

RECEIVED

Aug 07 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

Case No. 2024-CP-10-03732
Appellate Case No. 2025-000237

Joe Bryan,

Respondent,

v.

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

Appellant.

APPELLANT'S RETURN TO MOTION TO DISMISS APPEAL

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis Jr. (SC Bar No. 12084)
James D. Gandy III (SC Bar No. 11925)
T. Ashton Phillips III (SC Bar No. 104227)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
P.O. Box 993 (29402)
Charleston, South Carolina 29401
(843) 720-5488

Attorneys for Appellant

By and through its undersigned counsel, the Facility¹ submits this return in opposition to Mr. Bryan's² motion for the Court to dismiss this appeal (the "Subject Motion"). Respectfully, the Subject Motion should be denied, as explained below.

BACKGROUND³

With Michael's help, Mr. Bryan was admitted as a resident of the Facility in June of 2021. Michael handled the admissions paperwork and, in so doing, signed an Admission Agreement⁴ and an Arbitration Agreement⁵ on Mr. Bryan's behalf.

Mr. Bryan commenced this action in the Charleston County Court of Common Pleas on July 24, 2024, claiming the Facility is liable for deficient care/treatment he received during his residency. (**Exhibit 3** [Summons & Compl].) The Facility timely answered on August 22, 2024, denying liability, raising numerous affirmative defenses, and reserving the right to compel

¹ The "Facility" refers to Defendant/Appellant, THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab. It is a skilled nursing facility.

² "Mr. Bryan" refers to Plaintiff/Respondent, Joe Bryan. "Michael" refers to Michael Bryan, Mr. Bryan's son.

³ In accordance with Rule 240(c)(3), SCACR, a number of exhibits (specifically identified below) are attached to this return because the record on appeal has not yet been filed. Please note, however, that these exhibits do not include materials that have already been filed in this Court in this case (the Facility's notice of appeal, the Facility's principal initial brief, the Subject Motion).

⁴ (**Exhibit 1** [Admission Agreement Signature Page & Admission Agreement Form].)

⁵ (**Exhibit 2** [Arbitration Agreement].)

arbitration, which it also raised as an affirmative defense. (**Exhibit 4** [Facility’s Answer].)

On August 30, 2024, the Facility moved to compel Mr. Bryan’s claims to arbitration based on the Arbitration Agreement Michael signed on behalf of Mr. Bryan in conjunction with his admission to the Facility (the “Motion to Compel Arbitration”). (**Exhibit 5** [Motion to Compel Arbitration].)

Following a hearing on November 13, 2024,⁶ the circuit court, the Honorable Jennifer B. McCoy presiding, denied the Motion to Compel Arbitration by order filed December 13, 2024. (**Exhibit 7** [Order filed 12/13/24].) Pursuant to Rule 59(e), SCRCF, on December 23, 2024, the Facility timely moved the circuit court to alter, amend, and/or reconsider its decision. (**Exhibit 8** [Facility’s Motion to Alter, Amend, and/or Reconsider].) The circuit court denied that motion by order filed January 9, 2025. (**Exhibit 9** [Order filed 1/9/25].)

By notice served and filed February 7, 2025, this appeal timely followed, and in due course, the Facility served and filed its initial brief on June 6, 2025.

Mr. Bryan served and filed the Subject Motion on July 7, 2025. This return follows.

⁶ (**Exhibit 6** [Transcript of Hearing on November 13, 2024].)

ARGUMENT

I. The Subject Motion should be denied.

Although Mr. Bryan’s memo in support of the Subject Motion sets forth two numbered arguments (one based on issue preclusion, the other frivolousness), at bottom, his contention is simply that the case of *Solesbee v. Fundamental Clinical & Operational Services*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023), so hopelessly dooms the Facility’s appeal that there can be no good faith argument to the contrary.⁷ And as explained in the Facility’s initial brief, the entirety of which is adopted and incorporated herein by reference, this is not so, because the *Solesbee* Court (a) erred as to those aspects of the merger argument that it addressed and (b), in any event, did not actually address all material aspects of the argument, leaving gaps in the *Solesbee* decision through which the Facility’s position still fits. (Initial Brief of Appellant pp. 19–28.)⁸

⁷ The other case cited in the argument section of Mr. Bryan’s memo is *Hutley v. THI of S.C. at Magnolia Manor Inman, LLC*, Appellate Case No. 2023-0001612, which, besides being subject to a pending petition for a writ of certiorari (Supreme Court Case No. 2025-000398), was decided by this Court via an unpublished opinion, which, by rule, “ha[s] no precedential value and should not be cited except in proceedings in which [it is] directly involved.” Rule 268(d)(2), SCACR. Indeed, of all the arbitration appeals in cases involving the same form Arbitration Agreement and Admission Agreement as in the instant case, the only case that has been decided by published opinion, i.e., an opinion that has precedential value is, *Solesbee*.

⁸ At the same time as he relies on *Solesbee* in moving to dismiss this appeal, Mr. Bryan criticizes the Facility for arguing against the applicability of *Solesbee* in its brief since *Solesbee* was not expressly referenced in the circuit

Mr. Bryan does not actually argue against (a) and (b) above. Rather, he simply asserts that the Supreme Court’s denial of certiorari in *Solesbee* constitutes its rejection of the Facility’s arguments here. This is simply not so. A writ of certiorari is not a matter of right but solely a matter of the Supreme Court’s discretion. Rule 242(b), SCACR (“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.”). By denying certiorari, the Supreme Court has only expressed its decision to exercise its discretion to not review the case. It has not implicitly blessed the *Solesbee* Court’s analysis as correct. And in any event, by denying certiorari, the Supreme Court has neither answered any of the unanswered questions left by the *Solesbee* Court nor, for that matter, foreclosed the possibility that this Court may be persuaded to revisit the *Solesbee* Court’s reasoning.

court’s orders denying the Motion to Compel Arbitration and, thereafter, reconsideration. The undersigned (the primary author of the Facility’s brief) would make clear that his references to the circuit court’s reliance on *Solesbee* were in no way intended to mispresent anything to the Court. While it is true that the circuit court’s orders do not reference *Solesbee*, *Solesbee* was addressed at the hearing on the Motion to Compel Arbitration (**Ex. 6** pp. 5:13–13:1); the circuit court’s order denying the Motion to Compel Arbitration cites the authorities primarily relied upon by the *Solesbee* Court (*compare Ex. 7* pp. 3–4 (citing *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014) and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018)) *with Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149 (“Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and Magnolia’s equitable estoppel argument was properly denied.”)); and, in any event, the very fact that *Solesbee* exists—i.e., the very fact that precedent exists that Mr. Bryan himself contends should control the disposition of this case—naturally calls for the Facility to argue that it should not.

The *Solesbee* Court’s explanation of its finding against merger reads as follows:

Here, [1] the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law. [2] The Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement “shall survive any termination or breach of this Agreement or the Admission Agreement.” [3] The Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, “Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.” [4] The Admission Agreement and Arbitration Agreement were separately paginated and had their own signature pages. [5] Magnolia’s attorney admitted at the hearing that “[i]t’s perfectly true that [Dover] did not have to sign the arbitration agreement to move forward with [Solesbee] being admitted. It was voluntary” Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and Magnolia’s equitable estoppel argument was properly denied.

Solesbee, 438 S.C. at 648–49, 885 S.E.2d at 149.

Most respectfully, as demonstrated in the merger analysis in the Facility’s initial brief, the *Solesbee* Court’s explanation is not only erroneous but also incomplete, leaving unanswered material questions that the Facility may now appropriately put to the Court,⁹ along with good faith argument for the Court to

⁹ For instance, and, of course, without limitation, as further explained in the Facility’s initial brief, the *Solesbee* Court never dealt with the fact that, in this case, unlike in *Coleman*, *Hodge*, and *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), the “Entire Agreement” provision in the Admission

revisit the *Solesbee* Court’s reasoning. See Rule 3.1, RPC, Rule 407, SCACR (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”).

As an advocate, a lawyer is duty bound to “use the legal procedure for the fullest benefit of the client’s cause” while at the same time “not abusu[ing] legal procedure.” Rule 3.1, RPC, Rule 407, SCACR, cmt. 1. The undersigned humbly submits that, in pursuing the instant appeal, the Facility’s counsel honors both of these obligations and that the proof of this fact is in the pudding, i.e., the Facility’s

Agreement expressly disclaims the idea of its “separatedness” (in the parlance of the *Coleman* Court) by stating that “other Admissions materials” are a part of it. (**Ex. 1** p. 12.) Without question, the plain and ordinary meaning of the language “other Admissions materials” is such as to embrace the Arbitration Agreement. See *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) (“The same day as Decedent’s admission to White Oak, Stott, acting as Decedent’s authorized representative, signed White Oak’s admission documentation—including the Arbitration Agreement.”) (emphasis added) (internal footnote omitted); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 (“Her husband . . . executed various documents *related to her admission, including an Arbitration Agreement* and an Admission Agreement.”) (emphasis added)). But even if there were some ambiguity in this regard, the *Solesbee* decision (a) does not say so and (b) does not address the Facility’s argument in this case that the language in *Coleman* about construing ambiguity against the drafter is, first off, *dicta* and, in any event, illogical and internally inconsistent with the *Coleman* Court’s recognition that the instruments executed at the same time, by the same parties, for the same purpose, in the course of the same transaction (as, without question, the Admission Agreement and Arbitration Agreement here were) are presumed to merge absent evidence allowing for a conclusion to the contrary.

initial brief, the argument set forth in which cannot reasonably be condemned as frivolous.

The Subject Motion is substantially the same as recent motions made by the respective respondents in the cases of *Kilpatrick v. Pruitthealth-Ridgeway, LLC*, Appellate Case No. 2024-000596; *Calloway v. Oakbrook Healthcare, LLC*, 2024-000910; and *White v. St. George Healthcare, LLC*, 2024-000914. Each of these is a nursing home negligence case (i.e., a case alleging such negligence) involving an appeal from the denial of a motion to compel arbitration where, as here, the respective appellants contend that the circuit court erred in rejecting their argument for enforcement of an arbitration agreement on the basis of merger (of the arbitration agreement and a facility admission agreement) and direct benefits estoppel. Each of these cases involves the same form Arbitration Agreement and Admission Agreement as the instant case, and as in the instant case, in each of these cases, the respondent moved to dismiss the appeal and for sanctions arguing that the appeal was frivolous and taken solely for the purpose of delay. In response, the appellants argued that the one published case cited by the respondents, *Solesbee*, was wrongly decided or does not control the appeal. In each case, this Court denied the motions, finding that the appeal was not frivolous and had not been taken solely for delay. (Copies of the respective orders are

attached hereto as **Exhibits 10** [*Kilpatrick*], **11** [*Calloway*], and **12** [*White*].) Most respectfully, the Subject Motion should likewise be denied.

CONCLUSION

For the foregoing reasons, the Facility asks that the Court deny the Subject Motion.

