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SC Court of Appeals

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

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2021-CP-10-02744

Appellate Case No. 2025-000286

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

Respondent,

v.

Fundamental Administrative Services, LLC,
Fundamental Clinical and Operational Services, LLC, and
Jerrolyn Montgomery-Small,

Appellants.

**RECORD ON APPEAL
VOLUME I
(PAGES 1-349)**

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

Attorneys for Respondent

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Matthew O. Riddle (SC Bar No. 76650)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
P.O. Box 993 (29402)
Charleston, South Carolina 29401
(843) 720-5488

Attorneys for Appellants

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASES NO. 2021-CP-10-01437 & -02477

WILLIAM HAYNES,
as Personal Representative of the
Estate of Elizabeth Varner,
Plaintiff,

vs.

THI OF SOUTH CAROLINA AT
CHARLESTON, LLC d/b/a
Riverside Health and Rehab,
Defendant.

**ORDER GRANTING
MOTIONS TO COMPEL ARBITRATION
AND RELATED MOTIONS TO STAY**

WILLIAM HAYNES,
as Personal Representative of the
Estate of Elizabeth Varner,
Plaintiff,

vs.

FUNDAMENTAL ADMINISTRATIVE
SERVICES, LLC; FUNDAMENTAL
CLINICAL AND OPERATIONAL
SERVICES, LLC; and JERROLYN
MONTGOMERY-SMALLS,
Defendants.

This matter is before the Court on four motions (collectively, the “Subject Motions”): one motion in Case 1437¹, namely, the Facility’s² motion to compel arbitration, and three motions in

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

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

Case 2477³, namely, Ms. Montgomery-Small's⁴ motion to compel arbitration and FAS⁵ and FCOS's⁶ motions to stay. All of the Subject Motions were filed on October 4, 2021, and they were all heard together on February 10, 2022, with all parties' respective counsel appearing before the Court via WebEx.

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

I.

BACKGROUND

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

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

⁴ "Ms. Montgomery-Small's" is Jerrolyn Montgomery-Small's, one of the defendants in Case 2477.

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

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

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

Plaintiff⁷ filed Case 1437 and Case 2477 on March 25, 2021, and June 11, 2021, respectively, asserting claims arising out of alleged deficiencies in Ms. Varner’s care/treatment at the Facility. As for the relationship between the subject matter of the two cases, although Plaintiff ended up withdrawing the motion, his motion to consolidate (filed in Case 2477 on August 16, 2021) states that Case 1437 and Case 2477 “concern the same underlying facts and have factual and legal questions in common.”

Defendants⁸ timely answered the respective lawsuits, subject to and without waiving any right to compel the matter to arbitration, denying the liability Plaintiff alleged and raising a number of affirmative defenses.

⁷ “Plaintiff” is William in his capacity as personal representative of Ms. Varner’s estate, who is the plaintiff in both Case 1437 and Case 2477.

⁸ “Defendants” are the Facility, FAS, FCOS, and Ms. Montgomery-Small, collectively.

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

II.

ANALYSIS

A. **Re: the Motions to Compel Arbitration**

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

1. **Both state and federal policy favor arbitration.**

There is a "strong South Carolina and federal policy favoring arbitration" *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 877 (Ct. App. 2020); *see also Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016) ("The policy of the United States and of South Carolina is to favor arbitration of disputes."). Indeed,

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

2. The Arbitration Agreement is governed by the FAA⁹.

The Arbitration Agreement is governed by the FAA, not South Carolina’s Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10 to -240 (the “SCAA”). For one reason, the Arbitration Agreement expressly states that the FAA applies:

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

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

Moreover, and in any event, the FAA applies “to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363; *see also Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress’s power under the Commerce Clause). Our

⁹ The “FAA” is the Federal Arbitration Act, 9 U.S.C §§ 1–16.

Supreme Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

3. The FAA requires arbitration agreements to be placed on equal footing with all other contracts under South Carolina law.

“[T]he basic purpose of the [FAA] is to overcome courts’ refusals to enforce agreements to arbitrate”¹⁰ and “ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement.” *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). To that end, the FAA provides that an arbitration agreement is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. “By its terms, the [FAA] leaves no place for the exercise of discretion by a . . . court, but instead *mandates* that . . . courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis added); *see also* 9 U.S.C. § 4 (“The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.*”) (emphasis added).

While a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not do so based on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (citing *AT&T Mobility LLC v.*

¹⁰ *Allied–Bruce*, 513 U.S. at 270.

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

4. The Arbitration Agreement is valid on its face.

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

¹¹ To be clear, what the FAA requires is for arbitration agreements to be placed on *at least* equal footing with all other contracts under state law. As explained above, both state and federal policy *favor* arbitration. The FAA prohibits arbitration agreements from being singled out for *disfavored* treatment relative to other contracts, but it does not prohibit the *favored* treatment of arbitration agreements relative to other contracts.

¹² By virtue of her signature, Kim is “presumed to have read, understood, and assented to [the] terms” of the Arbitration Agreement, *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) (“[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.”), including, of course, the express representation therein of her authority to act on Ms. Varner’s behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract, *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (“There exists in every contract an implied covenant of good faith and fair dealing.”), and Kim is no less bound by this covenant than the Facility.

defined scope of disputes to binding arbitration¹³ before an arbitrator who is either agreed upon by the parties themselves or selected by the Court, in a proceeding to be conducted pursuant to the South Carolina ADR Rules, which will result in a decision that is enforceable in a court of competent jurisdiction.¹⁴ To require more just because an arbitration agreement is in issue would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *Concepcion*, 563 U.S. at 339.

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

The first part of the test (absence of meaningful choice) is undermined by the express acknowledgement in the Arbitration Agreement itself that the "Resident/Representative is not required to use the . . . Facility for Resident's healthcare needs and . . . there are numerous other health care providers in the State where Facility is located that are qualified to provide such care to Resident." It is further undermined by the fact that the Arbitration Agreement itself was not required for admission to the Facility.

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

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

But even assuming, *arguendo*, the first part of the test were somehow met, the second part (unreasonably oppressive terms) certainly is not. The Arbitration Agreement simply binds the parties (both sides) to resolve disputes via arbitration, which is something that is expressly favored as a matter of both state and federal policy. *Parsons*, 418 S.C. at 6, 791 S.E.2d at 131; *Doe*, 430 S.C. at 607, 846 S.E.2d at 877. And there is nothing about the Arbitration Agreement—which, again, calls for arbitration conducted pursuant to the South Carolina ADR Rules—that would suggest it is not geared towards achieving an unbiased decision by a neutral decision-maker. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668 (“In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.”). Indeed, Rule 1 of the South Carolina ADR Rules expressly states, “These rules shall be construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply.”

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

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

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

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

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

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

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

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

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

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

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

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

“South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel.” *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (confirming the validity of the general proposition of law on which the appellants based their merger/equitable estoppel argument: “Appellants’ equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. . . . Here, the documents were executed at the same time, by the same parties, for the same purposes, and in the

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

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

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

Merger

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

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

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

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

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

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

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

The merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”¹⁵ as undoubtedly the Admission Agreement and the Arbitration Agreement were here,¹⁶ evidence exists to upset the presumption in favor of merger, i.e., the presumption that the contracting parties intended the instruments to be construed together as effectively one contract. This is a question of the parties’ intention. *Id.* at 355, 755 S.E.2d at 455 (“in the absence of anything indicating a contrary *intention . . .*”) (emphasis added). And “in attempting to ascertain th[e] [parties’] intention,” courts “endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into.” *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

¹⁵ *Id.* at 355, 755 S.E.2d at 455.

¹⁶ As the *Coleman* Court expressly observed regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), “the documents were [indeed] executed at *the same time, by the same parties, for the same purposes, and in the course of the same transaction.*” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

It must be remembered that, where, as here, the instruments in question (i.e., the Admission Agreement and the Arbitration Agreement) were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For this presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the circumstances that gave rise to the merger presumption in the first place (same time, parties, purpose, and transaction)—can support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). No such inference can be drawn here.

Although the Admission Agreement does contain an “Entire Agreement” clause, it does not refer to the Arbitration Agreement as a separate contract but rather expressly states, “other Admissions materials . . . are made a part of this Agreement by reference herein.” Clearly, the Arbitration Agreement is among these other admissions materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) (recognizing “admission documentation” to include an arbitration agreement: “The same day as Decedent’s admission to White Oak, Stott, acting as Decedent’s authorized representative, signed White Oak’s *admission documentation—including the Arbitration Agreement*.”) (emphasis added) (internal footnote omitted). This directly contradicts the notion of any intended “separatedness” (in the parlance of the *Coleman* Court¹⁷) between the Admission Agreement and the Arbitration Agreement.

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

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

Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement). While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. Unlike the Admission Agreement, which theoretically could have stood on its own in the absence of the Arbitration Agreement—and, of course, had the Arbitration Agreement not been executed, it simply would not exist and no question of merger would have arisen to begin with—the Arbitration Agreement could not have stood on its own: It only makes sense together with, i.e., connected to, the Admission Agreement, which is its sole reason for being.

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

merger. To point to such things is to do no more than to observe that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

And even assuming, *arguendo*, there is some ambiguity in this regard, to fall back on the idea that it should be construed against the Facility as the drafter is uncalled for in this context. *Merger is the default position*, i.e., it is presumed, and this is so because of the confluence of a particular set of circumstances—the instruments at issue were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these stars align—same time, same parties, same purpose, same transaction—our law instructs the Court to consider and construe the instruments together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger presumption to be upset based on evidence that is merely ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention, but at most might (or might not) reflect a contrary intention—is to allow the exception to devour the rule.

Equitable Estoppel

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

the direct benefits test our Supreme Court endorsed in *Wilson*. See 426 S.C. at 340, 827 S.E.2d at 175 (“Under direct benefits estoppel, ‘[a] nonsignatory is estopped from refusing to comply with an arbitration clause ‘when [the nonsignatory] receives a direct benefit from a contract containing an arbitration clause.’”) (quoting *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012)) (quoting *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)); *id.* (““In the arbitration context, the doctrine [of direct benefits estoppel] recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause *when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.*”) (emphasis in original) (quoting *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601) (quoting *Int’l Paper*, 206 F.3d at 418).

The *Wilson* Court favorably discussed the application of the direct benefits test in the arbitration agreement context—the Court of Appeals having applied the test in the decision then before the *Wilson* Court on writ of certiorari, which test the Court of Appeals had earlier applied to find a nonsignatory estopped to deny the validity of an arbitration agreement in *Pearson*, 400 S.C. 281, 733 S.E.2d 597, and under which test the Facility and Ms. Montgomery-Small contend Plaintiff is estopped to deny the validity of the Arbitration Agreement here. See *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; see also *id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner’s alternative argument based on the application of the state’s “traditional” six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., “[t]he traditional test referenced by [the] [p]etitioners,” “has been analyzed most-often in *non*-arbitration cases”) (emphasis added).

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

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

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

B. Re: the Motions to Stay

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

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

III.

CONCLUSION

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

IT IS SO ORDERED.

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

Charleston, South Carolina

Dated: _____



Charleston Common Pleas

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

Case Number: 2021CP1001437

Type: Order/Compel

It is so ordered.

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

Electronically signed on 2022-02-24 10:44:26 page 21 of 21

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Plaintiff,

v.

Fundamental Administrative Services LLC,
And Fundamental Clinical and Operational
Services, LLC, and Jerrolyn Montgomery-
Smalls.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2021-CP-10-01754 & 10-02744

**ORDER DENYING MOTION FOR
RECONSIDERATION PURSUANT TO
RULE 59(e)**

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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

Plaintiff,

v.

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

Defendant.

The Plaintiff filed a motion asking this Court to reconsider its Order dated February 24, 2022 granting Defendants' Motions to Stay and Compel Arbitration. Specifically, Plaintiff asks this Court to reconsider the order and argues that the Arbitration Agreement is unenforceable for multiple reasons and that the Stays are improper under the Federal Arbitration Act. For the reasons set forth below, the motion to reconsider is DENIED.

STANDARD OF REVIEW

Motions for reconsideration will not be granted absent “highly unusual circumstances.” U.S. ex rel. Becker v. Washington Savannah River Co., 305 F.3d 284, 290 (4th Cir. 2002) (stating that simple disagreements with the court’s ruling will not support Rule 59(e) relief).¹ Courts have recognized three circumstances in which a court should grant a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Importantly, a motion for reconsideration is not a vehicle to re-litigate previously raised issues or “to raise argument or present evidence that could have been presented prior to the entry of judgment.” Dash v. Mayweather, C/A No. 3:10-1036-JFA, 2010 U.S. Dist. LEXIS 95277, *2 (D.S.C. Sept. 13, 2010) (quoting Exxon Shipping Co. v. Baker, 554 U.S. 471, n.5 (2008)). In other words, “[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.” Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Nor does “[a] party’s mere disagreement with the court’s ruling . . . warrant a Rule 59(e) motion.” In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prods. Liab. Litig., 269 F.Supp. 3d 685, 691 (D.S.C. 2017); *see also* Lyons v. Fid. Nat’l Title Ins. Co., 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015).

After consideration of the issues raised in the parties’ memorandums, Plaintiff’s Motion to Reconsider pursuant to Rule 59(e) is DENIED.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE TO FOLLOW

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



Charleston Common Pleas

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

Case Number: 2021CP1001437

Type: Order/Other

It is so ordered.

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

Electronically signed on 2022-03-23 15:58:59 page 3 of 3

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
WILLIAM HAYNES, AS PERSONAL
REPRESENTATIVE OF THE ESTATE
OF ELIZABETH VARNER,

PLAINTIFF,

vs.

THI OF SOUTH CAROLINA AT
CHARLESTON, LLC D/B/A
RIVERSIDE HEALTH AND REHAB
AND JERROLYN MONTGOMERY-
SMALLS,

DEFENDANTS.

IN THE MATTER OF ARBITRATION

ARBITRATION ORDER

It appearing that the Honorable Doyet A. Early, III has been appointed and agreed to serve as arbitrator in this case, and that the above parties have agreed and stipulated to the following items herein, it is hereby ordered as follows:

1. Judge Early shall serve as the arbitrator of the claims and defenses raised in the complaint and answer filed in the above state court matter.
2. The arbitrator shall be paid \$350 per hour plus his costs and these shall be split equally between the parties.
3. Judge Early shall be accorded judicial immunity in relation to his role as arbitrator in this matter.
4. The parties will conduct reasonable discovery that is reasonably tailored to the issues of the claim. The parties agree that the arbitrator can look to the South Carolina Rules of Civil Procedure and Evidence for guidance in resolving any disputes between the parties related to procedure or discovery.

WKE
#1

STP
WKE

5. Plaintiff shall provide an executed HIPAA authorization/release form for medical records to Defendant by September 9, 2022.

6. The parties shall produce to the other side any record they intend to use in the arbitration of this matter or with the examination of any witness to be deposed. Said records shall be produced on or before March 20, 2023, or three days prior to any scheduled deposition, if the documents are to be used in deposition.

7. Plaintiff agrees to provide medical records and bills for the resident and Defendant agrees to provide a copy of the facility chart for the resident including any bills for the resident.

8. All records and documents produced in this matter will be held confidential and only be used for purposes of this arbitration. The parties agree to return, upon written request, any documents produced to them during this arbitration at the conclusion of the arbitration and related appeals, if any. In the absence of any such request for return, the parties agree to destroy all such documents as soon as reasonably practicable and as permitted under applicable law following the conclusion of the arbitration and related appeals, if any. The parties and arbitrator agree that the proceeding, any related discovery, and the decision of the arbitrator shall be treated as confidential. However, during the course of the arbitration of this matter, records and documents may be shared with expert witnesses or other witnesses so long as they are advised of the confidentiality and the person's agreement to be bound to the confidentiality stipulation herein.

9. Plaintiff will disclose his experts by September 12, 2022 and will make those experts available for deposition on or before October 1, 2023.

10. Defendant will disclose its experts by October 20, 2023 and will make those experts available for deposition on or before November 20, 2022.

ME
#2

STP/mae

11. The parties shall bear the costs of their own expert witness fees and all costs related to the preparation for their experts' depositions, as well as the preparation and presentation of their respective cases at the arbitration hearing. Opposing counsel shall bear the costs of expert witness fees incurred for time during expert depositions.

12. Should any disputes arise regarding depositions, discovery, or any other related discovery matters, the parties agree to submit to the arbitrator for resolution. Any dispute regarding these depositions, discovery, or any other related discovery matters, shall be resolved by the arbitrator pursuant to the South Carolina Rules of Civil Procedure, South Carolina law, and the FAA.

13. Subject to the limitations and deadlines set herein, the parties may pursue discovery through the latter of March 20, 2023 or by consent at any time.

14. The parties agree to exchange a list of witnesses to be called live or by deposition at the hearing and a list of any exhibits to be used at the arbitration hearing ten (10) business days in advance of the hearing.

15. The parties may submit pre-hearing briefs to the arbitrator, so long as copies are served on opposing counsel at the same time.

16. On or before March 20, 2023, the parties will have a conference with the arbitrator prior to trial to agree upon the procedures applicable to the arbitration.

17. The parties may agree to amend any deadline, provision, or conduct additional discovery by consent.

18. Arbitration shall be conducted the week of April 3, 2023.

19. The arbitrator shall issue written findings of fact or conclusions of law.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

TRAC
#3

STP/ma

9-15-22
AND IT IS SO ORDERED
DEE Early III
The Honorable Doyet E. Early, III

We Consent:

PINKSTON LAW FIRM, LLC

By: Shawn Pinkston
Shawn Pinkston
856 Lowcountry Blvd., Suite 101
Mount Pleasant, South Carolina 29464
Office: 843-814-5472
Fax: 843-723-7300
shawnpinkston@me.com
Attorney for the Plaintiff

We Consent:

CLEMENT RIVERS, LLP

By: D. Jay Davis, Jr.
D. Jay Davis, Jr.
James D. Gandy
Matthew O. Riddle
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com; tgandy@ycrlaw.com; mriddle@ycrlaw.com
CLEMENT RIVERS, LLP
*Attorneys for Defendants THI of South Carolina, LLC d/b/a Riverside Health and Rehab and
Jerrolyn Montgomery-Small*

State of South Carolina)
) Arbitration Order
County of Charleston.)

William Hayes, as Personal Representative
of the Estate of Elizabeth Varner, Plaintiff.

vs.

THI of South Carolina at Charleston LLC
D/B/A Riverside Health and Rehab and
Jerrolyn Montgomery-Small, Defendants.

By order of the Honorable Roger M. Young, Sr. this case was to be decided by arbitration. By Arbitration Order dated September 15, 2022, the parties agreed I would serve as Arbitrator. The arbitration was conducted on April 3, 2023 and concluded on April 6, 2023. All parties were present and represented by counsel. Each side presented fact and expert witnesses in support of their respective claims and defenses. A complete copy of the relevant medical records were introduced into the proceeding.

Notwithstanding section 19 of the Arbitration Order which required me to issue written findings of facts or conclusions of law, the parties by agreement requested a succinct order without these findings.

I find the Plaintiff proved by the preponderance of the evidence the defendant, THI, breached the standard of care in regards to the manner in which they transferred Mrs.

Varner, failing to comply with the care plan they had ordered for her. This deviation was the proximate cause of the fracture she sustained to her distal femur and the medical care and surgery necessitated by the fracture.

Her estate is entitled to the reasonable and necessary medical expenses associated with the fracture. The evidence proved \$77,007.00 of medical expenses related to the fracture. The only other evidence of compensable damages was for pain and suffering from the fracture. Because of her deteriorated medical condition there was no evidence of loss of enjoyment of life or emotional distress. It was difficult to differentiate between pain and suffering caused by the fracture and her overall condition. The fracture occurred on or about October 6, 2019 and she suffered with it until her cardiac arrest on or about October 27, 2019. I award Plaintiff \$10,000.00 for pain and suffering.

I find the Plaintiff failed to prove by the preponderance of the evidence Mrs. Varner's cardiac arrest and death were proximately caused by the fracture.

I find the Plaintiff failed to prove by clear and convincing evidence that any of the defendants acted reckless, willful or with a conscious disregard of Mrs. Varner's care, therefore I award no punitive damages.

IT IS THEREFORE ORDERED Plaintiff is awarded judgement against the defendant THI of South Carolina at Charleston LLC D/B/A Riverside Health and Rehab in the amount of \$87,007.00.

D.A. Early III
Arbitrator

May16,2023

-----Original Message-----

From: Jack Early <jackearly1@gmail.com>

Sent: Friday, May 26, 2023 10:51 AM

To: Riddle, Matthew <MRiddle@ycrlaw.com>; shawnpinkston@me.com

Subject: State of South Carolina).

State of South Carolina).

Supplemental

) Arbitration Order

County of Charleston.)

William Hayes, as Personal Representative of the Estate of Elizabeth Varner, Plaintiff.

vs.

THI of South Carolina at Charleston LLC

D/B/A Riverside Health and Rehab and

Jerrolyn Montgomery-Small, Defendants.

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I find the Plaintiff failed to prove by clear and convincing evidence that any of the defendants acted reckless, willful or with a conscious disregard of Mrs. Varner's care, therefore I award no punitive damages.

IT IS THEREFORE ORDERED Plaintiff is awarded judgement against the defendant THI of South Carolina at Charleston LLC D/B/A Riverside Health and Rehab in the amount of \$87,007.00.

D.A. Early III

Arbitrator

May 16, 2023

Subsequent to issuing the original order, the parties requested a specific finding of liability as to the defendant, Jerrolyn Montgomery-Small.

I find the Plaintiff failed to prove by the preponderance of the evidence that defendant Montgomery-Small deviated from the standard of care in her care of or investigation of the fall.

Therefore Plaintiff is not entitled to judgement against Jerrolyn Montgomery-Small.

D.A. Early III

May 26, 2023

ROA 032

Sent from my iPad

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

THIS MATTER is before the Court on a Petition for a Final Order filed by Plaintiff.

Based on the Petition and the proof of ADR submitted on May 23, 2023, this Court hereby enters and incorporates by reference the Confidential Arbitration Order issued by Doyet A. Early, III, on May 16, 2023.

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

AND IT IS SO ORDERED.

[Electronic Signature Page to Follow]



Charleston Common Pleas

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

Case Number: 2021CP1001437

Type: Order/Other

It is so ordered.

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

Electronically signed on 2024-02-12 11:02:17 page 3 of 3

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1002744

William Haynes et al
PLAINTIFF(S)

Fundamental Administrative Services Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), 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:

This matter came before the Court for a hearing on 9/11/2024. The plaintiff was represented by Shawn Travis Pinkston and the defendants were represented by Matthew Oliver Riddle. After hearing arguments from the parties and reviewing the filings in the case, the Court makes the following rulings. Defendants' motion for summary judgment is Denied. Plaintiff's motion to compel discovery is Granted and the Defendants are ordered to comply with discovery within 30 days. Plaintiff's motion for sanctions is Denied. Defendants' motion to seal the record of the proceedings under Rule 41.1 is Denied. Defendants' motion for a protective order until the dispositive summary judgment motion is ruled upon is Granted.

It Is So Ordered.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 09/20/2024 .

Williams Haynes Personal Representative
Elizabeth Varner Estate

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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



Charleston Common Pleas

Case Caption: William Haynes , plaintiff, et al VS Fundamental Administrative Services Llc , defendant, et al

Case Number: 2021CP1002744

Type: Order/Electronic Form 4

So Ordered

William C. McMaster, III

Electronically signed on 2024-09-20 15:33:14 page 3 of 3

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1002744

William Haynes et al
PLAINTIFF(S)

Fundamental Administrative Services Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

After careful consideration and review of the filings in this case, Defendants' Motion for Reconsideration is Denied.

It Is So Ordered.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 10/04/2024 .

Williams Haynes Personal Representative
Elizabeth Varner Estate

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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



Charleston Common Pleas

Case Caption: William Haynes , plaintiff, et al VS Fundamental Administrative Services Llc , defendant, et al

Case Number: 2021CP1002744

Type: Order/Electronic Form 4

So Ordered

William C. McMaster, III

Electronically signed on 2024-10-04 10:50:20 page 3 of 3

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1002744

William Haynes et al
PLAINTIFF(S)

Fundamental Administrative Services Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), 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:

This matter came before the Court for a hearing on January 27, 2025 on Plaintiff's Notice of Rule to Show Cause, filed October 22, 2024, and Defendants' Motion to Compel Arbitration and Stay Proceedings, filed November 14, 2024. This court hereby DENIES Defendants' motion. With regards to Plaintiff's motion, this court hereby GRANTS Plaintiff's Rule to Show Cause but does not reward sanctions at this time. Defendant has fifteen (15) days from the date of this order to submit discovery responses.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 02/03/2025 .

Williams Haynes Personal Representative
Elizabeth Varner Estate

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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Charleston Common Pleas

Case Caption: William Haynes , plaintiff, et al VS Fundamental Administrative Services Llc , defendant, et al

Case Number: 2021CP1002744

Type: Order/Electronic Form 4

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2025-02-03 11:37:26 page 3 of 3

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1002744

William Haynes et al
PLAINTIFF(S)

Fundamental Administrative Services Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

Defendants filed a Motion to Alter, Amend, and/or Reconsider Judge McCoy's 2/3/2025 order with this Court on 2/4/2025. "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). This court hereby DENIES Defendants' motion without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 401-02, 444 S.E.2d 534, 536 (Ct. App. 1994).

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 02/07/2025 .

Williams Haynes Personal Representative
Elizabeth Varner Estate

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: William Haynes , plaintiff, et al VS Fundamental Administrative Services Llc , defendant, et al

Case Number: 2021CP1002744

Type: Order/Electronic Form 4

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2025-02-07 11:47:37 page 3 of 3

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

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to this Complaint to the below named subscriber at his office, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

PINKSTON LAW FIRM, LLC

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

Mount Pleasant, South Carolina

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

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

1. Williams Haynes, as the Personal Representative of the Estate of Elizabeth Varner, is a resident of the County of Berkeley, State of South Carolina.
2. Based on information and belief, Defendant THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab, (“Defendant”), is a corporation organized and existing under the laws of the State of Delaware and at all times relevant herein, conducted business in Charleston County through its agents, contractors, and employees for the purpose of carrying on its business as a healthcare facility and providing medical care to its patients through its agents and employees.
3. The parties engaged in mandatory presuit mediation on October 8, 2020, which resulted in an impasse.
4. On or about October 6, 2019, Elizabeth Varner was a resident at Defendant’s facility.
5. During the afternoon of October 6, 2019, Elizabeth Varner was transferred to the Medical University of South Carolina (“MUSC”) with chief complaints of a right knee fracture. The

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SECOND CAUSE OF ACTION
(Neglect of a Vulnerable Adult)

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

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

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

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

21. Defendant failed to timely identify that Elizabeth Varner was suffering from a fracture in her right leg.
22. Defendant failed to provide care and medical services to Elizabeth Varner by not transferring her to the hospital in a timely manner after a change of condition.
23. Elizabeth Varner trusted in, confided in and relied upon Defendant to use their expertise and discretion for Plaintiff's care.
24. Defendants accepted Elizabeth Varner's trust and reliance and so became responsible for Elizabeth Varner's health while residing at the nursing home facility.
25. As a result of aforementioned reliance and trust upon Defendant, Elizabeth Varner's physical, mental and emotional health was placed in the hands of Defendant.
26. Defendant received compensation for the care and treatment they were responsible for providing to Elizabeth Varner during her residency but did not provide that care and treatment.
27. As a direct and proximate result of Defendant's negligence, negligence per se, gross negligence, recklessness, willfulness and wantonness, Plaintiff suffered injuries, including, but not limited to, substantial physical and mental pain and suffering, mental anguish, mental shock and suffering, and wounded feelings.

