Varner "was severely injured in the Defendant's [F]acility" and "[t]he injuries so inflicted" on Ms. Varner "were the cause of her wrongful death on October 29, 2019." (Ex. B ¶¶ 57-58.) As alleged ~~in the~~

[3] The joint venture claim must be dismissed in any event because it is explicitly premised on Plaintiff's allegation that FAS, FCOS, *Defendant Smalls* and Riverside *collectively* comprised the joint venture. (Ex. B ¶ 37.) The arbitrator determined, however, that [redacted] therefore defeats Plaintiff's joint-venture theory.

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Complaint, the "injuries" to which Plaintiff refers are the "trauma to [Ms. Varner's] leg," resulting in her fractured right femur. (Ex. B ¶ 47; *see also id.* ¶¶ 14-18.) In the arbitration, however, the arbitrator determined that "[redacted]." (Ex. G at 2.) Plaintiff therefore is collaterally estopped from re-litigating the same issues in this case. *See Graham*, 277 S.C. at 391, 287 S.E.2d at 496 ("This matter having been fully and fairly adjudicated, the [plaintiff] is collaterally estopped by prior judgment from bringing this action to adjudicate the same issue"). Plaintiff's wrongful death claim must be dismissed.

CONCLUSION

For all the foregoing reasons, Defendants' Motion for Summary Judgment should be granted, and the Court should enter an order dismissing this case, with prejudice.

CLEMENT RIVERS, LLP

By:*/s/ Mathew O. Riddle Jr.*
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
Russell Grainger Hines
SC State Bar ID No.: 72100
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com, mriddle@ycrlaw.com
Attorneys for the Defendants

Charleston, South Carolina

Dated: September 6, 2024

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1002744

William Haynes et al
PLAINTIFF(S)

Fundamental Administrative Services Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

This matter came before the Court for a hearing on 9/11/2024. The plaintiff was represented by Shawn Travis Pinkston and the defendants were represented by Matthew Oliver Riddle. After hearing arguments from the parties and reviewing the filings in the case, the Court makes the following rulings. Defendants' motion for summary judgment is Denied. Plaintiff's motion to compel discovery is Granted and the Defendants are ordered to comply with discovery within 30 days. Plaintiff's motion for sanctions is Denied. Defendants' motion to seal the record of the proceedings under Rule 41.1 is Denied. Defendants' motion for a protective order until the dispositive summary judgment motion is ruled upon is Granted.

It Is So Ordered.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 09/20/2024 .

Williams Haynes Personal Representative
Elizabeth Varner Estate

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Plaintiff's Exhibit E

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Court Reporter:

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

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Charleston Common Pleas

Case Caption: William Haynes , plaintiff, et al VS Fundamental Administrative Services Llc , defendant, et al

Case Number: 2021CP1002744

Type: Order/Electronic Form 4

So Ordered

William C. McMaster, III

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	NINTH JUDICIAL CIRCUIT
)	
WILLIAM HAYNES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH VARNER,)	CASE NO. 2021-CP-10-02744
)	
PLAINTIFF,)	
)	
vs.)	**DEFENDANT'S MOTION TO ALTER, AMEND, AND/OR RECONSIDER ORDER DENYING MOTION FOR SUMMARY JUDGMENT**
)	
FUNDAMENTAL ADMINISTRATIVE SERVICES LLC, AND FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, AND JERROLYN MONTGOMERY-SMALLS,)	Plaintiff's Exhibit F
)	
DEFENDANTS.)	
)	

TO: THE HONORABLE WILLIAM C. MCMASTER, III, Presiding Judge, and SHAWN T. PINKSTON, ESQUIRE, Attorney for Plaintiff:

NOW COME Defendants Jerrolyn Montgomery-Smalls, Fundamental Administrative Services, LLC ("FAS") , and Fundamental Clinical and Operational Services, LLC ("FCOS") by and through their undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set forth below, hereby moves this Honorable Court to alter, amend, and/or reconsider its Order, filed September 20, 2024, denying Defendant's motion for summary judgment.

As set forth in the motion filed on June 28, 2024, Plaintiff's claims against the Defendants are barred by the doctrines of *res judicata* and collateral estoppel based on the outcome of a prior arbitration proceeding brought by Plaintiff arising out of exactly the same facts and circumstances alleged in this case. In light of the preclusive effect of the arbitration award, *see, e.g., Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 493-96, 593 S.E.2d 480, 484-86 (Ct. App. 2004); *Graham v. State Farm Fire & Cas. Ins. Co.*, 277 S.C. 389, 390-91, 287 S.E.2d

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495, 496 (1982), there are no material facts in dispute. Defendants therefore request that this court reconsider its Order and grant judgment to Defendants as a matter of law.

1. **Permitting the Plaintiff to relitigate claims and issues that have already been decided at arbitration would create duplicative litigation and would be a waste of judicial resources.**

The present suit involves allegations of nursing home negligence at Riverside Health and Rehab skilled nursing facility ("Facility" or "Riverside"), where Plaintiff's decedent Elizabeth Varner was a resident. Contrary to Plaintiff's erroneous argument to this Court in opposition to the present motion, Judge Roger M. Young, Sr. ordered all of Plaintiff's claims to arbitration, to include all claims raised in the present suit and the Plaintiff's related action against Riverside (C/A No. 2021-CP-10-01437). Judge Young further ordered that Riverside and Defendant Smalls were parties to the arbitration, and that Defendants FAS and FCOS were not parties to the arbitration. Finally, Judge Young ordered a judicial stay as to both the present suit and the suit against Riverside, to promote "efficiency and judicial economy," and to prevent "duplicative discovery and litigation." (*See* Feb. 24, 2022 Order at Page 19).

The parties presented testimony and evidence at arbitration. Retired Judge Doyet E. Early, III served as the arbitrator. Judge Early issued a ruling awarding compensatory damages as to Riverside for Plaintiff's femur fracture, denying punitive damages, and denying any liability as to Defendant Smalls. Judge Early further denied the Plaintiff's wrongful death claim. This court entered an order confirming Judge Early's arbitration award, and Riverside paid the arbitration award.

Judge Early's ruling was a final, binding award on the merits of all claims that were or could have been asserted. As a result, the Plaintiff's present claims against Defendant Jerrolyn Montgomery-Smalls are barred according to the doctrine of *res judicata*. The Plaintiff's claims

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against Defendants FAS and FCOS, who were not parties to the arbitration, are barred by collateral estoppel. Permitting the Plaintiff to relitigate these claims and issues that have already been decided at arbitration would create duplicative discovery and litigation, and would be a complete waste of judicial resources. Accordingly, the Defendants request that this Court reconsider its Order and grant judgment to the Defendants as a matter of law.

2. All of Plaintiff's claims in this lawsuit were or should have been raised at arbitration.

All claims asserted in the present lawsuit arose from the residency of Plaintiff's decedent at Riverside. As a result, all claims were within the scope of the subject arbitration agreement. Contrary to Plaintiff's erroneous argument in opposition to Defendants' motion, all claims asserted in the present lawsuit were or should have been raised at arbitration, *including Plaintiff's causes of action for corporate negligence, joint-venture liability, and corporate veil-piercing liability*. *Res judicata* applies where: (1) the judgment in the prior action was final, valid, and on the merits; (2) both actions involve the same parties; and (3) the second action involved claims properly included in the first action. *See Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995). *Res judicata* applies to arbitration awards and bars a litigant from asserting claims in a later action that were or "*could have been* arbitrated in the original proceeding." *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 496, 593 S.E.2d 480, 486 (Ct. App. 2004). As to Defendant Smalls, these claims are therefore barred by *res judicata*.

Contrary to Plaintiff's fallacious argument to this Court, the Defendants have never argued that any cause of action asserted in the present lawsuit should have been excluded from arbitration. The Defendants argued that FAS and FCOS were not *parties* to the arbitration agreement and therefore should not be *parties* to the arbitration. The Defendants requested a stay

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of all litigation in circuit court pending the outcome of arbitration. However, the Defendants never argued that any particular cause of action should be excluded from arbitration. Indeed, each and every cause of action the Plaintiff asserted against FCOS and FAS he also asserted against Defendant Smalls, who of course *was* a party to the arbitration. Judge Young granted a stay of both lawsuits to promote judicial economy and to avoid duplicative discovery and trials. ***However, nothing in Judge Young's Order or any order of this court or the arbitrator excluded any of Plaintiffs' claims from arbitration.*** Accordingly, the Plaintiff had the opportunity to assert corporate negligence, joint venture, and veil piercing claims against Defendant Smalls at arbitration, in addition to the other causes of action that Plaintiff admittedly asserted and that were without question decided at arbitration. He cannot now reassert these claims in a separate proceeding in circuit court. *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) (holding that *res judicata* "prohibits the owner of a single cause of action from either dividing or splitting the cause of action so as to make it the subject of several causes of action"). The Plaintiffs' claims against Defendant Smalls are therefore clearly barred. Respectfully, the Court must reconsider its Order and grant summary judgment to Defendant Smalls as a matter of law.