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
James D. Gandy III (SC Bar No. 11925)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
P.O. Box 993 (29402)
Charleston, South Carolina 29401
(843) 720-5488
Attorneys for Appellant

Charleston, South Carolina

August 7, 2025

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

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

XVIII. ENTIRE AGREEMENT

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

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

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

Signature of Resident _____ Date _____
Resident Social Security Number _____

Printed Name of Resident _____

Witness Signature _____ Date _____

Printed Name of Witness _____

OR

X Melinda Brown 6-8-21
Signature of Representative, if any Date

X Michael Brown
Printed Name of Representative

Witness Signature _____ Date _____

Printed Name of Witness _____

Representative Social Security No. (Voluntary Info.) _____

Megan Carlson
Signature of Facility Official
6/8/2021
Date

Megan Carlson
Printed Name of Facility Official & Title
Admission Coordinator

EXHIBIT

ADMISSION AGREEMENT – SOUTH CAROLINA

RESIDENT NAME: _____

RESIDENT NUMBER: _____

DATE OF ADMISSION: _____

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

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

I. GENERAL CONDITIONS

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

Original: Business File • Photocopy: Resident/Representative

II. AGREEMENT FOR CARE

A. FACILITY AGREES TO:

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

Original: Business File • Photocopy: Resident/Representative

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

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

Original: Business File • Photocopy: Resident/Representative

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

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

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

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

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

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

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

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

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

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

Original: Business File • Photocopy: Resident/Representative

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

III. FINANCIAL AGREEMENT

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

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

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

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

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

Original: Business File • Photocopy: Resident/Representative

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

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

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

IV. TERMINATION

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

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

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

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

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

V. MEDICAID BENEFICIARIES

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

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

Original: Business File • Photocopy: Resident/Representative

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

3. **Non-Covered Services.**

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

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

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

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

VI. MEDICARE BENEFICIARIES

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

Original: Business File • Photocopy: Resident/Representative

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

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

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

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

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

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

VII. PRIVATE PAY/INSURANCE

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

Original: Business File • Photocopy: Resident/Representative

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

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

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

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

VIII. NOTICES

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

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

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

Original: Business File • Photocopy: Resident/Representative

IX. GOVERNING LAW

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

X. SEVERABILITY

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

XI. CAPTIONS

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

XII. MODIFICATIONS

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

XIII. WAIVER

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

XIV. RESIDENT

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

XV. ASSIGNABILITY

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

Original: Business File • Photocopy: Resident/Representative

XVI. INFORMATION RELEASE/BILLING AUTHORIZATION

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

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

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

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

XVII. MISCELLANEOUS

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

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

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

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

Original: Business File • Photocopy: Resident/Representative

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

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

XVIII. ENTIRE AGREEMENT

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

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

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

Signature of Resident Date

Printed Name of Resident

Resident Social Security Number

Witness Signature Date

Printed Name of Witness

OR

Signature of Representative, if any Date

Printed Name of Representative

Witness Signature Date

Printed Name of Witness

Representative Social Security No. (Voluntary Info.)

Signature of Facility Official

Printed Name of Facility Official & Title

Date

Original: Business File • Photocopy: Resident/Representative

PLEASE READ CAREFULLY

FACILITY - RESIDENT/REPRESENTATIVE
ARBITRATION AGREEMENT

This Agreement is made between Riverside Health & Rehab ("Facility"), its agents, employees and servants, and Joe Bryan ("Resident") or Joe Bryan ("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.

* Megan Chalon
Resident/Representative Signature Date
Megan Chalon
Authorized Agent of Facility Date

* Megan Chalon
Printed Name of Resident/Representative
Megan Chalon
Printed Name & Title
Admission Coordinator

EXHIBIT

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

JOE BRYAN,

Plaintiff,

v.

THI OF SOUTH CAROLINA AT
CHARLESTON, LLC d/b/a RIVERSIDE
HEALTH AND REHAB,

Defendant.

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO.: 2024-CP-10-____

)
)
) **SUMMONS**
)
)
)

EXHIBIT

3

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to this Complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint, judgment by default will be rendered against you for the relief demanded in the Complaint.

s/ Christy R. Fagnoli
Samuel R. Clawson, Jr., Esq.
Christy R. Fagnoli, Esq.
Bert G. Utsey, III, Esq.
2 Amherst Street
Charleston, South Carolina 29403
843.970.2700 (o)
843.970.1780 (f)
sam@cfulaw.com
christy@cfulaw.com

Attorneys for Plaintiff

July 23, 2024
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2024-CP-10-____
	)	
JOE BRYAN,	)	
	)	
Plaintiff,	)	COMPLAINT
	)	(Jury Trial Demanded)
v.	)	
	)	
THI OF SOUTH CAROLINA AT	)	
CHARLESTON, LLC d/b/a RIVERSIDE	)	
HEALTH AND REHAB,	)	
	)	
Defendant.	)	
_____	)	

NOW COMES Plaintiff Joe Bryan, by and through his undersigned counsel of record and pursuant to the South Carolina Rules of Civil Procedure, and hereby alleges against the above-captioned Defendant as follows:

NATURE OF ACTION

1. This is a medical malpractice action brought against the defendant health care institution for the recovery of damages arising out of its negligence and gross negligence in its provision of care to Joe Bryan, resulting in a significant exacerbation of Mr. Bryan's sacral wound.
2. Plaintiff has complied with S.C. Code Ann. § 15-79-125 and the associated statutory requirements.

PARTIES

3. Plaintiff incorporates the preceding paragraphs by reference as if more fully set forth herein.
4. Plaintiff Joe Bryan (hereinafter "Joe") is a citizen and resident of Charleston County, South Carolina.
5. THI of South Carolina at Charleston, LLC ("THI") is an entity organized under the laws of Delaware with its principal place of business in the County of Charleston, South Carolina. At the time of the

acts complained of, THI was a skilled nursing facility doing business under the name Riverside Health and Rehab ("Riverside").

JURISDICTION AND VENUE

6. Plaintiff incorporates the preceding paragraphs by reference as if more fully set forth herein.
7. This Court has jurisdiction, as the Defendant transacted business in this State, contracted to supply services and things in this State, and committed tortious acts in whole or in part in this State.
8. Venue is proper with this Court, as Defendant conducts business in Charleston County, South Carolina, and/or the most substantial part of the alleged act or omission giving rise to the cause of action occurred in Charleston County, South Carolina.

STATEMENT OF FACTS

9. Plaintiff incorporates the preceding paragraphs by reference as if more fully set forth herein.
10. Defendant hires, trains, supervises, and employs medical professionals, including nurses and doctors, to provide medical services to patients.
11. Defendant is responsible for the actions of these employees pursuant to the doctrines of agency and respondeat superior.
12. Mr. Bryan was transferred from the Medical University of South Carolina to THI on June 4, 2021, for ongoing care and therapy due to his suffering a stroke.
13. Upon Mr. Bryan's admission, THI staff had his son, Michael, sign a purported Arbitration Agreement.
14. At the time of Mr. Bryan's admission, Michael did not have written power of attorney for his father, nor had he been appointed as guardian or conservator for his father.
15. Mr. Bryant had previously been judged to be incompetent by a physician and was incapable of consenting to Michael's signing on his behalf under agent/principal theories.

16. Michael lacked any authority, actual or apparent, to sign the Arbitration Agreement on Mr. Bryan's behalf.
17. Upon admission to Riverside, the staff noted Mr. Bryan was at risk for skin breakdown.
18. Riverside's admission assessments did not note Mr. Bryan had any skin breakdown at the time of his admission.
19. Riverside's baseline care plan was created on June 7, 2021. It addressed Mr. Bryan's needs for incontinence management, therapy, and pain management, as well as his risk for dehydration; but it included no plans addressing his risk for skin breakdown. The assessment noted that Mr. Bryan was completely dependent upon the staff to meet his daily needs.
20. On June 8, 2021, the physician order noted that staff was to provide weekly skin checks and a care plan conference.
21. On the same date, the physician noted a Stage 3 (full thickness skin destruction affecting the skin and subcutaneous tissues and often the underlying muscles) wound.
22. On June 9, 2021, a care plan conference recorded a treatment of medi-honey being applied to Mr. Bryan's buttocks and sacrum.
23. On June 10, 2021, a physician's order was obtained for a specialty mattress which was needed to prevent and heal any wounds caused by pressure.
24. There is no indication that Mr. Bryan received the specialty mattress.
25. On June 18, 2021, orders were obtained to address the Stage 3 wound on Mr. Bryan's coccyx.
26. A low air loss mattress was ordered and provided to Mr. Bryan on June 18, 2021.
27. After identification of the coccyx wound, there were no wound assessments noted in the chart and no documentation regarding the condition of the wound until July 7, 2021.
28. On July 7, 2021, the nursing staff documented that Mr. Bryan was seen by the wound care nurse and that the coccyx wound was debrided and a culture obtained.

29. Mr. Bryan was transferred to MUSC on July 8, 2021 due to rapid heart rate and atrial fibrillation.
30. MUSC noted upon his admission that Mr. Bryan had a large (5cm x 9.8 cm x 3cm) coccyx/sacral wound that was concerning for osteomyelitis (infection of the bone), with copious amounts of malodorous brown drainage and necrotic tissue.
31. At MUSC, Mr. Bryan was treated with conservative sharp debridement of the wound and antibiotics, as his blood cultures were positive for E-Coli.
32. After stabilization of his heart rate and plans for wound care, Mr. Bryan was transferred back to Riverside.
33. Mr. Bryan continued to suffer with the Stage IV wound to his sacrum and underwent a flap repair of the area.
34. The wound subsequently healed by February of 2022.

**FOR A FIRST CAUSE OF ACTION
(Negligence and Gross Negligence)**

35. Plaintiff incorporates the preceding paragraphs by reference as if more fully set forth herein.
36. Defendant and its employees undertook the duty to render medical care to Mr. Bryan in accordance with the prevailing professional standards of care for medical institutions in the national community.
37. Defendant and its employees departed from the prevailing standards of care and treatment for Mr. Bryan and were thereby careless, reckless, negligent, grossly negligent and acted in violation of the duties owed to Mr. Bryan that they committed one or more of the following acts or omissions, any or all of which were departures from the prevailing standard of care:
- a. In failing to properly evaluate the patient;
 - b. In failing to properly assess, treat, and monitor the sacral wound;
 - c. In failing to properly manage Mr. Bryan's pain and other symptoms;
 - d. In failing to timely implement ordered medication and follow physician's orders;

- e. In failing to notify Mr. Bryan's physician of changes in his condition that warranted being transferred to a higher level of care;
 - f. In failing to hire employees, agents, servants, contractors and/or representatives who were competent to perform their duties when it was reasonably foreseeable that negative outcomes could result from the hiring of unfit employees, agents, servants, contractors and/or representatives;
 - g. In failing to properly train employees, agents, servants, contractors and/or representatives to perform their duties competently when it was reasonably foreseeable that negative outcomes could result from the improper training of incompetent employees, agents, servants, contractors and/or representatives;
 - h. In failing to properly supervise employees, agents, servants, contractors and/or representatives to perform their duties competently when it was reasonably foreseeable that negative outcomes could result from the improper supervision of incompetent employees, agents, servants, contractors and/or representatives;
 - i. In failing to have in place policies and procedures to ensure proper care for Mr. Bryan, or, if such policies and procedures were in place, in failing to abide by them in the provision of care to Mr. Bryan; and
 - j. Otherwise failing to act within the acceptable standards of care as may be ascertained through discovery and proven at trial.
38. As a direct and proximate result of the breaches of the standard of care by Defendant and its employees, Mr. Bryan suffered bodily injury and incurred economic and non-economic loss, as set forth more fully herein above.
39. Defendant is directly liable for its own negligence and gross negligence in the hiring, training and supervision of its employees.

40. Defendant is vicariously liable for the negligence, gross negligence, and tortious actions and omissions of its employees and agents under the doctrine of respondeat superior and pursuant to Simmons v. Toumey Regional Medical Center, 341 S.C. 32 (2000).

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays for:

- a. Judgment against the Defendant for actual and punitive damages, in such amount as a jury may deem appropriate; and
- b. Such other and further relief to which the Plaintiff may be entitled and as this Honorable Court deems just and proper, including costs and reasonable attorney's fees, as appropriate.

s/ Christy R. Fagnoli
Samuel R. Clawson, Jr., Esq.
Christy R. Fagnoli, Esq.
Bert G. Utsey, III, Esq.
2 Amherst Street
Charleston, South Carolina 29403
843.970.2700 (o)
843.970.1780 (f)
sam@cfulaw.com
christy@cfulaw.com

Attorneys for Plaintiff

July 23, 2024
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

JOE BRYAN,

Plaintiff,

vs.