THIRD CAUSE OF ACTION
(Wrongful Death)

28. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.
29. That as a direct and proximate result of Defendants negligent, willful, wanton, reckless, careless and grossly negligent conduct, by and through their agents, servants, and employees, Elizabeth Varner was severely injured in Defendant's facility.
30. The injuries so inflicted on Elizabeth Varner were the cause of Elizabeth Varner's wrongful death on October 29, 2019.

FOURTH CAUSE OF ACTION
(Survival Action)

31. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.
32. As a direct and proximate cause of Defendant's negligence, willful, reckless and/or grossly negligent actions and inactions, Elizabeth Varner suffered:

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

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

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

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

PINKSTON LAW FIRM, LLC

/s/ Shawn Pinkston

Shawn Pinkston, SC Bar No. 79965

856 Lowcountry Blvd., Suite 101

Mount Pleasant, South Carolina 29464

Office: 843-814-5472

Fax: 843-723-7300

shawnpinkston@me.com

Date: March 25, 2021
Mount Pleasant, South Carolina

COUNTY OF McLENNAN

STATE OF TEXAS

)
)
)AFFIDAVIT OF SUZANNE FREDERICK,
MSN, RN-BC, CWCN

PERSONALLY APPEARED before me, Suzanne Frederick, MSN, RN-BC, CWCN,
who after being duly sworn now states as follows:

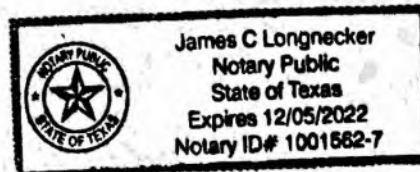
1. I am over the age of eighteen (18) and am competent to give this affidavit.
2. I am a Registered Nurse in the state of Texas, am Board Certified as a Gerontological Nurse, and am Certified as a Wound Care Nurse. I am familiar with the standard of care relating to Registered Nurses, Licensened Practical Nurses and other care providers who practice in skilled nursing facilities, specifically nursing homes. My professional background is provided in more detail in my Curriculum Vitae, attached as Exhibit "A."
3. I have reviewed the medical records from Riverside Health and Rehab regarding the care and treatment provided to Elizabeth Varner. It is my understanding the entire file relating to Elizabeth Varner was requested via subpoena and I reviewed the documents produced in response.
4. After reviewing the medical records produced by Riverside Health and Rehab relating to Elizabeth Varner, these are my findings and opinions. The care providers at Riverside Health and Rehab violated the standard of care by failing to take proper precautions to prevent injury to Elizabeth Varner and by failing to protect Elizabeth Varner from injury.
5. I, Suzanne Frederick, MSN, RN-BC, CWCN, reserve my right to amend this affidavit in light of any new, relevant, and reliable information that may be presented to me in the future.

FURTHER AFFIANT SAYETH NAUGHT.

Suzanne Frederick MSN RN BC CWCN
Suzanne Frederick, MSN, RN-BC, CWCN

Subscribed and sworn to me on this
27th day of MARCH, 2020.

James C. Longnecker
Notary Public

My commission expires on: 12/5/2022

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

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to this Complaint to the below named subscriber at his office, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

PINKSTON LAW FIRM, LLC

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

Mount Pleasant, South Carolina

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FACTUAL ALLEGATIONS

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

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

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

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

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

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

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

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

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

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

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

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

FIRST CAUSE OF ACTION
(Negligence, Gross Negligence)

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

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

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

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

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

SECOND CAUSE OF ACTION
(Corporate Negligence)

26. Plaintiff incorporates the preceding paragraphs as if repeated verbatim herein.
27. Based upon information and belief, Defendants operated, managed, and/or provided consulting services to THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab before and during Elizabeth Varner's residency.
27. Defendants had a duty of care to residents to discover, to warn, to prevent risks, to take reasonable safety precautions, to eliminate unreasonable risks, and to provide protection from harm.
28. Riverside was negligently administered and managed by Defendants who were working together to manage and operate the facility.
29. The facility was negligently administered in violation of state and federal laws by Defendants FCOS and FAS, who were working together to govern, administer, control, manage, and operate the facility.
30. Defendants, by and through their agents, servants, and employees, were negligent, willful, wanton, reckless, careless, and grossly negligent and deviated from the expected standards of skill, care, and learning in their treatment of Elizabeth Varner. Specifically, Defendants were negligent in the following ways:
- Failing to provide the care, supervision, and monitoring of patients;
 - Failing to take proper precautions to prevent injury to Elizabeth Varner and by failing to protect Elizabeth Varner from injury;
 - Failing to investigate the cause of an unknown bone fracture;
 - Failing to notify the appropriate regulatory agency following serious incidents, to include fractured bones;

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

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

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

THIRD CAUSE OF ACTION **(Joint Venture)**

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

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

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

an agreement;

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

36. That a joint venture exists when there is:

- contribution of resources by both parties;

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

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

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

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

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

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

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

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

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

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

FIFTH CAUSE OF ACTION
(Neglect of a Vulnerable Adult)

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

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

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

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

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

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

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

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

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

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

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

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

SIXTH CAUSE OF ACTION
(Wrongful Death)

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

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

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

SEVENTH CAUSE OF ACTION
(Survival Action)

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

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

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

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

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

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

PINKSTON LAW FIRM, LLC

/s/ Shawn Pinkston

Shawn Pinkston, SC Bar No. 79965

856 Lowcountry Blvd., Suite 101

Mount Pleasant, South Carolina 29464

Office: 843-814-5472

Fax: 843-723-7300

shawnpinkston@me.com

Date: June 11, 2021

Mount Pleasant, South Carolina

COUNTY OF McLENNAN) AFFIDAVIT OF SUZANNE FREDERICK,
) MSN, RN-BC, CWCN
 STATE OF TEXAS)

PERSONALLY APPEARED before me, Suzanne Frederick, MSN, RN-BC, CWCN, who after being duly sworn now states as follows:

1. I am over the age of eighteen (18) and am competent to give this affidavit.
2. I am a Registered Nurse in the state of Texas, am Board Certified as a Gerontological Nurse, and am Certified as a Wound Care Nurse. I am familiar with the standard of care relating to Registered Nurses, Licensened Practical Nurses and other care providers who practice in skilled nursing facilities, specifically nursing homes. My professional background is provided in more detail in my Curriculum Vitae, attached as Exhibit "A."
3. I have reviewed the medical records from Riverside Health and Rehab regarding the care and treatment provided to Elizabeth Varner. It is my understanding the entire file relating to Elizabeth Varner was requested via subpoena and I reviewed the documents produced in response.
4. After reviewing the medical records produced by Riverside Health and Rehab relating to Elizabeth Varner, these are my findings and opinions. The care providers at Riverside Health and Rehab violated the standard of care by failing to take proper precautions to prevent injury to Elizabeth Varner and by failing to protect Elizabeth Varner from injury.
5. I, Suzanne Frederick, MSN, RN-BC, CWCN, reserve my right to amend this affidavit in light of any new, relevant, and reliable information that may be presented to me in the future.

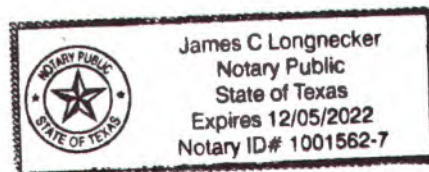
FURTHER AFFIANT SAYETH NAUGHT.

Suzanne Frederick MSN RN BC CWCN
 Suzanne Frederick, MSN, RN-BC, CWCN

Subscribed and sworn to me on this
27th day of MARCH, 2020.

James C. Longnecker
 Notary Public

My commission expires on: 12/5/2022



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

TO: SHAWN PINKSTON, ESQUIRE, ATTORNEY FOR PLAINTIFF:

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

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

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

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

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

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

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

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

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

8. The allegations set forth in Paragraphs 8 and 9 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, those allegations are denied to the extent they assert or imply liability

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

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

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

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

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

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

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

14. The allegations set forth in Paragraph 23 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, those allegations, including all subparts, are denied and strict proof is demanded thereof.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

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

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

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

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

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

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

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

thus reserves the right to amend its Answer to assert any such defenses. Furthermore, this Defendant hereby incorporates all defenses asserted by its Codefendants in this matter and all defenses asserted by the defendant in the case styled and captioned Williams Haynes as Personal Representative of the Estate of Elizabeth Varner vs. THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab, 2021-CP-10-01437 filed in the Court of Common Pleas, Charleston County, to the extent they are applicable.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

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

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

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

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

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

process over which the Defendant had no control and, as such, this Defendant pleads such a natural disease process as a complete or partial bar to this action.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

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

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

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

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

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

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

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

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

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

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

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

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

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

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

[Signature block on the following page]

CLEMENT RIVERS, LLP

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

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

Matthew O. Riddle

SC State Bar ID No.: 76650

Gaillard T. Dotterer, III

SC State Bar ID No.: 103620

P.O. Box 993, Charleston, SC 29402

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

mriddle@ycrlaw.com, gdotterer@ycrlaw.com

Attorneys for the Defendant Jerrolyn Montgomery-
Smalls

Charleston, South Carolina

Dated: July 16, 2021

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

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

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

Plaintiff,)

vs.)

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

Defendant.)

Transcript of Record

February 10, 2022

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

Plaintiff,)

vs.)

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

Defendant.)

B E F O R E:

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

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

Shawn Pinkston, Esquire
Attorney for Plaintiff

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

Sallie Beth Todd
Official Court Reporter

INDEX

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>

(There were no witnesses called during this hearing.)

Certificate of Court Reporter..... 37

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE</u>

(There were no exhibits marked during this hearing.)

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

3 **MR. HINES:** Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 But in case, so forgive me if I'm re-plowing any ground
2 here, but I don't know that anyone has yet said, and granted
3 it took me a little while to get on the call, really what's
4 going on in these cases. I guess we've hinted at it. It's
5 Mr. Haynes, who is suing on behalf of the estate of Ms.
6 Varner. Ms. Varner was admitted as a resident of our facility
7 Riverside. She was admitted in May of 2019. In October of
8 2019 she was taken from the facility to the hospital
9 complaining of some knee pain, I think it was in her right
10 knee, determined that she had a fracture, and then she had
11 some surgery. She was actually discharged from the hospital
12 and went back to our facility. But ultimately within the
13 month of October of 2019 she passed away, and the contention
14 was that there was deficient care that was given to her in
15 respect to this knee injury, and that that knee injury, the
16 surgery, and the consequences thereof contributed to her
17 death.

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

25 The reason we're moving to compel arbitration is because

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

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

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

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

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

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

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

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

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

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

20 **THE COURT:** Go ahead.

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

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

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

1 non-signatory starting with the idea of merger.

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

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

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

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

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

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

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

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

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

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

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

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

25 One of the reasons, irrespective of the affidavits that

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

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

1 would have said that and had the sophistication to say that in
2 those terms when what we just submitted to the Court ourselves
3 on the 8th is a recorded power of attorney where that same
4 person, Ms. Varner, not just a shade over a year before the
5 admission, she was made an alternate agent of Ms. Varner, her
6 husband William being the primary agent, in a power of
7 attorney that was executed again, I think, in March of 2008
8 (sic). The admission was in May of 2019, excuse me, March of
9 2018, admission in 2019. And this document specifically says
10 it takes effect upon the execution of the document, and it
11 specifically says that the power grants the attorney in fact
12 the ability to submit to alternative dispute resolution,
13 settle, or propose, or accept a compromise. And this document
14 is not something that Ms. Varner, Kim Varner, didn't know
15 about, she signed it. I mean she signed it as accepting agent
16 certification of secondary or alternative authority. What she
17 also said in her affidavit that makes her authority actually
18 applicable because according to this, the primary power is
19 granted to William, but then it says that if the primary is
20 unwilling, excuse me, unable or unwilling to serve Kimberly
21 Green Haynes, excuse me, I keep saying Varner, forgive me,
22 Your Honor, I've gotten the names jumbled, but Kimberly is
23 appointed and her powers take effect. Well she said in her
24 affidavit that her husband wasn't there, her husband was
25 waiting to greet his mother upon her arrival to the facility.

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

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

1 so much of it.

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

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

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

7 **MR. PINKSTON:** Just briefly, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 **MR. HINES:** Thank you, Your Honor. And that's by the
9 21st, correct?

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

11 **MR. HINES:** Thank you, Your Honor.

12 **THE COURT:** All right. You're welcome.

13 **MR. PINKSTON:** Thank you, Your Honor.

14 **(HEARING IS ADJOURNED)**

STATE OF SOUTH CAROLINA
GENERAL SESSIONS

Docket Number
2021-CP-10-02744

COUNTY OF CHARLESTON

WILLIAM HAYNES,)
)
Plaintiff,)
)
vs.)
)
)
FUNDAMENTAL SERVICES)
)
PRODUCTION,)
)
Defendant.

September 11, 2024

MOTION HEARING

B E F O R E:

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

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

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

Attorney for the Plaintiff

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

Attorney for the Defendant

Transcribed by: Barbie Teboe, Transcriber

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P R O C E E D I N G S

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

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

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

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

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

MR. PINKSTON: If it please the Court.

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

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

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

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

1 to start with, sir.

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

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

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

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

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

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

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

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

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

6 Thank you.

7 THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

6 THE COURT: All right.

7 I think --

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

10 MR. RIDDLE: Thank you, Your Honor.

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

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

1 Honor and your law clerks and staff.

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

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

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

1 MR. PINKSTON: Yes, Your Honor.

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

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

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

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

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

8 THE COURT: All right.

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

12 So we can go to the next motion, please.

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

15 THE COURT: Yes.

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

18 THE COURT: Yes, sir.

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

22 THE COURT: Yes, sir.

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

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

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

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

10 MR. RIDDLE: Okay.

11 THE COURT: All right?

12 MR. RIDDLE: Thank you, Your Honor.

13 THE COURT: Thank you.

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

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

20 I'll defer to you.

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

1 Honor.

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

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

7 THE COURT: All right.

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

10 (Pause.)

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

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

13 MR. RIDDLE: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

6 THE COURT: Oh. I'm sorry.

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

8 THE COURT: Okay.

9 MR. RIDDLE: --- (indiscernible).

10 THE COURT: Okay. Go ahead. Keep going.

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

18 THE COURT: All right. Go ahead.

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

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

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

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

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

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

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

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

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

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

25 And then as far as what the arbitrator actually decided,

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

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

10 Judge Early awarded the medical bills of \$77,000 -- I'm
11 sorry -- \$77,007. He awarded pain and suffering damages of
12 \$10,000. And Judge Early found that the plaintiff failed to
13 prove by the preponderance of the evidence that Ms. Varner's
14 cardiac arrest and death were proximately by the fracture.

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

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

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

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

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

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

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

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

25 Here, the damages of the facility have been determined

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

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

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

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

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

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

3 And, again, punitive damages do not and cannot exist as an
4 independent cause of action, Your Honor. And you know that's
5 a well-established principle of South Carolina case law.
6 There's the case of *Monroe versus Baker's Life and Casualty*
7 *Company* from 1958 that's kind of the -- is a case -- one of
8 the early cases that establishes that rule of law, stating
9 that "Punitive damages claims cannot exist as an independent
10 cause of action, but such damages are mere incidents to the
11 cause of action and could never constitute the basis thereof.

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

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

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

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

9 Morrow doesn't apply, Your Honor.

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

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

24 Thank you.

25 THE COURT: Thank you.

1 Yes, sir. Mr. Pinkston?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 were not decided against a previous defendant.

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

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

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

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

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

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

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

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

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

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

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

3 (Pause.)

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

11 THE COURT: All right. Thank you.

12 I appreciate both your arguments.

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

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

19 THE COURT: The McGee. Right. Go ahead.

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

21 THE COURT: Yes.

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

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

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

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

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

13 THE COURT: All right.

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

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

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

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

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

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

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

23 THE COURT: Thank you.

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

1 MR. RIDDLE: Certainly, Your Honor.

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

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

5 MR. RIDDLE: Thank you, Your Honor.

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

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

1 action.

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

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

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

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

25 If the Court determines there is a valid cause of action

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

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

12 Thank you, Your Honor.

13 THE COURT: All right.

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

21 MR. PINKSTON: Yes, Your Honor.

22 Just briefly ---

23 THE COURT: All right.

24 MR. PINKSTON: --- on the motion.

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

1 can address one while also addressing the other.

2 THE COURT: Right.

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

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

13 He asked for even more time. I said, "I'll give you some
14 additional time, but I'm not going to give you an additional
15 30 days because you're already 90 days past due. And if you
16 don't respond by a certain date, then I'm going to file a
17 Motion to Compel"

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

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

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

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

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

25 And that is simply wrong because they have a duty to

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

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

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

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

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

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

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

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

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

3 THE COURT: All right.

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

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

8 MR. RIDDLE: Yes, Your Honor.

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

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

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

24 MR. RIDDLE: Yes, Your Honor.

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

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

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

10 MR. PINKSTON: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 Thank you, Your Honor.

8 THE COURT: Thank you.

9 Mr. Riddle?

10 MR. RIDDLE: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

19 Thank you.

20 THE COURT: All right.

21 Thank you, both, for your arguments.

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

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

4 Thank you, both. Thank you.

5 MR. RIDDLE: Thank you, Your Honor.

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

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

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

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

15 THE COURT: Thank you.

16

17

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

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END OF TRANSCRIPT.

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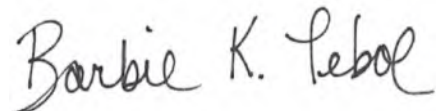
State of South Carolina

County of Charleston

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

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

January 15, 2025

A handwritten signature in cursive script that reads "Barbie K. Teboe". The signature is written in dark ink and is positioned above a horizontal line.

Barbie Teboe,
Transcriber

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS
C.A. NO.: 2021-CP-10-02744

HAYNES,

PLAINTIFF,

VS.

FUNDAMENTAL ADMINISTRATIVE A
SERVICES, LLC, ET AL,

DEFENDANT.

H E A R I N G
BEFORE THE HONORABLE JENNIFER B. MCCOY

DATE: JANUARY 27, 2025
LOCATION: SOUTH CAROLINA CIRCUIT COURT DISTRICT 7
TRANSCRIBER: BRIDGETTE LEE

LEGAL EAGLE
Post Office Box 5682
Greenville, South Carolina 29606
864-467-1373
depos@legaleagleinc.com

APPEARANCES:

SHAWN T. PINKSTON, ESQUIRE
PINKSTON LAW FIRM, LLC
856 LOWCOUNTRY BOULEVARD, SUITE 101
MT. PLEASANT, SOUTH CAROLINA 29464
shawnpinkston@me.com

REPRESENTING THE PLAINTIFF

RUSSELL G. HINES, ESQUIRE
CLEMENT RIVERS, LLP
25 CALHOUN STREET TE 400
CHARLESTON, SOUTH CAROLINA 29402

REPRESENTING THE DEFENDANT

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EXHIBITS

(NONE MARKED)

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS
REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

P R O C E E D I N G S

THE COURT: *William Haynes versus Fundamental Administrative Services*. Mr. Riddle, welcome. Think I saw Mr. Pinkston on.

MR. PINKSTON: Yes, ma'am, it looks like I'm now available and unmuted. Can you hear me? Can everyone hear?

THE COURT: Yes, I can. Yes, sir, happy to hear from you. This is your Rule to Show Cause; is that right?

MR. PINKSTON: It is, Your Honor. So that's the first motion, and may it please the Court. The memo and supporting exhibits were filed last week, and obviously they were not received due to the closures. They were provided to your law clerk, so I'm not sure.

THE COURT: Yes, sir. We got everything we need on our end. Happy to hear from you.

MR. PINKSTON: That's great, Your Honor. So Your Honor, the facts in this case are pretty straightforward. It's been 350 days since the stay was lifted in this lawsuit. It's been 348 days since Plaintiffs served Discovery on Defendants after the stay was lifted. It's been 129 days since this Court granted Plaintiffs Motion to Compel, Discovery responses, and ordered the Defendants to comply with Discovery within 30 days. And it's been 99 days since the court-imposed deadline has passed.

And so, Your Honor, it's -- there was an order in this

1 case. The Defendants ignored the order. They've not
2 responded to Discovery. They've not provided a single
3 document in this case since the days -- since the Discovery
4 was served almost one year ago to -- to the day.

5 Judge McMaster heard the Plaintiff's Motion to Compel
6 and granted the Plaintiff's Motion to Compel. The Discovery
7 responses in this case, the timeline, came and went.
8 Defendants did belatedly respond on December 30, but in -- as
9 I characterize in my motion -- or in my memo, it essentially
10 makes a mockery of the order, because they respond with an
11 objection to every single request and every single
12 interrogatory, and base those objections on a Motion to
13 Compel Arbitration that was filed the day before a jury
14 roster hearing in this matter and filed about a month after
15 the deadline to -- or almost two months after the deadline to
16 -- respond to Discovery in this case.

17 So Your Honor, there's been willful -- a willful
18 disobedience of the court order. There's been multiple
19 attempts or promises made by the Defendants in this case to
20 provide Discovery. Correspondence between counsel has been
21 provided to the Court. Quotations from the transcript on
22 Plaintiff's Motion to Compel has been provided to this Court,
23 where the Defendant said, if the Motion to Compel is granted
24 and our Motion for Summary Judgment is denied, or promptly --
25 we will promptly respond to Discovery. We're ready to go

1 Your Honor, we will provide Discovery responses, and they
2 simply haven't.

3 They filed a Motion to Compel Arbitration the day before
4 jury roster hearing in this matter. Plaintiff didn't have
5 any Discovery in this case, so Plaintiff certainly couldn't
6 prepare for any trial in this matter, and their Motion to
7 Compel Arbitration is essentially a Motion to Reconsider the
8 same arguments that they followed in their Motion for Summary
9 Judgment that was denied by this Court, and their Motion to
10 Reconsider was denied by this Court.

11 You know, Your Honor, it's just been -- it's been a year
12 since Discovery was served, still not a single thing. Their
13 Motion for Summary Judgment, their arguments are the same
14 thing as in their Motion to Compel. They style it as a
15 Motion to Compel, but in reality, it's either a Motion to
16 Enforce the Judgment or it's another Motion to Reconsider the
17 arguments that Judge McMaster has already denied. They want
18 to pretend that there's a dispute. There's no dispute.

19 You can look at all of the pleadings in this matter, and
20 that's part of the issue with this case, is the arguments
21 continue to change. It's like a zigzag course. You have to
22 go back to their argument regarding the final order in front
23 of Judge Young, which they specifically said, these are non-
24 arbitrable claims.

25 Then when Judge Young lifted the stay and Discovery was

1 served and a Motion to Compel was granted or a Motion to
2 Compel was filed, they filed a Motion for Summary Judgment,
3 saying all of these matters should have been heard in
4 arbitration. Judge McMaster heard those arguments. Judge
5 McMaster denied their Motion for Summary Judgment. In their
6 Motion for Reconsideration of that denial, they basically
7 said, well, since Judge McMaster didn't include any findings
8 of fact, there's still a dispute. Judge McMaster ---

9 THE COURT: You don't have to make those in summary
10 judgments.

11 MR. PINKSTON: Agreed, Your Honor. You don't have to
12 make those. And so -- and so, now they're simply saying,
13 well, since Judge McMaster didn't, now we're going to file
14 this Motion to Compel Arbitration.

15 THE COURT: Well, let me do this, Mr. Pinkston, I really
16 need to hear from the other side. That's a little bit ---

17 MR. PINKSTON: Yes, Your Honor, I appreciate it.

18 THE COURT: All right. Mr. Riddle, what do you want to
19 tell me? It's good -- good to see you.

20 MR. RIDDLE: Hey. Good morning, Your Honor. Thank you.
21 This is Matt Riddle on behalf of Defendants. May it please
22 the Court. And you know, first of all, Mr. Pinkston
23 mentioned the Motion to Compel Arbitration that we filed, and
24 I would just contend that the Court's ruling on the Motion to
25 Compel Arbitration is necessary before the Court can address

1 issues regarding Discovery, including Plaintiff's Rule --
2 Rule to Show Cause, and I can provide more information about
3 the Motion to Compel Arbitration in the context of this
4 reply, or, you know ---

5 THE COURT: Yeah. That is fine. I'm happy to morph the
6 two.

7 MR. RIDDLE: Sounds good. Okay. Well, the issues are
8 kind of intertwined, and I do want to make sure that Your
9 Honor understands sort of the background of this case. It's
10 very unusual in that the Plaintiff filed a lawsuit against --
11 and -- and generally speaking, this lawsuit involves
12 allegations of nursing home negligence.

13 And so the Plaintiffs filed a lawsuit against Riverside
14 Health and Rehab Skilled Nursing Facility, and then filed a
15 separate lawsuit against Ms. Geralyn Montgomery Smalls, who
16 was the administrator for the facility. And then two other
17 Defendants, Fundamental Administrative Services and
18 Fundamental Clinical and Operational Services, which are
19 companies that provide consulting type services to the
20 facility.

21 And so the Defendants filed a Motion to Compel
22 Arbitration, and we've already had an arbitration in this
23 case. Your Honor, Judge Early -- Judge Jack Early, was our
24 arbitrator. He issued an award on behalf to the Plaintiff,
25 and Riverside Skilled Nursing Facility has paid that award.

1 He, Judge Early, ordered \$87,007 for the Plaintiff's
2 (indiscernible) leg fracture and her pain and suffering
3 related to that leg fracture. Riverside paid that award.
4 And Judge Early also found that Defendant Smalls, the
5 Plaintiff, did not prove negligence as to Defendant Smalls.

6 And so when the time came -- when the -- when the stay
7 was lifted, and Plaintiff continued to try to pursue claims
8 against Defendant Smalls, Your Honor, the Defendants filed a
9 Motion for Summary Judgment, as Mr. Pinkston mentioned. And
10 Judge McMaster heard that motion, and it -- denied the motion
11 in a Form 4 Order didn't give us any reasoning for it.

12 To the extent Judge McMaster's Order is -- is allowing
13 claims to continue against Defendant Smalls, those claims are
14 still -- still fall under the arbitration agreement and must
15 be compelled to arbitration. Now, our position at -- before
16 Judge McMaster, was that all claims were already heard at
17 arbitration, and we still contend that all claims asserted in
18 the Complaint against Defendant Smalls were compelled to
19 arbitration by order of Judge Young.

20 So Judge Young granted the Defendant's Motion to Compel
21 Arbitration, and it ordered all claims to arbitration. And
22 Your Honor, if I may -- you know, I can share my screen
23 briefly and show you the portions of Judge Young's Order that
24 -- that apply here.

25 THE COURT: If you want to, you should be able to. If

1 not I can -- can definitely go back and see it. I think you
2 can -- if you want to -- do you need -- there you go.

3 MR. RIDDLE: So first of all, this is the arbitration
4 agreement itself. Are you able to see that?

5 THE COURT: Yeah.

6 MR. RIDDLE: So this provision of the arbitration
7 agreement, which is Exhibit E, our Motion of Arbitration,
8 essentially says that all claims related to the residency are
9 subject to arbitration, and this agreement is between the
10 Plaintiff and the facility and any employee of the facility.
11 So the -- so Judge Young, based on this arbitration
12 agreement, ordered the claims asserted against the facility
13 and Defendant Smalls, as an employee at the facility --
14 ordered all those claims to arbitration.