3. **The Plaintiff's claims against Defendants FAS and FCOS are barred by the collateral estoppel effect of the arbitration award, and there is no viable legal or equitable theory to the contrary that should allow these claims to proceed.**

As set forth in the Defendants' motion for summary judgment, supporting memorandum of law, and arguments presented at the hearing before this court, issues determined at arbitration were dispositive as to all claims against Defendants FAS and FCOS. As a result, Defendants FAS and FCOS are entitled to summary judgment, based on the collateral estoppel effect of the arbitration award. "Collateral estoppel, also known as issue preclusion, prevents a party from

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relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). Collateral estoppel applies when an issue was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *See id.* All the elements of collateral estoppel are met here as to each cause of action Plaintiff has asserted against the Defendants. As a result, the Court should reconsider its order and grant summary judgment to the Defendants as a matter of law.

First, there can be no dispute that the Plaintiff raised causes of action for negligence/gross negligence, neglect of a vulnerable adult, wrongful death, and survivorship at arbitration, and that these causes of action were determined. The arbitrator determined the Plaintiff's compensatory damages relative to Ms. Varner's femur fracture, and the Facility paid this award. The arbitrator also determined that the Ms. Varner's femur fracture was not the proximate cause of her death. The Plaintiff now asserts these identical claims/causes of action as to Defendants FAS and FCOS. These claims are clearly barred by collateral estoppel. The court should reconsider its Order and grant summary judgment to FAS and FCOS on these claims as a matter of law.

With regard to the joint venture and veil piercing causes of action (Counts 3 and 4 of Plaintiff's Complaint) the only damages that may be awarded for these claims are the imputed liability of the Facility. Again, the liability of the Facility has been determined, and the Facility has paid the arbitrator's award. This liability is therefore extinguished. There is no additional liability of the Facility that may be imputed to these Defendants. As a result, these claims are also barred by collateral estoppel.

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Additionally, as set forth in the Defendants' Memorandum of Law supporting the motion for summary judgment, Plaintiff's claim against FAS and FCOS for corporate negligence also seek the same damages that Plaintiff sought to (and did) recover at arbitration. Because the arbitrator already awarded all damages that Plaintiff was entitled to recover, and because the Facility has paid the award, Plaintiff is estopped from seeking additional damages from FAS and FCOS. *See Carolina Renewal*, 385 S.C. at 558, 684 S.E.2d at 784 (plaintiff estopped from re-litigating damages that were decided in a prior action). Plaintiff's reliance on *Morrow v. Fundamental Long-Term Care Holdings, LLC* is misplaced. . In *Morrow,* 412 S.C. 534, 773 S.E.2d 144 (2015), the S.C. Supreme Court ruled that direct corporate-liability claims and vicarious-liability claims against a nursing home's affiliated entities "can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other." But that principle has nothing to do with the present case. Here, the issue is not whether Plaintiff is bringing direct or vicarious liability claims against FAS/FCOS. For the reasons set forth herein and in the Defendants' prior memorandum, and argued at the hearing, the determination of the various issues raised at arbitration in this case does in fact preclude the present claims against FAS and FCOS.

Furthermore, contrary to Plaintiff's argument in opposition to the motion, the Plaintiff cannot maintain a standalone claim for punitive damages against FAS and FCOS. *Cook v. Atlantic Coast Line R.R. Co.,* 183 S.C. 279, 190 S.E. 923 (1937); see also Monroe v. Bankers Life & Cas. Co., 232 S.C. 363, 367, 102 S.E.2d 207, 208 (1958). The present case is distinguishable from *McGee v. Bruce Hospt. System*, 344 S.C. 466, 545 S.E.2d 286, cited by Plaintiff in support of his argument. *McGee* involved separate allegations of medical malpractice against multiple physicians who performed various procedures, that allegedly causing separate

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and distinct injuries to the Plaintiff's decedent. By contrast, here the Plaintiff alleges a single injury to Plaintiff's decedent (femur fracture) which Plaintiff alleged resulted from nursing negligence. The arbitrator determined Plaintiff's damages related to this femur fracture. The arbitrator further determined there was no willful or wanton conduct on the part of the Facility, or on the part of Defendant Smalls as it relates to the management of the facility, and therefore denied punitive damages. There is therefore no viable theory pursuant to which Plaintiff could seek additional punitive damages as it relates to the FAS and FCOS. The court should reconsider its Order and grant summary judgment to the Defendants.

Finally, as noted above, the Plaintiff had the opportunity to present evidence of corporate negligence and seek punitive damages at arbitration. Defendant Smalls was a party to the arbitration, and the Plaintiff asserted the same claims against Defendant Smalls in the Complaint as he has asserted against FAS and FCOS, including corporate negligence, joint venture, and veil piercing. To grant Defendants' motion would not permit these Defendants to unjustly avoid liability, as Plaintiff has argued. To the contrary, the Plaintiff has "had his day in court," and has had a full and fair opportunity to litigate his claims. *Graham*, 277 S.C. at 391. The Plaintiff is therefore collaterally estopped from asserting the present claims against these Defendants. The Court should reconsider its order and grant summary judgment.

4. **The Defendants request that the Court reconsider and expressly rule on each and every distinct issue/argument raised in support of its motion for summary judgment (whether raised in writing or orally at the motion hearing), all of which Defendants incorporate herein by reference.**

Following the hearing on September 11, 2024, this Court issued a Form 4 Order denying the subject motion. The Court's Form 4 Order did not include reasoning or order instructions. The Defendants therefore request that the Court reconsider its decision and expressly rule on each issue/argument raised in support of Defendants' motion. *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). The Defendants therefore respectfully request a ruling on each distinct issue/argument raised in support of the motion.

This Motion will be supported by the pleadings and motions filed in this case, all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any previous or subsequent memoranda of law, affidavits or other evidence which may be submitted prior to 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/ Matthew O. Riddle*
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
Russell Grainger Hines
SC State Bar ID No.: 72100
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com,
mriddle@ycrlaw.com
Attorneys for the Defendants

Charleston, South Carolina

Dated: September 30, 2024

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1002744

William Haynes et al
PLAINTIFF(S)

Fundamental Administrative Services Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

After careful consideration and review of the filings in this case, Defendants' Motion for Reconsideration is Denied.

It Is So Ordered.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 10/04/2024 .

Williams Haynes Personal Representative
Elizabeth Varner Estate

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Plaintiff's Exhibit G

ELECTRONICALLY FILED - 2024 Oct 04 1:33 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

Court Reporter:

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

ELECTRONICALLY FILED - 2024 Oct 04 1:33 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1002744

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Charleston Common Pleas

Case Caption: William Haynes , plaintiff, et al VS Fundamental Administrative Services Llc , defendant, et al

Case Number: 2021CP1002744

Type: Order/Electronic Form 4

So Ordered

William C. McMaster, III

STATE OF SOUTH CAROLINA

GENERAL SESSIONS

COUNTY OF CHARLESTON

Docket Number
2021-CP-10-02744

WILLIAM HAYNES,

Plaintiff,

vs.

FUNDAMENTAL SERVICES PRODUCTION,

Defendant.

September 11, 2024

MOTION HEARING

B E F O R E:

The Honorable William C. McMaster, III, Presiding Judge.

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

Shawn Pinkston, Esquire
Pinkston Law Firm
856 Lowcountry Blvd., Suite 101
Mount Pleasant, South Carolina 29464

Attorney for the Plaintiff

Matthew Riddle, Esquire
Clement Rivers, LLP
PO Box 993
Charleston, South Carolina 29402

Attorney for the Defendant

Plaintiff's Exhibit H

Transcribed by: Barbie Teboe, Transcriber

plaintiff from pursuing this action against all the defendants. There is no issue as to any material fact. Those claims and issues have already been decided by the arbitrator, Your Honor. The arguments that are in the plaintiff's Memo in Opposition and the case law that the plaintiff has cited are flawed, Your Honor. The plaintiff's arguments are all based upon a fundamental misunderstanding or misstatement about what claims were presented at arbitration and how those claims were decided by the arbitrator. The authority cited by the plaintiff does not apply to support the plaintiff's flawed arguments.

This is a clear case res judicata and collateral estoppel. Judge Early decided the claims and issues at arbitration. Damages, Your Honor, have been determined and were paid by Riverside Skilled Nursing Facility. There's nothing left for a Finder of Fact to decide. And therefore the defendants are entitled to judgment as a matter of law. And we would request that you grant the motion, Your Honor.

We filed a memorandum that we've discussed, Your Honor, already today with Exhibits attached, A through J. We filed redacted versions of these and per Your Honor's order, in response to the motion to seal the record, we'll file unredacted versions of those. And we'll ask that the memo and the -- those exhibits be made part of the record for the purposes of the decision in today's motion, Your Honor.

Now, in the present lawsuit, the plaintiff has alleged the identical four causes of action. They didn't use the words "medical malpractice" with the Negligence Cause of Action, but the -- I'll invite the Court to compare the two complaints, and you'll see that the cause of action -- or the allegations in the cause of action are identical, Your Honor.

And then the new claims as to Ms. Smalls, FAS, and FCOS were for corporate negligence, joint venture liability, and corporate veil piercing liability.

Those claims were all alleged against all three defendants, Your Honor, including Ms. Smalls who was a party to the arbitration. The same damages are alleged as to those defendants. There's only set of damages: the injuries to Ms. Warner, the femur fracture; and her alleged wrongful death, which the arbitrator denied the wrongful death. Those are the damages. Those are the damages that were alleged for each of the causes of action asserted in the -- in both complaints.