THI OF SOUTH CAROLINA AT
CHARLESTON, LLC d/b/a RIVERSIDE
HEALTH AND REHAB,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
C/A NO.: 2024-CP-10-03732

**DEFENDANT'S ANSWER TO
PLAINTIFF'S COMPLAINT**



TO: CHRISTY R. FARGNOLI, SAMUEL R. CLAWSON AND BERT G. UTSEY,
ATTORNEYS FOR PLAINTIFF:

The Defendant, THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab (hereinafter referred to as “Defendant” or “Riverside”), by and through its undersigned counsel, *and subject to and without waiving its objections to the jurisdiction of this Court and its rights to compel this matter to arbitration and subject to and without waiving any rights to have any and all claims dismissed*, hereby answers and responds to the allegations set forth in Plaintiff’s Complaint as follows:

1. All allegations in the Complaint not hereinafter admitted, qualified, or otherwise explained are hereby expressly denied and strict proof is demanded thereof.
2. The allegations in Paragraphs 1 and 2 of Plaintiff’s Complaint state and/or call for legal conclusions and, therefore, no response is required.
3. Responding to the allegations in Paragraph 3 of the Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

4. The Defendant is without sufficient knowledge and information to respond to the allegations set forth in Paragraph 4 of Plaintiff's Complaint and, therefore, denies these allegations and demands strict proof thereof.

5. Answering the allegations set forth in Paragraph 5 of Plaintiff's Complaint, this Defendant admits only that it is a Delaware limited liability company and is the sole entity licensed to operate the skilled nursing facility doing business as Riverside Health & Rehab (the "Facility"), which is located in Charleston County. Any and all allegations inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

6. Responding to the allegations in Paragraph 6 of the Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

7. The allegations in Paragraphs 7 and 8 of Plaintiff's Complaint state and/or call for legal conclusions and, therefore, no response is required.

8. Responding to the allegations in Paragraph 9 of the Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

9. Answering the allegations in Paragraph 10 of Plaintiff's Complaint, this Defendant admits that it hires, trains, supervises and employs nurses and other staff who provide medical services to patients. Any allegations inconsistent with the above are denied. To the extent the allegations in Paragraph 10 state and/or call for legal conclusions, no response is required. To the extent the allegations in Paragraph 10 are intended to allege liability or damage against this Defendant, the allegations are denied, and strict proof is demanded.

10. The allegations in Paragraphs 11 of Plaintiff's Complaint state and/or call for legal conclusions and, therefore, no response is required.

11. Responding to the allegations of Paragraph 12 of Plaintiff's Complaint, the Defendant admits that Plaintiff was transferred from MUSC to Riverside on or about June 4, 2021. As to the remaining allegations contained in this paragraph, the Defendant craves reference to the skilled nursing chart and Plaintiff's medical records to establish the existence, nature, and condition of Plaintiff's health and care and treatment. Any allegations in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied.

12. Responding to the allegations of Paragraph 13 of Plaintiff's Complaint, Defendant admits only that Michael Bryan signed and executed an Arbitration Agreement upon admission of Plaintiff to the Facility. Any allegation inconsistent with the above is denied and strict proof thereof is demanded.

13. The Defendant is without sufficient knowledge and information to respond to the allegations set forth in Paragraph 14, 15 and 16 of Plaintiff's Complaint and, therefore, denies these allegations and demands strict proof thereof. Further, to the extent that these paragraphs contain legal conclusions, no response is required, but to the extent a response is required, those paragraphs are denied.

14. Responding to the allegations set forth in Paragraphs 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34 of Plaintiff's Complaint, the Defendant craves reference to Mr. Bryan's medical records including the Facility's chart for their contents concerning his presentation on admission and course of care at the Facility and at MUSC. Any allegations inconsistent with their contents or which are intended to assert or imply liability and/or damages as to the Defendant are denied and strict proof is demanded thereof.

15. Responding to the allegations in Paragraph 35 of the Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

16. In response to the allegations contained in Paragraph 36 of the Complaint, Defendant affirmatively states that at all times its employees and staff provided care to Plaintiff within the appropriate standard of care. To the extent the allegations in Paragraph 36 state and/or call for legal conclusions, no response is required. To the extent the allegations in Paragraph 36 are intended to allege liability or damage against this Defendant, the allegations are denied, and strict proof is demanded.

17. The allegations contained in Paragraphs 37, including all subparts, 38 and 39 of Plaintiff's Complaint are denied and strict poof thereof is demanded.

18. The allegations in Paragraphs 40 of Plaintiff's Complaint state and/or call for legal conclusions and, therefore, no response is required. If a response is required, these allegations are denied, and strict proof thereof is demanded. Further, any allegations which are intended to assert or imply liability and/or damages as to the Defendant are denied and strict proof is demanded thereof.

19. The Defendant denies Plaintiff's Prayer for Relief and demands strict proof thereof.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

23. Plaintiff's claims for punitive damages and an award of punitive damages would violate those clauses of the Constitution of the United States and South Carolina related to privileges and immunities, due process and equal protection and the 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

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

25. Plaintiff's Recovery in this matter, if any, is limited by and subject to the provisions of the South Carolina Noneconomic Damages Awards Act of 2005, codified at South Carolina

Code Ann. § 15-32-200, *et seq.*, which is pled as a limitation or partial bar to the Plaintiff's claims and alleged damages.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

30. The care and treatment provided to Plaintiff provided by the Defendant was at all times in compliance with the governing standard of care.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

32. The Defendant affirmatively states that Plaintiff lacks standing to pursue some or all of the claims he alleges.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

33. Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and thus reserves the right to amend its Answer to assert any such defenses.

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

CLEMENT RIVERS, LLP

s/ James D. Gandy, III

D. Jay Davis, Jr.

James D. Gandy, III

T. Ashton Phillips, III

25 Calhoun Street, Suite 400

Charleston, SC 29401

Tel: 843-577-4000; jdavis@ycrlaw.com;

tgandy@ycrlaw.com; aphillips@ycrlaw.com

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

Dated: August 22, 2024
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

JOE BRYAN,

Plaintiff,

vs.

THI OF SOUTH CAROLINA AT
CHARLESTON, LLC d/b/a RIVERSIDE
HEALTH AND REHAB,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
C/A NO.: 2024-CP-10-03732

**DEFENDANT'S MOTION TO DISMISS
AND MOTION TO COMPEL
ARBITRATION**

EXHIBIT

5

TO: CHRISTY R. FARGNOLI, SAMUEL R. CLAWSON AND BERT G. UTSEY,
ATTORNEYS FOR PLAINTIFF:

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

Plaintiff has sued this Defendant for negligence during his residency at the Facility. However, in conjunction with his admission to the Facility, Plaintiff entered into an Arbitration Agreement with the Facility. (See **Exhibit A**). The parties to the Arbitration Agreement agreed that the South Carolina Uniform Arbitration Act would not apply; rather, arbitration would be

governed by the Federal Arbitration Act (“FAA”), because the services and reimbursement thereof to be provided to Mr. Bryan upon his admission to the facility involved interstate commerce. **Id.**

In accordance with the terms of this agreement, the Defendant respectfully requests that this matter be compelled to arbitration. Alternatively, this Defendant requests that these proceedings be stayed pending the outcome of arbitration pursuant to Section 3 of the FAA. Additionally, this Defendant respectfully requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any other motions or discovery filed or served by Plaintiff while the current motion is pending.

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

CLEMENT RIVERS, LLP

s/ James D. Gandy, III

D. Jay Davis, Jr.

James D. Gandy, III

T. Ashton Phillips, III

25 Calhoun Street, Suite 400

Charleston, SC 29401

Tel: 843-577-4000; jdavis@ycrlaw.com;

tgandy@ycrlaw.com; aphillips@ycrlaw.com

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

Dated: August 30, 2024
Charleston, South Carolina

PLEASE READ CAREFULLY

FACILITY - RESIDENT/REPRESENTATIVE
ARBITRATION AGREEMENT

This Agreement is made between Riverside Health & Rehab ("Facility"), its agents, employees and servants, and Joe Bryan ("Resident") or 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.

* Megan Chalon
Resident/Representative Signature
Megan Chalon
Authorized Agent of Facility
Date 6/8/21

* Megan Chalon
Printed Name of Resident/Representative
Megan Chalon
Printed Name & Title
Admission Coordinator

DEFENDANT'S
EXHIBIT

A

1 STATE OF SOUTH CAROLINA * COURT OF COMMON PLEAS
 2 COUNTY OF CHARLESTON * TRANSCRIPT OF RECORD
 3 -----X
 4 JOE BRYAN, *
 5 Plaintiff, *
 6 vs. * Case No. 2024-CP-10-03732
 7 THI OF SOUTH CAROLINA AT *
 8 CHARLESTON, LLC,, *
 9 Defendant.*
 -----X

November 13, 2024

11 B E F O R E:

12 The Honorable Jennifer B. McCoy, Presiding Judge

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

14 Laura Wilkes-D'Amato, Esq.
 15 Christina Fagnoli, Esq.
 Attorney for the Plaintiff

16 Russell G. Hines, Esq.
 Attorney for the Defendant

EXHIBIT

6

23 Recording Method: DCRP Court Monitor Maria Emanuel Klein

24 Court Stenographer: Bobbi Fisher, RPR
 25 SC Official Court Reporter III

I N D E X

DESCRIPTION

PAGE

Proceedings

3

E X H I B I T S

(None.)

COURT REPORTER LEGEND

Dash (--) Indicates an interruption in speech

Ellipses (...) Indicates trailing off in speech

(ph) Indicates phonetic word

[Verbatim] Indicates the word is said as written

(Indiscernible)[Transcription] Indicates word(s) is not
known due to audio recording quality

P R O C E E D I N G S

(The following proceedings started at 1:37 p.m.):

THE COURT: I see counsel have already taken a seat at the tables. If y'all could just tell me who you are and who you represent and we'll get started.

MR. HINES: Thank you, Your Honor. Russ Hines for the defendant, THI of South Carolina at Charleston, LLC.

THE COURT: All right.

MS. WILKES-D'AMATO: Good afternoon, Your Honor. Laura Wilkes-D'Amato for the plaintiff.

MS. FARGNOLI: Good afternoon. Christie Fagnoli also for the plaintiff.

THE COURT: All right. Welcome. Great.

All right, Mr. Hines. This is your motion to dismiss and to compel arbitration; is that right?

MR. HINES: Your Honor, that's correct, although I would say that the dismissal part of it is really probably surplus. It's really a motion to compel arbitration.

THE COURT: Okay.

MR. HINES: And what we would ask the Court to do, if Your Honor is to compel arbitration, would not be to dismiss but rather to stay this action.

THE COURT: All right. Tell me about that.

MR. HINES: Your Honor, this case is a case of alleged medical malpractice in the skilled nursing facility context,

1 and this is our motion to compel arbitration. Our argument,
2 I'll call it a 1-2 punch, and that's -- there's two things
3 that I would need to have you agree with me for me to win it:
4 The first one is merger, and the second one is equitable
5 estoppel.

6 But let me explain merger. Merger has to do with the
7 merging and considering as one of two different documents:
8 One is an admission agreement and another is an arbitration
9 agreement.

10 Now, we have to acknowledge that neither of these
11 documents were signed by Joe Bryan himself, who was the
12 resident and who was the plaintiff in this case. Both of
13 those documents were signed by his son, Michael.

14 The plaintiff argues -- and as I stand here today, I'm
15 not able to dispute that Michael was not Mr. Bryan's agent,
16 did not have power of attorney, wasn't his guardian. And when
17 I say -- we do have an alternative request for relief here,
18 Your Honor ---

19 THE COURT: Okay.

20 MR. HINES: --- that includes the request to do some
21 limited discovery and to the possibility of an agency theory
22 creating authority to sign these documents.

23 THE COURT: Right.

24 MR. HINES: But, short of that, I'm not able to argue
25 that there was authority, and I'm not doing that.

1 THE COURT: Yep.

2 MR. HINES: My argument has to do, again, with merger and
3 equitable estoppel. And we briefed this, and I don't mean to
4 just deliver our brief to Your Honor -- and I know you have a
5 full -- a house full of other motions, but I'll try to hit the
6 high points.