15 And this is Judge Young's Order. It's dated
16 February 24, 2022 and I'll just refer the Court to page 2.
17 Judge Young's Order summarizing the motion that was before
18 him, facility, and Ms. Montgomery Smalls identical motions to
19 compel arbitration of the claims asserted against them in
20 case 1437 and case 2477. Nothing here differentiates certain
21 claims for negligence versus, as the claims now contends,
22 claims for corporate negligence, veil piercing, that kind of
23 thing.

24 All those claims were asserted against Ms. Smalls in the
25 original complaint, and they were all compelled to

1 arbitration. Page 4 of Judge Young's Order, since Plaintiffs
2 claims against the facility and Ms. Montgomery Smalls' are
3 clearly within the scope of the arbitration agreement, they
4 should proceed in arbitration, not litigation.

5 Page 9 of Judge Young's Order, without question,
6 Plaintiff's claims against the facility and Ms. Montgomery
7 Smalls are within the scope of the arbitration agreement.
8 Page 10 of Judge -- Judge Young's Order, Plaintiff's
9 Complaint in case 2477, which is the Complaint against FAS
10 and FCOS and Defendant Smalls.

11 The Complaint in that case alleges that at all times
12 relevant herein Ms. Montgomery Smalls was the administrator.
13 Accordingly, the arbitration agreement covers Plaintiff's
14 claims against both the facility and Ms. Montgomery Smalls.
15 FAS and FCOS were not parties to the arbitration agreement.
16 That's why the claims against them were stayed entirely and
17 they were not part of the arbitration.

18 All the claims against Judge -- against Defendant Smalls
19 and the facility were addressed in arbitration, including the
20 corporate negligence, veil piercing, alter ego claims. Then
21 finally, that the conclusion of the order itself, on page 20,
22 the subject, motions are hereby granted.

23 Case 1437 is stayed, which is the case against the
24 facility, right, that was stayed entirely in favor of
25 arbitration between the Plaintiff and the facility. Case

1 2477, which is the case we're here on today, Your Honor,
2 against FCOS and FAS and Defendant Smalls was stayed in favor
3 of arbitration between the Plaintiff and Ms. Montgomery
4 Smalls, with Plaintiff's claims against FAS and FCOS stayed
5 pending the ultimate outcome for arbitration between the
6 Plaintiff.

7 Nothing in this order, differentiates any of the claims
8 alleged in the complaint against Defendant Smalls, the claims
9 for corporate veil piercing, corporate negligence, and alter
10 ego were asserted against Defendant Smalls and therefore
11 subject to arbitration, to the extent that Judge McMaster's
12 Order denying our Motion for Summary Judgment. As the effect
13 of any claims continuing against Defendant Smalls, those have
14 to go back to arbitration.

15 There's also an order that Judge Early issued in the
16 context of the arbitration that's been submitted as an
17 exhibit before this Court, and I noticed today, Your Honor,
18 that it was not an exhibit to our Motion to Compel
19 Arbitration.

20 This is an order that the Plaintiff had in -- in
21 arbitration, and it was used as an exhibit in previous filing
22 in this Court. I would ask that it be -- that we'd be
23 permitted to submit it as an exhibit as well for this motion.

24 THE COURT: That's fine. I don't have a problem
25 with you ---

1 MR. RIDDLE: This -- this I simply referred this to show
2 that Judge Early also stated in his Arbitration Order that
3 the claims and defenses raised in the Complaint and Answer
4 filed in the above state court matter were subject to
5 arbitration. There is no differentiation between general
6 negligence, medical malpractice claims versus corporate
7 negligence, veil piercing, that kind of thing, but the
8 Plaintiff is attempting to continue to pursue now, and so,
9 Your Honor, there is a legitimate dispute about what's
10 subject to arbitration and what's not.

11 Defendants contend that all claims were subject to
12 arbitration and the Plaintiff claims that they're not, which
13 is contrary to what I just showed you in the clear language
14 in Judge John's Order, but nonetheless, there is a dispute.
15 As long as there is this dispute, there's a question about
16 whether this Court has jurisdiction over Defendant Smalls,
17 and whether Defendant Smalls can be ordered to participate in
18 Discovery as it relates to a Circuit Court matter, then also
19 whether the case should remain stayed as to the other
20 Defendants while arbitration is ongoing.

21 To the extent there are any remaining claims against
22 Defendant Smalls, they have to be taken to arbitration, and
23 the case has to be stayed against FAS and FCOS, and that's
24 why there hasn't been -- there haven't been substantive
25 responses to the Discovery in this case Your Honor, because

1 this -- the Plaintiff has not dismissed Defendant Smalls from
2 the case.

3 Plaintiff continues to pursue claims against Defendant
4 Smalls, and the Defendants continue to assert that those
5 claims were either addressed at arbitration and barred by *res*
6 *judicata*, which apparently Judge McMaster disagreed, or now,
7 since they're still going on, they need to go to arbitration.
8 If they go to arbitration, the case has to be stayed against
9 the other Defendants, and we cited the case law in our memo
10 and support Your Honor.

11 THE COURT: What about the orders compelling this
12 Discovery?

13 MR. RIDDLE: Well, we filed a Motion to Reconsider that
14 was denied on October 4th, and then with -- you know, and so
15 with it, we timely filed the Motion to Compel Arbitration
16 within 30 days of that ---

17 THE COURT: Yeah.

18 MR. RIDDLE: --- denial of our Motion to Reconsider.
19 Our position is that to the extent the claims are still in
20 arbitration, that the Court does not have jurisdiction or
21 Discovery and that any Discovery as to the other Defendants
22 has to be stayed, including Judge McMaster's Order to Comply
23 with the Discovery responses.

24 THE COURT: Okay. I mean, I get all your arguments, I
25 guess, just at a real basic level, though. If you've been

1 ordered to produce something, you know, engage in Discovery,
2 I don't -- I don't think that your argument as to these other
3 issues are waived because you followed a court order. You
4 know what I mean?

5 I think that's where your client maybe has some hiccup
6 there, some -- I don't know -- some angst, or whatever the
7 word is. I can't -- come to mind right now, but I think
8 that's -- that's the issue. I mean, it's pretty -- it's
9 pretty black and white. I mean, if you've got a court order
10 compelling you to produce documents, you gotta do it.

11 That doesn't mean you agree and that you're waiving your
12 right to arbitration and you're waiving all these defenses.
13 That's fine. Make your motions and have, you know -- that's
14 fine. I mean, the bottom line is it's pretty -- I mean, it's
15 -- you know that happened -- this happens all the time, of
16 course. I mean, Circuit Court Judges, we make rulings every
17 day that people disagree with.

18 Let me save you the suspense. About 50 percent of the
19 people that -- that I make rulings with vehemently disagree
20 with my ruling, okay, just on a daily basis. So I think, you
21 know -- I think where Mr. Pinkston's coming from it says,
22 hey, whether you like it or not, this is what you're ordered
23 to do. So you got to do it.

24 MR. RIDDLE: Certainly. And if I may -- what we're
25 requesting is that the Court compel arbitration and stay the

1 case against the other Defendants, including the Order of
2 Judge McMaster to comply with Discovery.

3 THE COURT: Okay. All right. I mean, I get that in a
4 way -- it puts me in this odd position of sort of
5 reconsidering another Judge's ruling, which I can't -- I
6 can't do either, but I understand -- I think I understand
7 your position. It's tough. It's a tough one.

8 MR. RIDDLE: Sure. Finally, I just wanted to address,
9 the Plaintiff had requested sanctions in his memo. Just
10 briefly, you know, there's obviously legitimate dispute here.
11 By the arbitrariness of these claims. I would contend the
12 Defendants haven't acted in bad faith or haven't
13 intentionally done anything to delay the case. We're simply
14 trying to assert viable rights to arbitration and to protect
15 the rights of the Defendants in this case as it relates to
16 that arbitration agreement.

17 THE COURT: Okay. Yeah. I understand.

18 MR. RIDDLE: We just assert there's no grounds for
19 sanctions in this case, much less striking the Defendant's
20 answer or something like to that extent.

21 THE COURT: Okay. All right. Mr. Pinkston, wrap it up
22 for us.

23 MR. PINKSTON: Yes, Your Honor. You know he -- he's --
24 the Defense Counsel stated that they filed the Motion to
25 Compel arbitration within 30 days, so it was timely filed.

1 That -- that's not accurate either. Judge McMaster denied
2 their Motion to Reconsider on I believe it was October 4th,
3 and they didn't file their Motion to Compel Arbitration until
4 November 14th, which was, again, the day before the motions
5 roster.

6 I mean, Your Honor, that's -- Plaintiff does agree this
7 is cut and dry. I feel like this is deja vu all over again.
8 These arguments have been made in front of Judge Young,
9 they've been made in front of Judge McMaster, and now they're
10 being made in front of you. All of the pleadings, nothing's
11 been taken out of context.

12 All of the context has been provided to include, Your
13 Honor, the -- the transcripts of -- of the hearings where the
14 Defendants have made this exact argument. It is
15 inappropriate. It's the law of the case as we've cited. We
16 believe there has been willful conduct in this case in terms
17 of refusing the court order and that essentially just seeking
18 another delay by filing a motion on issues that have already
19 been decided in this case.

20 We do believe it rises to the event of a set of
21 sanctionable conduct in violation of a court order as it
22 relates to Discovery. Plaintiffs rights have been prejudiced
23 by the denial. The case is still pending, a trial roster
24 meeting at some point in the future, and we're a year from
25 when Discovery has been filed.

1 And who knows? You know, who knows what's going to
2 happen next, Your honor. This case was originally filed in
3 2021. It's probably going to pop up on the trial roster
4 again soon. Plaintiff just wants to move the case forward
5 and not keep re-plowing old ground, but it seems the only way
6 to get the Defendant's attention in this matter is for the
7 Court to tell them their conduct is wrong. It was willful,
8 it was a violation of the Court's Order, and that seems to be
9 the only way to get their attention in order to get them to
10 comply with -- with all of the Court's rulings in this case,
11 Your Honor.

12 I thank you for your time. Thank you for hearing the
13 case. If -- if the Court does require any additional
14 information, Plaintiff will be happy to provide it.

15 THE COURT: Okay. All right.

16 MR. RIDDLE: If I may briefly, Your Honor?

17 THE COURT: Yeah. Sure

18 MR. RIDDLE: I certainly did not intend to misstate the
19 timeline there. My point was simply that the Defendant's
20 filed Motion to Compel arbitration at -- not long after the
21 Order denying our motion for reconsideration was filed.

22 THE COURT: Yeah. That's what I took it to mean. Yeah.
23 I understood that.

24 MR. RIDDLE: Thank you, Your Honor, and -- and these are
25 not that -- and I would respond briefly to Mr. Pinkston's

1 statement that the transcript has been provided to you and
2 the previous briefing, and I'll just say that review of that
3 will show that the Defendants have never taken the position
4 that any claims asserted in the Complaint against Defendant
5 Smalls were not subject to arbitration.

6 It's always been the Defendant's argument that all
7 claims asserted in the complaint should have been addressed
8 at arbitration, and now, if Judge McMaster says there's still
9 claims out there, they need to go to arbitration. Case
10 should be stayed against the other Defendants. Thank you.

11 THE COURT: Okay. All right. I'll take a look at your
12 memos, and obviously what you've got on file before I reach a
13 Final Order. If I need a Formal Order, I will just indicate
14 that in the form at the time, okay. So any questions?

15 MR. PINKSTON: No, ma'am. Thank you for your time
16 today.

17 MR. RIDDLE: Thanks very much.

18 THE COURT: Thanks for your patience. Thank you all so
19 much have a good day.
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21
22
23

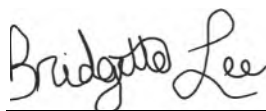
24 (THERE BEING NOTHING FURTHER, THIS HEARING CONCLUDED)
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CERTIFICATE OF TRANSCRIBER

I, Bridgette Lee, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 27th day of January, 2025.

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

April 2, 2025

A handwritten signature in cursive script that reads "Bridgette Lee". The signature is written in dark ink and is positioned above a solid horizontal line.

Bridgette Lee
Certified Transcriber

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

TO: SHAWN PINKSTON, ESQUIRE, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, Jerrolyn Montgomery-Small (hereinafter referred to as "this Defendant") by and through her undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action and compelling arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq. and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. This Motion is based on the terms and provisions of a valid and binding Arbitration Agreement executed at the time of Elizabeth Varner's admission to the Facility. (See Arbitration Agreement attached as **Exhibit A**). The Arbitration Agreement is expressly binding on all parties and requires that Plaintiff's claims be submitted to arbitration.

This Defendant further requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any motions or discovery filed or served by Plaintiff while the current motion is pending. This Motion is

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

CLEMENT RIVERS, LLP

By: /D. Jay Davis, Jr

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

Matthew O. Riddle

SC State Bar ID No.: 76650

Gaillard T. Dotterer, III

SC State Bar ID No.: 103620

P.O. Box 993, Charleston, SC 29402

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

mriddle@ycrlaw.com, gdotterer@ycrlaw.com

Attorneys for the Defendant Jerrolyn Montgomery-Smalls

Charleston, South Carolina

Dated: October 1, 2021

FACILITY - RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT

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

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

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

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

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

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

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

Kim Haynes 5/20/19
Resident/Representative Signature Date

Kim Haynes
Printed Name of Resident/Representative

Chandra Bryant
Authorized Agent of Facility Date

Riverside Health & Rehab
printed name of facility

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

TO: SHAWN PINKSTON, ESQUIRE, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that Defendant Fundamental Administrative Services, LLC ("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 staying this action.

Defendant Jerrolyn Montgomery-Small has filed a motion in this case to compel Plaintiff's claims to arbitration pursuant to a valid and enforceable Arbitration Agreement entered into at the time of Elizabeth Varner's admission to Riverside Health and Rehab. (See Motion to Compel Arbitration attached hereto as **Exhibit A**).

Additionally, THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab has filed a motion to compel Plaintiff's claims to arbitration based on the same Arbitration Agreement in a separate action pending in Charleston County styled *Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner v. THI of South Carolina*

at Charleston, LLC d/b/a Riverside Health and Rehab, 2021-CP-10-01437 (Mar. 25, 2021) (hereinafter the “companion case”) involving the same factual allegations and legal issues as the present case. (See THI of South Carolina at Charleston, LLC’s Motion to Compel Arbitration, attached hereto as **Exhibit B**). The allegations in the companion case and the instant case arise out of care provided to Ms. Varner while she was a resident at Riverside Health and Rehabilitation and involve common legal and factual issues such that the litigation in the companion case, including the outcome of Riverside Health and Rehab’s motion to compel arbitration, will have a direct bearing on these proceedings, including discovery and trial.

As such, this Defendant respectfully requests this Honorable Court stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement at issue in the companion case and the instant case and the appellate process, if any, has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion will be supported by the pleadings and motions filed in this case and the companion case, all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

CLEMENT RIVERS, LLP

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

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

Matthew O. Riddle

SC State Bar ID No.: 76650

Gaillard T. Dotterer

SC State Bar ID No.: 103620

P.O. Box 993, Charleston, SC 29402

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

mriddle@ycrlaw.com, gdotterer@ycrlaw.com

Attorneys for the Defendant Fundamental

Administrative Services, LLC

Charleston, South Carolina

Dated: October 4, 2021

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

TO: SHAWN PINKSTON, ESQUIRE, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, Jerrolyn Montgomery-Small (hereinafter referred to as "this Defendant") by and through her undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action and compelling arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq. and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. This Motion is based on the terms and provisions of a valid and binding Arbitration Agreement executed at the time of Elizabeth Varner's admission to the Facility. (See Arbitration Agreement attached as **Exhibit A**). The Arbitration Agreement is expressly binding on all parties and requires that Plaintiff's claims be submitted to arbitration.

This Defendant further requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any motions or discovery filed or served by Plaintiff while the current motion is pending. This Motion is

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mriddle@ycrlaw.com, gdotterer@ycrlaw.com

Attorneys for the Defendant Jerrolyn Montgomery-Small

Charleston, South Carolina

Dated: October 1, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
WILLIAMS HAYNES, AS PERSONAL	)	CASE NO. 2021-CP-10-01437
REPRESENTATIVE OF THE ESTATE	)	
OF ELIZABETH VARNER,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	DEFENDANT THI OF SOUTH
	)	CAROLINA AT CHARLESTON, LLC
THI OF SOUTH CAROLINA AT	)	D/B/A RIVERSIDE HEALTH AND
CHARLESTON, LLC D/B/A	)	REHAB'S MOTION TO COMPEL
RIVERSIDE HEALTH AND REHAB ,	)	ARBITRATION
	)	
DEFENDANT.	)	
	)	

TO: SHAWN PINKSTON, ESQUIRE, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab (hereinafter referred to as “this Defendant” or “the Facility”), by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action and compelling arbitration pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, et seq. and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. This Motion is based on the terms and provisions of a valid and binding Arbitration Agreement executed at the time of Elizabeth Varner’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.

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Attorneys for the Defendant THI of South Carolina

at Charleston, LLC d/b/a Riverside Health and

Rehab

Charleston, South Carolina

Dated: October 1, 2021

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

TO: SHAWN PINKSTON, ESQUIRE, ATTORNEY FOR PLAINTIFF:

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[Signature block on the following page]

CLEMENT RIVERS, LLP

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Attorneys for the Defendant Fundamental Clinical
and Operational Services, LLC

Charleston, South Carolina

Dated: October 4, 2021

FACILITY - RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT

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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.

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Kim Haynes 5/20/19
Resident/Representative Signature Date

Kim Haynes
Printed Name of Resident/Representative

Chandra Bryant
Authorized Agent of Facility Date

Riverside Health & Rehab
printed name of facility

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
WILLIAMS HAYNES, AS PERSONAL	)	CASE NO. 2021-CP-10-01437
REPRESENTATIVE OF THE ESTATE	)	
OF ELIZABETH VARNER,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	DEFENDANT THI OF SOUTH
	)	CAROLINA AT CHARLESTON, LLC
THI OF SOUTH CAROLINA AT	)	D/B/A RIVERSIDE HEALTH AND
CHARLESTON, LLC D/B/A	)	REHAB'S MOTION TO COMPEL
RIVERSIDE HEALTH AND REHAB ,	)	ARBITRATION
	)	
DEFENDANT.	)	
	)	

TO: SHAWN PINKSTON, ESQUIRE, ATTORNEY FOR PLAINTIFF:

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

This Defendant further requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any motions or discovery filed or served by Plaintiff while the current motion is pending. This Motion is

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

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Attorneys for the Defendant THI of South Carolina

at Charleston, LLC d/b/a Riverside Health and

Rehab

Charleston, South Carolina

Dated: October 1, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
WILLIAM HAYNES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH VARNER,	)	CASE NO. 2021-CP-10-01437
	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	DEFENDANT THI OF SOUTH CAROLINA AT CHARLESTON, LLC
	)	D/B/A RIVERSIDE HEALTH AND REHAB'S MEMORANDUM IN SUPPORT
	)	OF MOTION TO COMPEL
THI OF SOUTH CAROLINA AT CHARLESTON, LLC D/B/A RIVERSIDE HEALTH AND REHAB ,	)	ARBITRATION
	)	
DEFENDANT.	)	
	)	

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

COMES NOW the Defendant THI of South Carolina at Charleston, LLC (this "Defendant") and submits the following Memorandum in Support of its Motion to Compel Arbitration pursuant to the Federal Arbitration Act ("FAA") 9 U.S.C. § 1, et seq., and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure.

Plaintiff, acting as personal representative for the Estate of Elizabeth Varner, has sued the this Defendant for "Medical Malpractice, Negligence, Gross Negligence", "Neglect of a Vulnerable Adult", Wrongful Death and Survival arising out of Elizabeth Varner's residency at Riverside Health and Rehab (hereinafter the "Facility" or "Riverside"). However, on admission, Ms. Varner through her representative, Ms. Kim Haynes, entered into an arbitration agreement with the Facility which covers all allegations raised in the Complaint. On October 4, 2021 and before responding to Plaintiff's discovery requests, the Defendant filed its Motion to Compel Arbitration.

For the reasons set forth herein, the Defendant respectfully requests that the action be stayed and that this matter be compelled to arbitration pursuant to 9 U.S.C. §1, et seq.

FACTUAL BACKGROUND

Elizabeth Varner was admitted to the Facility on May 20, 2019 for skilled nursing care following an admission at St. George Healthcare Center. She was 76 years old upon admission to Riverside. On admission to Riverside, Ms. Varner's medical history included type 2 diabetes, stroke, COPD, hyperlipidemia, and chronic pain. Ms. Varner's age and condition necessitated family assistance for admission and she was admitted to Riverside with the assistance of her family, including daughter-in-law Kim Haynes and son William Haynes.

In connection with Ms. Varner's admission, Mrs. Haynes entered into a number of contracts with Riverside, which included the Admission Agreement and Arbitration Agreement, on behalf of Mrs. Varner. (See **Exhibits 1 and 2**, respectively, attached hereto). Mrs. Haynes also signed certain consents, authorizations, and acknowledgements directly related to Ms. Varner's residency, as well as an assignment agreement authorizing the Facility to secure payment from third-party resources for costs associated with Ms. Varner's stay and care. (See **Exhibit 3**). Many of these agreements, including the Admission Agreement bear the name of Michael Bennette. Ms. Varner's Face Sheet indicates Mr. Bennette held a power over attorney over Ms. Varner and may have given other family members permission to complete the admission paperwork. (See Face Sheet, attached hereto as **Exhibit 4**).

Based on the Admission Agreement and pursuant to the agreements set forth therein, Ms. Varner was admitted to the Facility and received skilled nursing care and treatment. During her stay at the Facility, Ms. Varner accepted the benefits of the contracts entered into on her behalf by her representative, Mrs. Haynes. Such benefits included, but are not limited to, Ms. Varner's

residency at the Facility and her receipt of the skilled nursing care provided therein. Plaintiff has never challenged any agreement's validity until now. Notably, Plaintiff does not assert that the Admission Agreement is invalid or that Ms. Varner entered the Facility unwillingly or without consent.

Upon admission, Mrs. Haynes explicitly represented that she was authorized to admit Ms. Varner to the Facility and execute necessary documents on her behalf, including the Arbitration Agreement. Indeed, the very first provision of the Admission Agreement states that *all information provided to the Facility* is truthful and correct, including Mrs. Haynes' authority to bind her mother-in-law, Ms. Varner, to certain agreements. (See **Ex. 1**). Mrs. Haynes signed the Admission Agreement on behalf of Ms. Varner as her "Legal Representative."

The relevant provisions of the Arbitration Agreement state the following:

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

The Arbitration Agreement further provides:

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

Regarding Mrs. Haynes' authority to sign on behalf of her mother-in-law, the Arbitration Agreement states:

By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative. (See **Ex. 2**).

Moreover, the Arbitration Agreement states "It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assignees, personal representatives, guardians, or any persons deriving their claims through or on behalf of Resident." (See **Ex. 2**). By its terms, the Arbitration Agreement is binding on the Facility's "agents, employees, and servants" as well. (See **Ex. 2**).

The Arbitration Agreement was executed by Mrs. Haynes as "Legal Representative" of Ms. Varner and Chandra Bryant on behalf of Riverside. (See **Declaration of Chandra Bryant, attached hereto as Exhibit 5**). Ms. Bryant conducted the admissions process for Ms. Varner. She recalls meeting with Mr. and Mrs. Haynes and that they represented that they were authorized to complete admissions paperwork, including the Arbitration Agreement. (**Ex. 5**, pg. 1). Further, Ms. Bryant recalls explaining to the Arbitration Agreement to Mr. and Mrs. Haynes to ensure they understood it before signing and believed Mrs. Haynes had the authority to sign the Arbitration Agreement, Admission Agreement and other documents on her mother-in-law's behalf. (**Ex. 5**, pgs. 2-3). Ms. Varner never repudiated or invalidated Mrs. Haynes' act of signing the Arbitration Agreement and never indicated to Ms. Bryant that she lacked the authority to sign on her behalf. (**Ex. 5**, pgs. 2-3) Because the acts complained of by Plaintiff fall within the scope of the Arbitration Agreement, the Court should stay these proceedings, and compel this matter to arbitration. 9 U.S.C. § 3.

ARGUMENT AND CITATION TO AUTHORITY

I. POLICY IN FAVOR OF ARBITRATION

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

II. THE FEDERAL ARBITRATION ACT GOVERNS THE ARBITRATION AGREEMENT AND THE CLAIMS ASSERTED BY THE PLAINTIFF IN THE COMPLAINT

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

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

9 U.S.C. § 4 (emphasis added).

“By its terms, the (FAA) leaves no place for the exercise of discretion by a... court, but instead mandates that... courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). While a court a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not invalidate an arbitration agreement on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423, 197 L. Ed. 2d 806 (2017)(citing *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742).

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

III. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE

A. The Plain Language of the Agreement Binds Plaintiff

According to the plain language of the Arbitration Agreement and consistent with her actions during the admissions process, Mrs. Haynes represented herself to admissions personnel at the Facility as her mother-in-law’s representative with the authority to sign documents and

enter agreements on her behalf.¹ It was clearly Ms. Hayne’s intention to bind Ms. Varner according to the terms of the Admission Agreement and Arbitration Agreement. Moreover, Ms. Varner evinced no intentions or directions to the contrary. Accordingly, the plain language of the Arbitration Agreement confirms that Mrs. Haynes was authorized to enter this Agreement binding his mother to arbitration, and the Agreement directly applies to the instant dispute. For these reasons, the Court should find this Agreement is valid and enforceable, and the present action must be stayed and compelled to arbitration.

This Court has recently found the plain language of arbitration agreements to support enforceability in at least two other cases with circumstances nearly identical to the case at bar. *See e.g. Macie Price v. THI of South Carolina at Magnolia Manor Inman, LLC et. Al*, 2018-CP-42-01054 (S.C. Com. Pls. August 7, 2018) (attached hereto as **Exhibit 6**); *Josephine Spears v. Rehab Center of Cheraw, LLC et al.* 2019-CP-13-00308 (January 10, 2020) (attached hereto as **Exhibit 7**). In both cases, the plaintiff was the wife of a resident at a skilled nursing facility in South Carolina. The resident’s wife in each case executed an admissions agreement and an arbitration agreement *identical* to the ones in the case at bar, and as here represented to the facility that she had authority to enter these agreements on her husband’s behalf. (See **Ex. 6**, p. 2-3; see **Ex. 7**, p. 1). Unlike the present case, the plaintiffs in *Price* and *Spears* later executed contradictory affidavits in opposition to the Defendants’ motion to compel arbitration, disclaiming their authority to enter the agreements. Nevertheless, this Court found that the signatory plaintiffs’ attestations of authority in the arbitration agreements prevailed over the contradictory affidavits, and bound plaintiffs in both cases to the terms of the agreements. The Court should reach the same conclusion in the present case, and enforce the Arbitration

¹ See **Ex. 2** “It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assignees, personal representatives, guardians, or **any persons deriving their claims through or on behalf of Resident.**” (emphasis added).

Agreement, particularly in the apparent absence of any affidavits or other evidence to contradict the plain language of the Agreement.