The Court -- when Judge Young ordered arbitration, the arbitration -- he ruled that the arbitration agreement applies to Ms. Smalls because she was an agent/employee and servant of the facility, Riverside. He cited to the arbitration agreement and stated that all claims are subject to arbitration; all claims asserted against Ms. Smalls, all claims asserted against Riverside were subject to arbitration, including the claims asserted against Ms. Smalls for corporate

negligence, joint venture liability, and corporate veil piercing liability. Those claims were heard in arbitration -- or they were subject to arbitration. And it was up to the plaintiff to present evidence in support of those claims or not. But he doesn't get a chance to come back now and try to present new evidence that he didn't present in arbitration.

There's no language in the order, Your Honor -- there's no language in any of the arguments that this defendant has made to the Court. And there's no language in the arbitration order that Judge Early entered that states that any claims asserted against Ms. Smalls were not included in the -- or not to be included in the arbitration.

The claims against FAS and FCOS were stayed pursuant to Judge Young's order because they're not parties to the arbitration agreement, not because of the subject matter of any of the claims.

The plaintiff had the opportunity to present claims for corporate negligence, joint venture liability, and corporate veil piercing liability. And it's clear, in a reading of his complaint -- I won't go line by line here with you today, Judge. But in a reading of the complaint, all of those were asserted against Ms. Smalls in addition to the other defendants. (Inaudible) the Court that limits the ability of the plaintiff to present those claims at arbitration.

And then as far as what the arbitrator actually decided,

asserted in this lawsuit against all defendants are barred by res judicata, which is claim preclusion. All the claims asserted against Ms. Smalls are precluded. It could have been tried at arbitration. They're precluded. And collateral estoppel, which is issue preclusion, as to the defendants who are not a party to the arbitration.

So issue preclusion means the judge determined that the damages already. Damages are a necessary element of all these cause of action that were raised against FAS and FCOS. Judge determined that. The arbitrator determined that already. It's been determined. It's been paid.

FAS -- the plaintiff can't come back now and try to proved new damages. There are no new damages. The damages are the same. There's one set of damages. They've been determined and they've been paid.

The -- and that extinguishes the liability, Your Honor. There's not liability -- and there can't be any claims for punitive damages without a finding of compensatory damages. And the compensatory damages have been determined and have been paid. So that issue is precluded.

The issue of joint venture or corporate veil piercing. Those are imputed liability damages, meaning, the liability of the facility is imputed to the corporate entities if the plaintiff can prove the veil piercing elements.

Here, the damages of the facility have been determined

the caps. But there's no finding or holding that there's different damages related to each different act of negligence. There was one set of damages in that case.

There's -- and there's one set of damages in this case. The damages have been determined and paid. In Boiter, the issue was whether the cap should be applied differently because of the number of occurrences that there were. That's not an issue in this case. So Boiter doesn't apply.

Morrow doesn't apply, Your Honor.

The plaintiff's damages have been determined and paid. That issue is precluded, Your Honor, under collateral estoppel. Wrongful death is precluded. Joint venture, corporate veil piercing, and corporate negligence, Your Honor, have all been decided. And if they weren't decided, you know, the plaintiff had the opportunity to present those claims against -- and evidence in support of those claims against Defendant Smalls at the arbitration. All the claims against Defendant Smalls were or should have been present at arbitration. They're barred against her under res judicata. The claims are barred against FAS and FCOS under collateral estoppel.

And we would ask that you grant a Motion for Summary Judgment, Your Honor.

Thank you.

THE COURT: Thank you.

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	NINTH JUDICIAL CIRCUIT
)	
WILLIAM HAYNES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH VARNER,)	CASE NO. 2021-CP-10-02744
)	
PLAINTIFF,)	
)	
vs.)	**MEMORANDUM IN OPPOSITION TO PLAINTIFF'S NOTICE OF RULE TO SHOW CAUSE**
)	
FUNDAMENTAL ADMINISTRATIVE SERVICES LLC, AND FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, AND JERROLYN MONTGOMERY-SMALLS,)	**Exhibit Q**
)	
DEFENDANTS.)	
)	

TO: SHAWN PINKSTON, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

The Defendants Jerrolyn Montgomery-Smalls ("Defendant Smalls"), Fundamental Administrative Services, LLC ("FAS"), and Fundamental Clinical and Operational Services, LLC ("FCOS"), by and through their undersigned counsel, hereby submit this Memorandum of Law in in Opposition to Plaintiff's Notice of Rule to Show Cause in the above-referenced matter.

The Plaintiff's claims in this case involve allegations of nursing home negligence at Riverside Health and Rehab skilled nursing facility. Arbitration has already been conducted arising from the same facts and circumstances alleged in the present case. The arbitrator, Ret. Judge Doyet E. "Jack" Early, III, rendered an award of $87,007.00 to the Plaintiff relative to a leg fracture sustained by Plaintiff's decedent while she was a resident at the facility. Defendant Riverside has paid this award. Judge Early further found the Plaintiff failed to prove his wrongful death allegations, failed to prove any breach of the standard of care on the part of Defendant Smalls, and that "*Plaintiff is not entitled to judgment against Jerrolyn Montgomery-Smalls*."

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Despite Judge Early's arbitration ruling, Plaintiff has continued to pursue claims against Defendant Smalls and has not dismissed her from the present suit. Defendants filed a Motion for Summary Judgment and asserted that all claims asserted against Defendant Smalls had already been addressed at arbitration. As a result, any further claims against were barred pursuant to the doctrine of *res judicata.* In opposition to Defendant Smalls' motion, Plaintiff took the position that certain causes of action asserted against Defendant Smalls in the Complaint were not addressed at arbitration.

Plaintiff's position as it relates to Defendant Smalls is directly contradicted by the plain language of the pertinent agreements of the parties and orders of the court and arbitrator in this case. Nonetheless, Judge William C. McMaster, III denied the Defendants' motions in a Form 4 Order dated September 20, 2024, without providing any reasoning or explanation. He further ordered the Defendants to respond to Plaintiff's discovery requests in the present matter.

Accordingly, to the extent there are any claims or causes of action asserted against Defendant Smalls that were not previously addressed at arbitration, the Defendants assert that those claims must be arbitrated pursuant to the parties' agreement, Judge Young's Order, and Judge Early's rulings as referenced above. (See Defendants' Motion to Compel Arbitration and Memorandum of Law/Exhibits in Support).

While the issue of arbitration remains in dispute, the Defendants cannot participate in discovery, as to do so would risk waiver of any remaining arbitration rights. See, e.g. Rhodes v. Benson Chrysler-Plymouth, Inc. 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007). If the Court grants Defendants' Motion, discovery will be stayed as to the non-arbitrable Defendants, including responses subject to Judge McMaster's Order. As Plaintiff has noted in his Memorandum, should the court deny Defendants' Motion to Compel Arbitration, the ruling would be immediately appealable. See S.C. Code Ann. § 15-48-200(a)(1) (2005); New Hope Missionary Baptist Church v. Paragon

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Builders, 379 S.C. 620, 626, 667 S.E.2d 1, 4 (Ct. App. 2008); Towles v. United HealthCare Corp., 338 S.C. 29, 35, 524 S.E.2d 839, 842–43 (Ct.App.1999). An appeal to the Court of Appeals would stay all circuit court proceedings. S.C. Code Ann. § 18-9-220. Therefore, Plaintiff's Rule to Show Cause should not be addressed or ruled upon until such time as Defendants' Motion to Compel Arbitration and to Stay has been fully resolved.

Finally, the Defendants have not acted in a dilatory manner and have not willfully violated an order of this Court. There remains a legitimate dispute regarding the arbitrability of the claims asserted against Defendant Smalls and the associated stay as to the other Defendants. For the reasons set forth above, this dispute directly impacts the parties' ability to engage in discovery. The Defendants' efforts to enforce their arbitration rights are not frivolous, nor interposed for delay or in bad faith, but instead founded upon well-established principles of South Carolina law. Accordingly, there has been no conduct by the Defendants to warrant sanctions under Rule 37, SCRCP, much less striking Defendants' Answer as Plaintiff suggests in his Memorandum. See Karppi v. Greenville Terrazzo Co., Inc., 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997). Accordingly, Plaintiff's request for sanctions should be denied

CONCLUSION

For the foregoing reasons, Plaintiff's Rule to Show Cause should not be ruled upon until the Defendants' Motion to Compel Arbitration and for Stay is fully resolved, and Plaintiff's request for sanctions under Rule 37, SCRCP should be denied.

[SIGNATURE BLOCK ON FOLLOWING PAGE.]

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CLEMENT RIVERS, LLP

By:*/s/ Mathew O. Riddle*
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
Russell Grainger Hines
SC State Bar ID No.: 72100
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com,
mriddle@ycrlaw.com
Attorneys for the Defendants

Charleston, South Carolina

Dated: January 26, 2025

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS
C.A. NO.: 2021-CP-10-02744

HAYNES,

PLAINTIFF,

VS.

FUNDAMENTAL ADMINISTRATIVE A
SERVICES, LLC, ET AL,

DEFENDANT.