7 On the merger point, the high point is, is that the law
8 in South Carolina is that, when you have multiple instruments
9 that are executed at the same time by the same parties for the
10 same purpose and in the course of the same transaction, they
11 are deemed to be merged and to be considered and construed as
12 one contract unless there is an intention contrary to merger.

13 Now, at this point, it's probably appropriate for me, in
14 keeping with my obligations of candor to the Court, to mention
15 a case that goes against me called Solesbee. That case in
16 Solesbee -- when I say it goes against me, I have to
17 acknowledge that, in that case, the Court found there was no
18 merger and the documents at issue were the same form documents
19 that are at issue in this case today, Your Honor. They were
20 the admission agreement and the arbitration agreement.

21 The reason why I believe that I still, in good faith, can
22 make this argument to you today, Your Honor, is there are --
23 one, I do respectfully disagree with the reasoning of the
24 Solesbee Court.

25 THE COURT: Okay.

1 MR. HINES: But more than just that, the Solesbee Court
2 left unanswered questions that I think are still appropriate
3 to ask. Even though the documents at issue were the same, the
4 Solesbee Court's analysis or what it came down to was it
5 basically ticked off, I think, five different points where it
6 found intention contrary to merger.

7 And we have gone through each one of those points in our
8 memo and explained how the Solesbee Court's analysis, in our
9 view, respectfully, is incorrect and/or insufficient. And I
10 will give -- I can give an example, Your Honor, about this.

11 And let me, for instance, mention very quickly, because I
12 realize there's a lot of ground to plow here in this argument
13 because the case law is kind of -- it's quite a bit of it, and
14 Your Honor may well have heard it even from me a time or two
15 in the past, and so, you can certainly feel free to stop me if
16 I'm going too far into it.

17 But, again, merger is the same time, same parties, same
18 purpose, and same transaction. In a case called Coleman vs.
19 Mariner Health Care, it's when our Supreme Court did something
20 that's very important for me in terms of making my argument,
21 which is, it established that, yes, that is the law. If
22 you've got those four things, then you have a presumption of
23 merger unless there's intention to the contrary.

24 Now, it went on and said, in the case of Coleman -- and
25 it's important to note that Coleman was another case, like we

1 have here, where it was an admission agreement to a nursing
2 facility, arbitration agreement. Now, the terms of the
3 agreement themselves especially -- well, they were not the
4 same, but the context in terms of -- the very same context we
5 have here: a non-signatory enforcement of arbitration
6 agreement.

7 THE COURT: Right.

8 MR. HINES: Well, in Coleman, the Court said, "Well, yes,
9 we understand that the law allows for merger if you have these
10 four things, but we do find that there's an intent contrary to
11 merger, and we find it because the arbitration agreement" --
12 one, they found there was a facial recognition of an intent to
13 keep these two documents separate because the arbitration
14 agreement referred to the admission agreement. And they
15 looked at that and said, Well, if this one is referring to the
16 other one, it seems that's a facial recognition of separated
17 -- what the Court called separateness, and they put it in
18 quotes.

19 They also said, Well, the admission -- the arbitration
20 agreement has a provision where it can be revoked within 30
21 days for any reason; the admission agreement doesn't. Well,
22 we also say that that is evidence of separateness and,
23 therefore, there's no merger.

24 Now, the Court did go on to say in dicta that if you have
25 an ambiguous situation where there may or may not be a merger,

1 that that ambiguity will be construed against the drafter or,
2 in this case, the proponent of arbitration, and therefore,
3 there's no merger.

4 But when I look at Coleman, aside from establishing the
5 background law that I need to argue to you about the merger
6 and those four points, the Coleman Court specifically said
7 that every one of those four boxes was, indeed, checked: time,
8 parties, purpose, transaction. So, you had to then look at is
9 there contrary intention? And it said there was in that case.

10 In our case, importantly, we don't have -- whereas in
11 Coleman, the Court noted this idea of a facial recognition of
12 separateness. Well, we have an entire agreement provision in
13 the admission agreement. And in that provision, if the Court
14 will indulge just a little bit of reading, it says as follows,
15 in pertinent part: "The undersigned further acknowledges that
16 he/she has received and read the Admission Handbook and other
17 admissions materials and understands that these documents are
18 made part of this agreement by reference herein."

19 The arbitration agreement is another admissions material.
20 It was signed in conjunction with admission. Admittedly, it
21 was voluntary; it did not have to be signed, but it was
22 signed.

23 And even in Plaintiff's memo in opposition, while we
24 would disagree with the idea that anyone at the facility had
25 Michael sign it, in the sense that it made him sign it or that

1 -- there's a line in here that says, "Perhaps sensing that an
2 arbitration agreement signed by Plaintiff would be
3 unenforceable, the defendant's employees apparently had
4 Michael's -- Plaintiff's son, Michael, sign all the
5 paperwork." We disagree with those assertions, which are not
6 supported by evidence, meaning there's no evidence that we
7 forced him to sign. In fact, the only evidence is to the
8 contrary. His signature on the document itself is presumed,
9 under South Carolina law, to indicate that he read,
10 understood, and agreed to it.

11 And, furthermore, part of its contents -- and it's only
12 one page -- included that his representation that "by his/her
13 signature below, the executing party represents that he/she
14 has authority to sign on the resident's behalf so as to bind
15 the resident as well as representative." I don't take a
16 position that that creates authority. I do take the position
17 that he signed that and is deemed to have understood, agreed
18 with, and assented to its contents and represented that to the
19 facility by doing so.

20 But the part that was perhaps more important was to say,
21 even in the memo in opposition, it reads, "As mentioned in the
22 complaint, Defendant Staff had Plaintiff's son, Michael Bryan,
23 sign the admission paperwork upon Plaintiff's admission to the
24 facility. This paperwork included a purported arbitration
25 agreement," meaning the admission paperwork included the

1 arbitration agreement, which my point here is to say that,
2 yes, it is part of the admissions materials.

3 And we go into that in a little more detail and cite a
4 couple of cases from the Court of Appeals in our memo where
5 the Court, at least in its language, said to the effect said
6 -- had -- that an admission agreement was signed and other --
7 of other arbitration materials, including an arbitration
8 agreement -- other admission materials, including an
9 arbitration agreement.

10 My point is not to say that those cases specifically
11 looked at the question of what's an admission material. My
12 point is just to say that, in plain language, the Court
13 readily made the association between an arbitration agreement
14 signed in conjunction with admission and admissions materials.
15 And that all goes to the point of, unlike the Coleman case
16 where you had this evidence of separateness, you don't have
17 that here.

18 And I can sort of wrap this up and rely on what we have
19 written just to say, but that long exposition -- and I
20 appreciate Your Honor's patience with it -- makes the point
21 that, nowhere in the Solesbee case does the Court ever wrestle
22 with the fact that we have that language in our admission
23 agreement. It had the talks about these other admissions
24 materials being part of it.

25 So, I think that's fair game to say, well, Solesbee

1 doesn't answer that question. It's a question that's still
2 worthy of being asked.

3 And Solesbee ticks off just a few other things, Your
4 Honor, that I would briefly mention. For instance, that it
5 found an evidence contrary to merger because of -- it said
6 that one of the documents was governed by federal law and the
7 other by state. That's an incorrect statement, even just as
8 an evidentiary matter, because what the admission agreement
9 actually says is that it will be governed by the applicable
10 federal regulations and those of the state in which the
11 facility sits. So it didn't just pick one or the other.

12 And when it said that the arbitration agreement was
13 governed by federal law, it actually just says that the
14 arbitration agreement, it recognized that the FAA, the Federal
15 Arbitration Act, applies because the evidence is a contract
16 involving interstate commerce.

17 My point there is to say that that would be the case even
18 if it was simply an arbitration clause within, undoubtedly, a
19 single instrument. The FAA would still apply. So, the idea
20 of picking out the FAA's applicability to one and not the
21 other as evidence of an indicia of -- or as evidence of
22 separateness, respectfully, just doesn't track, not to mention
23 the fact that the FAA loops back around and applies South
24 Carolina's general contract law to determine the
25 enforceability.

1 So, I could go on with that, and we've done it in
2 writing, and I trust that Your Honor will be familiar with
3 that in deciding this matter, but all of that goes to the
4 merger point. If Your Honor finds that they're merged, then
5 it becomes quite simple. On equitable estoppel, it's called
6 direct benefits estoppel.

7 There's a case called Wilson vs. Willis we cite, and it
8 talks about the basic idea that you can't have your cake and
9 eat it too. You can't receive direct benefits from a
10 contract, including an arbitration provision, which would be
11 the case if they merged and they're considered one contract.
12 That's why a merger goes first, because, obviously, there were
13 benefits received in the form of room, board, care, treatment,
14 all sorts of benefits, understanding that the plaintiff's
15 case, it says, that there's an aspect of that the plaintiff
16 feels was deficient.

17 That's fine. Obviously, the point of the arbitration --
18 our motion is not to adjudicate that question now; we deny
19 those claims. But separate and apart or, I should say, over
20 and above from the things that Plaintiff complains about or
21 all the things the plaintiff doesn't complain about -- again,
22 room, board, every meal -- to say there was no benefit
23 conferred would be to say -- to nullify the entire experience,
24 and I don't think there's any reasonable way to do that.

25 So, Your Honor, with that, merger, equitable estoppel

1 based upon direct benefits, and that's the way we'd ask the
2 Court to grant this motion. If the Court is not inclined to
3 do that at this time, we do ask, as a fallback position, to
4 allow us to do some discovery targeted at the question of any
5 potential agency between father and son here. And the reason
6 that we ask that specifically as opposed to just doing it is
7 because we wouldn't want to be accused or subject ourselves to
8 the argument that we have waived any right to compel
9 arbitration by exercising the tools of litigation in search of
10 that right.

11 So, thank you, Your Honor.

12 THE COURT: Okay. Yes, sir.

13 Yes, ma'am.

14 MS. WILKES-D'AMATO: Good afternoon, Your Honor. Before
15 I start, I do have copies of the motions as well as some cases
16 that I'll be citing, if I can ---

17 THE COURT: Sure.

18 MS. WILKES-D'AMATO: --- approach.

19 The defendant's motion in this particular case simply
20 glosses over the fact that, in order for an arbitration
21 agreement to even be merged with anything, that agreement
22 needs to exist and be a valid agreement.

23 Defendant's employees here had our client sign and enter
24 into this agreement without his father's consent or knowledge.
25 And more importantly, he also signed the agreement without any

1 legal authority to do so.

2 Mr. Bryan, you know, spends all of his time there,
3 obviously, in the midst of a health crisis. Right? And the
4 defendant, in the majority of the brief, spends time arguing
5 that the two different agreements -- the admissions agreement
6 and arbitration agreement -- should be merged to estop
7 Mr. Bryan from now having his day in court.

8 But what the defendant fails to address in doing that is
9 that neither one of those agreements is validly binding.
10 Michael did not, as defendant asserts in the brief, have
11 authority to enter into the admissions agreement under the
12 Adult Health Care Consent Act. I believe that's kind of the
13 premise behind the theory that they can merge is that he did
14 have authority to enter into the admissions contract but not
15 the arbitration, and more or less, that's why they're merged
16 together.

17 However, the defendant has failed to comply with that Act
18 because it hasn't been demonstrated that two examining
19 physicians have certified that Mr. Bryan was incompetent to
20 make those healthcare decisions.

21 So, it's our opinion that Michael did not have the
22 authority to sign the admissions agreement. And even if he
23 did, Michael still did not have authority to enter into the
24 arbitration agreement on behalf of his father because, again,
25 there was no guardianship, no power of attorney, or no agency

1 in place at the time. And simply put, the burden is on the
2 defendant as the party seeking to enforce the arbitration
3 agreement, to first establish the existence of that agreement.