Specifically, this Court determined in *Price* that “the terms of the Arbitration Agreement clearly apply to the instant dispute[,]” because it was clearly the intent of the wife to bind her husband (and herself, as personal representative) according to the plain language terms of the arbitration agreement. (See **Ex. 6**, p. 5). Likewise, in *Spears*, the arbitration agreement at issue contained an express attestation of authority to enter into the agreement on behalf of the resident identical to Plaintiff’s attestation in the Arbitration Agreement noted above. As such, this Court in *Spears* held, in part, that the wife’s authority to sign the arbitration agreement at issue was “valid on its face” by its plain language (and indeed the arbitration agreement as a whole was found to be valid on its face) and that the skilled nursing facility had no obligation whatsoever to inquire as to the signatory plaintiff’s authority beyond her own attestation. (See **Ex. 7**, p. 4). As in *Price* and in *Spears*, Mrs. Haynes in this matter expressly attested to her own authority to enter into the Arbitration Agreement on behalf of her mother-in-law, Ms. Varner. She has not submitted an affidavit or other evidence disclaiming his authority to enter such an agreement on her mother-in-law’s behalf. Therefore, the Court should find that Plaintiff is bound by the plain language of the Arbitration Agreement and compel this matter to arbitration.

B. Mrs. Haynes Possessed the Apparent and Inherent Authority to Execute and Bind Ms. Varner to the Arbitration Agreement, and should be Estopped from Denying the Validity of the Arbitration Agreement.

i. Agency Relationship - Apparent Agency Authority

In addition to representing herself as authorized to enter the Arbitration Agreement on her mother-in-law’s behalf by the plain language of the Arbitration Agreement and by her own express representations, Mrs. Haynes possessed the *apparent and inherent authority* to bind Ms.

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

Alternatively “[a]n agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties.” *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145-146, 425 S.E.2d 764, 773 (Ct. App. 1992.) The doctrine of apparent authority provides that a principal may be bound by the acts of its agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

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

represented himself to be authorized to make health care decisions on her behalf. The arbitration agreement in *Carraway* was a separate document and was not a condition of admission to the facility. *Id.*

When signing the arbitration agreement, the brother in *Carraway* left the resident signature line blank and signed it as the “authorized representative” of his sister. Suit was later filed and the facility moved to compel arbitration, which the trial court granted. On appeal, the Alabama Supreme Court affirmed the trial court's decision holding, relevant here, that the resident's brother possessed the apparent authority to enter into the arbitration agreement on his sister's behalf, as evidenced by the fact that she never objected to him signing on her behalf and the arbitration agreement specifically provided that any person authorized by the resident may execute it on her behalf. *Id.* See also, *Tenn. Health Mgmt. v. Johnson*, 49 So. 3d 175 (Ala. 2010) (holding that a daughter possessed the apparent authority to enter into an arbitration agreement on her mother's behalf). Notably, the Supreme Court of Alabama’s holding in *Carraway* was applied as “persuasive authority” by this Court in *Price, supra.* (Ex. 6, p. 8).

Clearly, in this matter, Mrs. Haynes held herself out as an agent for her mother-in-law without any indication to the contrary when she executed various admission documents on behalf of her mother-in-law, including the Arbitration Agreement. Based on Mr. and Mrs. Haynes’ conduct and explicit representations, Ms. Bryant believed she possessed the authority to execute all admissions documents on her behalf, including the Arbitration Agreement. Therefore, it was Ms. Bryant’s and the Facility’s reasonable and justified belief that Mrs. Haynes was her mother-in-law’s authorized representative and had the authority to execute the documents on her behalf.

Moreover, by allowing Mrs. Haynes to procure her admission to the Facility and, thereafter, by accepting the benefits of the contracts entered into in connection with that

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

A holding to the contrary would contradict the fundamental concept of apparent agency: *an agency relationship is based on a third party's understanding of a principal's manifestations and a reasonable belief that the agent has been authorized to act.* Ms. Bryant and the Facility had reason to believe that, by allowing Mrs. Haynes to sign the admissions paperwork, including the documents providing for Ms. Varner's stay and the skilled nursing care provided at the Facility, Ms. Varner cloaked Mrs. Haynes with the authority to execute those documents. Further, Neither Ms. Varner, Mr. Bennette nor any other family member repudiated or invalidated Mrs. Haynes' actions. Instead, Ms. Varner accepted the benefits of the contracts with the Facility by remaining at the Facility and receiving skilled nursing care and services, thereby ratifying her daughter-in-law's actions. Because no one attempted to repudiate the Arbitration Agreement or even question it, the Facility was further justified in believing Mrs. Haynes had been authorized to execute it. It is clear that an apparent agency relationship existed such that the Arbitration Agreement should be deemed enforceable.

ii. Inherent Agency Authority

Even if Mrs. Haynes lacked the actual or apparent authority to enter into the terms of the Arbitration Agreement, she still possessed sufficient inherent agency powers to render the

agreement enforceable. Such powers are recognized by South Carolina courts and are used to enforce agreements where supposed unauthorized actions “accompany or are incidental to transactions which the agent is authorized to conduct....” *See*, §§ 8A, 161 *Restatement (Second) of Agency* (1958); *Smith v. Fitton & Pittman, Inc.*, 264 S.C. 129, 212 S.E.2d 925 (1975) (*abrogated on unrelated grounds*) (examining whether party had properly demonstrated the existence of inherent agency powers); *Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r*, 309 P.3d 372 (Wash. 2013); *Daly v. Aspen Ctr. for Women's Health, Inc.*, 134 P.3d 450, 452 (Colo. App. 2005); *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210-11 (Ind. 2000); *Cange v. Stotler & Co.*, 826 F.2d 581, 591 (7th Cir. 1987) (“[t]he powers of an agent are, prima facie, coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.”) (*citing Lumbermen's Mut. Ins. Co. v. Slide Rule & Scale Eng'g Co.*, 177 F.2d 305, 309 (7th Cir. 1949)).

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

iii. Agency by Estoppel

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

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

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

(See **Ex. 6**, p. 9). Accordingly, the court concluded that the arbitration agreement was valid and enforceable.

Similarly, in *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011) the United States District Court of South Carolina concluded the plaintiff was estopped from denying he had authority to bind his wife to arbitration. (Attached hereto as **Exhibit 8**). As in the present case, the husband in *McCutcheon*

executed a number of documents on his wife's behalf upon her admission to a nursing home facility, including an admissions agreement and an arbitration agreement. As in this case, the admissions agreement in *McCutcheon* provided that the husband was his wife's legal representative for the purposes of admission, as he was her next-of-kin and represented himself as authorized to make health care decisions on her behalf. The court held:

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

Id. at *5.

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

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

i. Merger

As additional grounds to compel arbitration and in the alternative, the Admissions Agreement and Arbitration Agreement should be construed together and Plaintiff should be required to arbitrate her claims against the Facility. The Arbitration Agreement and Admission Agreement were executed by Mrs. Haynes on behalf of Ms. Varner. The validity of these agreements, including the Arbitration Agreement, must be determined in accordance with the general principles of contract law and agency law that would apply to any other contract. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010).

The Arbitration Agreement provides that “any controversy or dispute between the parties *arising out of or relating to Facility’s Admission Agreement . . .* or relating in any way to Resident’s stay at Facility” shall be resolved by arbitration pursuant to the terms of the Arbitration Agreement. (See **Ex. 2**) (emphasis added). As previously described, the Arbitration Agreement and the Admissions Agreement were both signed by Mrs. Haynes on behalf of her mother-in-law on the same day, at the same time, and in connection with the same subject matter and transaction - Ms. Varner’s residency at the Facility and receipt of skilled nursing care there.

Courts in South Carolina construe contemporaneous instruments together; if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated. *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977). Absent some evidence indicating a contrary intention, when instruments are executed at the same time, by the same parties, for the same purpose, and in the

course of the same transaction, the courts will generally consider and construe them together on the theory that the instruments are effectively one instrument or contract. *Id.* See also *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994) (holding that promissory notes and a mortgage agreement executed contemporaneously on the same date, must be construed together). Furthermore, even when instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. See *Plaza Development Services v. Joe Hardin Builder, Inc.*, 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988); accord *Cafe Associates, Ltd v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991).

As indicated previously, the court in *McCutcheon* analyzed facts almost identical to the case at bar and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011WL6318575 (See **Ex. 8**). Indeed, this Court has cited to *McCutcheon* on numerous occasions in holding that a nursing home arbitration agreement merged with the admission agreement for purposes of equitable estoppel under precisely the same circumstances. See *Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012). (See *Abrams*, *Campsen* attached hereto as **Exhibits 9 and 10, respectively**).

Accordingly, Ms. Varner, by and through the acts of her representative, Mrs. Haynes, and the Facility, both contemplated that the terms of the agreement to admit Ms. Varner were contained in the Admissions Agreement and Arbitration Agreement. Mrs. Haynes executed the Arbitration Agreement and the Admissions Agreement at the same time; the Arbitration

Agreement and the Admissions Agreement both covered the same subject matter and transaction (Ms. Varner's residency at the Facility and her receipt of residential and skilled nursing services); the Arbitration Agreement and Admissions Agreement were executed by the same parties; the Arbitration Agreement specifically makes citation to and incorporates the Admission Agreement; and thus the Arbitration Agreement and Admission Agreement should be construed as part and parcel of the same agreement between the parties.

ii. Equitable Estoppel of Merged Agreement

“Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.” *Int'l Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). “A nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause.’” *Id.* (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)); *see also Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290–297, 733 S.E.2d 597, 601–605 (Ct. App. 2012) (applying the direct benefits test as set forth in *International Paper Co.* to reverse the circuit court's denial of a motion to compel arbitration); *Wilson v. Willis*, 426 S.C. 326, 339–345, 827 S.E.2d 167, 174–177 (2019) (discussing direct benefits test).

Because of the doctrine of merger referenced above, this legal principle is properly applied in this case. The doctrine of equitable estoppel “exists to prevent a litigant from unfairly receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the contract, namely the contractual arbitration provision.” *S. Ill. Bev., Inc. v. Hansen Bev. Co.*, 2007 U.S. Dist. LEXIS 76229 (S.D. Ill. 2007). Moreover, the Fourth Circuit

has held that “no party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein.” *United States v. Bankers Ins. Co.*, 245 F.3d 315, 323 (4th Cir. 2001).

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

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

. . . .

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

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

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

Of note, this Court applied this precise reasoning in *Spears*, referenced above. (See **Ex. 7**, pg. 9). In that case and as discussed above, a woman admitted her husband to a skilled nursing facility and in connection with his admission, executed admission and arbitration agreements *identical* to the ones here. The agreements were both executed by the woman and a representative of the skilled nursing facility at the same time. This Court considered the agreements as merged and held that the plaintiff was estopped from refusing to comply with the arbitration agreement where, like here, the resident received “direct benefits from the Admission Agreement in the form of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein.” *Id.*, pg. 10 (footnote omitted).

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

As described, the Plaintiff’s allegations fall within the scope of the Arbitration Agreement. In accordance with the foregoing law, Plaintiff cannot assert claims against the Facility based upon certain terms of the Admission Agreement while repudiating the Arbitration Agreement and should be prevented from doing so pursuant to the doctrine of equitable estoppel. Pursuant to numerous orders of this Court and numerous other courts on essentially identical facts and concerning identical arbitration agreements, where a non-signatory receives the

benefits of the contract, which Ms. Varner certainly did here, Plaintiff must be prevented from refusing to comply with the Arbitration Agreement merely because Ms. Varner did not sign it.

iii. Coleman and Thompson are Distinguishable

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

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

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

Instead, in the present case, the agreements “were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction” and, therefore, the documents merged. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts*, *supra*, 268 S.C. at 88, 232 S.E.2d at 24).³ Specifically, the Admission and Arbitration Agreements were signed by Mr. Greene, on his mother’s behalf, and the Facility on November 27, 2017. The documents were signed by the exact same people: Mrs. Haynes as representative for her mother and by Chandra Bryant for the Facility. The documents were signed for the same purpose and transaction of establishing Ms. Varner’s residency at the skilled nursing facility.

While the Admission Agreement in this case does contain an “Entire Agreement” clause, unlike the admission agreements in those other cases, the provision in this case does not separately reference the Arbitration Agreement (in fact, it doesn’t refer to it at all). Moreover, the Arbitration Agreement at issue contains no disclaimer provision, unlike *Coleman* and *Thompson*.

Further still, it must be remembered that the merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”⁴ as indeed the admission and arbitration agreements were here, there is evidence to upset the *default presumption* that the contracting parties intended the instruments to be construed together as effectively one contract. As a practical matter, if this presumption is to mean anything, upsetting it must require actual evidence of sufficient probity that, notwithstanding the concurrence of all the circumstances that must come together for the

³ To be clear, even though the *Coleman* Court found evidence of an intent contrary to merger on the particular facts before it, it nonetheless recognized as *correct* the general proposition of law on which the *Coleman* Appellants’ based their merger argument, i.e., the *Coleman* Court expressly observed that the admission agreements and arbitration agreements before it (which, in this respect, are no different than the instant agreements—though that is not the case in regard to the material facts bearing on the question of merger), “the documents were [indeed] executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction.” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

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

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

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

the Arbitration Agreement, the Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitration Agreement's) sole reason for being.

It matters not whether the Arbitration Agreement was a condition of admission, only that it was in fact agreed to in conjunction with admission; and, here, there can be no question that the Arbitration Agreement—once agreed upon—was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument, governing various interrelated aspects of Ms. Varner's relationship with the Defendants. Indeed, this conclusion finds direct support in the Admission Agreement's "Entire Agreement" provision, which states, "[t]he undersigned further acknowledges that he/she has received and read the Admission Handbook and other Admissions materials and understand that these documents are made a part of this Agreement by reference herein." (Ex. 2, p. 12 (emphasis added)). Had the Arbitration Agreement not been executed, it would not constitute admissions material, but, of course, it was executed, and it does constitute admissions material; most respectfully, to conclude otherwise simply does not make sense. Respectfully, the material facts of *Coleman* and *Thompson*, are different from the material facts of the instant case, and those other cases do not control the outcome here. Under the particular facts of this case, an intent contrary to merger cannot reasonably be found.

D. Should the Court decide to Deny the Facility's Motion, the Parties Should be Permitted to Conduct Additional Discovery.

If the Court is not inclined to grant the instant motion on the grounds contained in this memorandum, the Defendant requests that the parties be permitted to conduct additional discovery on the issues raised herein, and in particular, the nature of Mrs. Haynes' agency relationship with her mother-in-law and the circumstances surrounding the admissions process.

In a case involving similar issues, the Honorable Perry Gravely allowed the parties to conduct additional discovery on the issue of a mother's authority to execute an Arbitration Agreement on her son's behalf in connection with his admission to a skilled nursing facility. *See James Boyd v. THI of South Carolina, LLC d/b/a at Magnolia Place-Greenville, et. Al*, 2018-CP-23-01934 (S.C. Com. Pls. July 9, 2018)(attached hereto as **Exhibit 11**). Critical to the court's decision in that case was whether the son's conduct and admissions director's understanding of that conduct created apparent agency so as to bind the son to an arbitration agreement. The court permitted the parties to take the depositions of the mother, the son, the admissions coordinator for the skilled nursing facility, and the case manager for the hospital the son was transferred from. After considering the testimony of those individuals, the court found there was evidence to support a finding of apparent agency.

Likewise, the Honorable Alison Lee allowed the parties to conduct additional discovery on a wife's authority to execute an arbitration agreement on behalf of her husband. *See Priscilla Brown, as Personal Representative of the Estate of James Brown v. THI of South Carolina at Columbia at Magnolia Manor d/b/a Midlands Health and Rehabilitation Center*, 2017-CP-40-00516 (S.C. Com. Pls. Nov. 7, 2019) (attached hereto as **Exhibit 12**). The case at the bar involves Mrs. Haynes' authority to execute the Arbitration Agreement and the circumstances surrounding its execution. As in *Boyd* and *Brown*, if the Court determines the record is insufficient to properly rule on the issues before it, additional discovery should be permitted as necessary.

Most respectfully, if the Court should make such a determination, it is only fair to allow the Facility to engage in some appropriately limited discovery to attempt to protect its arbitration rights. It must be remembered that the Facility moved to compel arbitration under a facially

valid arbitration agreement. The Defendant firmly believes Mrs. Haynes had the authority to execute the Arbitration Agreement on behalf of her mother-in-law. Nevertheless, neither Plaintiff, Mr. Bennette, nor Ms. Varner (or anyone else authorized to act on Ms. Varner's behalf) ever called Mrs. Haynes' authority to enter into the Arbitration Agreement into question until now. The Facility had no reason to conduct discovery until this dispute arose, and even then, they still maintain their primary position that the Arbitration Agreement was enforceable based on the record as is. If further development of the record is needed on any point material to arbitrability, the Court should expressly allow the Facility to protect its legitimate interests through discovery into the relevant subject matter without exposing itself to a claim of waiver by Plaintiff, i.e., without having to expose itself to a potential Catch-22 where it could be said to have waived its arbitration rights simply by endeavoring to prove them.

CONCLUSION

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

[Signature block on the following page]

CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

Russell G. Hines

SC State Bar ID No.: 72100

Matthew O. Riddle

SC State Bar ID No.: 76650

Gaillard T. Dotterer, III

SC State Bar ID No.: 103620

P.O. Box 993, Charleston, SC 29402

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

rhines@ycrlaw.com, mriddle@ycrlaw.com,

gdotterer@ycrlaw.com

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

Charleston, South Carolina

Dated: January 28, 2022

ADMISSION AGREEMENT – SOUTH CAROLINA

RESIDENT NAME: Elizabeth Varner

RESIDENT NUMBER: 301940

DATE OF ADMISSION: 5/20/19

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among ("Facility"), ("Resident") and/or Michael Bennett ("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 aids 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 reserve 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 have 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 have 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.

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

III. FINANCIAL AGREEMENT

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

1. Room and board, including meals, laundering of linens and bedding, nursing care, personal care or custodial care for the health, grooming and well-being of Resident in (☐-private) (☐-semi-private) accommodations, for a basic fee of \$221.00 per day, payable one month in advance. In the event Resident is unable or unwilling to receive any of the services included in the room and board charge, such as meals, laundry, etc., no adjustment will be made to the daily rate. Payment for all invoices is due upon receipt. In the event public aid funds are denied for services for which coverage has been expected, Resident and/or Representative will be responsible for payment and will pay such charges upon receipt of invoice. Resident and/or Representative agree(s) to pay any rate change charged to Resident so long as each party to this Agreement is given at least thirty (30) days written notice of the new rate, including any increases or adjustments in Resident's liability by any financial third party or regulatory agency. Additional notice may be provided under applicable state regulations.

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

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

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

Original: Business File • Photocopy: Resident/Representative

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.

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- 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.
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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 11-B-13 herein.

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

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

IV. TERMINATION

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

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

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

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

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

V. MEDICAID BENEFICIARIES

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

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

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

3. **Non-Covered Services.**

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

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

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 agree 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 authorize 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 remain 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 agree 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 authorize 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

6. Not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remain 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.

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, and 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

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

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

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

XVIII. ENTIRE AGREEMENT

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

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

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

Signature of Resident

Date

Printed Name of Resident

249 64 4655

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

FACILITY - RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT

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

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

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

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

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

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

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

Kim Haynes 5/20/19
Resident/Representative Signature Date

Kim Haynes
Printed Name of Resident/Representative

Chandra Bryant
Authorized Agent of Facility Date

Riverside Health & Rehab
printed name of facility

AUTHORIZATIONS, CONSENTS & ACKNOWLEDGMENTS

Please read, review and acknowledge each the following:

Elizabeth Garner

Treatment/Health Care Professionals:**Authorization for Treatment**

☒ (Initial) I hereby authorize Facility's professional staff to administer nursing procedures, podiatric procedures, therapies, skin scrapings, nonsurgical dental procedures and laboratory and x-ray procedures on me/Resident. I understand that I may withdraw this consent at any time by notifying Facility in writing. I further understand that an additional consent will be required for any surgical treatment or for any treatment requiring the use of general anesthesia.

Medical Treatment

☒ (Initial) It is understood and agreed that Resident is under the control of his/her elected physician and/or his/her designee and that Facility is not liable for any act or omission as a result of following instructions of said physician(s)/designee(s). Resident consents to diagnostic imaging procedures, laboratory procedures, or medical treatment rendered to Resident under the general and special instructions of Resident's physician or physician's designee.

General Duty Nursing

☒ (Initial) Facility provides general duty nursing care. Under this system, nurses are called to the resident's bedside by a signal system. If Resident is in such condition as to need continuous or special duty nursing care, it is agreed that Resident, Resident's legal representative or Resident's physician(s) will make the necessary arrangements for such care. It is understood and agreed that Facility shall not, in any way, be responsible for the failure to provide such care and is hereby released from any and all liability arising from the fact Resident is not provided with such care.

Independent Status of Health Care Providers and their Agents/Designees

☒ (Initial) Resident and/or Resident's legal representative acknowledges that any and all health care providers and their agents/designees are not agents or employees of Facility. Resident and/or Resident's legal representative understands and agrees that each health care provider or their agent/designee who renders services to Resident will independently bill and collect fees for these services. Resident and/or Resident's legal representative agrees and understands that the health care provider's bills will be separate and apart from Facility's.

Selection of Medical Professionals:

You have the right to use your personal health care providers during your stay. In the event you do not have a current provider, the facility has a list of independent providers who are available to provide on-site care. If you have difficulty contacting any of these professionals, please notify our staff. Please indicate your choice of health care providers below, including the provider's phone number and address.

PHYSICIAN:

Name: Leo Jesion MD
Address: 2375 Bakers Hospital Blvd. Charleston, SC 29405
Phone: 843-744-2750

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative FFUS003

DENTAL

☐ Yes

☒ No

Examination Charge \$ _____

I would like to receive dental services at the above charge and have selected the following provider:

Name: _____
Address: _____
Phone: _____

VISION

☐ Yes

☒ No

Examination Charge \$ _____

I would like to receive vision services at the above charge and have selected the following provider:

Name: _____
Address: _____
Phone: _____

PODIATRY

☐ Yes

☒ No

Examination Charge \$ _____

I would like to receive podiatry services at the above charge and have selected the following provider:

Name: _____
Address: _____
Phone: _____

Mental Health Counselor

☐ Yes

☒ No

Examination Charge \$100.00

I would like to receive dental services at the above charge and have selected the following provider:

Name: _____
Address: _____
Phone: _____

Self-Administration of Medications

Please indicate whether or not you wish to invoke your right to self-administer medications prescribed by your physician as outlined in the Admission Handbook.

☐ I wish to invoke my right to self-administer medications prescribed by my physician. I (Initial) authorize and consent to an evaluation by the Interdisciplinary Team in order to determine my ability to carry out this responsibility.

☒ I wish to waive my right to self-administer medications. I request and authorize Facility's (Initial) nursing staff to administer medications prescribed by my physician. **I understand that I am entitled to this right and that I may invoke this right any time in the future by written notification to the facility.**

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative FFUS003

Authorizations, Consents & Acknowledgment (6-22-2009)

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Personal Property/Valuables/Money:

☒ KH I acknowledge that I have received, read or had read to me, and understand Facility's policy (Initial) on personal property, valuables and money. I understand that all personal belongings should be labeled properly and entered on a personal inventory list. I understand that all items removed from or brought into the facility after admission should be documented on the inventory list and that missing items must be reported to appropriate staff as soon as possible.

☒ KH I acknowledge and understand that Facility is not responsible for damage to or theft/loss of (Initial) any personal property/valuables/money not kept in compliance with Facility policies.

Deposit of Personal Funds:

Please indicate below whether or not you wish to deposit personal funds with Facility in accordance with the *Protection of Resident's Funds* policy outlined in the Admission Handbook. **Please note that you are not required to deposit any funds with the facility.**

☒ KH I do not wish to deposit personal funds with the facility at this time. (Initial)

☐ I authorize Facility to accept, hold and account for my personal funds in accordance with the (Initial) policies outlined herein. I acknowledge that I have the right to revoke this authorization at any time upon written notice to Facility. I acknowledge that authorized State agencies may audit this account, regardless of my payer source.

Beneficiary Designation: (THIS PORTION TO BE FILLED IN BY RESIDENT ONLY)

In the event of my death, I authorize Facility to transfer all personal funds and property held by Facility to the following person(s): William Haynes. If I have not named a beneficiary or the beneficiary cannot be located, I understand that Facility will hold and pay the funds in line with the State's regulations.

Advance Directive Acknowledgment:

☐ I acknowledge that I have received, read or have had read to me, and understand *Facility's Policy* (Initial) and *State Requirements for Advance Directives* and have executed the following advance directive measures and **a photocopy has been provided to the facility for inclusion with my Medical Records:**

- ☐ Living Will
- ☐ Durable Power of Attorney for Health Care or similar agent designation
- ☐ "Do-Not-Resuscitate" Identification (CPR)
- ☐ Other: _____

☒ KH I acknowledge that I have received, read or have had read to me, and understand *Facility's Policy* (Initial) and *State Requirements for Advance Directives* and have elected **NOT** to execute any advance directive at this time, including DNR Identification. **I understand that facility staff will respond to medical emergencies with CPR measures and a full code will be instituted.**

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative FFUS003

Special Services:

Please indicate whether or not you authorize the following services to be provided. All associated fees will be charged to your account:

Telephone	Yes	No	☒ N/A	Charge \$
Television	Yes	No	☒ N/A	Charge \$
Newspaper	Yes	No	☒ N/A	Charge \$
Laundry	Yes	No	☒ N/A	Charge \$
Beauty Shop	Yes	No	☐ N/A	See charge list
Other(s) (Please Specify Below)				

_____	☐ Yes ☐ No	Charge \$
_____	☐ Yes ☐ No	Charge \$

Photographs by State/Federal Survey Agencies

I acknowledge and understand that, during my/Resident's stay, Federal and/or State surveyors (investigators) may take my/Resident's photograph as part of their independent survey/investigation process and in line with conditions of my/Resident's participation in the Medicare and/or Medicaid program. I understand that, in line with CMS guidelines, the surveyors must obtain written consent from Resident or his/her surrogate **before** any photographs are taken. I understand that the Federal/State Survey Agency is wholly responsible for acquiring and securing any photographs they may take.

☒ KA (Initials) I acknowledge and understand that neither Facility nor its parent, affiliates, officers, directors, employees, attorneys, assigns or any other person acting on its behalf, has any oversight or responsibility for the surveyors actions or inactions as it relates to taking photographs for their independent investigations.

Photograph/Audiotape/Videotape ☒ Yes KA (Initial) ☐ No _____ (Initial)

I hereby authorize Facility to photograph/audiotape/videotape me/Resident for its use in resident identification, infection control, surveillance and/or other medical purposes. I understand that, if the facility wishes to photograph/audiotape/video tape me for any other reason, (activities, marketing, media coverage, etc.), the facility will secure permission from me through a separate written authorization.

Posted Information ☒ Yes KA (Initial) ☐ No _____ (Initial)

To better serve you and meet your health care need, permission is needed to post information regarding your/Resident's health care needs within your room and the facility as needed. The information to be disclosed will be the minimum amount necessary and shall serve as a means of communication, enabling staff to provide service while, at the same time, ensuring your/Resident's rights to privacy. Information to be disclosed may include, but not be limited to, therapy schedules, activities of daily living, ambulation/mobility parameters, swallowing and aspiration precautions, do-not-resuscitate orders.