H E A R I N G
BEFORE THE HONORABLE JENNIFER B. MCCOY

DATE: JANUARY 27, 2025
LOCATION: SOUTH CAROLINA CIRCUIT COURT DISTRICT 7

TRANSCRIBER: BRIDGETTE LEE

LEGAL EAGLE
Post Office Box 5682
Greenville, South Carolina 29606
864-467-1373
depos@legaleagleinc.com

Exhibit R

APPEARANCES:

SHAWN T. PINKSTON, ESQUIRE
PINKSTON LAW FIRM, LLC
856 LOWCOUNTRY BOULEVARD, SUITE 101
MT. PLEASANT, SOUTH CAROLINA 29464
shawnpinkston@me.com

REPRESENTING THE PLAINTIFF

RUSSELL G. HINES, ESQUIRE
CLEMENT RIVERS, LLP
25 CALHOUN STREET TE 400
CHARLESTON, SOUTH CAROLINA 29402

REPRESENTING THE DEFENDANT

INDEX

PROCEEDINGS 4

CERTIFICATE OF TRANSCRIBER 20

EXHIBITS

(NONE MARKED)

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

P R O C E E D I N G S

THE COURT: *William Haynes versus Fundamental Administrative Services.* Mr. Riddle, welcome. Think I saw Mr. Pinkston on.

MR. PINKSTON: Yes, ma'am, it looks like I'm now available and unmuted. Can you hear me? Can everyone hear?

THE COURT: Yes, I can. Yes, sir, happy to hear from you. This is your Rule to Show Cause; is that right?

MR. PINKSTON: It is, Your Honor. So that's the first motion, and may it please the Court. The memo and supporting exhibits were filed last week, and obviously they were not received due to the closures. They were provided to your law clerk, so I'm not sure.

THE COURT: Yes, sir. We got everything we need on our end. Happy to hear from you.

MR. PINKSTON: That's great, Your Honor. So Your Honor, the facts in this case are pretty straightforward. It's been 350 days since the stay was lifted in this lawsuit. It's been 348 days since Plaintiffs served Discovery on Defendants after the stay was lifted. It's been 129 days since this Court granted Plaintiffs Motion to Compel, Discovery responses, and ordered the Defendants to comply with Discovery within 30 days. And it's been 99 days since the court-imposed deadline has passed.

And so, Your Honor, it's -- there was an order in this

case. The Defendants ignored the order. They've not responded to Discovery. They've not provided a single document in this case since the days -- since the Discovery was served almost one year ago to -- to the day.

Judge McMaster heard the Plaintiff's Motion to Compel and granted the Plaintiff's Motion to Compel. The Discovery responses in this case, the timeline, came and went. Defendants did belatedly respond on December 30, but in -- as I characterize in my motion -- or in my memo, it essentially makes a mockery of the order, because they respond with an objection to every single request and every single interrogatory, and base those objections on a Motion to Compel Arbitration that was filed the day before a jury roster hearing in this matter and filed about a month after the deadline to -- or almost two months after the deadline to -- respond to Discovery in this case.

So Your Honor, there's been willful -- a willful disobeyance of the court order. There's been multiple attempts or promises made by the Defendants in this case to provide Discovery. Correspondence between counsel has been provided to the Court. Quotations from the transcript on Plaintiff's Motion to Compel has been provided to this Court, where the Defendant said, if the Motion to Compel is granted and our Motion for Summary Judgment is denied, or promptly -- we will promptly respond to Discovery. We're ready to go

Your Honor, we will provide Discovery responses, and they simply haven't.

They filed a Motion to Compel Arbitration the day before jury roster hearing in this matter. Plaintiff didn't have any Discovery in this case, so Plaintiff certainly couldn't prepare for any trial in this matter, and their Motion to Compel Arbitration is essentially a Motion to Reconsider the same arguments that they followed in their Motion for Summary Judgment that was denied by this Court, and their Motion to Reconsider was denied by this Court.

You know, Your Honor, it's just been -- it's been a year since Discovery was served, still not a single thing. Their Motion for Summary Judgment, their arguments are the same thing as in their Motion to Compel. They style it as a Motion to Compel, but in reality, it's either a Motion to Enforce the Judgment or it's another Motion to Reconsider the arguments that Judge McMaster has already denied. They want to pretend that there's a dispute. There's no dispute.

You can look at all of the pleadings in this matter, and that's part of the issue with this case, is the arguments continue to change. It's like a zigzag course. You have to go back to their argument regarding the final order in front of Judge Young, which they specifically said, these are non-arbitrable claims.

Then when Judge Young lifted the stay and Discovery was

served and a Motion to Compel was granted or a Motion to Compel was filed, they filed a Motion for Summary Judgment, saying all of these matters should have been heard in arbitration. Judge McMaster heard those arguments. Judge McMaster denied their Motion for Summary Judgment. In their Motion for Reconsideration of that denial, they basically said, well, since Judge McMaster didn't include any findings of fact, there's still a dispute. Judge McMaster ---

THE COURT: You don't have to make those in summary judgments.

MR. PINKSTON: Agreed, Your Honor. You don't have to make those. And so -- and so, now they're simply saying, well, since Judge McMaster didn't, now we're going to file this Motion to Compel Arbitration.

THE COURT: Well, let me do this, Mr. Pinkston, I really need to hear from the other side. That's a little bit ---

MR. PINKSTON: Yes, Your Honor, I appreciate it.

THE COURT: All right. Mr. Riddle, what do you want to tell me? It's good -- good to see you.

MR. RIDDLE: Hey. Good morning, Your Honor. Thank you. This is Matt Riddle on behalf of Defendants. May it please the Court. And you know, first of all, Mr. Pinkston mentioned the Motion to Compel Arbitration that we filed, and I would just contend that the Court's ruling on the Motion to Compel Arbitration is necessary before the Court can address

issues regarding Discovery, including Plaintiff's Rule -- Rule to Show Cause, and I can provide more information about the Motion to Compel Arbitration in the context of this reply, or, you know ---

THE COURT: Yeah. That is fine. I'm happy to morph the two.

MR. RIDDLE: Sounds good. Okay. Well, the issues are kind of intertwined, and I do want to make sure that Your Honor understands sort of the background of this case. It's very unusual in that the Plaintiff filed a lawsuit against -- and -- and generally speaking, this lawsuit involves allegations of nursing home negligence.

And so the Plaintiffs filed a lawsuit against Riverside Health and Rehab Skilled Nursing Facility, and then filed a separate lawsuit against Ms. Geralyn Montgomery Smalls, who was the administrator for the facility. And then two other Defendants, Fundamental Administrative Services and Fundamental Clinical and Operational Services, which are companies that provide consulting type services to the facility.

And so the Defendants filed a Motion to Compel Arbitration, and we've already had an arbitration in this case. Your Honor, Judge Early -- Judge Jack Early, was our arbitrator. He issued an award on behalf to the Plaintiff, and Riverside Skilled Nursing Facility has paid that award.

He, Judge Early, ordered $87,007 for the Plaintiff's (indiscernible) leg fracture and her pain and suffering related to that leg fracture. Riverside paid that award. And Judge Early also found that Defendant Smalls, the Plaintiff, did not prove negligence as to Defendant Smalls.

And so when the time came -- when the -- when the stay was lifted, and Plaintiff continued to try to pursue claims against Defendant Smalls, Your Honor, the Defendants filed a Motion for Summary Judgment, as Mr. Pinkston mentioned. And Judge McMaster heard that motion, and it -- denied the motion in a Form 4 Order didn't give us any reasoning for it.

To the extent Judge McMaster's Order is -- is allowing claims to continue against Defendant Smalls, those claims are still -- still fall under the arbitration agreement and must be compelled to arbitration. Now, our position at -- before Judge McMaster, was that all claims were already heard at arbitration, and we still contend that all claims asserted in the Complaint against Defendant Smalls were compelled to arbitration by order of Judge Young.

So Judge Young granted the Defendant's Motion to Compel Arbitration, and it ordered all claims to arbitration. And Your Honor, if I may -- you know, I can share my screen briefly and show you the portions of Judge Young's Order that -- that apply here.

THE COURT: If you want to, you should be able to. If

not I can -- can definitely go back and see it. I think you can -- if you want to -- do you need -- there you go.

MR. RIDDLE: So first of all, this is the arbitration agreement itself. Are you able to see that?

THE COURT: Yeah.

MR. RIDDLE: So this provision of the arbitration agreement, which is Exhibit E, our Motion of Arbitration, essentially says that all claims related to the residency are subject to arbitration, and this agreement is between the Plaintiff and the facility and any employee of the facility. So the -- so Judge Young, based on this arbitration agreement, ordered the claims asserted against the facility and Defendant Smalls, as an employee at the facility -- ordered all those claims to arbitration.

And this is Judge Young's Order. It's dated February 24, 2022 and I'll just refer the Court to page 2. Judge Young's Order summarizing the motion that was before him, facility, and Ms. Montgomery Smalls identical motions to compel arbitration of the claims asserted against them in case 1437 and case 2477. Nothing here differentiates certain claims for negligence versus, as the claims now contends, claims for corporate negligence, veil piercing, that kind of thing.