4 There is a presumption in favor of arbitration
5 agreements, and there is mandatory language regarding those
6 agreements that was cited by the defendant, but that only
7 applies when the making of the agreement for arbitration was
8 not at issue.

9 And, Your Honor, we submit that it's definitely at issue
10 here. In fact, the threshold question of whether an agreement
11 exists is so important that the FAA even allows parties to
12 proceed to trial on that issue.

13 As noted in the Weaver case, which I handed up in that
14 binder, the fact that the FAA places arbitration on equal
15 footing as contract law does not give a leg up to a party
16 that's trying to seek arbitration.

17 The presumption regarding the favorability of arbitration
18 is as to the scope, not as to the existence of an agreement in
19 the first place or the identity of the parties bound by that
20 agreement.

21 And so, in short, Defendant -- before it can rely on
22 presumptions of FAA, it has to approve that an agreement
23 exists. A valid agreement to arbitrate or even a contract
24 doesn't exist if the person signing a purported agreement
25 doesn't have the authority to bind the party that it's signing

1 for.

2 State law controls when an arbitration agreement may be
3 enforced against someone who hasn't signed it, and South
4 Carolina case law is clear that, ordinarily, parties who have
5 any rights under a contract only are the promisor and the
6 promisee.

7 And there are many South Carolina opinions that I handed
8 up denying motions to compel arbitration in similar
9 situations. For example, in Thompson vs. Pruitt, the Court
10 held that the estate of a dementia patient could not be
11 compelled to arbitrate when the patient's son signed the
12 purported agreement along with an admission agreement, even
13 though, at that time, the son did have authority under the
14 Health Care Act -- Health Care Consent Act. It's also a
15 distinction that exists as to the Coleman case that Plaintiff
16 did have authority under the scope of the Act.

17 Additionally, there's a case, Foreman vs. Shiloh
18 Management Company, where the Circuit Court denied a similar
19 motion on the basis of lack of authority for a daughter to
20 sign for a father for reasons very similar to this case, and
21 that was as to both the admissions agreement and the
22 arbitration agreement.

23 And South Carolina Circuit Court recently summarized the
24 precedent regarding this in the Dawkins matter, which was just
25 affirmed last week in an unpublished opinion that the order in

1 that case says that, "When a healthcare facility attempts to
2 bind a patient to an arbitration agreement that's signed by a
3 family member, the facility has to make a clear showing that
4 the family member was the legal agent of the patient."

5 And the order goes on to clarify that, without a power of
6 attorney or some expressed delegation of authority by the
7 principal, there's no legal authority for this alleged agent
8 to bind the principal to the agreement or to do anything
9 really besides possibly making health care decisions.

10 And in addition to these specific examples that have to
11 do with the health care context, there's also the Court of
12 Appeals case in Malloy vs. Thompson that recognizes five
13 theories arising out of common law that can provide a
14 potential basis for binding a non-signatory to a contract.

15 The memorandum in this case only really address two of
16 those; those would be agency and estoppel via merger. First,
17 as to agency, they could establish that there's no agency
18 between Mr. Bryan and his son. There's no presumption of
19 agency between an adult child and a parent. Even if Michael
20 did have authority to make health care decisions for his
21 father, which we deny, the case law is very clear that that
22 authority to handle finances or make health care decisions
23 doesn't encompass all the way to executing arbitration
24 agreements.

25 And Defendant's argument that Michael made the expressed

1 representation that he was authorized to sign for Mr. Bryan
2 kind of fails, to me, to explain why that should be used to
3 bind Mr. Bryan because the burden of establishing that agency
4 is first on the defendant, and the defendants are required to
5 use due care to determine the scope of this supposed
6 authority.

7 As in Shiloh, there was no evidence that Mr. Bryan made
8 any kind of representation to the defendant or even that he
9 was aware of the execution of this agreement.

10 It is true that a principal can be bound by the acts of
11 his agent when he puts that agent in that position that a
12 third party can rely on him. That doesn't happen here.
13 Mr. Bryan did nothing to place his son in this position, and
14 in fact, it was Defendant who placed him in that position.

15 Lastly, moving on to the concept of merger and estoppel.
16 Again, Defendant contends that these agreements are valid and
17 they have merged, such that Mr. Bryan should be estopped from
18 denying the enforceability of this arbitration agreement.

19 Although they were executed at the same time, at the same
20 place, by the same parties and all of that, there is still the
21 fact that Michael lacked legal authority to execute them and
22 lacked authority to bind Mr. Bryan to either of these
23 agreements.

24 It does not make sense to merge two invalid documents or
25 even to merge one binding document with another invalid one.

1 Mr. Bryan simply can't be bound by these, and Mr. Bryan should
2 not be estopped from making his case.

3 And, lastly, just a few final points. To the extent that
4 equitable estoppel may apply under the direct benefit theory,
5 I think if the Court were to accept that position, then it
6 would logically follow that every resident who is admitted to
7 a nursing home would then be able to deny the enforceability
8 of the admissions contract under these facts. And I think, as
9 it points out in the order in the Foreman case, that would
10 just be inequitable.

11 Again, the defendant's memorandum dives into the details
12 of the agreements, including things that would be relevant for
13 merger. And we do have points to make regarding those, but we
14 just think that it's inapposite here. Because Michael didn't
15 have the authority to bind his father, there's no point in
16 arguing about how the purported agreements should interact.

17 And, finally, Defendant's assertion that Mr. Bryan would
18 be having his cake and eating it too by being admitted to a
19 facility and also not being forced to arbitrate completely
20 misses the point. I think, in this case, it would be the
21 defendant having its cake and eating it too by collecting
22 money that was paid by Mr. Bryan's behalf pursuant to an
23 agreement he did not sign and then to deny his right to have
24 his day in court, again, under an agreement that he did not
25 sign.

1 So, for those reasons, we would ask that the motion be
2 denied.

3 THE COURT: Okay. Anything else?

4 MR. HINES: Very briefly, Your Honor. As I understand --
5 well, the major point that I want to clarify is, our argument
6 has nothing to do with the Adult Health Care Consent Act.
7 We're not arguing that there was authority, actual or
8 apparent.

9 Our argument is based on estoppel. It's not necessary
10 for us to show a contract that is valid per se. Our argument
11 is estopping -- the idea is that the plaintiff should be
12 estopped to deny the validity and enforceability, and that
13 argument as to the admission agreement by itself is very
14 straightforward because the admission agreement by itself
15 doesn't even bring in the question of merger. I mean, the
16 admission agreement, he certainly received benefits -- direct
17 benefits under the admission agreement.

18 So, I just want to be clear that the idea that we have to
19 both prove -- we have to prove a valid contract before we can
20 argue estoppel, respectfully, Your Honor, is a bit of a
21 contradiction in terms because we are arguing estoppel as to
22 -- not to say that we have a valid contract per se, but that
23 the validity can't be challenged because that's what estoppel
24 does, it estops the plaintiff from doing that.

25 Yes, Your Honor, I guess that would be the only -- well,

1 the only point I would like to clarify with that. So, again,
2 I'd ask Your Honor either to grant our motion, respectfully,
3 or to allow us the additional discovery.

4 THE COURT: Okay. Sure. I'll take a look at everything
5 in your memos that are merged into the record for purposes of
6 today and issue a ruling by the end of the week on this
7 motion. All right?

8 MS. WILKES-D'AMATO: Thank you.

9 MR. HINES: Thank you, your Honor.

10 THE COURT: Thank you.

11 (At 2:01 p.m., the above hearing concluded.)
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Certificate of Transcriber

CASE NAME/NUMBER: Bryan v. THI of SC

DATE OF HEARING: 11/13/24

RECORDING METHOD: DCRP Court Monitor Klein

I, Bobbi Fisher, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that I was not present for the live proceeding; and that said proceedings were transcribed to the best of my ability from the audio and/or video recording and supporting information; and that I am neither counsel for, related to, nor employed by any of the parties to this case; and I have no interest, financial or otherwise, in its outcome.

Bobbi Fisher

/s/ Bobbi Fisher

Bobbi Fisher, SC Official Court Reporter III, RPR

Transcript Prepared: 2/22/25

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

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

JOE BRYAN,

Plaintiff,

v.

THI OF SOUTH CAROLINA AT CHARLESTON, LLC
d/b/a RIVERSIDE HEALTH AND REHAB,

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2024-CP-10-03732

ORDER**EXHIBIT**

7

This matter came before the Court on November 13, 2024 for a hearing on Defendant's Motion to Dismiss and Motion to Compel Arbitration. Laura Wilkes-D'Amato appeared on behalf of the Plaintiff. Russell Hines appeared on behalf of the Defendant. The Court, having reviewed the motions and memoranda of law, heard oral argument from counsel. For the reasons set forth herein below, the Court denies Defendant's Motions.

PROCEDURAL HISTORY

This is a medical malpractice action arising from Plaintiff's treatment at Defendant's rehabilitation facility (hereinafter the "Facility") following Plaintiff's hospitalization for a stroke in the summer of 2021. While Plaintiff was a resident at Defendant's Facility, he developed a pressure wound that resulted in an additional hospitalization and further treatment, including a surgical procedure.

Defendant's staff had Plaintiff's son, Michael Bryan (hereinafter "Michael"), sign the admission paperwork upon Plaintiff's admission to the Facility. This paperwork included a purported Arbitration Agreement (hereinafter the "Agreement"). Based on the content of the Agreement, Defendant has moved to stay or dismiss this action and for a court order compelling arbitration on the basis that "Plaintiff

entered into an Arbitration agreement with the Facility.” This Agreement does not contain Plaintiff’s signature.

APPLICABLE STANDARD

“Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court’s factual findings, this court will not reverse those findings.” *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 554 (Ct. App. 2018) (internal citations omitted).

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. *See Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008).

Arbitration agreements are governed by the Federal Arbitration Act (“FAA”). While there is a presumption in favor of Arbitration Agreements, this presumption only applies where there is a valid Arbitration Agreement. 9 U.S.C. § 4 (“The court shall make an order directing the parties to proceed to arbitration” but only “upon being satisfied that the making of the agreement...is not in issue”); *see also EEOC v. Waffle House*, 534 U.S. 279 (2002); *Toler’s Cove Homeowners Ass’n, Inc. v. Trident Constr. Co., Inc.*, 355 S.C. 605, 612, 586 S.E. 2d 581 (2003).

“Arbitration is available only when the parties involved contractually agree to arbitrate [. . .] In determining whether an agreement to arbitrate exists, the court should apply ‘ordinary state-law principles that govern the formation of contracts.’” *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E. 2d 839, 844 (Ct. App. 1999). These principles include the axiom that, “in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all

essential and material terms of the agreement. *Player v. Chandler*, 299 S.C. 101, 105 382 S.E.2d 891, 893 (1989).

“Whether an arbitration agreement may be enforced against a non-signatory to the agreement is a matter subject to de novo review by an appellate court.” *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019). The South Carolina Court of Appeals has recognized that five theories “aris[ing] out of common law principles of contract and agency law could provide a basis for binding nonsignatories to arbitration agreements: 1) incorporation by references; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel. *Malloy v. Thompson*, 409 S.C. 557, 561-62, 762 S.E.2d 690, 692 (2014) (internal quotations omitted).

FINDINGS

1. Plaintiff’s Son Lacked Legal Authority to Sign the Arbitration Agreement.

At the time of his admission to Defendant’s Facility, Plaintiff had just suffered a stroke. According to Defendant’s own medical records, Plaintiff did not have capacity to make medical decisions or follow commands, was nonverbal, and was a poor historian due to cognitive/psychiatric impairment. Defendant’s employees had Plaintiff’s son, Michael, sign all of Plaintiff’s admissions paperwork, despite Michael’s lack of authority to do so. Because the purported Arbitration Agreement was not signed by Plaintiff or anyone with legal authority to sign documents on his behalf, it is unenforceable, and Plaintiff cannot be bound by its terms.