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative FFUS003

Authorization to Release and Obtain Information ☒ Yes (Initial) ☐ No (Initial)

I hereby authorize the facility to release and/or obtain medical information or other necessary data which may be necessary for my/Resident's continued treatment and care at the facility, including but not limited to the filing of insurance claims in my/Resident's/Facility's interest. I further authorize the release of information, medical or otherwise, to any government agency without my prior approval or that of my representative, if any.

Authorization to Receive/Open Mail ☒ Yes (Initial) ☐ No (Initial)

I hereby authorize Facility to open all mail received by me/Resident. Further, I would like this mail to be read to me/Resident upon receipt. You have the right to revoke this authorization at any time upon written notice to the facility.

Resident Signature () Date ()

Kim Haynes (5/20/19)
Legal Representative Signature, if any Date

Printed name of Resident

Kim Haynes
Printed Name of Representative

Witness Signature () Date ()

1
Printed Name of Witness

Chandra Bryant 5/20/19
Facility Representative Signature Date

Chandra Bryant
Printed name of Facility Representative

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative FFUS003

Authorizations, Consents & Acknowledgment (6-22-2009)

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Revision: 11/14/2017 - CMS FR

FFUS002 (Admission Handbook)

ASSIGNMENT AGREEMENT

THIS ASSIGNMENT AGREEMENT ("Agreement"), made and entered into as of this 20th day of May, 2019, by and between Riverside ("Facility") AND ("Resident") AND/OR Michael Bennett ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party," hereinafter collectively "Representative"), who together shall be referred to as "Resident" within this agreement;

NOW, THEREFORE, intending to be bound and as consideration for admission to the Facility, the Parties hereto agree as follows:

1. **Obligations of Resident.** Resident agrees to make full and complete disclosure to the local Medicaid Program Office regarding all financial resources and income during the application process, including all transfers of assets and/or financial resources having taken place within the preceding five years of the date of application for admission to Facility. Failure to identify all resources, income, and transfers or the submission of false information may result in the termination of this Agreement and financial liability. Resident is obligated to notify Facility when only \$2000.00, or the value thereof, exists to satisfy financial obligations under this Agreement and/or the Admissions Agreement. Resident agrees to apply for Medicaid benefits at such time as his/her resources will no longer be sufficient to pay all Facility charges for Resident's care and stay.
2. **Patient Pay Amount.** For residents approved for Medicaid benefits, Facility will accept payment from Medicaid and, if applicable, the Resident's Patient Liability Amount as determined by Medicaid as payment in full only for those services covered by the Medicaid Program. During the period of time that the application for Medicaid benefits is pending, Resident shall pay such monthly Patient Liability Amount (less any qualified medical expense deductions) as estimated by the Facility and the Medicaid Program at the time of application for Medicaid benefits.
3. **Determination of Medicaid Eligibility.** Resident is obligated to cooperate fully in any Medicaid eligibility determination or redetermination process. In the event that Resident's eligibility for Medicaid benefits is denied, interrupted or terminated due to his/her failure to cooperate in the Medicaid application process, redetermination or appeal process, Resident shall be liable for the applicable daily room rate plus charges for ancillary services and supplies, during any period of nonpayment.
4. **Eligibility for Third-Party Payments.** Resident may be or may become eligible to receive financial assistance, reimbursement, or other benefits from third parties, such as private insurance, employee benefit plans, benefits under the Medicaid Program, Medicare benefits, managed care coverage, supplementary medical or other health insurance, supplemental security income insurance, or old-age survivors' or disability insurance. It is Resident's responsibility to apply for these benefits. If Resident is or becomes eligible to receive payments from any third parties for Resident's stay and care, the Facility reserves the right to collect such payments directly from the third-party source. Resident shall at all times cooperate fully with Facility and each third-party payer to secure payment. Cooperation includes providing information, signing and delivering documents, and assigning to Facility (to the extent permitted by law) any payments from Federal Social Security benefits, from any other federal or state governmental assistance programs, reimbursement or benefits of any third party payer to the extent of all amounts due the Facility. Resident agrees to reimburse Facility for any and all costs incurred by Facility to collect such payments directly from the third-party source.

Original: Business File • Photocopy: Resident/Representative

5. Assignment of Payments. Although it is Resident's responsibility to secure payment from third-party resources, including but not limited to Medicaid benefits, Resident authorizes Facility to make such claims and to take such actions as it deems necessary to secure for the Facility receipt of third-party payments to reimburse Facility for its charges associated with Resident's stay and care. This assignment includes, but is not limited to, filing an application for Medicaid benefits and pursuing any and all appeals in the event the application is denied. To the fullest extent permitted by law, as security for payment of charges, Resident hereby assigns to Facility all of his/her rights to any third-party payments now or subsequently payable to the extent of all charges due under this Agreement and/or the Admission Agreement. To the extent permitted by law, Resident shall promptly endorse and turn over to Facility any payments received from third parties to the extent necessary to satisfy the charges under this Agreement and/or the Admission Agreement.

By way of this assignment, Resident hereby authorizes and directs any financial institution, governmental agency, entity or person having or possessing information in whatever form that is requested or needed to determine Resident's eligibility for third-party payments, including, but not limited to Medicaid, to turn over or produce the information to the Facility upon written demand.

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 Gene Haynes (5/20/19) Date

Printed Name of Representative

Witness Signature _____ Date _____

Printed Name of Witness

Chandra Bryant
Signature of Facility Official

Chandra Bryant
Printed name of Faculty official

15/20/19
Date

Original: Business File • Photocopy: Resident/Representative

Resident Face Sheet: Elizabeth Annette Varner

Unit: UNIT 100 Preferred Name:
 Room/Bed: 113/A Attending: Leo Jesion -
 Status: In House Email:

Diagnoses:**Alerts:****Face Sheet Notes:**

** Per POA, patient's daughter/son may complete admission paperwork **

** Per POA, he is 1st contact, uncle is 2nd if he's unavailable **

Contacts

Relationship	Name	Responsibilities	Call Order	Phone/Email	Address	Notes
Other-Grandson	Michael Bennette	Emergency Contact Resident Representative Responsible Party POA - Financial Primary Financial Contact Receive A/R Statement	1	Primary	N/A Moncks Corner, SC 29461	** Per POA, patient's daughter/son may complete admission paperwork ** ** Per POA, he is 1st contact, uncle is 2nd if he's unavailable ** **Need Updated Address 7/24/19 RTS**
Son	William "Billy" Haynes	Emergency Contact	2	Primary	Moncks Corner, SC 29461	
Daughter	Deborah Colvard	Emergency Contact	3	Primary	unknown unknown, SC	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
WILLIAMS HAYNES, AS PERSONAL	)	CASE NO. 2021-CP-10-01437
REPRESENTATIVE OF THE ESTATE	)	
OF ELIZABETH VARNER,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	DECLARATION OF CHANDRA BRYANT
	)	
THI OF SOUTH CAROLINA AT	)	
CHARLESTON, LLC D/B/A	)	
RIVERSIDE HEALTH AND REHAB ,	)	
	)	
DEFENDANT.	)	
	)	

I, Chandra Bryant, respectfully submit this Declaration in support of THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab's ("Riverside" or the "facility") Motion to Compel Arbitration in the above-captioned case:

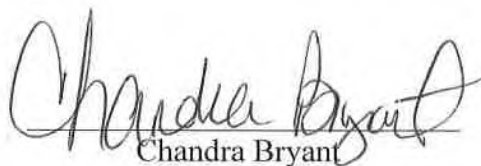
1. I am over the age of eighteen, am otherwise competent, and a resident of the State of South Carolina.
2. I worked at Riverside Health and Rehab during the time period at issue in the Plaintiff's Complaint.
3. I personally conducted the admissions process for Elizabeth Varner, during her admission to Riverside Health and Rehab on May 20, 2019. Ms. Varner's son, William Haynes, and daughter-in-law, Kim Haynes, were present for the admissions process. Mrs. Haynes completed all admissions paperwork, identified and set forth below, on behalf of her mother-in-law.
4. Mr. and Mrs. Haynes represented to me that they were authorized to complete the admissions paperwork, including the Arbitration Agreement.

5. As part of the admissions process, each admitting resident, or their representatives on the resident's behalf, review an Admissions Agreement and various other documents that must be completed by the resident or their representatives for admission to the facility.
6. The admitting resident and their representatives also receive a written copy of the Facility's Handbook, a written copy of the resident's rights under applicable state laws, a written copy of the facility's policy on Advance Directives, a written explanation of the charges for services provided by facility, a separate listing of local and government resources furnished by the state Ombudsman and other state/local advocacy groups, a separate listing of all medical professionals available to provide on-site services, and a written copy of the facility's policy on the use of physical/chemical restraints, in addition to other administrative documents. The admitting resident, or the resident's representatives on behalf of the resident, initial an Acknowledgement Form as part of this admissions process, acknowledging that they have received and reviewed these respective items.
7. The admitting resident, or the resident's representatives on behalf of the resident, also have the option to enter into an Arbitration Agreement with the facility during the admissions process, whereby any future claims by and between the resident and the facility based on the admitting resident's residency at the facility must be submitted to mandatory arbitration. completion of the Arbitration Agreement is not a condition for admission to the facility.
8. The admissions process normally takes approximately one hour, depending on the admitting resident, but can take longer depending on certain variables, including whether the resident's family members are present for the admission process, whether the resident or family members have any questions about the admissions documents, and what the resident's medical condition is during the admissions process.
9. During the admissions process on May 20, 2019, I personally reviewed and explained each of the admissions documents, described above, to Mr. and Mrs. Haynes to ensure that they reviewed, were comfortable with, and understood each and every document, including the Admission Agreement and Arbitration Agreement.
10. I specifically told Mr. and Mrs. Haynes that completion of the Arbitration Agreement was not a condition of Ms. Varner's admission to the facility.

11. It appeared Mr. and Mrs. Haynes were listening to me and understood me as I explained each of the admissions documents during the admissions process, and they did not voice any objections as to any of the admissions documents, including the Arbitration Agreement.
12. I believed based on Mrs. Haynes statements and actions at the time of Ms. Varner's admission that Mrs. Haynes was her mother-in-law's authorized representative and had the authority to execute the Admission Agreement, Arbitration Agreement, and other admissions documents on her behalf.
13. Mrs. Haynes signed each of the admissions documents, including the Admissions Agreement and Arbitration Agreement, on behalf of her mother-in-law.
14. Ms. Varner never repudiated or invalidated her daughter-in-law's actions, and did not otherwise indicate that Mrs. Haynes was not her authorized representative for the purpose of executing the Admission Agreement, Arbitration Agreement, and other admissions documents on her behalf.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on January 27, 2022

Charleston, South Carolina


Chandra Bryant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
MACIE PRICE AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MELVIN PRICE,	)	CASE NO. 2018-CP-42-01054
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
THI OF SOUTH CAROLINA AT MAGNOLIA MANOR INMAN, LLC D/B/A MAGNOLIA MANOR-INMAN; THI OF SOUTH CAROLINA, LLC; AND NAKHEYA STANTON AS OWNER/MANAGER OF MAGNOLIA MANOR SPARTANBURG ,	)	ORDER GRANTING DEFENDANT THI OF SOUTH CAROLINA AT MAGNOLIA MANOR-INMAN, LLC'S MOTION TO DISMISS AND COMPEL ARBITRATION
	)	
DEFENDANTS.	)	

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This matter was before the Court on June 6, 2018 upon Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman's ("Magnolia" or "Defendant Magnolia") Motion to Dismiss and Compel Arbitration. Counsel of record for all pertinent parties were present including Perry M. Buckner, IV for Defendant Magnolia and Stefan B. Fielder for the Plaintiff. Having reviewed the submissions by counsel and heard all arguments advanced, the Court hereby **GRANTS** Magnolia's Motion and orders that this matter be compelled to arbitration in accordance with the below findings.

FACTUAL BACKGROUND

Plaintiff's decedent, Mr. Melvin Price, was admitted to Magnolia in February of 2015. Mr. Price was legally blind at the time of his admission with a history of multiple strokes and was recovering from a recent hospitalization. He was admitted to Magnolia with the assistance and aid

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[Handwritten signature]

of his wife of nearly 50 years, the named Plaintiff, Mrs. Macie Price. Prior to his admission, Mr. Price entered into a number of contracts with Magnolia. The contracts were each signed by the Plaintiff, as representative of Mr. Price, on February 16, 2015. These executed contracts included an Admission Agreement and Arbitration Agreement. Based on the Admission Agreement and pursuant to the agreements set forth therein, Mr. Price was admitted to Magnolia Manor and received skilled nursing care and treatment. During his stay at Magnolia, Mr. Price accepted the benefits of the contracts entered into on his behalf by his representative, Macie Price. Such benefits included, but are not limited to, Mr. Price's admission to Magnolia and his receipt of the skilled nursing care provided therein. Mr. Price never challenged any agreement's validity during his lifetime nor did any representative challenge any agreement until the Arbitration Agreement was challenged by Plaintiff in response to the instant Motion. Notably, Plaintiff does not assert that the Admissions Agreement is invalid or that Mr. Price entered Magnolia unwillingly or without consent.

Upon admission, Mrs. Price explicitly represented that she was authorized to admit Mr. Price to Magnolia and execute necessary documents on his behalf, including an Arbitration Agreement. Indeed, the very first provision of the Admissions Agreement states that all information provided, including her authority to bind her husband to certain agreements, is truthful and correct.

The Arbitration Agreement at issue defines Magnolia Manor as the "Facility," Mr. Price as the "Resident," and Mrs. Price as the "Representative." The relevant provisions of the Arbitration Agreement state the following:

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal



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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 Arbitration Agreement further provides:

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

Regarding Mrs. Price's authority to sign on behalf of her husband, the Arbitration Agreement states:

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

The Arbitration Agreement was executed by Macie Price as "Representative" and Darlene Lindsay, the Admissions Director of the Facility, on behalf of Magnolia Manor. Because the acts complained of by the Plaintiff fall within the scope of the Arbitration Agreement, the Court finds that matter should be dismissed and compelled to arbitration.

LAW/ANALYSIS

I. POLICY IN FAVOR OF ARBITRATION

At the outset, this Court is mindful of the strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir.1997). Indeed, both federal and state policy favor arbitrating disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) ("The policy of the United States and this State is to favor arbitration of disputes."). "This preference for



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arbitration has manifested itself in legislation and judicial decisions supporting the expeditious appeal of decisions denying an application to compel arbitration.” *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999). Therefore, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Id.*, 338 S.C. at 41, 524 S.E. 2d at 846 (internal quotations and citations omitted).

II. THE FEDERAL ARBITRATION ACT GOVERNS THE ARBITRATION AGREEMENT AND THE CLAIMS ASSERTED BY THE PLAINTIFF IN THE COMPLAINT

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

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

9 U.S.C. § 4 (emphasis added). “By its terms, the act leaves no place for the exercise of discretion by a... court, but instead mandates that... courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).



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Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving interstate commerce. 9 U.S.C. § 2. This Court finds that Defendant Magnolia has demonstrated both.

III. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE

A. The Plain Language of the Agreement Binds Plaintiff

This Court finds that the Plaintiff represented herself to staff and admissions personnel Magnolia as her husband's representative, with the authority to sign documents on Mr. Price's behalf and bind Mr. Price and the Facility pursuant to those documents.¹ It was clearly Mrs. Price's intention to bind Mr. Price (and herself, as personal representative) according to the terms of the Admissions Agreement and Arbitration Agreement and Mr. Price evinced no intentions or directions to the contrary. The terms of the Arbitration Agreement clearly apply to the instant dispute.

B. Plaintiff Possessed the Apparent and Inherent Authority to Bind Mr. Price under the Arbitration Agreement, and Plaintiff Should be Estopped from Denying the Validity of the Arbitration Agreement

a. Agency Relationship / Apparent Authority / Inherent Agency

A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49,

¹ "It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assignees, **personal representatives**, guardians, or any persons deriving their claims through or on behalf of Resident." (emphasis added).



748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006). “An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties.” *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145-146, 425 S.E.2d 764, 773 (Ct. App. 1992.)

This Court finds the records presented to it show that Plaintiff held herself out as an agent for her husband without any indication to the contrary. Under the record before this Court, an apparent agency relationship has been fairly demonstrated such that the Arbitration Agreement should be deemed enforceable. While Plaintiff's counsel has asserted that Mr. Price was capable of making his own decisions, no evidence was offered that Mr. Price objected or opposed the execution of any documents whatsoever. To the contrary, these facially valid contracts remained in effect for years without any formal or informal challenge by him or the Plaintiff. While the arbitration agreement is now being formally challenged, Mr. Price does not assert that the Admissions Agreement was invalid or that his wife lacked authority to admit him to Magnolia. *See, Dean v. Heritage Healthcare of Ridgeway, LLC*, 2014 WL 11802563, at *4 (S.C. Cm. Ct. September 8, 2014) (“To the extent the Plaintiff is correct that [the resident] had capacity to contract, I find that [the resident] gave apparent authority to her daughter to contract on her behalf or she ratified both contracts during her two and a half years residency.”); *See also, Fuller v. Eastern Fire & Cas. Ins Co* 240 S.C.75, 86, 124 S.E.2d 602, 608 (1962)(holding “[r]atification as it relates to the law of agency may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent.”).



Even if Plaintiff lacked apparent authority to enter into the terms of the Arbitration Agreement, she still possessed sufficient inherent agency powers to render the agreement enforceable. Such powers are recognized by South Carolina courts and are used to enforce agreements where supposed unauthorized actions “accompany or are incidental to transactions which the agent is authorized to conduct....” See, §§ 8A, 161 *Restatement (Second) of Agency* (1958); *Smith v. Fitton & Pittman, Inc.*, 264 S.C. 129, 212 S.E.2d 925 (1975)(abrogated on unrelated grounds)(examining whether party had properly demonstrated the existence of inherent agency powers); *Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r*, 309 P.3d 372 (Wash. 2013); *Daly v. Aspen Ctr. for Women's Health, Inc.*, 134 P.3d 450, 452 (Colo. App. 2005); *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210-11 (Ind. 2000); *Cange v. Stotler & Co.*, 826 F.2d 581, 591 (7th Cir. 1987)(“[t]he powers of an agent are, prima facie, coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.”)(citing *Lumbermen's Mut. Ins. v. Rule & Scale Eng'g Co.*, 177 F.2d 305, 309 (7th Cir. 1949)).

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



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

When signing the arbitration agreement, the brother in *Carraway* left the resident signature line blank and signed it as the "authorized representative" of his sister. Suit was later filed and the facility moved to compel arbitration, which the trial court granted. On appeal, the Alabama Supreme Court affirmed the trial court's decision holding, relevant here, that the resident's brother possessed the apparent authority to enter into the arbitration agreement on his sister's behalf, as evidenced by the fact that she never objected to him signing on her behalf and the arbitration agreement specifically provided that any person authorized by the resident may execute it on her behalf. *Id.* See also, *Tenn. Health Mgmt. v. Johnson*, 49 So. 3d 175 (Ala. 2010)(holding that a daughter possessed the apparent authority to enter into an arbitration agreement on her mother's behalf).

Applying *Carraway* to the instant facts, Plaintiff executed various admission documents on behalf of her husband including the Arbitration Agreement. She executed these documents in her capacity as "representative." Just as in *Carraway*, the Arbitration Agreement provides that

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signing was on behalf of the resident. It was Magnolia's reasonable and justified belief that Mrs. Price was her husband's authorized representative and had the authority to execute the documents on his behalf.

b. Agency by Estoppel

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

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

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

a. Merger

As additional grounds to compel arbitration, the Court finds the Admissions Agreement and Arbitration Agreement should be construed together and merged such that the Plaintiff is bound to arbitrate her claims against the Facility. The validity of these agreements, including the Arbitration Agreement, must be determined in accordance with the general principles of contract law and agency law that would apply to any other contract. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010).

The Arbitration Agreement provides that “any controversy or dispute between the parties arising out of or relating to Facility’s Admission Agreement . . . or relating in any way to Resident’s stay at Facility” shall be resolved by arbitration pursuant to the terms of the Arbitration Agreement. This Court finds that the Arbitration Agreement and the Admission Agreement were both signed by Mrs. Price on behalf of her husband on the same day, at the same time, upon Mr. Price’s admission to Magnolia.

Courts in South Carolina construe contemporaneous instruments together; if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated. *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977). Absent some evidence indicating a contrary intention, when instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will generally consider and construe them together on the theory that the instruments are effectively one instrument or contract. *Id. See also Saro*



Investments v. Ocean Holiday Partnership, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994) (holding that promissory notes and a mortgage agreement executed contemporaneously on the same date, must be construed together). Furthermore, even when instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. See *Plaza Development Services v. Joe Hardin Builder, Inc.*, 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988); accord *Cafe Associates, Ltd v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991).

The United States District Court for the District of South Carolina in *McCutcheon* analyzed facts almost identical to the case at bar and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011WL6318575 (D.S.C. Dec. 15, 2011). Indeed, this very Court has cited to *McCutcheon* on numerous occasions in holding that a nursing home arbitration agreement merged with the admissions agreement for purposes of equitable estoppel under precisely the same circumstances. See *Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012).

Accordingly, Mr. Price, by and through the acts of his representative, the Plaintiff and Magnolia, both contemplated that the terms of the agreement to admit Mr. Price were contained in the Admissions Agreement and Arbitration Agreement. Plaintiff executed the Arbitration Agreement at the same time as the Admissions Agreement; the Arbitration Agreement and the Admissions Agreement both covered the same subject matter and transaction (Mr. Price's residency at Magnolia Place); the Arbitration Agreement and Admissions Agreement were

executed by the same parties; the Arbitration Agreement specifically makes citation to and incorporates the Admission Agreement; and thus the Arbitration Agreement and Admissions Agreement should be construed as part and parcel of the same agreement between the parties.

b. Equitable Estoppel of Merged Agreement

This Court finds the doctrine of equitable estoppel applies to the instant case such that Plaintiff cannot dispute the validity of the Arbitration Agreement. “Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.” *Int'l Paper Co. v. Schwabedissen Maschinen & Anlaeën GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). “A nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause.’” *Id.* (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)).

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

“Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.” *E.I. DuPont de Nemours & Co. v. Rhone*

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Poulenc Fiber & Resin Intermediates. S.A.S., 269 F.3d 187, 200 (3d Cir. 2001)(citing *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)). As noted by the Federal District Court in *Jackson v. Iris.com*:

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

....

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

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

c. Coleman and Hodge are Distinguishable

To the extent Plaintiff argues the Admissions Agreement and Arbitration Agreement are not merged pursuant to *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544,

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

813 S.E.2d 292 (Ct. App. 2018) and *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 350, 755 S.E.2d 450, 452 (2014), such reliance is misplaced.

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

Similarly, in *Hodge*, the admissions agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law. 422 S.C. 544, 813 S.E.2d at 302. Furthermore, like in *Coleman*, the arbitration agreement in *Hodge* recognized a separateness, as it referenced the two documents separately, stating "[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement." *Id.* Finally, the arbitration agreement in *Hodge* stated it could be revoked within thirty days, whereas the admission agreement contained no such indication. *Id.*

Unlike the arbitration agreements in *Coleman* and *Hodge*, the Arbitration Agreement and Admissions Agreement in the case at bar should not be considered "separate" for purposes of denying merger. Unlike *Coleman* and *Hodge*, the Arbitration Agreement in this case does not



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state that it can be revoked after it has been signed. Furthermore, it does not state that arbitration is a precondition to admission to the Facility.

Instead, in the present case, the agreements “were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction” and, therefore, the documents merged.” *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts*, *supra*, 268 S.C. at 88, 232 S.E.2d at 24). Specifically, the Admissions and Arbitration Agreements were executed for the same parties, by Plaintiff, on her husband’s behalf, and the Facility on February 15, 2016. The documents were signed by the exact same people: Macie Price as representative for her husband and by Darlene Lindsay, Admissions Director for Magnolia, as representative for Magnolia. The documents were signed for the same purpose and transaction of establishing Mr. Price’s residency at the skilled nursing facility. While the Admissions Agreement in this case does contain an “Entire Agreement” clause, unlike the admission agreements in *Hodge* and *Coleman*, the provision in this case does not separately reference the Arbitration Agreement (in fact, it doesn’t refer to it at all). Accordingly, there is no language in either the Admission or Arbitration Agreement akin to the language in *Hodge* or *Coleman* to indicate the parties desired the documents be considered as separate contracts. As such, *Coleman* and *Hodge* are not controlling Plaintiff’s claims should be compelled to arbitration pursuant to the contract.

This Court recognizes that the agreements are in fact separately signed and have different terms and provisions. That is to be expected. However, unlike *Coleman* and *Hodge*, the documents are not sufficiently separate such that the presumption of merger can be overcome.

D. The Arbitration Agreement is Not Unconscionable

Lastly, this Court finds that the Arbitration Agreement is unconscionable. In an initial matter, both state and federal courts in South Carolina have consistently ruled that arbitration



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agreements identical to the one *sub judice* are not unconscionable. See *McCutcheon v. THI of S.C. at Charleston, LLC*, *supra*, at 6* - *8; *Benson v. THI of S.C. at Charleston, LLC*, No. C.A. No. 7:11-CV-2613-HMH (D.S.C. Nov. 30, 2011); *Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012).

Furthermore, anyone who enters into a written contract has a duty to read the contract which she or he signs. *Maw v. McAlister*, 252 S.C. 280, 284-285, 166 S.E.2d 203, 204 (1969). Anyone who is capable of reading and understanding, but fails to read a contract before signing, is bound by the terms thereof. *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Furthermore, arbitration clauses are not unconscionable and will be enforced if a person who can read fails to read the contract, regardless of whether he was advised of the arbitration terms by the contracting party. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding the plaintiff's failure to read an arbitration provision did not render it unconscionable even though the plaintiffs claimed they were not advised of those terms). Additionally, "inequality of bargaining power alone will not invalidate an arbitration agreement." *Id.*

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

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

Furthermore, on that same signature page, the Arbitration Agreement states clearly **bold**



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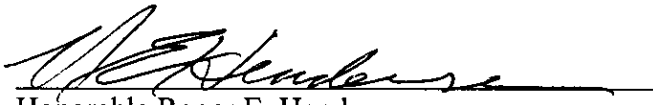
lettering in a separate heading: “**I understand and agree that I am giving up and waiving my right to a jury trial.**” (emphasis in original).

Since Mr. Price’s representative and agent, Mrs. Price, had a duty to read and understand the documents she was signing on Mr. Price’s behalf under proper authority, she also had a duty to communicate those terms to Mr. Price as his agent. To the extent she did not, Plaintiff cannot now claim that Mr. Price was unaware of the terms of the Arbitration Agreement that Mrs. Price voluntarily and with proper authority executed on her husband’s behalf.

CONCLUSION

For the reasons set forth herein, the Defendant’s Motion to Compel is hereby **GRANTED** and this matter is compelled to arbitration.

IT IS SO ORDERED!


Honorable Roger E. Henderson
Presiding Judge

Chesterfield
~~Spartanburg~~, South Carolina

August 7, 2018

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTH JUDICIAL CIRCUIT
COUNTY OF CHESTERFIELD	)	CASE NO. 2019-CP-13-00308
JOSEPHINE SPEARS,	)	
as power of attorney for Howard Spears,	)	
	)	
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
vs.	)	MOTION TO COMPEL ARBITRATION
	)	
REHAB CENTER OF CHERAW, LLC,	)	
d/b/a Chesterfield Convalescent Center,	)	
	)	
Defendant.	)	

This matter is before the Court on motion of Defendant, Rehab Center of Cheraw, LLC, d/b/a Chesterfield Convalescent Center (the “Facility”), to compel arbitration (the “Subject Motion”).¹ For the reasons set forth below, the Subject Motion is GRANTED.