All those claims were asserted against Ms. Smalls in the original complaint, and they were all compelled to

arbitration. Page 4 of Judge Young's Order, since Plaintiffs claims against the facility and Ms. Montgomery Smalls' are clearly within the scope of the arbitration agreement, they should proceed in arbitration, not litigation.

Page 9 of Judge Young's Order, without question, Plaintiff's claims against the facility and Ms. Montgomery Smalls are within the scope of the arbitration agreement. Page 10 of Judge -- Judge Young's Order, Plaintiff's Complaint in case 2477, which is the Complaint against FAS and FCOS and Defendant Smalls.

The Complaint in that case alleges that at all times relevant herein Ms. Montgomery Smalls was the administrator. Accordingly, the arbitration agreement covers Plaintiff's claims against both the facility and Ms. Montgomery Smalls. FAS and FCOS were not parties to the arbitration agreement. That's why the claims against them were stayed entirely and they were not part of the arbitration.

All the claims against Judge -- against Defendant Smalls and the facility were addressed in arbitration, including the corporate negligence, veil piercing, alter ego claims. Then finally, that the conclusion of the order itself, on page 20, the subject, motions are hereby granted.

Case 1437 is stayed, which is the case against the facility, right, that was stayed entirely in favor of arbitration between the Plaintiff and the facility. Case

2477, which is the case we're here on today, Your Honor, against FCOS and FAS and Defendant Smalls was stayed in favor of arbitration between the Plaintiff and Ms. Montgomery Smalls, with Plaintiff's claims against FAS and FCOS stayed pending the ultimate outcome for arbitration between the Plaintiff.

Nothing in this order, differentiates any of the claims alleged in the complaint against Defendant Smalls, the claims for corporate veil piercing, corporate negligence, and alter ego were asserted against Defendant Smalls and therefore subject to arbitration, to the extent that Judge McMaster's Order denying our Motion for Summary Judgment. As the effect of any claims continuing against Defendant Smalls, those have to go back to arbitration.

There's also an order that Judge Early issued in the context of the arbitration that's been submitted as an exhibit before this Court, and I noticed today, Your Honor, that it was not an exhibit to our Motion to Compel Arbitration.

This is an order that the Plaintiff had in -- in arbitration, and it was used as an exhibit in previous filing in this Court. I would ask that it be -- that we'd be permitted to submit it as an exhibit as well for this motion.

THE COURT: That's fine. I don't have a problem with you ---

MR. RIDDLE: This -- this I simply referred this to show that Judge Early also stated in his Arbitration Order that the claims and defenses raised in the Complaint and Answer filed in the above state court matter were subject to arbitration. There is no differentiation between general negligence, medical malpractice claims versus corporate negligence, veil piercing, that kind of thing, but the Plaintiff is attempting to continue to pursue now, and so, Your Honor, there is a legitimate dispute about what's subject to arbitration and what's not.

Defendants contend that all claims were subject to arbitration and the Plaintiff claims that they're not, which is contrary to what I just showed you in the clear language in Judge John's Order, but nonetheless, there is a dispute. As long as there is this dispute, there's a question about whether this Court has jurisdiction over Defendant Smalls, and whether Defendant Smalls can be ordered to participate in Discovery as it relates to a Circuit Court matter, then also whether the case should remain stayed as to the other Defendants while arbitration is ongoing.

To the extent there are any remaining claims against Defendant Smalls, they have to be taken to arbitration, and the case has to be stayed against FAS and FCOS, and that's why there hasn't been -- there haven't been substantive responses to the Discovery in this case Your Honor, because

this -- the Plaintiff has not dismissed Defendant Smalls from the case.

Plaintiff continues to pursue claims against Defendant Smalls, and the Defendants continue to assert that those claims were either addressed at arbitration and barred by *res judicata*, which apparently Judge McMaster disagreed, or now, since they're still going on, they need to go to arbitration. If they go to arbitration, the case has to be stayed against the other Defendants, and we cited the case law in our memo and support Your Honor.

THE COURT: What about the orders compelling this Discovery?

MR. RIDDLE: Well, we filed a Motion to Reconsider that was denied on October 4th, and then with -- you know, and so with it, we timely filed the Motion to Compel Arbitration within 30 days of that ---

THE COURT: Yeah.

MR. RIDDLE: --- denial of our Motion to Reconsider. Our position is that to the extent the claims are still in arbitration, that the Court does not have jurisdiction or Discovery and that any Discovery as to the other Defendants has to be stayed, including Judge McMaster's Order to Comply with the Discovery responses.

THE COURT: Okay. I mean, I get all your arguments, I guess, just at a real basic level, though. If you've been

ordered to produce something, you know, engage in Discovery, I don't -- I don't think that your argument as to these other issues are waived because you followed a court order. You know what I mean?

I think that's where your client maybe has some hiccup there, some -- I don't know -- some angst, or whatever the word is. I can't -- come to mind right now, but I think that's -- that's the issue. I mean, it's pretty -- it's pretty black and white. I mean, if you've got a court order compelling you to produce documents, you gotta do it.

That doesn't mean you agree and that you're waiving your right to arbitration and you're waiving all these defenses. That's fine. Make your motions and have, you know -- that's fine. I mean, the bottom line is it's pretty -- I mean, it's -- you know that happened -- this happens all the time, of course. I mean, Circuit Court Judges, we make rulings every day that people disagree with.

Let me save you the suspense. About 50 percent of the people that -- that I make rulings with vehemently disagree with my ruling, okay, just on a daily basis. So I think, you know -- I think where Mr. Pinkston's coming from it says, hey, whether you like it or not, this is what you're ordered to do. So you got to do it.

MR. RIDDLE: Certainly. And if I may -- what we're requesting is that the Court compel arbitration and stay the

case against the other Defendants, including the Order of Judge McMaster to comply with Discovery.

THE COURT: Okay. All right. I mean, I get that in a way -- it puts me in this odd position of sort of reconsidering another Judge's ruling, which I can't -- I can't do either, but I understand -- I think I understand your position. It's tough. It's a tough one.

MR. RIDDLE: Sure. Finally, I just wanted to address, the Plaintiff had requested sanctions in his memo. Just briefly, you know, there's obviously legitimate dispute here. By the arbiter-ability of these claims. I would contend the Defendants haven't acted in bad faith or haven't intentionally done anything to delay the case. We're simply trying to assert viable rights to arbitration and to protect the rights of the Defendants in this case as it relates to that arbitration agreement.

THE COURT: Okay. Yeah. I understand.

MR. RIDDLE: We just assert there's no grounds for sanctions in this case, much less striking the Defendant's answer or something like to that extent.

THE COURT: Okay. All right. Mr. Pinkston, wrap it up for us.

MR. PINKSTON: Yes, Your Honor. You know he -- he's -- the Defense Counsel stated that they filed the Motion to Compel arbitration within 30 days, so it was timely filed.

That -- that's not accurate either. Judge McMaster denied their Motion to Reconsider on I believe it was October 4th, and they didn't file their Motion to Compel Arbitration until November 14th, which was, again, the day before the motions roster.

I mean, Your Honor, that's -- Plaintiff does agree this is cut and dry. I feel like this is deja vu all over again. These arguments have been made in front of Judge Young, they've been made in front of Judge McMaster, and now they're being made in front of you. All of the pleadings, nothing's been taken out of context.

All of the context has been provided to include, Your Honor, the -- the transcripts of -- of the hearings where the Defendants have made this exact argument. It is inappropriate. It's the law of the case as we've cited. We believe there has been willful conduct in this case in terms of refusing the court order and that essentially just seeking another delay by filing a motion on issues that have already been decided in this case.

We do believe it rises to the event of a set of sanctionable conduct in violation of a court order as it relates to Discovery. Plaintiffs rights have been prejudiced by the denial. The case is still pending, a trial roster meeting at some point in the future, and we're a year from when Discovery has been filed.

And who knows? You know, who knows what's going to happen next, Your honor. This case was originally filed in 2021. It's probably going to pop up on the trial roster again soon. Plaintiff just wants to move the case forward and not keep re-plowing old ground, but it seems the only way to get the Defendant's attention in this matter is for the Court to tell them their conduct is wrong. It was willful, it was a violation of the Court's Order, and that seems to be the only way to get their attention in order to get them to comply with -- with all of the Court's rulings in this case, Your Honor.

I thank you for your time. Thank you for hearing the case. If -- if the Court does require any additional information, Plaintiff will be happy to provide it.

THE COURT: Okay. All right.

MR. RIDDLE: If I may briefly, Your Honor?

THE COURT: Yeah. Sure

MR. RIDDLE: I certainly did not intend to misstate the timeline there. My point was simply that the Defendant's filed Motion to Compel arbitration at -- not long after the Order denying our motion for reconsideration was filed.

THE COURT: Yeah. That's what I took it to mean. Yeah. I understood that.

MR. RIDDLE: Thank you, Your Honor, and -- and these are not that -- and I would respond briefly to Mr. Pinkston's

statement that the transcript has been provided to you and the previous briefing, and I'll just say that review of that will show that the Defendants have never taken the position that any claims asserted in the Complaint against Defendant Smalls were not subject to arbitration.

It's always been the Defendant's argument that all claims asserted in the complaint should have been addressed at arbitration, and now, if Judge McMaster says there's still claims out there, they need to go to arbitration. Case should be stayed against the other Defendants. Thank you.