South Carolina Courts have consistently ruled against compelling arbitration in similar cases. See *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016) (estate of a dementia patient could not be compelled to arbitrate when patient’s son signed the purported Arbitration Agreement along with the Admission Agreement to a nursing home); *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014) (decendent’s sister’s authority to make decisions for his health care under the Adult Health Care Consent Act extended to the Admission Agreement, but not the separate Arbitration

Agreement); and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 550, 813 S.E.2d 292, 295 (Ct. App. 2018) (husband did not have authority to sign Arbitration Agreement on his wife's behalf when she was competent and did not represent that he was her agent). Recently, a South Carolina Circuit Court discussed *Coleman*, *Hodge*, and *Thompson* and concluded as follows:

This precedent clearly stands for the proposition that when a healthcare facility attempts to bind a patient to an Arbitration Agreement signed by a family member, the facility must make a clear showing that the family member was a legal agent of the patient. Our Courts have indicated that without a Power of Attorney, or some other express delegation of authority by the principal, there is no actual legal authority for an alleged agent to bind the principal to any agreement, or to do anything beyond making healthcare decisions for an incompetent patient.

Order Regarding Defendants' Motions to Stay and Motion to Compel Arbitration, *Trina Dawkins, as Personal Representative of the Estate of William Dawkins* (2020-CP-42-03593) (affirmed in *Dawkins v. Clinical*, 2023 S.C. App. Unpub. LEXIS 462).

It is undisputed that Michael did not hold a Power of Attorney for his father, that he had not been appointed as Plaintiff's guardian, and that he did not have any express authority to make healthcare decisions on his father's behalf. Michael did not have authority to enter into the Agreement on Plaintiff's behalf.

2. The Common Law Principles in *Malloy* do not Support Binding Plaintiff to the Agreement as a Non-Signatory.

Having established Michael's lack of authority to enter into the Agreement on his father's behalf, we turn to whether Plaintiff can nonetheless be bound by the Agreement despite his status as a non-signatory. Because Defendant has failed to satisfy any of the five common law theories listed in *Malloy* (409 S.C. 557, 561-62 (2014)), the answer is no. The first theory, incorporation by reference, is inapposite because there is no indication that any document signed by Plaintiff referred to the purported Arbitration Agreement. Similarly, Defendant has not set forth any evidence to support an argument for assumption or veil piercing/alter ego liability.

To the extent Defendant relies on a purported agency relationship between Plaintiff and Michael, that argument also fails. There was no express agency between the two at the time of Michael's signature, and nothing in South Carolina law supports a presumption of apparent agency between an adult child and a parent. *Cf. Hodge*, 422 S.C. 544, 550 (Ct. App. 2018). Even if there were an agency relationship based on apparent authority to make health care decisions for Plaintiff, an incompetent person, it would not result in Plaintiff being bound by the Arbitration Agreement. South Carolina case law is clear that authority to make health care decisions does not extend to the ability to enter into arbitration agreements. "[T]he authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial." *Thompson*, 416 S.C. at 45 (Ct. App. 2016).

Finally, Plaintiff is not estopped from bringing his claims. As discussed in *Coleman* and later in *Hodge*, equitable estoppel only applies to Plaintiff in this context if the Arbitration Agreement is merged with the Admission Agreement. "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." *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355.

However, the courts in both *Coleman* and *Hodge* pointed out several relevant factors for determining merger in the context of admission agreements and purported arbitration agreements, and those factors weigh heavily against merger in the present case. As in *Hodge*, the Admission Agreement and other admission paperwork in this case indicate it is governed by South Carolina law, while the purported Arbitration Agreement states that it is governed by the FAA. Like in *Hodge*, Defendant's purported Arbitration agreement case also contains a separate reference to the Admission Agreement. The purported Arbitration Agreement in this case also has its own signature line, and is contained on its

own page. Based on these factors, the Admissions Agreement, other admission paperwork, and purported Arbitration Agreement do not merge.

Because there was no merger between the two purported agreements, Plaintiff is not estopped from asserting that the lack of his signature precludes enforcement of the arbitration agreement. This same rationale extends to any potential claim of equitable estoppel. *See Hodge*, 422 S.C. at 563 (noting that equitable estoppel arguments are also “premised on the[] contention that, under state law, the admission agreements and the arbitration agreements merged”).

CONCLUSION

For the foregoing reasons, Defendant’s Motion to Dismiss and Motion to Compel Arbitration are DENIED.

AND IT IS SO ORDERED.

[electronic signature page to follow]



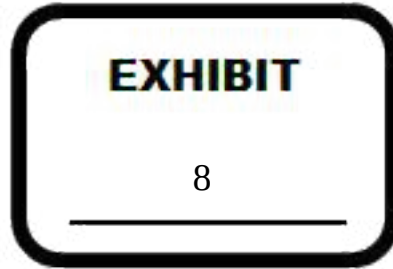
Charleston Common Pleas

Case Caption: Joe Bryan VS Thi Of South Carolina At Charleson Llc , defendant, et al
Case Number: 2024CP1003732
Type: Order/Other

So Ordered

s/Jennifer B. McCoy #2764

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2024-CP-10-03732
JOE BRYAN,	)	
	)	
Plaintiff,	)	MOTION TO ALTER, AMEND, AND/OR
	)	RECONSIDER ORDER DENYING
vs.	)	MOTION TO COMPEL ARBITRATION
	)	
THI OF SOUTH CAROLINA AT	)	
CHARLESTON, LLC d/b/a	)	
Riverside Health and Rehab,	)	
	)	
Defendant.	)	



TO: THE HONORABLE JENNIFER B. MCCOY, Presiding Judge, and PLAINTIFF’S COUNSEL OF RECORD

NOW COMES Defendant, THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab Center (the “Facility”), by and through its undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set forth below, hereby most respectfully moves this Honorable Court to alter, amend, and/or reconsider its order filed December 13, 2024 (the “Subject Order”), denying the Facility’s motion, filed August 30, 2024, to compel Mr. Bryan’s¹ claims to arbitration (the “Underlying Motion”).

¹ “Mr. Bryan” refers to Plaintiff, Joe Bryan. “Michael” refers to Mr. Bryan’s son, Michael Bryan, who signed the Admission Agreement and the Arbitration Agreement on Mr. Bryan’s behalf.

- I. Contending, most respectfully, that the Underlying Motion should have been (and should now be) granted, the Facility asks the Court to (re)consider and expressly rule on each and every distinct issue/argument raised in support of the Underlying Motion, i.e., each and every distinct issue/argument set forth in the Underlying Motion itself; in the Facility’s memo in support of the Underlying Motion, filed November 8, 2024; and via oral argument at the hearing on the Underlying Motion on November 13, 2024, all of which is/are hereby incorporated herein by reference.**

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

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

- A. Out of an abundance of caution, the Facility objects to the language in the Subject Order that it “had” Michael sign the Admission Agreement and/or the Arbitration Agreement.²**

Even though the Subject Order does not actually state that this is material to its reasoning, out of an abundance of caution, to the extent that it might potentially be prejudicial to the Facility, the Facility objects to any notion that Michael was in any way required to sign the Admission Agreement and/or the Arbitration Agreement. Indeed, the Arbitration Agreement expressly states, “It is understood by Resident/Representative that he/she is not required to use

² (Subject Order p. 1 (“Defendant’s staff *had* Plaintiff’s son, Michael . . . , sign the admission paperwork upon Plaintiff’s admission to the Facility.”) (emphasis added); *id.* at p. 3 (“Defendant’s employees *had* Plaintiff’s son, Michael, sign all of Plaintiff’s admissions paperwork”) (emphasis added).)

the aforesaid Facility for Resident’s healthcare needs and that there are numerous other health care providers in the State where the Facility is located that are qualified to provide such care to Resident;”³ contains Michaels’ express representation that he “has the authority to sign [it] on [Mr. Bryan’s] behalf;”⁴ and, by virtue of his signature thereon, Michael “is presumed to have read, understood, and assented to” the same. *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.”). As explained in the Facility’s memo in support of the Underlying Motion, the Arbitration Agreement was optional and was not required as a condition of Mr. Bryan’s admission to the Facility,⁵ and there is no evidence whatsoever in the record to the contrary. *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.”). Lastly, to the extent that the language of the Subject Order in this regard (“had”) might suggest any duress, which is, of course, denied, duress is an affirmative defense to contract enforceability⁶ that Mr. Bryan would have to have raised and proved, neither of which he did. (See generally Pl.’s Mem. in Opp’n. to the Underlying Motions.)

³ (Arbitration Agreement.)

⁴ (Arbitration Agreement.)

⁵ (See Facility’s Mem. in Supp. of Motion to Compel Arbitration p. 11.)

⁶ (See Rule 8(c), SCRCP (“[A] party shall set forth affirmatively the defense[] [of] . . . duress . . . and any other matter constituting an avoidance or affirmative defense.”); *Gainey v. Gainey*, 382 S.C. 414, 428, 675 S.E.2d 792, 799 (Ct. App. 2009) (“If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”); *id.* (“Three factors must be proved in order to establish that a contract was procured through duress: (1) that the person was coerced to enter into the contract; (2) that the person was put in such fear that he was bereft of the quality of mind essential to the making of a contract; and (3) that the contract was thereby obtained as a result of this state of mind.”); *id.* (“Wife contends that she was forced to enter the property and separation agreement and as such, the court erred in refusing to vacate the judgment. We disagree. Wife’s argument was properly rejected because Wife failed to present sufficient evidence that she was under duress when she entered into the agreement.”).

B. The Court should have found (and should now find) that the Admission Agreement and the Arbitration Agreement merged and that, because Mr. Bryan effectively embraced and directly benefitted from the Admission Agreement, he is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.

1. The Court should have found (and should now find) that the Admission Agreement and the Arbitration Agreement merged.

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

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

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

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

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

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

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

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

The Court wrongfully concluded that the Admission Agreement and the Arbitration Agreement are separate contracts that do not merge. The merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”⁷ as undoubtedly the Admission Agreement and the Arbitration Agreement were here,⁸ there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the instruments were intended to be construed together as effectively one contract. This is a question of intention. *Id.* at 355, 755 S.E.2d at 455 (“in the absence of anything indicating a contrary *intention* . . .”) (emphasis added). And “in attempting to ascertain th[e] [parties’] intention,” our courts “endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into.” *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

⁷ *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

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

It must be remembered that, where, as here, the instruments in question were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For the merger presumption to mean anything in practice it cannot be upset based on mere conjecture, but only by actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. Huffines Co., LLC v. Lockhart*, 365 S.C. at 188, 617 S.E.2d at 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). No such inference can be drawn here. Indeed, under the circumstances, the idea that there would have been an intention contrary to merger does not make sense.