BACKGROUND

Plaintiff, Josephine Spears (“Plaintiff” or “Mrs. Spears”), is, and at all relevant times has been, married to Howard Spears (“Mr. Spears”). She has brought this action in her capacity as Mr. Spears’s attorney-in-fact, asserting claims for damages arising out of alleged deficiencies in the care/treatment provided to Mr. Spears when he was a resident of the Facility.²

When Mr. Spears was admitted to the Facility in late January 2016, Mrs. Spears signed a number of documents on his behalf, including an Admission Agreement and the Arbitration Agreement that the Subject Motion seeks to enforce. Although she represented to the Facility that she had authority to sign for her husband, Mrs. Spears did not have power of attorney for Mr. Spears

¹ The Subject Motion was filed on June 21, 2019. It was heard on September 25, 2019, at the Chesterfield County Courthouse, with both parties represented by counsel. Having been duly heard and considered, it is ripe for decision.

² The Facility is a skilled nursing facility.

at the time. It was not until late February 2016, approximately halfway through Mr. Spears's residency at the Facility,³ that he executed a durable power of attorney in favor of Mrs. Spears.

ANALYSIS

The issue before the Court comes down to this: Is the Arbitration Agreement (which Mrs. Spears signed for Mr. Spears) enforceable against Mr. Spears (or, more precisely, Plaintiff, i.e., Mrs. Spears, as Mr. Spears's attorney-in-fact) even though it was not signed by Mr. Spears himself? The Court concludes that, yes, the Arbitration Agreement is enforceable against Plaintiff. The Court's reasoning is as follows.

1. The Arbitration Agreement is governed by the FAA⁴.

Unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273–77 (1995). The Arbitration Agreement expressly states that the FAA applies:

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

Moreover, our state Supreme Court has 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). Clearly, the Arbitration Agreement is governed by the FAA.⁵

³ Mr. Spears's residency ended in March 2016.

⁴ The "FAA" is the Federal Arbitration Act, 9 U.S.C §§ 1–16.

⁵ Indeed, neither party disputes the FAA's applicability here.

2. The Arbitration Agreement must be placed on equal footing with all other contracts.

“[T]he basic purpose of the [FAA] is to overcome courts’ refusals to enforce agreements to arbitrate”⁶ and “ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement.” *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). “By its terms, the [FAA] leaves no place for the exercise of discretion by a . . . court, but instead *mandates* that . . . courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis added); *see also* 9 U.S.C. § 4 (“The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.*”) (emphasis added). While a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not do so based on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (citing *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)); *see also* 9 U.S.C. § 2 (providing that an arbitration agreement is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”). The FAA requires that the Court place the Arbitration Agreement “on *equal footing with other contracts . . .*” *Concepcion* at 339 (emphasis added).

⁶ *Allied-Bruce*, 513 U.S. at 270.

3. The Arbitration Agreement is valid on its face.

The Court finds that the Arbitration Agreement is valid on its face. In other words, there is nothing within the four corners of the document itself that appears out of order. It sets forth the materials terms of an agreement to arbitrate. It expressly attests to Mrs. Spears's authority to sign on behalf of Mr. Spears. It is duly signed by Mrs. Spears and the Facility's director of admissions.

The Court recognizes that Mrs. Spears has filed an affidavit in opposition to the Subject Motion, wherein she states (contrary to her representation in the Arbitration Agreement itself) that she did not have authority to sign on Mr. Spears's behalf. She also suggests that the Facility should have inquired further into her authority to sign for Mr. Spears and should have explained to her what an arbitration agreement was. To be clear, in observing that the Arbitration Agreement is valid on its face, the Court is not finding that Mrs. Spears in fact had actual or apparent authority to the sign the Arbitration Agreement on Mr. Spears's behalf.⁷ The Court, however, is rejecting the notion that the Facility was obligated to investigate Mrs. Spears's authority or to explain the Arbitration Agreement's terms to her.

There is no question here as to Mrs. Spears's competency. Indeed, she expressly attests to her competency in her aforementioned affidavit. Besides that, the fact of her competency is implicit in her service as Mr. Spears's attorney-in-fact. She is thus "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement,⁸ including, of course, those whereby she represented herself to the Facility as having authority to act on Mr. Spears's behalf.

⁷ As further explained below, the Court's decision to grant the Subject motion is based on estoppel, not on a finding that Mrs. Spears had actual or apparent authority to bind Mr. Spears at the time she signed the Arbitration Agreement.

⁸ *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.").

Moreover, there is an implied covenant of good faith and fair dealing in every contract,⁹ and Mrs. Spears is no less bound by this covenant than the Facility. Further still, to require anything more from the Facility as a contracting party just because the contract in issue is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed on equal footing with other contracts. *Concepcion* at 339.

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

In pertinent part, the Arbitration Agreement reads as follows:

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

This plain language clearly embraces the subject matter of Plaintiff's claims against the Facility. Moreover, even were there "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) (quoting *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273–74 (4th Cir. 1997)) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)) (internal quotation marks omitted); *see also Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) ("The policy of the United States and this State is to favor arbitration of disputes.").

⁹ *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995).

5. The Arbitration Agreement is enforceable against Plaintiff.

In opposition to the Subject Motion, Plaintiff argues that the Arbitration Agreement is not enforceable against Mr. Spears because he himself did not sign it and, at the time Mrs. Spears signed it for him (January 25, 2016), she did not have authority to do so. In furtherance of this argument, Plaintiff points to the fact that it was not until February 23, 2016,¹⁰ that Mr. Spears gave Mrs. Spears power of attorney.¹¹

“South Carolina,” however, “has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel.” *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (confirming the validity of the general proposition of law on which the appellants based their merger/equitable estoppel argument: “Appellants’ equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. . . . Here, the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that

¹⁰ The Court would note here that, while the power of attorney provides no basis to find that Mrs. Spears was authorized to sign the Arbitration Agreement for Mr. Spears when she signed it, the power of attorney does confirm Mr. Spears’s competency through at least the date of its execution, which was approximately one month into his residency. *See In re Thames*, 344 S.C. 564, 570, 544 S.E.2d 854, 857 (Ct. App. 2001) (“[I]n order to execute or revoke a valid power of attorney, *the principal must possess contractual capacity.*”) (emphasis added).

¹¹ Plaintiff also argues that neither the Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80 (the “AHCCA”), nor the Bill of Rights for Residents of Long-Term Care Facilities, S.C. Code Ann. §§ 44-81-10 to -70 (the “Residents Bill of Rights”), gave Mrs. Spears authority to sign the Arbitration Agreement on Mrs. Spears’s behalf; however, these arguments are of no moment because neither the Subject Motion nor this order relies on the AHCCA or the Resident’s Bill of Rights as having granted Mrs. Spears any authority to sign the Arbitration Agreement for Mr. Spears.

there was a merger.”). The Court finds that the Arbitration Agreement is enforceable against Plaintiff based on estoppel.

“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*, 407 S.C. at 355, 755 S.E.2d at 455 (quoting *Klutts Resort Realty, Inc. v. Down’Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)).

The merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”¹² as the Admission Agreement and the Arbitration Agreement were here, there is evidence to upset the presumption of merger. This is a question of the parties’ intention. *Id.* at 355, 755 S.E.2d at 455 (“in the absence of anything indicating a contrary *intention* . . .”) (emphasis added). “[I]n attempting to ascertain th[e] [parties’] intention,” the Court “endeavor[s] to determine the situation of the parties, as well as their purposes, at the time the contract was entered into.” *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

It must be remembered that, where, as here, the instruments in question were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For this presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the circumstances giving rise to the merger presumption (same time, parties, purpose, and transaction)—can support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. The*

¹² *Id.* at 355, 755 S.E.2d at 455.

Huffines Co., LLC v. Lockhart, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). No such inference can be drawn here.

The cases Plaintiff cites in opposition to merger are inapposite. The “Entire Agreement” clause in the subject Admission Agreement expressly states that other admissions materials are deemed a part of it. While it is true that the Arbitration Agreement was not required for Mr. Spears’s admission to the Facility, all this means is that it did not have to be agreed to for Mr. Spears to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact agreed to. In other words, even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Mr. Spears’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.

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). The Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitration Agreement’s) sole reason for being.

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. To point to such things is to do no more than to point out that the

Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

Moreover, 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. Again, where, as here, the instruments in question are signed at the same time, by the same parties, for the same purpose, in the course of the same transaction, merger is presumed. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger presumption to be upset based on evidence that is at best ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention—is to allow the exception to devour the rule.

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement under the “direct benefits” test our Supreme Court endorsed in *Wilson*, 426 S.C. 326, 827 S.E.2d 167. The *Wilson* Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals’ earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which it is now contended that Plaintiff is estopped from refusing to comply with the Arbitration Agreement here. *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). “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.’” *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 (quoting *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)).

Without question, Mr. Spears received direct benefits from the Admission Agreement in the form of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein.¹³ Plaintiff cannot now deny the validity of the Arbitration Agreement with which the Admission Agreement merged.

¹³ To deny Mr. Spears’s receipt of any benefit one would have to accept the absurd premise that every single aspect of his residency—every instance of care/treatment, every meal, all day every day—was deficient. Plaintiff herself does not even suggest this.

CONCLUSION

For the reasons set forth herein, the Subject Motion is hereby GRANTED, this action is STAYED, and this matter is compelled to ARBITRATION.

IT IS SO ORDERED.

ROGER E. HENDERSON
Presiding Judge – Fourth Judicial Circuit
Court of Common Pleas – Chesterfield County

Chesterfield, South Carolina

Dated: _____



Chesterfield Common Pleas

Case Caption: Josephine Spears , plaintiff, et al VS Rehab Center Of Cheraw Llc ,
defendant, et al
Case Number: 2019CP1300308
Type: Order/Other

So Ordered

s/Roger E. Henderson 2754

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

ELIJAH R. MCCUTCHEON,)
INDIVIDUALLY AND AS PERSONAL)
REPRESENTATIVE OF THE ESTATE)
OF CARMELA MCCUTCHEON,)

Plaintiff,)

vs.)

THI OF S.C. AT CHARLESTON, LLC,)
d/b/a DRIFTWOOD REHABILITATION)
AND NURSING CENTER, n/k/a)
RIVERSIDE HEALTH AND REHAB,)

Defendant.)

No. 2:11-CV-02861

ORDER

This matter is before the court on a motion to dismiss and to compel arbitration brought by defendant THI of South Carolina at Charleston, LLC, d/b/a Driftwood Rehabilitation and Nursing Center, n/k/a Riverside Health and Rehab (“Driftwood”). For the reasons set forth below, the court grants defendant’s motion.

I. BACKGROUND

Elijah R. McCutcheon, individually and as personal representative of the estate of Carmela B. McCutcheon, originally filed suit on September 15, 2011, in the South Carolina Court of Common Pleas for the Ninth Judicial District. Driftwood filed a notice of removal in federal court on October 20, 2011, asserting diversity jurisdiction under 28 U.S.C. § 1332. Driftwood then answered the complaint on October 24, 2011. On November 1, 2011, Driftwood filed a motion to dismiss and to compel arbitration. On November 30, 2011, McCutcheon filed a response in opposition. Driftwood filed a reply on December 6, 2011.

Plaintiff brings this action against Driftwood for: negligence; negligence per se; breach of contract; fraud and misrepresentation; violation of the South Carolina Unfair Trade Practices Act; negligence – wrongful death; and negligence – survivorship. The dispute arises from Carmela McCutcheon’s care while residing at the Driftwood Rehabilitation and Nursing Center in Charleston.

Upon her admittance into the facility, Carmela McCutcheon and Driftwood entered into an Admissions Agreement and an Arbitration Agreement. Def.’s Mot. 2. These documents were signed by Elijah McCutcheon, Carmela McCutcheon’s husband, as Carmela’s “‘Durable Power of Attorney for Health Care’ / ‘Legal Guardian’ / ‘Responsible Party.’” See id. Ex. A. The Arbitration Agreement provided in part,

[I]n the event of any controversy or dispute between the parties arising out of or relating to Health Care Center’s Admission Agreement, or breach thereof, or relating in any way to Resident’s stay at Health Care Center, or to the provisions of care or services to Resident, included 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/Media Rules.

...

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.

...

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

Id. (emphasis added).

II. DISCUSSION

Driftwood moves to compel arbitration under Section 4 of the Federal Arbitration Act (“FAA”), which provides in part that a “party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.” 9 U.S.C. § 4. “[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . [A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 23-24 (1983). Section 2 of the FAA states that a written arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

A court shall compel arbitration pursuant to the FAA if a party demonstrates:

(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of [a party] to arbitrate the dispute.

Am. Gen. Life & Accident Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005) (internal quotation marks omitted). Plaintiff only contests the second and third elements of the four-part test, arguing that the dispute is not arbitrable because there is no valid and enforceable arbitration agreement, and that the FAA does not apply because the transaction does not “in fact” involve interstate or foreign commerce. While federal law governs the arbitrability of disputes, state law governs issues regarding contract formation. Hill v. PeopleSoft USA, Inc., 412 F.3d 540, 543 (4th Cir. 2005). Because this

case involves the question of whether the Arbitration Agreement was a valid contract, the court looks to South Carolina law, as the agreement was entered into in South Carolina and contemplated services to be rendered in South Carolina.

A. Existence of Enforceable Arbitration Agreement

Driftwood argues plaintiff should be equitably estopped from denying the validity of the Arbitration Agreement, and that Carmela McCutcheon is bound to the agreement as a third party beneficiary. Plaintiff responds that the arbitration agreement is not enforceable.

1. Equitable Estoppel

First, Driftwood argues plaintiff should be equitably estopped from denying that Elijah McCutcheon had authority to bind Carmela McCutcheon. “[T]he doctrine of estoppel is equitable in nature.” Ahrens v. State, 709 S.E.2d 54, 58 (S.C. 2011). “Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do.” Parker v. Parker, 443 S.E.2d 388, 391 (S.C. 1994). “[N]o party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein.” United States v. Bankers Ins. Co., 245 F.3d 315, 323 (4th Cir. 2001); see Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) (internal quotation marks omitted) (“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.”).

Here, the Arbitration Agreement and Admissions Agreement, while separate documents, were executed by the same parties, at the same time, and regarding the same transaction; therefore, they constitute the entire agreement between the parties. See Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 232 S.E.2d 20, 24 (S.C. 1977) (“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 instruments together. The theory is that the instruments are effectively one instrument or contract.”). Plaintiff attempts to hold Driftwood liable for alleged breach of certain contractual terms while simultaneously denying the enforceability of other terms. Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, plaintiff still takes inconsistent positions regarding these contracts, which were executed by the same parties under the same purported authority. It would be inequitable, for example, to allow plaintiff to assert that Elijah McCutcheon had authority to sign the Admissions Agreement on behalf of Carmela McCutcheon, but lacked such authority to sign the Arbitration Agreement. For these reasons, the court finds that plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

2. Third Party Beneficiary

Alternatively, Driftwood argues Carmela McCutcheon is an intended third party beneficiary and is therefore bound by the Arbitration Agreement. “A third party beneficiary is a party that the contracting parties intend to directly benefit.” Helms Realty, Inc. v. Gibson-Wall Co., 611 S.E.2d 485, 488 (S.C. 2005). “[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the

contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person.” Bob Hammond Const. Co. v. Banks Const. Co., 440 S.E.2d 890, 891 (S.C. Ct. App. 1994). Moreover, “[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.” Int’l Paper Co., 206 F.3d at 416-17 (emphasis added).

Carmela McCutcheon’s care was the essential purpose of the agreement, as she is named in both the Arbitration Agreement and the Admissions Agreement as the resident to be admitted into the facility. Further, the terms of both agreements refer to the rights and obligations of Carmela McCutcheon as resident of the facility, and Driftwood as the caregiver. As such, Carmela McCutcheon was an intended beneficiary to the contract, and the court finds that the arbitration provision was binding on her and remains binding on her estate. See THI of S.C. at Columbia, LLC v. Wiggins, No 11-888, 2011 WL 4089435, at *6 (D.S.C. Sept. 13, 2011) (“Hall’s care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate.”); Cook v. GGNSC Ripley, LLC, 786 F. Supp. 2d 1166, 1172 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care bound third-party beneficiary and her estate).

3. Unconscionability

Plaintiff argues the arbitration contract is unconscionable and should not be enforced. “Unconscionability has been recognized as the absence of meaningful choice

on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” Fanning v. Fritz’s Pontiac-Cadillac-Buick, Inc., 472 S.E.2d 242, 245 (S.C. 1996).

In determining whether a contract was “tainted by an absence of meaningful choice,” courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 669 (S.C. 2007) (citation omitted).

Plaintiff argues the Arbitration Agreement is unconscionable because: it is not “geared towards achieving an unbiased decision by a neutral decision-maker”; Elijah McCutcheon was disadvantaged in terms of bargaining power and sophistication; and the clause stating that the agreement is governed by interstate commerce is inconspicuous and constitutes an element of surprise. Pl.’s Resp. 10-11. First, the law does not require that an arbitration agreement specifically state that the arbitrator will be neutral. Even though the Arbitration Agreement does not contain the terms “neutral” or “unbiased,” it provides that, in the event the parties fail to agree on an arbitrator, the court will select one. See Def.’s Mot. Ex. A. In addition, the Arbitration Agreement here does not create any unfair process for selection of arbitrators, such as requiring that the arbitrators be chosen from a list created by Driftwood alone. Cf. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938-39 (4th Cir. 1999). Next, any lack of sophistication on the part of Elijah McCutcheon does not overcome the fairness of the terms in the agreement itself. See

Munoz v. Green Tree Fin. Corp., 542 S.E.2d 360, 365 n.5 (S.C. 2001) (“[I]nequality of bargaining power alone will not invalidate an arbitration agreement.”). Finally, the clause stating that the agreement is governed by interstate commerce was set in normal text, rather than obscured in smaller text or in a footnote. See Def.’s Mot. Ex. A. “[A] person who can read is bound to read an agreement before signing it,” Munoz, 542 S.E.2d at 365, and the law generally presumes that a party to a contract has read and understood the contract’s terms. Simpson, 644 S.E.2d at 670. The clause relating to interstate commerce did not constitute an unfair surprise. For these reasons, the court finds that the Arbitration Agreement was not unconscionable.¹

B. Applicability of Federal Arbitration Act

Plaintiff argues that even if the Arbitration Agreement is enforceable, the FAA does not apply because the transaction between McCutcheon and Driftwood does not “in fact” involve interstate or foreign commerce. For an arbitration agreement to be subject to the FAA, it must involve interstate commerce. 9 U.S.C. § 2. “The FAA has an expansive reach, similar to that of the Commerce Clause, such that an arbitration clause merely ‘affecting’ interstate commerce would be covered by the statute.” Wiggins, No. 11-888, 2011 WL 4089435, at *1 n.3 (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-74 (1995)). “Congress’ Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject

¹ Plaintiff also argues that an enforceable arbitration agreement does not exist because Elijah McCutcheon had neither apparent agency authority nor statutory authority to bind Carmela McCutcheon under the contract. Because the court holds that plaintiff is equitably estopped from denying the validity of the Arbitration Agreement, and that Carmela McCutcheon was a third party beneficiary and the Arbitration Agreement remains binding on her estate, the court need not reach plaintiff’s additional arguments.

to federal control.” Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) (internal quotation marks omitted).

The Arbitration Agreement here clearly states that “the services and reimbursement thereof effects a transaction that involves interstate commerce.” Def.’s Mot. Ex. A. Courts look to the terms of the arbitration agreement itself as evidence of whether the transaction involves interstate commerce. Wood, 429 F.3d at 87 (emphasis added) (noting that courts must consider “the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce”). Even without this stipulation in the Arbitration Agreement, the FAA still applies because the type of nursing home care involved here affects interstate commerce. Driftwood’s Administrator, Jim Thomas, submitted an affidavit wherein he attested that food is supplied to Driftwood, located in South Carolina, by Sysco Corporation, which is headquartered in Texas. Def.’s Mot. Ex. E, ¶ 6. Thomas further stated that supplies used at Driftwood are purchased from manufacturers in California, Colorado, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, and Wisconsin. Id. at ¶¶ 7-13. These supplies must be shipped across state lines to reach Driftwood’s facility. Finally, Driftwood participates in the federal Medicare and Medicaid programs. Id. at ¶ 14. The court finds this evidence sufficient to fulfill the interstate commerce requirement.

Plaintiff cites to Timms v. Greene, 427 S.E.2d 642 (S.C. 1993), as support for his argument that the transaction at issue does not involve interstate commerce. In Timms, the South Carolina Supreme Court found that an affidavit from the administrator of a health care center, in which the administrator averred that the center engaged in interstate commerce, was “insufficient to form the basis of the contract between the parties.” Id. at

644. Timms is distinguishable from the present case, because the Arbitration Agreement signed by plaintiff specifically stated that the underlying transaction involves interstate commerce. Thus, the Arbitration Agreement “on its face evidences commerce.” Id. The court finds that the FAA applies in this case.

III. CONCLUSION

For the foregoing reasons, the court **GRANTS** defendant’s motion to compel arbitration.

The court dismisses this matter, but retains jurisdiction to select an arbitrator in the event that the parties cannot reach a mutual decision.

AND IT IS SO ORDERED.



DAVID C. NORTON
CHIEF UNITED STATES DISTRICT JUDGE

December 15, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT
ROBERT ABRAMS,) CASE NO. 2010-CP-42-6861
))
))
PLAINTIFF,))
))
vs.))
))
FUNDAMENTAL LONG-TERM CARE)
HOLDINGS, LLC D/B/A MAGNOLIA)
MANOR-INMAN; THI OF SOUTH)
CAROLINA AT MAGNOLIA MANOR-)
INMAN, LLC D/B/A MAGNOLIA)
MANOR-INMAN; ROBERT CROOKS;)
DALE LYLES; AND CAROL CLARK,)
))
DEFENDANTS.))

ORDER

Date of Hearing: July 21, 2011
Date of Re-hearing: March 13, 2012
Attorneys for Plaintiff: Gary W. Poliakoff and Raymond P. Mullman, Jr.
Attorneys for Defendant: Lori Proctor

This matter is before the Court on Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark, and a Motion to Stay on behalf of Defendant Fundamental Long-Term Care Holdings, LLC. The Court denied these motions by Order dated August 25, 2011, after a hearing on July 21, 2011. Defendants filed a Motion to Alter, Amend or Reconsider the August 25, 2011 Order. For the reasons set forth below, the Court vacates the August 25, 2011 Order and grants Defendants' motions.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff has sued Defendants for Negligence, Negligence per Se, Intentional and Negligent Infliction of Emotional Distress, Breach of Fiduciary Duty and Unjust Enrichment,

pursuant to the Plaintiff's residency at the Magnolia Manor-Inman nursing facility. Plaintiff was a resident of the Magnolia Manor-Inman facility from approximately November 23, 2008, to January 23, 2009. Pursuant to Plaintiff's admission to Magnolia Manor-Inman, his wife Rebecca Abrams, acting as his representative, executed an Admissions Agreement and an Arbitration Agreement.

The Arbitration Agreement defines Magnolia Manor-Inman as the "Health Care Center," Robert J. Abrams as the "Resident" and Rebecca Abrams as "Representative." Mot. Exh. A. The relevant provisions of the Arbitration Agreement state the following:

It is further understood that in the event of any controversy or dispute . . . relating in any way to Resident's stay at Health Care Center, 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.

Id. The Arbitration Agreement further states that:

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.

Id. Regarding Rebecca Abrams authority to sign on behalf of her husband, the Arbitration Agreement states:

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

The Arbitration Agreement was executed by Rebecca Abrams as "Representative" and the admissions director at Magnolia Manor-Inman as the "Authorized Agent for Healthcare Center."

II. DISCUSSION

A. Arbitration Under the Federal Arbitration Act

Defendants move for arbitration under the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 et seq. The FAA and its expression of the federal policy favoring arbitration are binding in state and federal courts. Zabinski v. Bright Acres Associates, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). Arbitration is available “only when the parties involved contractually agree to arbitrate.” Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (Citations omitted.). State law governs issues of contract formation. See Hill v. PeopleSoft USA, Inc., 412 F.3d 540, 543 (4th Cir. 2005); Davis v. KB Home of S. Carolina, Inc., 394 S.C. 116, 124, 713 S.E.2d 799, 803 (Ct. App. 2011)(“[E]ven in cases where the FAA otherwise applies, general contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause.”); 9 U.S.C. §2. The Court must “decide whether there is an agreement to arbitrate according to common law principles of contract law” and “apply ordinary state-law principles that govern the formation of contract.” Towles, 338 S.C. at 37, 524 S.E.2d at 844.

There is a “strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). “The policy of the United States and this State is to favor arbitration of disputes.” Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). “[T]he heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.” Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989). Any doubts concerning the “scope of arbitrable issues” should be resolved in favor of arbitration.

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Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983).

The FAA establishes a “broad principle of enforceability;” arbitration agreements must not be singled out for suspect status, but rather it is required that arbitration provisions are “placed upon the same footing as other contracts.” Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 682, 684-85, 116 S. Ct. 1652, 1653, 1655 (1996).

Thus, the court may not deny a party’s request to arbitrate an issue “unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute.” Towles, 338 S.C. at 41-42, 524 S.E.2d at 846 (Ct. App. 1999).

B. Application of the FAA

Plaintiff argues that the South Carolina Uniform Arbitration Act applies to the Arbitration Agreement and that the FAA does not apply to the Arbitration Agreement because the parties’ agreement does not touch on interstate commerce.

The FAA will govern the enforcement of an arbitration agreement when a contract provides that it shall be governed by the FAA. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-364 (2001); Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248 (1989). “Arbitration agreements, like other contracts, are enforceable in accordance with their terms.” Id. Clearly, the parties here have agreed that the Arbitration Agreement will be governed by the FAA.

Because the FAA applies, the requirements as set forth under the South Carolina Uniform Arbitration Act, (“SCUAA”) S.C. Code §15-48-10 et seq., are not applicable. In passing the FAA, “Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed

to resolve by arbitration . . . Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.” Perry v. Thomas, 482 U.S. 483, 489, 107 S. Ct. 2520, 2525 (1987). Therefore, the FAA supersedes state acts governing arbitration agreements, including the SCUAA, in situations such as the case here.

Furthermore, the parties’ transaction and relationship in fact involve interstate commerce. As required, this court has “examine[d] the agreement, the complaint, and the facts to ascertain whether the transaction is one involving commerce within the meaning of the [the FAA].” Mathews v. Fluor Corp., 312 S.C. 404, 407, 440 S.E.2d 880, 881 (1994). “[T]he FAA applies in federal and state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” Munoz, 343 S.C. at 538-539, 542 S.E.2d at 363, citing Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 115 S. Ct. 834 (1995); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996). “The FAA has an expansive reach, similar to that of the Commerce Clause, such that an arbitration clause merely ‘affecting’ interstate commerce would be covered by the statute.” THI of S. Carolina at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. 2011), citing Allied-Bruce, 513 U.S. 265, 273-74. “Congress’ Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject to federal control.” Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) (internal quotation marks omitted).