THE COURT: Okay. All right. I'll take a look at your memos, and obviously what you've got on file before I reach a Final Order. If I need a Formal Order, I will just indicate that in the form at the time, okay. So any questions?

MR. PINKSTON: No, ma'am. Thank you for your time today.

MR. RIDDLE: Thanks very much.

THE COURT: Thanks for your patience. Thank you all so much have a good day.

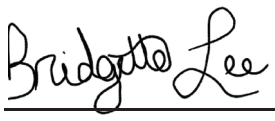
(THERE BEING NOTHING FURTHER, THIS HEARING CONCLUDED)

CERTIFICATE OF TRANSCRIBER

I, Bridgette Lee, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 27th day of January, 2025.

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

April 2, 2025



Bridgette Lee
Certified Transcriber

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1002744

William Haynes et al
PLAINTIFF(S)

Fundamental Administrative Services Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

This matter came before the Court for a hearing on January 27, 2025 on Plaintiff's Notice of Rule to Show Cause, filed October 22, 2024, and Defendants' Motion to Compel Arbitration and Stay Proceedings, filed November 14, 2024. This court hereby DENIES Defendants' motion. With regards to Plaintiff's motion, this court hereby GRANTS Plaintiff's Rule to Show Cause but does not reward sanctions at this time. Defendant has fifteen (15) days from the date of this order to submit discovery responses.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 02/03/2025 .

Williams Haynes Personal Representative
Elizabeth Varner Estate

Exhibit S

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

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Court Reporter:

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

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Charleston Common Pleas

Case Caption: William Haynes , plaintiff, et al VS Fundamental Administrative Services Llc , defendant, et al

Case Number: 2021CP1002744

Type: Order/Electronic Form 4

So Ordered

s/Jennifer B. McCoy #2764

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO. 2021-CP-10-02744
WILLIAM HAYNES, as Personal Representative of the Estate of Elizabeth Verner, Plaintiff, vs. FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, and JERROLYN MONTGOMERY-SMALLS, Defendants.	)	**DEFENDANTS' MOTION TO ALTER, AMEND, AND/OR RECONSIDER ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS AND GRANTING PLAINTIFF'S RULE TO SHOW CAUSE**

Exhibit T

TO: THE HONORABLE JENNIFER B. MCCOY, Presiding Judge, and PLAINTIFF'S COUNSEL OF RECORD

NOW COME Defendants, Fundamental Administrative Services, LLC ("FAS"), Fundamental Clinical And Operational Services, LLC ("FCOS"), and Jerrolyn Montgomery-Smalls ("Montgomery-Smalls") (collectively, "Defendants"), by and through their undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set forth below, hereby most respectfully move this Honorable Court to alter, amend, and/or reconsider its order filed February 3, 2025 (the "Subject Order"), denying Defendants' Motion to Compel Arbitration and Stay Proceedings, filed November 14, 2024, which asked the Court to (1) compel Plaintiff[1] to arbitrate any and all claims that he is asserting against Montgomery-Smalls in this case and to (2) stay this action as to FAS and FCOS pending the outcome of any arbitration of Plaintiff's claims against

[1] "Plaintiff" refers to William Haynes, as Personal Representative of the Estate of Elizabeth Varner ("Ms. Varner").

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Montgomery-Smalls ("Defendants' Underlying Motion"), and granting in part Plaintiff's Notice of Rule to Show Cause, filed October 22, 2024 ("Plaintiff's Underlying Motion") (collectively, the "Underlying Motions").[2]

I. Contending, most respectfully, that Defendants' Underlying Motion should have been (and should now be) granted and that Plaintiff's Underlying Motion should have been (and should now be) denied, Defendants ask the Court to (re)consider and expressly rule on each and every distinct issue/argument raised by Defendants in support of Defendants' Underlying Motion and in opposition to Plaintiff's Underlying Motion, whether written or oral, i.e., each and every distinct issue/argument set forth in Defendants' Underlying Motion itself (as well as in the Declaration of Matthew O. Riddle, Esq., filed contemporaneously therewith); in any briefing or other written submissions by Defendants regarding the Underlying Motions;[3] and via oral argument at the hearing on the Underlying Motions on January 27, 2025, all of which is/are hereby incorporated herein by reference.

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

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[2] The Subject Order is said to grant Plaintiff's Underlying Motion "in part" because, while it requires Defendants to respond to Plaintiff's interrogatories and requests for production within fifteen (15) days, it does not at this time grant Plaintiff's request for sanctions to be imposed against Defendants. Defendants, of course, take no exception to the Court not granting Plaintiff's request for sanctions.

[3] Such briefing/written submissions by Defendants include the Memorandum of Law in Support of Defendants' Motion to Compel Arbitration and Stay Proceedings (and the exhibits thereto), filed November 14, 2024; Defendants' Memorandum in Opposition to Plaintiff's Notice of Rule to Show Cause, filed January 26, 2025; and the additional exhibit Defendants submitted on January 28, 2025.

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

A. The Court should have found (and should now find) that Defendants' Underlying Motion should be granted.

1. The Court should enforce the Arbitration Order and compel arbitration of Plaintiff's claims against Montgomery-Smalls.

On March 25, 2021, Plaintiff, as the personal representative of Ms. Varner's estate, brought a personal injury and wrongful-death lawsuit (the "*Riverside* Lawsuit") against nonparty THI of South Carolina at Charleston, LLC, d/b/a Riverside Health and Rehab (the "Facility" or "Riverside"), a skilled-nursing facility where Ms. Varner was a resident in October 2019. (Declaration of Matthew O. Riddle, Esq., filed November 14, 2024 ("Decl.") ¶ 2, Ex. A ¶¶ 2, 4.)

On June 11, 2021, Plaintiff filed the instant action against Defendants based on the same factual allegations regarding Ms. Varner's care and treatment at the Facility that were alleged in the *Riverside* Lawsuit. (Decl. ¶ 3, Ex. B ¶¶ 11-21.) Montgomery-Smalls was the administrator of the Facility. (Decl. ¶ 4, Ex. C ¶ 18.) Plaintiff alleges that FAS and FCOS provided various consulting services to the Facility. (Decl. ¶ 3, Ex. B ¶¶ 8, 9.)

Plaintiff's complaint asserts claims against all Defendants for negligence/gross negligence (Count 1) (Decl. ¶ 3, Ex. B ¶¶ 22-25); corporate negligence (Count 2) (Decl. ¶ 3, Ex. B ¶¶ 26-32); joint venture (Count 3) (Decl. ¶ 3, Ex. B ¶¶ 33-41); alter ego/piercing the corporate veil (Count 4) (Decl. ¶ 3, Ex. B ¶¶ 42-43); neglect of a vulnerable adult (Count 5) (Decl. ¶ 3, Ex. B ¶¶ 44-55); wrongful death (Count 6) (Decl. ¶ 3, Ex. B ¶¶ 56-58); and, survivorship action (Count 6) (Decl. ¶ 3, Ex. B ¶¶ 59-61). On July 16, 2021, Montgomery-Smalls filed an answer denying any liability and affirmatively asserting the right to demand arbitration. (Decl. ¶ 4, Ex. C ¶ 35.)

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On February 24, 2022, the Court in both cases entered an order (the "Arbitration Order") granting the Facility's and Montgomery-Smalls' respective motions to compel arbitration (Decl. ¶ 5, Ex. D) pursuant to the parties' Arbitration Agreement. (Decl. ¶ 6, Ex. E.) The Court specifically ruled that because the Arbitration Agreement is valid on its face and applies to both the Facility and the Facility's "agents, employees, and servants," "the Arbitration Agreement covers Plaintiff's claims against both the Facility and Ms. Montgomery-Smalls." (Decl. ¶ 5, Ex. D at 10.) In the "interest of efficiency and judicial economy," the Court also stayed Plaintiff's claims against FAS and FCOS (which are non-parties to the Arbitration Agreement), pending the completion of the arbitration of Plaintiff's claims against the Facility and Montgomery-Smalls. (Decl. ¶ 5, Ex. D at 18-20.)

The arbitration hearing was held from April 3, 2023, to April 6, 2023. (Decl. ¶ 7, Ex. F at 1.) On May 16, 2023, the arbitrator issued his award ("Arbitration Award") in which he awarded $87,007 in compensatory damages against Riverside (but not Montgomery-Smalls) for injuries that Ms. Varner sustained, but the arbitrator rejected Plaintiff's claims for wrongful death and punitive damages. (Decl. ¶ 7, Ex. F at 1-2.) In addition, on May 26, 2024, the arbitrator, at the request of the parties, specifically determined that "Plaintiff is not entitled to a judgment against Jerrolyn Montgomery-Smalls." (Decl. ¶ 8, Ex. G.) On April 9, 2024, the Facility paid the award in full. (Decl. ¶ 9, Ex. H.)

Meanwhile, on February 12, 2024, the Court granted Plaintiff's petition for entry of a Final Order that incorporated the Arbitration Award and lifted the stay of this lawsuit. (Decl. ¶ 10, Ex. I.)