Unlike the arbitration agreement at issue in *Coleman*—and, for that matter, the arbitration agreements at issue in *Coleman*’s progeny *Thompson* and *Hodge*, all of which cases involved arbitration agreements that contained a provision allowing them to be disclaimed or revoked within 30 days of signing while the corresponding admission agreements did not—the instant Arbitration Agreement has no disclaimer/revocation provision. (Arbitration Agreement.) Moreover, while the instant Admission Agreement does contain an “Entire Agreement” clause, it does not reference the Arbitration Agreement as a separate contract. (Admission Agreement p. 12.) Indeed, directly contradicting the idea of “separatedness” (in the parlance of the *Coleman* Court⁹), the “Entire Agreement” clause in the instant Admission Agreement expressly states that “other Admissions materials” are part of the Admission Agreement, thereby expressly

⁹ 407 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).

contemplating the lack of its own supposed “separatedness.” (Admission Agreement p. 12.) Without question, the Arbitration Agreement is among these other materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) (“The same day as Decedent’s admission to White Oak, Stott, acting as Decedent’s authorized representative, signed White Oak’s admission documentation—including the Arbitration Agreement.”) (emphasis added) (internal footnote omitted); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 (“Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement*.”) (emphasis added)).¹⁰

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

¹⁰ To be clear, the Facility’s point here is not that the holding of either *Stott* or *Hodge* established a legal standard for what counts as admission paperwork, but rather that the very fact that the language that the *Stott* and *Hodge* Courts used in discussing the facts of the cases so readily made the natural and logical connection between arbitration agreements signed in conjunction with admission and “admission documentation” / “documents related to . . . admission” that it illustrates that, in its plain, ordinary, and popular sense, “Admissions materials” plainly includes the Arbitration Agreement. *See Beaufort Cnty. Sch. Dist. v. United Nat’l Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) (“If the contract’s language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract’s force and effect.”). Moreover, this connection between the Admission Agreement and the Arbitration Agreement (with the Arbitration Agreement being understood in the plain, ordinary, and popular sense as included in the term “Admissions materials”) is underscored by the *Coleman* Court’s recognition that an admission agreement and arbitration agreement signed in conjunction with resident’s admission to a nursing facility are indeed “executed at the same time, by the same parties, *for the same purposes, and in the course of the same transaction*.” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

Moreover, while it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement’s) sole reason for being. (Arbitration Agreement (providing for arbitration of “any controversy or dispute between the parties arising out of or relating to [the] Facility’s Admission Agreement, or breach thereof, or relating in any way to [Mr. Bryan’s] stay at [the] Facility, or to the provisions of care or services to [Mr. Bryan]”); *id.* (“This [Arbitration] Agreement shall remain in effect for all care rendered at [the] Facility”).)¹¹

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument

¹¹ Without question, Plaintiff’s claims against the Facility are within the scope of the Arbitration Agreement, the plain language of which calls for arbitration of “any controversy or dispute between the parties arising out of or relating to [the] Facility’s Admission Agreement, or breach thereof, or relating in any way to [Mr. Bryan’s] stay at [the] Facility, or to the provisions of care or services to [Mr. Bryan]” (Arbitration Agreement.) But even if there were “any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration” *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) (“[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.”).

governing various interrelated aspects of Mr. Bryan's relationship with the Facility, the Admission Agreement setting forth the terms of his admission, the Arbitration Agreement providing for arbitration of disputes arising out of his admission. (*Compare* Admission Agreement (setting forth the terms of Mr. Bryan's admission to the Facility) *with* Arbitration Agreement (providing for arbitration of disputes arising out of Mr. Bryan's admission in the Facility).)

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

Similarly, the survival of the Arbitration Agreement is no evidence of "separatedness." Again, the only reason for the Arbitration Agreement is the Admission Agreement, as the point of the Arbitration Agreement is to cover disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after

termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

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

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

transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention.

The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” 407 S.C. at 355, 755 S.E.2d at 455. While it is true that the *Coleman* Court also cited the rule that ambiguity is construed against the drafter, (a) it did so in dicta¹² and (b) it never addressed the logical inconsistency—which thus remains fair game as an argument in this case¹³—in recognizing a rule of law creating a presumption in favor of merger (i.e., in recognizing the occurrence of a set of circumstances (same time, parties, purpose, and transaction) as sufficiently probative to affirmatively tip the scales in favor of merger) while at the same time allowing that presumption to be completely overturned by evidence that is merely ambiguous, i.e., evidence that does not even go so far as to clearly indicate a contrary intention and, indeed, is actually still susceptible to a reasonable conclusion in favor of merger. *See S.C. Dep’t of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) (“A contract is ambiguous when the terms of the contract are *reasonably* susceptible of more than one interpretation.”) (emphasis added).

Respectfully, the Court’s finding against merger relies on improper speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding intent. The

¹² *Id.* at 407 S.C. at 355–56, 755 S.E.2d at 455 (“By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply. *Even if* the ‘Entirety’ clause creates an ambiguity as to merger, the law is clear that any ambiguity in such a clause is construed against the drafter, in this case, appellants.”) (emphasis added) (internal citation omitted); *see Nash v. Tindall Corp.*, 375 S.C. 36, 40–41, 650 S.E.2d 81, 83 (Ct. App. 2007) (“Judicial dicta is not essential to the decision. Dicta . . . is a statement on a matter not necessarily involved in the case, and is not binding as authority.”) (internal citations and quotations marks omitted).

¹³ To be clear, none of *Coleman*’s progeny has addressed this either.

presumption of merger arises from the concurrence of the four elements of time, parties, purpose, and transaction. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. This is why for the merger presumption to mean anything in practice it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). The merger presumption is “earned,” so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

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

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

In *Solesbee*, the Court of Appeals affirmed the denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as here¹⁴—although, most respectfully, the *Solesbee* Court (a) erred as to those aspects of the argument that it addressed¹⁵ and (b), in any event, did not actually address all material aspects of the argument, leaving gaps in the *Solesbee* decision through which the Facility’s position still fits. In affirming the denial of the motion to compel arbitration in *Solesbee*, the *Solesbee* Court likened that case to *Coleman* and *Hodge* and found that the circuit court had correctly determined that there was no merger of the Admission Agreement and the Arbitration Agreement and, in turn, had properly denied the Facility’s equitable estoppel argument. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149 (“Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and [the Facility’s] equitable estoppel argument was properly denied.”).¹⁶ Most respectfully, *Solesbee* should not control the disposition of the Underlying Motion.

First, the *Solesbee* Court erroneously found against merger on the basis that “the Admission Agreement provides it is governed by South Carolina law, and the Arbitration

¹⁴ Indeed, the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*.

¹⁵ While the Facility acknowledges that our Supreme Court denied certiorari in *Solesbee*, it would note that a writ of certiorari is not a matter of right but solely a matter of the Supreme Court’s discretion. Rule 242(b), SCACR (“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.”). In other words, by denying certiorari, the Supreme Court has only expressed its decision to exercise its discretion to not review the case. It has not implicitly blessed the *Solesbee* Court’s analysis as correct.

¹⁶ To be clear, Court of Appeals’ decision in *Solesbee* turned on its affirmance of the circuit court’s ruling against *merger* of the Arbitration Agreement and the Admission Agreement. Consequently, the *Solesbee* Court did not address the substance of the *equitable estoppel* prong of the merger/equitable estoppel argument.

Agreement provides it is governed by federal law.” It is not true that “the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law.”

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

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

(Arbitration Agreement.)

Without question, the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (the “FAA”), applies to the Arbitration Agreement,¹⁷ as it does “to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction”¹⁸—and this is so even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law. *See Southland Corp. v.*

¹⁷ 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 v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress’s power under the Commerce Clause); *id.* at 273–77 (1995) (explaining that unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce). And our Supreme Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

¹⁸ *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363.

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

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

Second, the *Solesbee* Court erroneously found against merger on the basis that “[t]he Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement ‘shall survive any termination or breach of this Agreement or the Admission Agreement.’” 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger here. Unlike in *Coleman* and *Hodge*, the supposed textual recognition of the Admission Agreement as being separate from the Arbitration Agreement is not included in any “Entire Agreement” provision. Rather, the “Entire Agreement” provision of the Admission Agreement expressly states, “other Admissions materials . . . are made a part of this Agreement by reference.” (Admission Agreement p. 12.) And as in the instant case, the Arbitration Agreement that was signed in conjunction with the admission is clearly among these “other Admissions materials.” Moreover, that the Arbitration Agreement “shall survive any termination or breach of this Agreement or the Admission Agreement” just means that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. Again, this is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. 2d at 612–13 (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

Third, the *Solesbee* Court erroneously found against merger on the basis that “[t]he Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, ‘Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.’” 438 S.C. at 649, 885 S.E.2d at 149. This provides no

reasonable inference of an intent contrary to merger. The absence of a “revocation” provision is one way in which the Arbitration Agreement is materially different from those at issue in *Coleman* and *Hodge*, and, for that matter, *Thompson*. Moreover, the *Solesbee* Court drew a false equivalency between the concept of “revocation” and that of “termination.” A “revocation” is an annulment (i.e., to make something a nullity),¹⁹ whereas “termination” is to put or bring something to an end—which is materially different from making something a nullity, i.e., void and never having properly existed in the first place. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. at 612–13.

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

¹⁹ *Black’s Law Dictionary* p. 1321 revocation (7th ed. 1999); *id.* at 89 annulment (“The act of nullifying or making void.”).

factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. Again, the very nature of *merger* is to *merge* separate documents.

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

To say that the Arbitration Agreement was not required for admission, which it was not, is not to say that it was not intended to be part of the admissions materials in the event it was agreed to, which it was, by Mr. Dover on Ms. Solesbee's behalf in *Solesbee* and by Michael on Mr. Bryan's behalf in the instant case. While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either

standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement's) sole reason for being. (See Arbitration Agreement (providing for arbitration of “any controversy or dispute between the parties arising out of or relating to Facility’s Admission Agreement, or breach thereof, or relating in any way to Resident’s stay at Facility, or to the provisions of care or services to Resident”); *id.* (“This [Arbitration] Agreement shall remain in effect for all care rendered at Facility”).)

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

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

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

The Facility’s merger/equitable estoppel argument is a standalone argument that does not depend on any showing of authority (actual or apparent or otherwise) on the part of Michael or otherwise on the existence of any per se valid and enforceable agreement between the parties.

Wilson v. Willis, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (“South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including . . . estoppel.”); *see also Coleman*, 407 S.C. at 354–55, 755 S.E.2d at 455 (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel); *id.* (explaining that “Appellants’ equitable estoppel argument,” which “[wa]s premised on [Appellants’] contention that, under state law, the admission agreements and the [arbitration agreements] merged,” as follows: “Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] . . . , she is nevertheless *equitably estopped to deny the [arbitration agreement’s] enforceability.*”) (emphasis added).

Conceptually, the Facility’s merger/equitable estoppel argument is *not* an argument *for the enforceability* of the Admission Agreement/Arbitration Agreement *but rather* an argument *for Mr. Bryan to be estopped to deny the enforceability* of the Admission Agreement/Arbitration Agreement. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Mr. Bryan having effectively embraced and directly benefitted from the Admission Agreement, he is now estopped to deny the enforceability not only of the Admission Agreement but also the Arbitration Agreement merged therewith.

Accordingly, as to the Facility’s merger/equitable estoppel argument, any contrary analysis regarding the Admission Agreement/Arbitration Agreement’s supposed lack of enforceability—e.g., that Michael lacked authority to sign the Admission Agreement/Arbitration Agreement on behalf of Mr. Bryan under the law of agency and/or under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80, and/or because Michael lacked power of attorney or guardianship over Mr. Bryan—is beside the point and unavailing to

refute it, which, again, turns not on the question of whether the Arbitration Agreement is enforceable but whether Mr. Bryan is estopped to deny its enforceability.

In *Wilson*, our Supreme Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals’ earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which the Facility contends Mr. Bryan is estopped from refusing to comply with the Arbitration Agreement here, where Mr. Bryan received direct benefits (in the form of his admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement was merged. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner’s alternative argument based on the application of the state’s “traditional” six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., “[t]he traditional test referenced by [the] [p]etitioners,” “has been analyzed most-often in *non*-arbitration cases”) (emphasis added).

Wilson supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration case like this, and it instructs that the key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability but whether benefits to the nonsignatory are direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 (“Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause. In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently maintained that other

provisions of the same contract should be enforced to benefit him. Stated another way, [u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement”) (internal citations and quotation marks omitted); *id.* at 343, 827 S.E.2d at 176 (“It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.”) (internal citations omitted).

Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration clause (which is the case here because the Admission Agreement and the Arbitration Agreement merge) while at the same time denying that the arbitration clause is enforceable. *See Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 (“To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.”) (citation and internal quotation marks omitted). As set forth in our Supreme Court’s controlling decision in *Wilson*, and consistent with this Court’s decision in *Pearson*, which the *Wilson* Court favorably cites, the essence of the test for direct benefits estoppel is simply whether the nonsignatory has exploited other parts of the contract by reaping its benefits. Indeed, to require more than this—or, in other words, to limit the applicability of direct benefits estoppel to only instances where the nonsignatory’s claim relies solely on the contract terms to impose liability—is to invite the very sort of have-your-

cake-and-eat-it-too inequity that the doctrine aims to prevent in the first place. Neither *Wilson* nor this Court's decision in *Pearson* nor general notions of equity countenance,²⁰ much less call for, such a result.

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

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Mr. Bryan received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein. Respectfully, the Court should have found that the Arbitration Agreement merged with the Admission Agreement and that Mr. Bryan is estopped to deny the Admission Agreement/Arbitration Agreement's enforceability, Mr. Bryan having effectively embraced the contract with the Facility for the purpose of his admission and receipt of the benefits thereof.²¹

WHEREFORE, for the foregoing reasons (and, again, for that matter, for all of the reasons previously advanced to the Court in and in support of the Underlying Motion (both those advanced in writing and those advanced via oral argument), all of which the Facility incorporates by reference herein and asks the Court to (re)consider and expressly rule upon in full), the

²⁰ See *Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) (“Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible.”).

²¹ To be clear, although the dispute here is about the Arbitration Agreement, as opposed to the Admission Agreement, to the extent there were any question about the enforceability of the Admission Agreement, the Facility's equitable estoppel argument applies with equal force to the Admission Agreement.

Facility asks that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Underlying Motion.

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

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines
D. Jay Davis, Jr. (SC Bar No. 12084)
jdavis@ycrlaw.com
James D. Gandy III (SC State Bar No. 11925)
tgandy@ycrlaw.com
Russell G. Hines (SC State Bar No. 72100)
rhines@ycrlaw.com
T. Ashton Phillips III (SC State Bar No. 104227)
aphillips@ycrlaw.com
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5406
Attorneys for Defendant

Charleston, South Carolina

December 23, 2024

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2024CP1003732

Joe Bryan
PLAINTIFF(S)

Thi Of South Carolina At Charleson Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

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

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

Defendant filed a Motion to Alter, Amend, and/or Reconsider with this Court on December 23rd, 2024. "The purpose of Rule 59(e), SCRPC, 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 Defendant's motion without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRPC; 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 01/09/2025 .

EXHIBIT

9

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.



Charleston Common Pleas

Case Caption: Joe Bryan VS Thi Of South Carolina At Charleson Llc , defendant, et al
Case Number: 2024CP1003732
Type: Order/Electronic Form 4

So Ordered

s/Jennifer B. McCoy #2764

The South Carolina Court of Appeals

Thomas D. Kilpatrick as Special Administrator for the
Estate of Anthony Lemon, Respondent,

v.

Pruitthealth-Ridgeway, LLC f/k/a Unihealth Post-Acute
Care-Tanglewood, LLC, United Health Services of South
Carolina, Inc., Pruitthealth Consulting Services, Inc.,
Pruitthealth Therapy Services, Inc. f/k/a United Rehab,
Inc., Pruitthealth, Inc., Neil Pruitt, Jr., THI of South
Carolina at Columbia, LLC d/b/a Midlands Health and
Rehabilitation Center, THI of South Carolina, LLC,
Fundamental Clinical and Operational Services, LLC,
Fundamental Clinical Consulting, LLC, Fundamental
Long Term Care Holdings, Inc., Fundamental
Administrative Services, LLC, and Hunt Valley
Holdings, LLC, Defendants,

Of which THI of South Carolina at Columbia, LLC d/b/a
Midlands Health and Rehabilitation Center, THI of South
Carolina, LLC, Fundamental Clinical and Operational
Services, LLC, Fundamental Administrative Services,
LLC, and Hunt Valley Holdings, LLC are the Appellants.

Appellate Case No. 2024-000596

ORDER

EXHIBIT

10

Respondent moved to dismiss this appeal, for sanctions, and for attorney's fees and costs. Respondent argues this appeal is frivolous, has been taken solely for the purpose of delay, and is unsupported by precedent substantiating Appellants' arguments. Appellants filed a return, opposing dismissal, the imposition of sanctions, and the awarding of costs. Appellants argue the appeal is not frivolous and has not been taken for the purpose of delay. Appellants submit the one

published case cited by Respondent either was wrongly decided or does not control the instant appeal. After careful consideration, we deny Respondent's motion to dismiss. Further, we deny Respondent's motion for sanctions because we do not believe this appeal is frivolous or has been taken solely for the purpose of delay. *See* Rule 269, SCACR ("Where an appeal, petition, motion[,] or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require."). To the extent Respondent requests attorney's fees and costs separate from its request for sanctions, we deny the request as premature. *See* Rule 222, SCACR ("A party desiring costs to be taxed shall, within fifteen (15) days of the issuance of the remittitur, serve and file a motion requesting that costs be assessed under this Rule.").



FOR THE COURT

Columbia, South Carolina

FILED
Jan 24 2025

cc:

Neil Edward Alger, Esquire
Russell Grainger Hines, Esquire
Donald Jay Davis, Jr., Esquire
Stephen Lynwood Brown, Esquire
Matthew Oliver Riddle, Esquire
John Elliott Parker, Jr., Esquire
Gaillard Townsend Dotterer, III, Esquire

The South Carolina Court of Appeals

Beverly Calloway, as Personal Representative of the
Estate of Hattie Admore, Respondent,

v.

Oakbrook Healthcare, LLC, d/b/a Oakbrook Health and
Rehabilitation Center and Patricia Castle, Appellants.

Appellate Case No. 2024-000910

ORDER

EXHIBIT

11

Respondent moved to dismiss this appeal, for sanctions, and for attorney's fees and costs. Respondent argues this appeal is frivolous, has been taken solely for the purpose of delay, and is unsupported by precedent substantiating Appellants' arguments. Appellants filed a return, opposing dismissal, the imposition of sanctions, and the awarding of costs. Appellants argue the appeal is not frivolous and has not been taken for the purpose of delay. Appellants submit the one published case cited by Respondent either was wrongly decided or does not control the instant appeal. Respondent also filed a reply. After careful consideration, we deny Respondent's motion to dismiss. Further, we deny Respondent's motion for sanctions because we do not believe this appeal is frivolous or has been taken solely for the purpose of delay. *See* Rule 269, SCACR ("Where an appeal, petition, motion[,], or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require."). To the extent Respondent requests attorney's fees and costs separate from its request for sanctions, we deny the request as premature. *See* Rule 222, SCACR ("A party desiring costs to be taxed shall, within fifteen (15) days of the issuance of the remittitur, serve and file a motion requesting that costs be assessed under this Rule.").



FOR THE COURT

Columbia, South Carolina

cc:

Lee Deer Cope, Esquire

Margie Bright Matthews, Esquire

Stephen Lynwood Brown, Esquire

Donald Jay Davis, Jr., Esquire

James D. Gandy, III, Esquire

Ted Ashton Phillips, III, Esquire

Russell Grainger Hines, Esquire

John Elliott Parker, Jr., Esquire

FILED
Mar 05 2025

The South Carolina Court of Appeals

Kevin White, as Personal Representative of the Estate of
Mary Brisbon, Respondent,

v.

St. George Healthcare, LLC, d/b/a St. George Healthcare
Center and Vicki Sides, Appellants.

Appellate Case No. 2024-000914

ORDER

EXHIBIT

12

Respondent moved to dismiss this appeal, for sanctions, and for attorney's fees and costs. Respondent argues this appeal is frivolous, has been taken solely for the purpose of delay, and is unsupported by precedent substantiating Appellants' arguments. Appellants filed a return, opposing dismissal, the imposition of sanctions, and the awarding of costs. Appellants argue the appeal is not frivolous and has not been taken for the purpose of delay. Appellants submit the one published case cited by Respondent either was wrongly decided or does not control the instant appeal. Respondent also filed a reply. After careful consideration, we deny Respondent's motion to dismiss. Further, we deny Respondent's motion for sanctions because we do not believe this appeal is frivolous or has been taken solely for the purpose of delay. *See* Rule 269, SCACR ("Where an appeal, petition, motion[,], or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require."). To the extent Respondent requests attorney's fees and costs separate from its request for sanctions, we deny the request as premature. *See* Rule 222, SCACR ("A party desiring costs to be taxed shall, within fifteen (15) days of the issuance of the remittitur, serve and file a motion requesting that costs be assessed under this Rule.").


FOR THE COURT

Columbia, South Carolina

cc:

Lee Deer Cope, Esquire
Margie Bright Matthews, Esquire
Stephen Lynwood Brown, Esquire
Donald Jay Davis, Jr., Esquire
Matthew Oliver Riddle, Esquire
Ted Ashton Phillips, III, Esquire
Russell Grainger Hines, Esquire
John Elliott Parker, Jr., Esquire

FILED
Feb 04 2025

RECEIVED

Aug 07 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

Case No. 2024-CP-10-03732
Appellate Case No. 2025-000237

Joe Bryan,

Respondent,

v.

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

Appellant.

PROOF OF SERVICE

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis Jr. (SC Bar No. 12084)
James D. Gandy III (SC Bar No. 11925)
T. Ashton Phillips III (SC Bar No. 104227)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
P.O. Box 993 (29402)
Charleston, South Carolina 29401
(843) 720-5488

Attorneys for Appellant

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellant, hereby certify that the **APPELLANT’S RETURN TO MOTION TO DISMISS APPEAL** was served on Respondent on August 7, 2025, by emailing (see attached email) a copy of the same to Respondent’s counsel of record:

Samuel R. Clawson Jr., Esquire
sam@cfulaw.com
Christy R. Fagnoli, Esquire
christy@cfulaw.com
Bert G. Utsey III, Esquire
bert@cfulaw.com
Laura K. Wilkes-D’Amato, Esquire
laura@cfulaw.com
CLAWSON FARGNOLI UTSEY, LLC
Attorneys for Respondent

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Russell G. Hines (SC Bar No. 72100)
Attorneys for Appellant

Charleston, South Carolina

August 7, 2025

Hines, Russell

From: Hines, Russell
Sent: Thursday, August 7, 2025 5:59 PM
To: Sam Clawson; Christy Fagnoli; Bert Utsey; Laura Wilkes-D'Amato
Cc: Brown, Stephen L.; Davis, Jay; Gandy, III, James D. (Tripp); Phillips, Ashton; Justman, Aimee; Bell, Pollyana (Polly); Peterson, Susan
Subject: Bryan v. THI (2025-000237) -- Return to Motion to Dismiss
Attachments: Bryan v. THI (2025-000237) -- Return to Motion to Dismiss.pdf; Ex. 1 -- Adm. Agmt. Sig Page & Form.pdf; Ex. 2 -- Arb. Agmt.pdf; Ex. 3 -- Summons & Compl.pdf; Ex. 4 -- Def.'s Answer to Compl.pdf; Ex. 5 -- Motion to Compel Arbitration.pdf; Ex. 6 -- Motion Hearing Transcript.pdf; Ex. 7 -- Order Denying MTCA.pdf; Ex. 8 -- Def.'s Motion to Reconsider.pdf; Ex. 9 -- Order Denying MTR.pdf; Ex. 10 -- Kilpatrick Order Denying Motion to Dismiss Appeal.pdf; Ex. 11 -- Calloway Order Denying Motion to Dismiss Appeal.pdf; Ex. 12 -- White Order Denying Motion to Dismiss Appeal.pdf

Attached for service in the above-referenced matter please find **Appellant's Return to Motion to Dismiss Appeal**.

Russell G. Hines
CLEMENT RIVERS, LLP
www.ycrlaw.com
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
Phone: (843) 720-5488
Fax: (843) 579-1327
Email: rhines@ycrlaw.com



CLEMENT RIVERS, LLP
25 Calhoun Street • Suite 400 • Charleston, SC 29401
ycrlaw.com