The Arbitration Agreement here clearly states that “the services and reimbursement thereof effects a transaction that involves interstate commerce.” Mot. Ex. A. Courts look to the terms of the arbitration agreement itself as evidence of whether the transaction involves interstate

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commerce. Am. Gen. Life & Acc. Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005)(noting that courts must consider “the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce”). “Arbitration agreements, like other contracts, are enforceable in accordance with their terms.” Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001), citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Even without this stipulation in the Arbitration Agreement, the FAA must apply because the type of nursing home care involved here affects interstate commerce. Magnolia Manor-Inman’s Administrator, Dale Lyles, submitted an affidavit wherein he attested that medical supplies used in the care of residents and personal supplies used at the facility come from outside the state of South Carolina. Mtn. Ex. D. These supplies must be shipped across state lines to reach Magnolia Manor-Inman’s facility. Dale Lyles further attested that part of Mr. Abrams stay at the facility was paid for by the federal Medicare program; insurance companies outside of South Carolina electronically deposited payments in the facility’s bank accounts which are also outside of South Carolina. *Id.* These are clear examples of interstate commerce.

Furthermore, arbitration agreements have consistently been interpreted under the FAA in similar nursing home negligence cases. See Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012); McCutcheon v. THI of S.C. at Charleston, LLC, 2011 WL 6318575 (D.S.C. 2011); Wiggins.

Plaintiff cites to Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642, (1993), as support for his argument that the transaction at issue does not involve interstate commerce as necessary to apply the FAA. In Timms, the administrator of a nursing home set forth via affidavit a number of factors indicating how the nursing home engaged in interstate commerce. The Court held that

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“[a]lthough these factors could evidence the [nursing home]’s involvement in interstate commerce, we find that their relationship to the agreement between the [nursing home] and the [plaintiff] is insufficient to form the basis of the contract between the parties.” Id., 310 S.C. at 473, 427 S.E.2d at 644. Timms is distinguishable from the present case for a number of reasons, namely that the parties here explicitly agreed that the FAA would apply and that “the services and reimbursement thereof effects a transaction in interstate commerce.” Mot. Exh. A. Furthermore, the reasoning used in Timms has been subsequently implicitly overruled by the United States Supreme Court. In Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 123 S. Ct. 2037 (2003), the Court discussed the relationship between the arbitration agreement and interstate commerce such as to require the application of the FAA. The Court held:

We have interpreted the term “involving commerce” in the FAA as the functional equivalent of the more familiar term “affecting commerce”- words of art that ordinarily signal the broadest permissible exercise of Congress’ Commerce Clause power. Because the [FAA] provides for “the enforcement of arbitration agreements within the full reach of the Commerce Clause,” it is perfectly clear that the FAA encompasses a wider range of transactions than those actually “in commerce”- that is, “within the flow of interstate commerce,” . . . [A]pplication of the FAA [is not] defeated because the [the transactions at issue,] taken alone, did not have a “substantial effect on interstate commerce.” **Congress’ Commerce Clause power “may be exercised in individual cases without showing any specific effect upon interstate commerce” if in the aggregate the economic activity in question would represent “a general practice ... subject to federal control.” Only that general practice need bear on interstate commerce in a substantial way.**

Id., 539 U.S. at 56-57, 123 S. Ct. at 2040. (Citations omitted.)(Emphasis added.) When determining effect on interstate commerce, it is the general practice, not the particular transaction at issue, which must be analyzed. Here, the nursing home at issue is clearly involved in interstate commerce, and provision of nursing home services effects interstate commerce in a substantial way. See Mot. Exh. D. As such, the Timms analysis of the interstate commerce question is effectively overruled, and must not be given credence by this Court.

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The Court finds this evidence sufficient to fulfill the interstate commerce requirement.

C. Existence of Enforceable Arbitration Agreement

Plaintiff denies the validity of the Arbitration Agreement with Magnolia Manor-Inman.

1. Equitable Estoppel

Magnolia Manor-Inman argues the Plaintiff should be equitably stopped from denying that Rebecca Abrams had authority to bind Robert Abrams.

“[T]he doctrine of estoppel is equitable in nature.” Ahrens v. State, 392 S.C. 340, 348, 709 S.E.2d 54, 58 (2011). “Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do.” Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). “[N]o party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein.” United States v. Bankers Ins. Co., 245 F.3d 315, 323 (4th Cir. 2001); see Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) (internal quotation marks omitted) (“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.”).

Here, the Arbitration Agreement and Admissions Agreement, while separate documents, were executed by the same parties, at the same time, and regarding the same transaction; therefore, the two instruments constitute the entire agreement between the parties and must be construed together. See Klutts Resort Realty, Inc. v. Down’Round Dev. Corp., 268 S.C. 80, 88-89, 232 S.E.2d 20, 24, (1977) (“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

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instruments together. The theory is that the instruments are effectively one instrument or contract.”).

Plaintiff admits he was a resident of Magnolia Manor-Inman pursuant to the terms of the Admissions Agreement. (See Complaint ¶34: Plaintiff states he “resided at the [] facility pursuant to the terms of the admissions agreement.”) Yet Plaintiff simultaneously denies the enforceability of terms of the Arbitration Agreement. The Admissions Agreement and Arbitration Agreement must be construed as one agreement; Plaintiff cannot claim the benefits of one while denying the perceived burdens of the other.

Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, Plaintiff still takes inconsistent positions regarding these contracts. It would be inequitable, for example, to allow Plaintiff to assert that Rebecca Abrams had authority to sign the Admissions Agreement on behalf of Robert Abrams, but lacked such authority to sign the Arbitration Agreement.

Plaintiff further argues that no cause of action for breach of contract has been pled, and thus the doctrine of equitable estoppel should not apply. However, the doctrine of equitable estoppel has a much broader application than suggested by Plaintiff. It is well settled that when a duty arises from contractual obligations, equitable estoppel may apply with equal effect to a related tort action. The Fourth Circuit Court of Appeals examined this exact issue in American Bankers Ins. Group v. Long, 453 F.3d 623 (4th Cir. 2006). In reversing the trial court’s denial of the defendant’s motion to compel arbitration, the Court stated:

The legal principle [underlying the theory of equitable estoppel] rests on a simple proposition: it is unfair for a party to rely on a contract when it works to its advantage, and repudiate it when it works to its disadvantage. To be equitably estopped from denying the applicability of an arbitration clause, therefore, the [plaintiff] need not necessarily assert a cause of action for breach of contract containing the arbitration clause. Instead, **estoppel is appropriate if in**

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substance the [plaintiff]'s complaint [is] based on the [defendant's] alleged breach of the obligations and duties assigned to it in the agreement, regardless of the legal label assigned to the claim.

Id. (Emphasis added.)(Internal citations omitted.) South Carolina District Courts have continually endorsed this precise proposition as well. See Thomas v. Matrix Sys. Auto. Finishers, LLC, 2010 WL 147956, at 8 (D.S.C. 2010); Wiggins. Because Plaintiff's claim in substance is based on the breach of certain duties assigned the Defendants pursuant to their contractual agreements, equitable estoppel may be applied to prevent Plaintiff from denying the validity of the Arbitration Agreement.

For these reasons, the Court finds that Plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

2. Third Party Beneficiary

Magnolia Manor-Inman alternatively argues that Robert Abrams is a third-party beneficiary and is therefore bound by the Arbitration Agreement.

"A third party beneficiary is a party that the contracting parties intend to directly benefit." Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). "[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." Bob Hammond Const. Co. v. Banks Const. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). Moreover, "[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-417 (4th Cir. 2000).

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Robert Abrams' care was the essential purpose of the parties' agreement, as he is named in both the Arbitration Agreement and the Admissions Agreement as the resident to be admitted into the facility. Further, the terms of both agreements refer to the rights and obligations of Robert Abrams as resident of the facility, and Magnolia Manor-Inman as the caregiver. As such, Robert Abrams was an intended beneficiary to the contract, and the Court finds that the arbitration provision is binding on him. See Wiggins ("Hall's care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate."); Cook v. GGNCS Ripley, LLC, 786 F. Supp. 2d 1166, 1172 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care bound third-party beneficiary and her estate).

3. Unconscionability

Plaintiff further argues the Arbitration Agreement is invalid because it is unconscionable.

"[A]n adhesion contract is not per se unconscionable." Munoz, 343 S.C. at 541, 542 S.E.2d at 365. "Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996). "Further, a person who can read is bound to read an agreement before signing it." Munoz, 343 S.C. at 541, 542 S.E.2d at 365 (holding that arbitration provision was not unconscionable even though plaintiffs did not read it and were not advised of those terms). In

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addition, “inequality of bargaining power alone will not invalidate an arbitration agreement.” Id. at n.5.

In Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, (2007), our Supreme Court held that:

In determining whether a contract was “tainted by an absence of meaningful choice,” courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties’ bargaining power; the parties’ relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

373 S.C. at 25, 644 S.E.2d at 669 (citation omitted).

“[W]here the contract is subject to the FAA, this court must defer to that legislative policy and may not view arbitration as an inherently less beneficial form of dispute resolution.” Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 400, 498 S.E.2d 898, 905 (Ct. App. 1998). In addition, “a party desiring to avoid an arbitration clause on the grounds that no reasonable person would have agreed to it merely because it precludes judicial remedies must demonstrate how he or she has been prejudiced by compelled arbitration. This requires, at the least, identification of judicial relief not available in arbitration.” Id. “The loss of the right to a jury trial is an obvious result of arbitration.” Simpson, 373 S.C. at 27, 644 S.E.2d at 670 (holding that arbitration clause was unconscionable because in addition to “the inconspicuous nature of [the] provision, which was drafted by the superior party,” the provision “also required Simpson to forego certain [significant] remedies that were otherwise required by statute”).

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

It is understood by Resident/Representative that he/she is not required to use the

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aforesaid Health Care Center for Resident's healthcare needs and that there are numerous other health care providers in the State where Health Care Center is located that are qualified to provide such care to Resident.

Mot. Exh. A. Furthermore, the Arbitration Agreement states clearly in bold lettering in a separate heading: **"I understand and agree that I am giving up and waiving my right to a jury trial."** Mot. Exh. A (Emphasis in Original.).

Any lack of sophistication on the part of Rebecca Abrams does not overcome the fairness of the terms in the agreement itself. See Munoz. All judicial remedies available in a jury trial are available to Abrams in arbitration, and as such Robert Abrams is not prejudiced by enforcement of the Arbitration Agreement. Furthermore, the express terms of the Arbitration Agreement, which Rebecca Abrams was bound to read, indicate she understood and agreed that she was giving up the right to a jury trial. There is no fine print or convoluted language here; the Arbitration Agreement is fair, clear and unambiguous.

Further, the Arbitration Agreement does not create any unfair process for selection of arbitrators, such as requiring that the arbitrators be chosen from a list created by Magnolia Manor-Inman alone. Cf. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938-39 (4th Cir. 1999). The Arbitration Agreement is not unconscionable, as it applies equally to both the resident and the facility. Each party is given equal rights to seek arbitration of disputes.

For these reasons, the court finds that the Arbitration Agreement is not unconscionable.

4. Federal Statutes and Regulations Governing Medicare and/or Medicaid

Abrams' further argues that the Arbitration Agreement is not enforceable because it amounts to an additional charge for admission into the facility pursuant to 42 U.S.C. §1396r(c)(5)(A)(iii) and 42 C.F.R. §483.12(d)(3), which prohibit the requirement of other consideration as a precondition of admission." This argument too is unpersuasive.

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In Sanford v. Castleton Health Care Ctr., LLC, 813 N.E.2d 411, 419 (Ind. Ct. App. 2004), the Indiana Court of Appeals noted that requiring a nursing-home admittee to sign an arbitration agreement is not akin to charging an additional fee or other consideration as a prerequisite of admittance. Rather, an arbitration agreement merely establishes a forum for future disputes; both parties are bound to it and both parties receive whatever benefits and detriments accompany the arbitral forum. Id.; Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983, 989 (Ala. 2004) (finding that the argument that arbitration agreement violated 42 U.S.C. §1396r(c)(5)(A)(iii) prohibition of “other consideration” failed and noting that “[i]f we were to agree with Owens, virtually any contract term Owens decided she did not like could be construed as requiring other consideration in order to gain admittance to the nursing home and thus be disallowed by the statute); Owens v. Nat. Health Corp., 263 S.W.3d 876, 887 (Tenn. 2007) (finding no violation); Broughsville v. OHECC, LLC, 2005 WL 3483777 (Ohio Ct. App. 2005) (unpublished); Gainesville Health Care Ctr., Inc. v. Weston, 857 So.2d 278, 288 (Fla. Ct. App. 1 Dist. 2003) (“We have found no authority from any jurisdiction which holds that an arbitration provision constitutes ‘consideration’ in this sense; nor do we believe that the federal regulation was intended to apply to such a situation.”). The Court agrees with the reasoning in the above cited cases and finds that 42 U.S.C. § 1396r(c)(5)(A)(iii) and 42 C.F.R. § 483.12(d)(3) are not intended to apply to this case and further, that an arbitration agreement is not considered an additional charge as contemplated therein.

5. Plaintiff's Claims Fall within the Scope of the Arbitration Agreement

Plaintiff further argues that his claims do not fall within the scope of the Arbitration Agreement. However, the Arbitration Agreement is broadly worded to include “any controversy or dispute . . . relating in any way to Resident's stay at Health Care Center, or to the provisions of

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care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim . . .” Mot. Exh. A. Furthermore, the FAA’s “text includes no exception for personal-injury [] claims” but rather “requires courts to enforce the bargain of the parties to arbitrate.” Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203 (2012). Clearly the disputes raised in Plaintiff’s Complaint fall under the terms of the Arbitration Agreement.

6. Defendants have not Waived their Right to Arbitrate

Plaintiff further argues Defendants have by their conduct nullified the Arbitration Agreement and waived their right to Arbitrate. Defendants filed their Motion to Dismiss and Petition to Compel Arbitration at their first opportunity for a responsive pleading i.e. at the same time as answering the Plaintiff’s Complaint. No action was pending against the Defendants prior to Plaintiff filing his Complaint, and as such no assertion of the right to arbitration was required and no possibility of waiver existed. Defendants have not waived or abandoned their right to enforce a proper arbitration agreement.

D. Defendants Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark Have Standing to Assert Arbitration

The express written language of the Arbitration Agreement indicates the following:

This Agreement is made between Magnolia Manor-Inman (“Health Care Center”), its agents, employees and servants, and Robert J. Abrams (“Resident”) or Rebecca Abrams [as “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.

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Mot. Exh. A. It is well established that non-signatories have the right to enforce arbitration agreements in certain situations. See Am. Bankers Ins. Group, Inc. v. Long, 453 F.3d 623 (4th Cir. 2006). Robert Crooks, Dale Lyles and Carol Clark were members of Magnolia Manor-

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Inman's governing body. Further, it appears Dale Lyles was the facility administrator and Carol Clark was the director of nursing at all times relevant to Plaintiff's claim. Plaintiff does not contest this. As such, Robert Crooks, Dale Lyles and Carol Clark are all agents of Magnolia Manor-Inman pursuant to their roles as members of the governing body. Further, Dale Lyles and Carol Clark are employees of Magnolia Manor-Inman. As such, each individual has a right to assert the terms of the Arbitration Agreement.

III. CONCLUSION

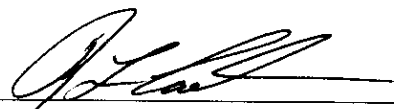
For the foregoing reasons, the Court **GRANTS** the Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark. The Court **STAYS** the matter as to the remaining Defendant, Fundamental Long-Term Care Holding, LLC, until the arbitration process has been completed. The Court retains jurisdiction of the matter as to the Dismissed Defendants only to the following extent: should the parties to the Arbitration Agreement be unable to select an arbitrator or unable to agree on one pursuant to the terms of the Arbitration Agreement, this Court retains jurisdiction of the matter to assist the parties in selecting an arbitrator.

It is therefore

ORDERED that Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark are **GRANTED** and the matter is **STAYED** for the remaining Defendant until arbitration has been completed.

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IT IS SO ORDERED.



Honorable Roger L. Couch
Presiding Judge Seventh Judicial Circuit

Spartanburg, South Carolina

Dated: 6/22/12

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

FRANK A. CAMPSSEN BY AND) CASE NO. 2011-CP-42-0438
THROUGH HIS ATTORNEY-IN-FACT)
LARRY F. CAMPSSEN,)

PLAINTIFFS,

VS.

FUNDAMENTAL LONG-TERM CARE)
HOLDINGS, LLC; FUNDAMENTAL)
CLINICAL CONSULTING, LLC;)
FUNDAMENTAL ADMINISTRATIVE)
SERVICES, LLC; THI OF BALTIMORE,)
INC.; THI OF SOUTH CAROLINA,)
LLC; THI OF SOUTH CAROLINA AT)
MAGNOLIA PLACE AT)
SPARTANBURG, LLC D/B/A)
MAGNOLIA PLACE AT)
SPARTANBURG; EDWARD WARREN,)
MD; NETWORK GERIATRICS)
SERVICES, P.A.; ROBERT CROOKS;)
PATRICIA HARRIS; AND MARGARET)
KELLER,)

DEFENDANTS.

ORDER

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Date of Hearing: July 21, 2011
Date of Re-hearing: March 13, 2012
Attorneys for Plaintiff: Gary W. Poliakoff and Raymond P. Mullman, Jr.
Attorneys for Defendant: Lori Proctor

This matter is before the Court on Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg ("Magnolia Place"), Robert Crooks, Patricia Harris and Margaret Keller, and Motions to Stay on behalf of Defendants Fundamental Long-Term Care Holdings, LLC, Fundamental Administrative Services, LLC, Fundamental Clinical

Consulting, LLC, THI of Baltimore, Inc. and THI of South Carolina, LLC. The Court denied these motions by Order dated August 25, 2011, after a hearing on July 21, 2011. Defendants filed a Motion to Alter, Amend or Reconsider the August 25, 2011 Order. For the reasons set forth below, the Court vacates the August 25, 2011 Order and grants Defendants' motions.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff has sued Defendants for Negligence, Negligence per Se, Breach of Fiduciary Duty and Unjust Enrichment, pursuant to Frank A. Campsen's residency at the Magnolia Place nursing facility. Mr. Campsen was a resident of the Magnolia Place facility from approximately October 21, 2009, to December 20, 2009. Pursuant to Mr. Campsen's admission to Magnolia Place, Larry F. Campsen, acting as his representative, executed an Admissions Agreement and an Arbitration Agreement. Frank Campsen had previously designated Larry F. Campsen as his General Durable Power of Attorney and Healthcare Power of Attorney, and given him authority to enter into agreements on his behalf. Mtn. Exh. D.

The Arbitration Agreement defines Magnolia Place as the "Facility," Frank A. Campsen as the "Resident" and Larry Campsen as "Resident's Durable Power of Attorney for Healthcare" and "Representative." *Id.* The relevant provisions of the Arbitration Agreement state the following:

It is further understood that in the event of any controversy or dispute . . . 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.

Id. The Arbitration Agreement further states that:

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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.

Id. Regarding Larry Campsen's authority to sign on behalf of Frank Campsen, the Arbitration Agreement states:

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

The Arbitration Agreement clearly sets forth the parties to be bound by the Agreement:

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.

Id. The Arbitration Agreement was executed by Larry Campsen as "Representative" of Frank Campsen and by the "Authorized Agent of Facility."

II. DISCUSSION

A. Arbitration Under the Federal Arbitration Act

Defendants move for arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. The FAA and its expression of the federal policy favoring arbitration are binding in state and federal courts. Zabinski v. Bright Acres Associates, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). Arbitration is available "only when the parties involved contractually agree to arbitrate." Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999), (Citations omitted.). State law governs issues of contract formation. See Hill v. PeopleSoft USA, Inc., 412 F.3d 540, 543 (4th Cir. 2005); Davis v. KB Home of S. Carolina, Inc., 394 S.C. 116, 124, 713 S.E.2d 799, 803 (Ct. App. 2011)("[E]ven in cases where the FAA otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability

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of an arbitration clause.”); 9 U.S.C. §2. The Court must “decide whether there is an agreement to arbitrate according to common law principles of contract law” and “apply ordinary state-law principles that govern the formation of contract.” Towles, 338 S.C. at 37, 524 S.E.2d at 844.

There is a “strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). “The policy of the United States and this State is to favor arbitration of disputes.” Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). “[T]he heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.” Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989). Any doubts concerning the “scope of arbitrable issues” should be resolved in favor of arbitration. Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983).

The FAA establishes a “broad principle of enforceability;” arbitration agreements must not be singled out for suspect status, but rather it is required that arbitration provisions are “placed upon the same footing as other contracts.” Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 682, 684-85, 116 S. Ct. 1652, 1653, 1655 (1996).

Thus, the court may not deny a party’s request to arbitrate an issue “unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute.” Towles, 338 S.C. at 41-42, 524 S.E.2d at 846 (Ct. App. 1999).

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B. Application of the FAA

Plaintiff argues that the South Carolina Uniform Arbitration Act applies to the Arbitration Agreement and that the FAA does not apply to the Arbitration Agreement because the parties' agreement does not touch on interstate commerce.

The FAA will govern the enforcement of an arbitration agreement when a contract provides that it shall be governed by the FAA. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-364 (2001); Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248 (1989). "Arbitration agreements, like other contracts, are enforceable in accordance with their terms." Id. Clearly, the parties here have agreed that the Arbitration Agreement will be governed by the FAA.

Because the FAA applies, the requirements as set forth under the South Carolina Uniform Arbitration Act, ("SCUAA") S.C. Code §15-48-10 et seq., are not applicable. In passing the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration . . . Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." Perry v. Thomas, 482 U.S. 483, 489, 107 S. Ct. 2520, 2525 (1987). Therefore, the FAA supersedes state acts governing arbitration agreements, including the SCUAA, in situations such as the case here.

Furthermore, the parties' transaction and relationship in fact involve interstate commerce. As required, this court has "examine[d] the agreement, the complaint, and the facts to ascertain whether the transaction is one involving commerce within the meaning of the [the FAA]". Mathews v. Fluor Corp., 312 S.C. 404, 407, 440 S.E.2d 880, 881 (1994). "[T]he FAA applies in federal and state court to any arbitration agreement regarding a transaction that in fact involves

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interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” Munoz, 343 S.C. at 538-539, 542 S.E.2d at 363, citing Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 115 S. Ct. 834 (1995); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996). “The FAA has an expansive reach, similar to that of the Commerce Clause, such that an arbitration clause merely ‘affecting’ interstate commerce would be covered by the statute.” THI of S. Carolina at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. 2011), citing Allied-Bruce, 513 U.S. 265, 273-74. “Congress’ Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject to federal control.” Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) (internal quotation marks omitted).

The Arbitration Agreement here clearly states that “the services and reimbursement thereof effects a transaction that involves interstate commerce.” Mot. Ex. A. Courts look to the terms of the arbitration agreement itself as evidence of whether the transaction involves interstate commerce. Am. Gen. Life & Acc. Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005)(noting that courts must consider “the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce”). “Arbitration agreements, like other contracts, are enforceable in accordance with their terms.” Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001), citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Even without this stipulation in the Arbitration Agreement, the FAA must apply because the type of nursing home care involved here affects interstate commerce. Magnolia Place’s Business Office Manager, Lynn Henderson, submitted an affidavit wherein she attested that medical supplies used in the care of residents and

personal supplies used at the facility come from outside the state of South Carolina. Mtn. Ex. F. These supplies must be shipped across state lines to reach Magnolia Place's facility. Timothy Johnson further attested that part of Mr. Campsen stay at the facility was paid for by the federal Medicare program; insurance companies outside of South Carolina electronically deposited payments in the facility's bank accounts which are also outside of South Carolina. *Id.* These are clear examples of interstate commerce.

Furthermore, arbitration agreements have consistently been interpreted under the FAA in similar nursing home negligence cases. See Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012); McCutcheon v. THI of S.C. at Charleston, LLC, 2011 WL 6318575 (D.S.C. 2011); Wiggins.

Plaintiff cites to Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642, (1993), as support for his argument that the transaction at issue does not involve interstate commerce as necessary to apply the FAA. In Timms, the administrator of a nursing home set forth via affidavit a number of factors indicating how the nursing home engaged in interstate commerce. The Court held that "[a]lthough these factors could evidence the [nursing home]'s involvement in interstate commerce, we find that their relationship to the agreement between the [nursing home] and the [plaintiff] is insufficient to form the basis of the contract between the parties." *Id.*, 310 S.C. at 473, 427 S.E.2d at 644. Timms is distinguishable from the present case for a number of reasons, namely that the parties here explicitly agreed that the FAA would apply and that "the services and reimbursement thereof effects a transaction in interstate commerce." Mot. Ex. A. Furthermore, the reasoning used in Timms has been subsequently implicitly overruled by the United States Supreme Court. In Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 123 S. Ct. 2037,

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(2003), the Court discussed the relationship between the arbitration agreement and interstate commerce such as to require the application of the FAA. The Court held:

We have interpreted the term “involving commerce” in the FAA as the functional equivalent of the more familiar term “affecting commerce”- words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power. Because the [FAA] provides for “the enforcement of arbitration agreements within the full reach of the Commerce Clause,” it is perfectly clear that the FAA encompasses a wider range of transactions than those actually “in commerce”- that is, “within the flow of interstate commerce,” . . . [A]pplication of the FAA [is not] defeated because the [the transactions at issue,] taken alone, did not have a “substantial effect on interstate commerce.” **Congress' Commerce Clause power “may be exercised in individual cases without showing any specific effect upon interstate commerce” if in the aggregate the economic activity in question would represent “a general practice ... subject to federal control.” Only that general practice need bear on interstate commerce in a substantial way.**

Id., 539 U.S. at 56-57, 123 S. Ct. at 2040. (Citations omitted.)(Emphasis added.) When determining effect on interstate commerce, it is the general practice, not the particular transaction at issue, which must be analyzed. Here, the nursing home at issue is clearly involved in interstate commerce, and provision of nursing home services effects interstate commerce in a substantial way. See Mot. Exh. D. As such, the Timms analysis of the interstate commerce question is effectively overruled, and must not be given credence by this Court.

The Court finds this evidence sufficient to fulfill the interstate commerce requirement.

C. Existence of Enforceable Arbitration Agreement

Plaintiff denies the validity of the Arbitration Agreement with Magnolia Place.

1. Larry Campsen As Personal Representative of the Estate of Frank Campsen

In pursuing this action, Larry Campsen acts as personal representative of Frank Campsen's estate. Under South Carolina law, “a personal representative of a decedent domiciled in this State at his death has the same standing to sue and be sued in the courts of this State and the courts of any other jurisdiction as his decedent had immediately prior to death.” S.C.Code

Ann. § 62-3-703. Thus, Larry Campsen is bound in his capacity as personal representative if Frank Campsen would have been bound immediately prior to his death.

2. Equitable Estoppel

Magnolia Place argues the Plaintiff should be equitably stopped from denying that Larry Campsen had authority to bind Frank Campsen.

“[T]he doctrine of estoppel is equitable in nature.” Ahrens v. State, 392 S.C. 340, 348, 709 S.E.2d 54, 58 (2011). “Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do.” Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). “[N]o party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein.” United States v. Bankers Ins. Co., 245 F.3d 315, 323 (4th Cir. 2001); see Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) (internal quotation marks omitted) (“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.”).

Here, the Arbitration Agreement and Admissions Agreement, while separate documents, were executed by the same parties, at the same time, and regarding the same transaction; therefore, the two instruments constitute the entire agreement between the parties and must be construed together. See Klutts Resort Realty, Inc. v. Down’Round Dev. Corp., 268 S.C. 80, 88-89, 232 S.E.2d 20, 24, (1977) (“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

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instruments together. The theory is that the instruments are effectively one instrument or contract.”).