After Plaintiff indicated that he wanted to continue pursuing this case against Defendants—including Montgomery-Smalls—notwithstanding the outcome of the arbitration, on June 28, 2024,

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Defendants moved for summary judgment. In their summary judgment motion, Defendants argued, in part, that the Arbitration Award is res judicata and precluded Plaintiff from pursuing further claims against Montgomery-Smalls in this case. (Decl. ¶ 11, Ex. J.) In response, Plaintiff argued incorrectly that res judicata did not bar his claims for corporate negligence, joint venture, and alter ego-veil/piercing liability against Montgomery-Smalls because Plaintiff was prevented from raising those claims against Montgomery-Smalls in the arbitration in light of the Court's stay of this case against FAS and FCOS, who were not participants in the arbitration. (Decl. ¶ 12, Ex. K.)

On September 20, 2024, the Court entered a Form 4 order denying Defendants' Motion for Summary Judgment. (Decl. ¶ 13, Ex. L.) While the Form 4 order contained no explanation for the Court's ruling, it signaled the Court's intention to allow Plaintiff to continue pursuing claims against Montgomery-Smalls for corporate negligence, joint venture, and alter ego/veil-piercing liability notwithstanding the Arbitration Award that absolved her of any liability. On September 30, 2024, Montgomery-Smalls asked the Court to reconsider the denial of her motion for summary judgment because: (1) the Arbitration Order required Plaintiff to arbitrate all of his claims against Montgomery-Smalls, and (2) nothing about the Court's stay of proceedings as to FAS and FCOS prevented Plaintiff from litigating his corporate negligence, joint venture, and alter ego/veil-piercing claims against Montgomery-Smalls in the already-concluded arbitration. (Decl. ¶ 15, Ex. N at 2-4.) On October 4, 2024, the Court issued another Form 4 order (Decl. ¶ 14, Ex. M) denying Defendants' Motion for Reconsideration.

Because the aforementioned Form 4 orders permit Plaintiff to continue pursuing his corporate negligence, joint venture, and alter-ego/veil-piercing claims against Montgomery-

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Smalls, the Court should compel arbitration of all such arbitrable claims, as previously required by this Court's Arbitration Order.[4]

The Arbitration Order could not be clearer: The parties' Arbitration Agreement is governed by the Federal Arbitration Act ("FAA") (Decl. ¶ 5, Ex. D at 5), the Arbitration Agreement is valid and enforceable (Decl. ¶ 5, Ex. D at 7), and "[w]ithout question, Plaintiff's claims against . . . Ms. Montgomery-Smalls are within the scope of the Arbitration Agreement." (Decl. ¶ 5, Ex. D at 9.) Under the Arbitration Order, Plaintiff therefore is required to assert all of his claims against Montgomery-Smalls in arbitration.

Plaintiff's contention that he could not raise his corporate negligence, joint venture, and alter ego/veil-piercing claims as to Montgomery-Smalls in the first arbitration in light of the stay of proceedings as to FAS and FCOS wrongly presumes that because these claims are asserted against all three Defendants (Montgomery-Smalls, FAS and FCOS), they only can be adjudicated in a forum in which all three Defendants are present. (E.g., Decl. ¶ 12, Ex. K at 8 ("the corporate

[4] In his prior briefing, Plaintiff has argued that his corporate negligence, joint venture, and alter ego/veil-piercing claims against Montgomery-Smalls (and FAS and FCOS) somehow were excluded from the now-concluded arbitration due to the stay of proceedings as to FAS and FCOS. (*See, e.g.,* Decl. ¶ 12, Ex. K at 3-4 ("The corporate negligence claims asserted against [Montgomery-Smalls, FAS, and FCOS] in the instant case were stayed at Defendants' request and Plaintiff was barred from litigating them at arbitration."); *id.* at 10 ("The arbitrator could not determine any issue relating to joint venture because that issue was stayed and therefore not part of the arbitration agreement.").) The Arbitration Order, however, says no such thing. Rather, the Arbitration Order expressly compelled Plaintiff to arbitrate all of his claims against Montgomery-Smalls—including Plaintiffs' claims for corporate negligence, joint venture, and alter ego/veil-piercing; the Arbitration Order stayed only "Plaintiff's claims against FAS and FCOS [] pending the ultimate outcome of arbitration between Plaintiff, the Facility, and Ms. Montgomery-Smalls]." (Decl. ¶ 5, Ex. D at 20.) Thus, Plaintiff was required to present all of his claims against Montgomery-Smalls in the arbitration, where Montgomery-Smalls prevailed on the merits. (*See* Decl. ¶ 8, Ex. G.) The Arbitration Award thus conclusively resolved all of Plaintiff's causes of action against Montgomery-Smalls that were or could have been presented in arbitration. Accordingly, there should be no further claims against Defendants Smalls that are still outstanding. To the extent the Court thinks otherwise, however, any remaining claims against Montgomery-Smalls should be sent back to the arbitrator for resolution.

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negligence claims were barred from inclusion [in the arbitration] due to the stays requested by these Defendants.").) Indeed, the United States Supreme Court specifically has held the FAA "leaves no place for the exercise of discretion" by the courts; "when a complaint contains both arbitrable and nonarbitrable claims, the [FAA] requires courts to 'compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.'" *KPMG LLP v. Cocchi*, 565 U.S. 1, 4 (2011) (per curiam) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985)); *see id.* at 1 ("The [FAA] has been interpreted to require that if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation.").

In his complaint, every cause of action that Plaintiff has asserted against FAS and FCOS also is asserted against Montgomery-Smalls—including Plaintiff's claims for corporate negligence, joint venture, and alter ego/veil-piercing liability. (Decl. ¶ 3, Ex. B ¶¶ 26-43.) Thus, under *Cocchi* and *Dean Witter*, to the extent those claims are asserted against Montgomery-Smalls, they are arbitrable claims and must be arbitrated. By the same token, to the extent those claims are asserted against FAS and FCOS (who are non-parties to the Arbitration Agreement), they are non-arbitrable and must be stayed under the Arbitration Order (as explained below). Accordingly, the Court should have granted (and should now grant) Montgomery-Smalls' request for a further order compelling Plaintiff to arbitrate any remaining claims that the Court intends to permit Plaintiff to pursue against Montgomery-Smalls, so that those claims can be sent back to the arbitrator for final resolution

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2. Because the Court should enforce the Arbitration Order and compel arbitration of Plaintiff's claims against Montgomery-Smalls, the Court should in turn stay this action as to FAS and FCOS until any arbitration of Plaintiff's claims against Montgomery-Smalls is concluded.

In the Arbitration Order, the Court ruled that pursuant to FAA § 3 and in the interests of efficiency and judicial economy, all proceedings against FAS and FCOS in this case must be stayed pending the ultimate outcome of arbitration between Plaintiff and Montgomery-Smalls. (Decl. ¶ 5, Ex. D at 20.) This aspect of the Court's Arbitration Order must be enforced as well.

Indeed, the relationship between the part of Defendants' Underlying Motion that seek to compel arbitration of Plaintiff's claims against Montgomery-Smalls and the part that seeks a stay of this action as to FAS and FCOS pending the outcome of arbitration between Plaintiff and Montgomery-Smalls is such that the grant of the first part (i.e., Montgomery-Smalls's request to compel arbitration) requires the grant of the second (i.e., FAS and FCOS's requests for a stay)—and thus to show that the first part should be granted (as, most respectfully, has been done) is in turn to show that the second part should as well. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.") (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to

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arbitration under an agreement in writing for such arbitration' upon the application of one of the parties.").

B. The Court should have found (and should now find) that Plaintiff's Underlying Motion should be denied.

Plaintiff's claims in this case involve allegations of nursing home negligence at Riverside. Arbitration has already been conducted arising from the same facts and circumstances alleged in the present case. The arbitrator, Ret. Judge Doyen E. "Jack" Early, III, rendered an award of $87,007.00 to the Plaintiff relative to a leg fracture sustained by Ms. Varner while she was a resident at the Facility. Riverside paid this award. Judge Early further found that Plaintiff failed to prove his wrongful death allegations, failed to prove any breach of the standard of care on the part of Montgomery-Smalls, and that "Plaintiff is not entitled to judgment against Jerrolyn Montgomery-Smalls."

Despite Judge Early's arbitration ruling, Plaintiff has continued to pursue claims against Montgomery-Smalls and has not dismissed her from the present suit. Defendants filed a Motion for Summary Judgment and asserted that all claims asserted against Montgomery-Smalls had already been addressed at arbitration. As a result, any further claims against were barred pursuant to the doctrine of res judicata. In opposition to Montgomery-Smalls' motion, Plaintiff took the position that certain causes of action asserted against Montgomery-Smalls in the Complaint were not addressed at arbitration.

Plaintiff's position as it relates to Montgomery-Smalls is directly contradicted by the plain language of the pertinent agreements of the parties and orders of the Court and the arbitrator in this case. Nonetheless, Judge William C. McMaster, III, denied the Defendants' motions in a Form 4 Order dated September 20, 2024, without providing any reasoning or explanation. He further ordered the Defendants to respond to Plaintiff's discovery requests in the present matter.

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Accordingly, to the extent there are any claims or causes of action asserted against Montgomery-Smalls that were not previously addressed at arbitration, Defendants assert that those claims must be arbitrated pursuant to the parties' agreement, Judge Young's Arbitration Order, and Judge Early's rulings (as arbitrator) as referenced above.

While the issue of arbitration remains in dispute, Defendants cannot participate in discovery, as to do so would risk waiver of any remaining arbitration rights. *See, e.g. Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007). If Defendants' Underlying Motion is granted (as, most respectfully, it should be), this case (and, along with it, discovery, to include responses subject to Judge McMaster's Order) will be stayed as to FAS and FCOS (i.e., non-arbitrating Defendants).[5] And, on the other hand, as Plaintiff himself observed in his briefing, the denial of Defendants' Underlying Motion is immediately appealable. *See* S.C. Code Ann. § 15-48-200(a)(1) (2005); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 626, 667 S.E.2d 1, 4 (Ct. App. 2008); *Towles v. United HealthCare Corp.*, 338 S.C. 29, 35, 524 S.E.2d 839, 842–43 (Ct.App.1999). An appeal would stay all circuit court proceedings. Rule 241(a), SCACR ("As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision."); *id.* (providing that, upon service of the notice of appeal, the circuit court's jurisdiction extends only to "matters not affected by the appeal"); S.C. Code Ann. § 18-9-220. Therefore, at a minimum, Plaintiff's Underlying Motion should not be addressed or ruled upon until such time as Defendants' Underlying Motion has been fully resolved with finality.

[5] And, of course, if Defendants' Underlying Motion is granted, the claims against Montgomery-Smalls will no longer be before this Court but will instead proceed in the arbitral forum.

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Finally, Defendants have not acted in a dilatory manner and have not willfully violated an order of this Court. There remains a legitimate dispute regarding the arbitrability of the claims asserted against Montgomery-Smalls and the associated stay as to FAS and FCOS. For the reasons set forth above, this dispute directly impacts the parties' ability to engage in discovery. Defendants' efforts to enforce their arbitration rights are not frivolous, nor interposed for delay or in bad faith, but instead founded upon well-established principles of South Carolina law. Accordingly, there has been no conduct by the Defendants to warrant sanctions under Rule 37, SCRCP, much less striking Defendants' answer as Plaintiff suggests. *See Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997). Accordingly, Plaintiff's request for sanctions should be denied.

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 Defendants' Underlying Motion and in opposition to Plaintiff's Underlying Motion (both those advanced in writing and those advanced via oral argument), all of which Defendants incorporate by reference herein and asks the Court to (re)consider and expressly rule upon in full), Defendants ask that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting Defendants' Underlying Motion and denying Plaintiff's Underlying Motion.

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

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

CLEMENT RIVERS, LLP

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

Attorneys for Defendants

Charleston, South Carolina

February 4, 2025

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1002744

William Haynes et al
PLAINTIFF(S)

Fundamental Administrative Services Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

Defendants filed a Motion to Alter, Amend, and/or Reconsider Judge McCoy's 2/3/2025 order with this Court on 2/4/2025. "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "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." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). This court hereby DENIES Defendants' motion without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 401–02, 444 S.E.2d 534, 536 (Ct. App. 1994).

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 02/07/2025 .

Williams Haynes Personal Representative
Elizabeth Varner Estate

Exhibit U

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

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Court Reporter:

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

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Charleston Common Pleas

Case Caption: William Haynes , plaintiff, et al VS Fundamental Administrative Services Llc , defendant, et al

Case Number: 2021CP1002744

Type: Order/Electronic Form 4

So Ordered

s/Jennifer B. McCoy #2764

RECEIVED
Apr 11 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2025-000286

William Haynes as Personal Representative of the Estate of Elizabeth Varner,

Respondent,

v.

THI of Charleston LLC d/b/a Riverside Health and Rehab, Fundamental Services LLC, Fundamental Clinical and Operational Services LLC, and Jerrolyn Montgomery-Smalls,

Appellants.

PROOF OF SERVICE

PINKSTON LAW FIRM, LLC
Shawn Pinkston, SC Bar No. 79965
856 Lowcountry Blvd., Suite 101
Mount Pleasant, South Carolina 29464
Office: 843-814-5472

Attorney for Respondent

I, Shawn Pinkston, of the Pinkston Law Firm, LLC, attorney for Appellant, hereby certify that I have served **Respondent's Motion to Dismiss Appellants' Notice of Appeal** was served on all parties by electronic mail (see attached email) a copy of the same to Appellants' Counsel of Record:

Russell G. Hines
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Matthew O. Riddle (SC Bar No. 76650)
Russell G. Hines (SC Bar No. 72100)
Young Clement Rivers LLP
25 Calhoun Street – Suite 400
Charleston, S.C. 29401

Attorneys for Appellants

Mount Pleasant, South Carolina
April 11, 2025

From: **Shawn Pinkston** shawnpinkston@me.com
Subject: Haynes v. Fundamental (2025-000286) -- Respondent's Motion to Dismiss Appellants' Notice of Appeal (1 of 3)
Date: April 11, 2025 at 12:37 PM
To: Hines, Russell RHines@ycrlaw.com, Brown, Stephen L. sbrown@ycrlaw.com, Davis, Jay jdavis@ycrlaw.com, Riddle, Matthew MRiddle@ycrlaw.com
Cc: Justman, Aimee AJustman@ycrlaw.com, Bell, Pollyana (Polly) pbell@ycrlaw.com, Peterson, Susan speterson@ycrlaw.com, Bohannon, Kiara kbohannon@ycrlaw.com, Eadie, Christine ceadie@ycrlaw.com

Russ,

Please see Respondent's Motion to Dismiss Appellants' Notice of Appeal, which is being submitted to the Court of Appeals today. There are three emails based on the saize of the attachments. Please confirm receipt at your earliest convenience. Thank you.

Appellate Case 2025-000286 - Proof of Service.pdf
73 KB

Plf MTD - NoA.pdf

Ex A - Summons and Complaint - Fundamental and Smalls Filed.pdf

Ex B - Summons and Complaint - THI Filed.pdf
143 KB

Ex C - Transc - Haynes v Fundamental Services 9-11-24 ...
175 KB

Ex D - Haynes.vs.THI.02.10.2022 .pdf
511 KB

Ex F - Final Order Re Arbitration - Entered.pdf
312 KB

Ex G - Def Petition for Final Order - THI.pdf
257 KB

Ex H - Def MSJ.pdf

Ex I - Plf Memo in Opp to MSJ.pdf

Ex J - Order - MSJ, MTC.pdf

Ex E - Order Compelling Arbitration - THI.pdf

Ex K - Def MTR.pdf

Ex L - Plf's Memo in Opp to MTR - Filed.pdf

Ex M - Order MTR - Denied.pdf

Ex N - RTSC - Varner - Filed.pdf
1.4 MB

Shawn Pinkston
PINKSTON LAW FIRM, LLC
856 Lowcountry Blvd, Ste 101
Mount Pleasant, SC 29464
(843) 814-5472

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Subject: Haynes v. Fundamental (2025-000286) -- Respondent's Motion to Dismiss Appellants' Notice of Appeal (2 of 3)
Date: April 11, 2025 at 12:38 PM
To: Hines, Russell RHines@ycrlaw.com, Brown, Stephen L. sbrown@ycrlaw.com, Davis, Jay jdavis@ycrlaw.com, Riddle, Matthew MRiddle@ycrlaw.com
Cc: Justman, Aimee AJustman@ycrlaw.com, Bell, Pollyana (Polly) pbell@ycrlaw.com, Peterson, Susan speterson@ycrlaw.com, Bohannon, Kiara kbohannon@ycrlaw.com, Eadie, Christine ceadie@ycrlaw.com

Russ,

Email 2 of 3.

Ex O - Def MTC and Stay - Filed .pdf
16.1 MB

Shawn Pinkston
PINKSTON LAW FIRM, LLC
856 Lowcountry Blvd, Ste 101
Mount Pleasant, SC 29464
(843) 814-5472

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From: **Shawn Pinkston** shawnpinkston@me.com
Subject: Haynes v. Fundamental (2025-000286) -- Respondent's Motion to Dismiss Appellants' Notice of Appeal (3 of 3)
Date: April 11, 2025 at 12:39 PM
To: Hines, Russell RHines@ycrlaw.com, Brown, Stephen L. sbrown@ycrlaw.com, Davis, Jay jdavis@ycrlaw.com, Riddle, Matthew MRiddle@ycrlaw.com
Cc: Justman, Aimee AJustman@ycrlaw.com, Bell, Pollyana (Polly) pbell@ycrlaw.com, Peterson, Susan speterson@ycrlaw.com, Bohannon, Kiara kbohannon@ycrlaw.com, Eadie, Christine ceadie@ycrlaw.com

Russ,

Email 3 of 3.

Ex P - Plf Memo in Opp to MTC - File.pdf
11.5 MB

Ex Q - Def Memo in Opp - RTSC .pdf

Ex R - Transc. Haynes vs Fundamental Administrative 1-2...
118 KB

Ex S - Order - RTSC other motions .pdf

Ex T - Def MTR - Arbitration.pdf

Ex U - Order - Deny Def MTR.pdf

Shawn Pinkston
PINKSTON LAW FIRM, LLC
856 Lowcountry Blvd, Ste 101
Mount Pleasant, SC 29464
(843) 814-5472

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