Plaintiff admits Frank Campsen was a resident of Magnolia Place pursuant to the terms of the Admissions Agreement. (See Amended Complaint ¶37: Plaintiff states Frank Campsen “resided at the [] facility pursuant to the terms of the admissions agreement.”) Yet Plaintiff simultaneously denies the enforceability of terms of the Arbitration Agreement. The Admissions Agreement and Arbitration Agreement must be construed as one agreement; Plaintiff cannot claim the benefits of one while denying the perceived burdens of the other.

Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, Plaintiff still takes inconsistent positions regarding these contracts. It would be inequitable, for example, to allow Plaintiff to assert that Larry Campsen had authority to sign the Admissions Agreement on behalf of Frank Campsen, but lacked such authority to sign the Arbitration Agreement.

Plaintiff further argues that no cause of action for breach of contract has been pled, and thus the doctrine of equitable estoppel should not apply. However, the doctrine of equitable estoppel has a much broader application than suggested by Plaintiff. It is well settled that when a duty arises from contractual obligations, equitable estoppel may apply with equal effect to a related tort action. The Fourth Circuit Court of Appeals examined this exact issue in American Bankers Ins. Group v. Long, 453 F.3d 623 (4th Cir. 2006). In reversing the trial court’s denial of the defendant’s motion to compel arbitration, the Court stated:

The legal principle [underlying the theory of equitable estoppel] rests on a simple proposition: it is unfair for a party to rely on a contract when it works to its advantage, and repudiate it when it works to its disadvantage. To be equitably estopped from denying the applicability of an arbitration clause, therefore, the [plaintiff] need not necessarily assert a cause of action for breach of contract containing the arbitration clause. Instead, **estoppel is appropriate if in**

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substance the [plaintiff]'s complaint [is] based on the [defendant's] alleged breach of the obligations and duties assigned to it in the agreement, regardless of the legal label assigned to the claim.

Id. (Emphasis added.)(Internal citations omitted.) South Carolina District Courts have continually endorsed this precise proposition as well. See Thomas v. Matrix Sys. Auto. Finishers, LLC, 2010 WL 147956, at 8 (D.S.C. 2010); Wiggins. Because Plaintiff's claim in substance is based on the breach of certain duties assigned the Defendants pursuant to their contractual agreements, equitable estoppel may be applied to prevent Plaintiff from denying the validity of the Arbitration Agreement.

For these reasons, the Court finds that Plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

3. Third Party Beneficiary

Magnolia Place alternatively argues that Frank Campsen is a third-party beneficiary and is therefore bound by the Arbitration Agreement.

"A third party beneficiary is a party that the contracting parties intend to directly benefit." Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). "[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." Bob Hammond Const. Co. v. Banks Const. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). Moreover, "[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-417 (4th Cir. 2000).

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Frank Campsen's care was the essential purpose of the parties' agreement, as he is named in both the Arbitration Agreement and the Admissions Agreement as the resident to be admitted into the facility. Further, the terms of both agreements refer to the rights and obligations of Frank Campsen as resident of the facility, and Magnolia Place as the caregiver. As such, Frank Campsen was an intended beneficiary to the contract, and the Court finds that the arbitration provision is binding on him. See Wiggins ("Hall's care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate."); Cook v. GGNSC Ripley, LLC, 786 F. Supp. 2d 1166, 1172 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care bound third-party beneficiary and her estate).

4. Unconscionability

Plaintiff further argues the Arbitration Agreement is invalid because it is unconscionable.

"[A]n adhesion contract is not per se unconscionable." Munoz, 343 S.C. at 541, 542 S.E.2d at 365. "Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996). "Further, a person who can read is bound to read an agreement before signing it." Munoz, 343 S.C. at 541, 542 S.E.2d at 365 (holding that arbitration provision was not unconscionable even though plaintiffs did not read it and were not advised of those terms. In

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addition, “inequality of bargaining power alone will not invalidate an arbitration agreement.” Id. at n.5.

In Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, (2007), our Supreme Court held that:

In determining whether a contract was “tainted by an absence of meaningful choice,” courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties’ bargaining power; the parties’ relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

373 S.C. at 25, 644 S.E.2d at 669 (citation omitted).

“[W]here the contract is subject to the FAA, this court must defer to that legislative policy and may not view arbitration as an inherently less beneficial form of dispute resolution.” Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 400, 498 S.E.2d 898, 905 (Ct. App. 1998). In addition, “a party desiring to avoid an arbitration clause on the grounds that no reasonable person would have agreed to it merely because it precludes judicial remedies must demonstrate how he or she has been prejudiced by compelled arbitration. This requires, at the least, identification of judicial relief not available in arbitration.” Id. “The loss of the right to a jury trial is an obvious result of arbitration.” Simpson, 373 S.C. at 27, 644 S.E.2d at 670 (holding that arbitration clause was unconscionable because in addition to “the inconspicuous nature of [the] provision, which was drafted by the superior party,” the provision “also required Simpson to forego certain [significant] remedies that were otherwise required by statute”).

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

It is understood by Resident/Representative that he/she is not required to use the

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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.

Mot. Exh. A. Furthermore, the Arbitration Agreement states clearly in bold lettering in a separate heading: **"I understand and agree that I am giving up and waiving my right to a jury trial."** Mot. Exh. A (Emphasis in Original.).

Any lack of sophistication on the part of Larry Campsen does not overcome the fairness of the terms in the agreement itself. See Munoz. All judicial remedies available in a jury trial are available to Plaintiff in arbitration, and as such Plaintiff is not prejudiced by enforcement of the Arbitration Agreement. Furthermore, the express terms of the Arbitration Agreement, which Larry Campsen was bound to read, indicate he understood and agreed that he was giving up the right to a jury trial. There is no fine print or convoluted language here; the Arbitration Agreement is fair, clear and unambiguous.

Further, the Arbitration Agreement does not create any unfair process for selection of arbitrators, such as requiring that the arbitrators be chosen from a list created by Magnolia Place alone. Cf. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938-39 (4th Cir. 1999). The Arbitration Agreement is not unconscionable, as it applies equally to both the resident and the facility. Each party is given equal rights to seek arbitration of disputes.

For these reasons, the court finds that the Arbitration Agreement is not unconscionable.

5. Federal Statutes and Regulations Governing Medicare and/or Medicaid

Plaintiff further argues that the Arbitration Agreement is not enforceable because it amounts to an additional charge for admission into the facility pursuant to 42 U.S.C. §1396r(c)(5)(A)(iii) and 42 C.F.R. §483.12(d)(3), which prohibit the requirement of other consideration as a precondition of admission." This argument too is unpersuasive.

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In Sanford v. Castleton Health Care Ctr., LLC, 813 N.E.2d 411, 419 (Ind. Ct. App. 2004), the Indiana Court of Appeals noted that requiring a nursing-home admittee to sign an arbitration agreement is not akin to charging an additional fee or other consideration as a prerequisite of admittance. Rather, an arbitration agreement merely establishes a forum for future disputes; both parties are bound to it and both parties receive whatever benefits and detriments accompany the arbitral forum. Id.; Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983, 989 (Ala. 2004) (finding that the argument that arbitration agreement violated 42 U.S.C. §1396r(c)(5)(A)(iii) prohibition of “other consideration” failed and noting that “[i]f we were to agree with Owens, virtually any contract term Owens decided she did not like could be construed as requiring other consideration in order to gain admittance to the nursing home and thus be disallowed by the statute); Owens v. Nat. Health Corp., 263 S.W.3d 876, 887 (Tenn. 2007) (finding no violation); Broughsville v. OHECC, LLC, 2005 WL 3483777 (Ohio Ct. App. 2005) (unpublished); Gainesville Health Care Ctr., Inc. v. Weston, 857 So.2d 278, 288 (Fla. Ct. App. 1 Dist. 2003) (“We have found no authority from any jurisdiction which holds that an arbitration provision constitutes ‘consideration’ in this sense; nor do we believe that the federal regulation was intended to apply to such a situation.”). The Court agrees with the reasoning in the above cited cases and finds that 42 U.S.C. § 1396r(c)(5)(A)(iii) and 42 C.F.R. § 483.12(d)(3) are not intended to apply to this case and further, that an arbitration agreement is not considered an additional charge as contemplated therein.

6. Plaintiff’s Claims Fall within the Scope of the Arbitration Agreement

Plaintiff further argues that his claims do not fall within the scope of the Arbitration Agreement. However, the Arbitration Agreement is broadly worded to include “any controversy or dispute . . . 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 . . .” Mot. Exh. A. Furthermore, the FAA’s “text includes no exception for personal-injury [] claims” but rather “requires courts to enforce the bargain of the parties to arbitrate.” Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203 (2012). Clearly the disputes raised in Plaintiff’s Amended Complaint fall under the terms of the Arbitration Agreement.

7. Defendants have not Waived their Right to Arbitrate

Plaintiff further argues Defendants have by their conduct nullified the Arbitration Agreement and waived their right to Arbitrate. Defendants filed their Motion to Dismiss and Petition to Compel Arbitration at their first opportunity for a responsive pleading i.e. at the same time as answering the Plaintiff’s Complaint. No action was pending against the Defendants prior to Plaintiff filing his Complaint, and as such no assertion of the right to arbitration was required and no possibility of waiver existed. Defendants have not waived or abandoned their right to enforce a proper arbitration agreement.

D. Defendants Magnolia Place, Robert Crooks, Patricia Harris and Margaret Keller Have Standing to Assert Arbitration

The express written language of the Arbitration Agreement indicates the following:

This Agreement is made between Magnolia Place at Spartanburg (“Facility”); its agents, employees and servants, and Frank A. Campsen (“Resident”) or Larry Campsen [as “Resident’s Durable Power of Attorney for Health Care” and “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.

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Mot. Exh. A. It is well established that non-signatories have the right to enforce arbitration agreements in certain situations. See Am. Bankers Ins. Group, Inc. v. Long, 453 F.3d 623 (4th Cir. 2006). Robert Crooks, Patricia Harris and Margaret Keller were members of Magnolia Place’s governing body. Further, it appears Patricia Harris was the facility administrator and

Margaret Keller was the director of nursing at all times relevant to Plaintiff's claim. Plaintiff does not contest this. As such, Robert Crooks, Patricia Harris and Margaret Keller are all agents of Magnolia Place pursuant to their roles as members of the governing body for the purposes of the Arbitration Agreement. Further, Patricia Harris and Margaret Keller are employees of Magnolia Place for the purposes of the Arbitration Agreement. As such, each individual has a right to assert the terms of the Arbitration Agreement.

III. CONCLUSION

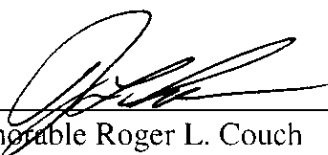
For the foregoing reasons, the Court **GRANTS** the Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg, Robert Crooks, Patricia Harris and Margaret Keller. The Court **STAYS** the matter as to the Defendants Fundamental Long-Term Care Holdings, LLC, Fundamental Administrative Services, LLC, Fundamental Clinical Consulting, LLC, THI of Baltimore, Inc. and THI of South Carolina, LLC. The Court retains jurisdiction of the matter as to the Dismissed Defendants only to the following extent: should the parties to the Arbitration Agreement be unable to select an arbitrator or unable to agree on one pursuant to the terms of the Arbitration Agreement, this Court retains jurisdiction of the matter to assist the parties in selecting an arbitrator.

It is therefore

ORDERED that Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg, Robert Crooks, Patricia Harris and Margaret Keller are **GRANTED** and the matter is **STAYED** for the remaining Defendants until arbitration has been completed.



IT IS SO ORDERED.


Honorable Roger L. Couch
Presiding Judge Seventh Judicial Circuit

Spartanburg, South Carolina

Dated: 6/22/12


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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

James Boyd, Jr.,

Case No: 2018-CP-23-01934

Plaintiff,

v.

ORDER

THI of South Carolina, LLC, d/b/a Magnolia Place-Greenville; Hunt Valley Holdings, LLC; THI of Baltimore, Inc.; Fundamental Clinical and Operational Services LLC; Fundamental Administrative Services, LLC; Fundamental Clinical Consulting, LLC; Leonard Grunstein Both Individually and as Owner/Operator of Magnolia Place; Murray Forman Both Individually and as Owner/Operator of Magnolia Place; and Rusty Flathmann Both Individually and as Employee/Manager of Magnolia Place,

Defendants.

This matter comes before the Court upon Defendant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place of Greenville (misidentified in Plaintiff's Complaint and hereinafter referred to as "Defendants" or "Facility") Motion to Dismiss and Compel Arbitration. Defendants Fundamental Administrative Services, LLC ("Administrative Services") and Fundamental Clinical and Operational Services, LLC ("Operational Services") also filed motions to stay any requirement to file further responsive pleadings, motions, or discovery filed or served by Plaintiff until the Court has made a final decision regarding the validity of the arbitration agreement. The hearing was held June 13, 2018 in Greenville, South Carolina. Present on behalf of Plaintiff James Boyd, Jr. ("Boyd" or "Plaintiff" or "Mr. Boyd") was Stefan B. Feidler, Esq. of Anastopoulo Law Firm, LLC. Present on behalf of Defendant THI

of South Carolina at Magnolia Place at Greenville d/b/a Magnolia Place of Greenville was Perry M. Buckner, IV, Esq. of Young Clement Rivers, LLP.

BACKGROUND

The Plaintiff was admitted to Defendants' nursing home facility on June 30, 2016 after he was rendered a quadriplegic in a car accident with an unidentified driver. Prior to his admission, Wilda Boyd – Plaintiff's Mother – entered into several contracts with the Defendants on behalf of the Plaintiff. The contracts were each signed by Wilda Boyd, as representative of the Plaintiff, during his admission. The executed contracts included an Admission Agreement and Arbitration Agreement. Both parties agree that the Plaintiff was oriented and competent at the time of his admission. During his stay at Defendants' facility, the Plaintiff developed a number of health problems which led to the filing of the present action.

FINDINGS

I. EQUITABLE ESTOPPEL

In its Motion, Defendants argue the Plaintiff should be estopped from denying the parties' mutual right to arbitrate. In the arbitration setting, the equitable estoppel doctrine estops a party from asserting 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." Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 557-78, 813 S.E.2d 292, 299 (Ct. App. 2018) (quoting Thompson v. Pruitt Corp., 416 S.C. 43, 59, 784 S.E.2d 679, 688 (Ct. App. 2016)). "Restated, when a signatory seeks to enforce an arbitration agreement against a nonsignatory, the doctrine prevents the nonsignatory from averring he or she is not bound to the arbitration agreement when he or she receives a direct benefit from a contract that contains an arbitration clause." Id. With regard

to the party to be estopped, the elements of the doctrine of equitable estoppel are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. Id. (citing Thompson, 416 S.C. at 60, 784 S.E.2d at 688) (emphasis omitted).

In the present context, the Defendants' equitable estoppel argument is premised on the contention that the Admissions Agreement and Arbitration Agreement merged. Generally, "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, 755 S.E.2d 450, 455 (2014) (quoting Klutts Resort Realty Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)).

However, merger does not occur where the documents recognize the "separatedness" of the arbitration agreement, which is indicative of an intent that the common law doctrine of merger not apply. See Coleman, 407 S.C. at 355, 755 S.E.2d at 455. In Coleman, 407 S.C. at 350, 755 S.E.2d at 452, Ann Coleman signed several documents, including arbitration agreements, when admitting her sister to a health care facility. Coleman brought suit after her sister's death, and the facility sought to compel arbitration. Id. The circuit court denied the motion to compel. Id. On appeal, the Coleman court found the language in the section titled "Entirety of Agreement" "recognizes the 'separatedness' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts." Coleman, 407 S.C. at 355, 755 S.E.2d at 455. The Court noted, in

addition to the "Entirety of Agreement" clause, the [arbitration agreement] could be disclaimed within thirty days of signing while the admissions agreement could not...." Id. Furthermore, the court noted that the "Entirety of Agreement" clause creates an ambiguity as to merger, and "the law is clear that any ambiguity...is construed against the drafter...." Id. at 355-56, 755 S.E.2d at 455. The Coleman court ruled the circuit court properly denied [the health care facility's] equitable estoppel arguments because no merger occurred. Id. at 356, 755 S.E.2d at 455.

Additionally, merger does not occur where an arbitration agreement and admission agreement are governed by different law, reference each other separately, provide different mechanisms by which they can be revoked, are separately paginated, and have their own signature page. See Hodge, 422 S.C. at 562-563, 813 S.E.2d at 302. In Hodge, 422 S.C. at 550, 813 S.E.2d at 295, Mable Hodge entered a rehabilitation facility. Id. She was "'well developed' and 'in no real distress' and had a full range of motion in her extremities when she entered the [f]acility." Id. Mable's husband executed various documents related to her admission, including an arbitration agreement and an admission agreement. Id. Mable was not present at the time her husband signed these documents on the day before her admission because she was still in the hospital. Id. However, Mable was competent at the time of her admission. Id. 422 S.C. at 550, 813 S.E.2d at 296. Three weeks after her admission, Mable became paralyzed from the waist down and died one year later as a result of her paralysis. Id. 422 S.C. at 553, 813 S.E.2d at 297.

The circuit court denied [the facility's] motion to dismiss or compel arbitration. Id. The facility appealed arguing the circuit court erred in finding the arbitration agreement was separate from the admissions agreement because the two documents were merged. Id. 422 S.C. at 556, 813 S.E.2d at 299. The Court of Appeals upheld the circuit court, finding the admissions agreement and arbitration agreement did not merge. Id. 422 S.C. at 563, 813 S.E.2d at 302. The

Court based its rulings on the fact that the "Admissions Agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law." Id. 422 S.C. at 562, 813 S.E.2d at 302. Additionally, similar to Coleman, the Arbitration Agreement recognized separatedness because it referenced the two documents separately, "stating '[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement.'" Id. Furthermore, the arbitration agreement stated it could be revoked within thirty days, while the admission agreement did not contain such an indication; rather, it provided the admissions agreement could only be amended by the patient with written agreement executed by the facility and the patient. The Court noted that each document was separately paginated and had its own signature page. Finally, signing the arbitration agreement was not a precondition to admission. Id. 422 S.C. at 562-63, 813 S.E.2d at 302. Based on this, the Court of Appeals found the admissions agreement and arbitration agreement did not merge. Id. 422 S.C. at 563, 813 S.E.2d at 302. Therefore, because Mable received no benefit from the arbitration agreement, equitable estoppel did not bar Mable's claims. Id.

In contrast, merger would occur – and equitable estoppel would apply – when the admission agreement contains the arbitration provision. See THI of South Carolina at Magnolia Manor-Inman, LLC v. Gilbert, No. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. 2015). In that case, the District Court of South Carolina distinguished Coleman from the case before it, stating that "the admission agreement *contains* the arbitration provision." Id. at *2 (emphasis in original). Therefore, a signatory's authority to execute a separate, non-essential legal waiver was not implicated by the facts of that case. Id.

Counsel for Plaintiff cites McCutcheon v. THI of S.C. at Charleston, LLC, No. 2:11-CV-

02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011). In that case, the plaintiff was the husband of a resident to a nursing home facility who executed a number of documents on his wife's behalf upon her admission to the facility, including an arbitration agreement. Id. The arbitration agreement was a separate document and not a condition of admission to the facility. Id. In that case, the District Court determined the arbitration agreement and admissions agreement, while separate documents, merged because they were executed by the same parties, at the same time, and regarded the same transaction. Id. at *3. The Court noted it would be inequitable to allow plaintiff to assert that husband had authority to sign the admissions agreement on behalf of the plaintiff, but lacked the authority to sign the arbitration agreement. Id. Based on this, the District Court found the plaintiff was estopped from denying enforceability of the arbitration agreement.

In the present case, the documents present the hallmarks of "separatedness" stated in Coleman and Hodge. Here, the document entitled "Addressing Decisional Capacity" indicates that the Plaintiff was competent to make decisions on behalf of himself. However, despite his competency, Wilda Boyd signed the Admission Agreement and Arbitration Agreement as "Representative" on his behalf. The Arbitration Agreement refers to itself and the Admission Agreement separately.ⁱⁱ Additionally, the Arbitration Agreement states that it is governed by federal law, while the admissions agreement states it is governed by state law. The Admissions Agreement states that it can be terminated at any time, upon written notice; however, the Arbitration Agreement does not provide a means of termination. Rather, the Arbitration Agreement "remain[s] in effect for all care rendered at Facility and shall survive any termination or breach of this Agreement or the Admission Agreement." The Arbitration Agreement also contains a "merger clause" entitled "Entire Agreement," which states that the Admissions Agreement "represents the entire agreement and understanding between the parties."

Furthermore, each document is separately paginated and has its own signature page, and the Arbitration Agreement is not contained within the Admissions Agreement. Finally, the Arbitration Agreement is not a precondition to admission.

While the McCutchen case presents a factually analogous scenario, the case was decided several years prior to the Coleman and Hodge. Moreover, the McCutchen case is only persuasive whereas the Coleman and Hodge cases are binding on this Court. In light of this, the Court finds the Admission Agreement and Arbitration Agreement did not merge. Since the Agreements did not merge, it cannot be argued that the Plaintiff received a benefit from the Arbitration Agreement. Therefore, the court finds that equitable estoppel does not bar the Plaintiff from denying the validity of the Arbitration Agreement.

II. AGENCY

Defendants argue Wilda Boyd possessed the actual or apparent authority to bind the Plaintiff under the Arbitration Agreement, and that Plaintiff should be estopped from denying the validity of the arbitration agreement. "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control. Hodge, 422 S.C. at 564, 813 S.E.2d at 303 (quoting Froneberger v. Smith, 406 S.C. 37, 49, 748 S.E.2d 625 631 (Ct. App. 2013)). "An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow." Agency may be proved by circumstantial evidence showing a course of dealing between the parties. Hodge, 422 S.C. at 565, 813 S.E.2d at 303 (quoting Peoples Fed. Sav. & Loan Ass'n, 310 S.C. 132, 145-46, 425 S.E.2d 764, 773 (Ct. App. 1992)). "A party asserting agency as a basis of liability must prove the existence of the agency, and the agency must be clearly established by the facts."

Hodge, 422 S.C. at 565, 813 S.E.2d at 304 (quoting McCall v. Finley, 294 S.C. 1, 6, 362 S.E.2d 26, 29 (Ct. App. 1987)).

"A true agency relationship may be established by evidence of actual or apparent authority." Id. (quoting R & G Constr., Inc. v. Lowcountry Reg'l Transp. Autho., 343 S.E. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000)). "To establish apparent authority, the proponent must show (1) 'the purported principal consciously or impliedly represented another to be his agent; (2) the proponent relied on the representation; and (3) there was a change of position to the [proponent's] detriment." Hodge, 422 S.C. at 571-72, 813 S.E.2d at 307 (quoting Thompson, 416 S.C. at 54, 784 S.E.2d at 685). "Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the *principal* which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him." Hodge, 422 S.C. at 572, 813 S.E.2d at 307 (quoting Froneberger, 406 S.C. at 47, 748 S.E.2d at 630).

However, agency may not be established solely by the declarations and conduct of an alleged agent. Id. (quoting Cowburn v. Leventis, 366 S.C. 20, 39-40, 619 S.E.2d 437, 448 (Ct. App. 2005)). In fact, "[t]he law is clear in this state that statements made by an agent concerning the existence or extent of his authority are insufficient standing alone to establish agency." Id. (quoting Klippel v. Mid-Carolina Oil, Inc., 303 S.C. 127, 128-31, 399 S.E.2d 163, 164-65 (Ct. App. 1990)).

Furthermore, "the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration...." Id. (quoting Thompson, 416 S.C. at 55, 784 S.E.2d at 686). In Hodge, 422 S.C. at 573-74, 813 S.E.2d at 308, the Court of Appeals upheld the circuit court's finding that Husband

was not Mable's agent. In that case, the Court noted that "Husband's signing of the arbitration agreement, admissions agreement, and other forms does not make him Mable's agent." Hodge, 422 S.C. at 573-74, 813 S.E.2d at 308. While she was not present, the facility knew Mable was competent at the time of admission as indicated by the doctor's examination and allowed her to sign other forms. Hodge, 422 S.C. at 5774, 813 S.E.2d at 308. The record contained no evidence from the facility that Mable, as principal, represented Husband was her agent. Id. Furthermore, since Mable was competent, no argument could be made the Adult Health Care Consent Act gave Husband the right to sign medical forms. Id. The Court of Appeals noted that, "even if Husband had authority to handle finances or make health care decisions... 'the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration....'" Id. (quoting Thompson, 416 S.C. at 55, 784 S.E.2d at 686). Accordingly, the Court of Appeals held the circuit court did not err in finding husband was not Mable's agent. Id.

In the present case, the Defendant claims that it relied on the affirmative representations of Wilda Boyd and the Plaintiff in admitting Plaintiff to the its health care facility. Defendant further states that Wilda Boyd possessed sufficient inherent agency to render the agreement enforceable. However, "statements made by an agent concerning the existence or extent of his authority are insufficient standing alone to establish agency." Hodge, 422 S.C. at 572, 813 S.E.2d at 307 (quoting Klippel v. Mid-Carolina Oil, Inc., 303 S.C. 127, 128-31, 399 S.E.2d 163, 164-65 (Ct. App. 1990). Here, there is no evidence that Wilda Boyd possessed actual authority to sign the documents on behalf of the Plaintiff. Nor is there evidence that the Plaintiff explicitly represented to the Defendant that Wilda Boyd was authorized to sign the documents on his behalf. However, at the hearing, counsel for Defendants mentioned that the Plaintiff may have

been in the room while Wilda Boyd signed the papers for him.

In light of this and the lack of record regarding the agency relationship in this case, the Court will allow discovery on the issue of the agency relationship between the Plaintiff and Wilda Boyd at the time the Arbitration Agreement and Admissions Agreement were signed and executed.

III. SOUTH CAROLINA BILL OF RIGHTS

Defendant argues Wilda Boyd possessed statutory authority under the South Carolina Bill of Rights for Residents of Long-Term Care Facilities to Bind the Plaintiff under the Arbitration Agreement. South Carolina provides certain rights to residents of long-term care facilities under South Carolina's "Bill of Rights for Residents of Long-Term Care Facilities" ("Bill of Rights"). S.C. Code Ann. § 44-81-10 et seq. S.C. Code Ann. § 44-81-30 defines "resident" as a person who is receiving treatment or care in a long-term care facility, and "representative" as a resident's legal guardian, committee, or next of kin or other person acting as agent of a resident who does not have a legally appointed guardian. S.C. Code Ann. § 44-81-30(2)-(3). The Act defines "long-term care facility" as an intermediate care facility, nursing care facility or residential care facility subject to regulation and licensure by the State Department of Health and Environmental Control.

South Carolina's Bill of Rights provides residents and their representatives with certain rights, including written and oral explanations of: rights and grievance procedures, available services and related charges, refund policies, change in services, ability to choose attending physician, participate in treatment or changes in care, receive the physician's complete diagnosis, refuse to participate in experimental research, relocate if desired, manage personal finances, keep personal possessions, be treated with respect and dignity, and a number of other rights related to

the autonomy and self-determination of the resident. See S.C. Code Ann. § 44-81-40. However, South Carolina's Bill of Rights does not confer upon representatives the ability to enter into contracts, aside from those relating to sitter services. See S.C. Code Ann. § 44-81-10 et seq. But see S.C. Code Ann. 44-66-10 et seq. ("Adult Health Care Consent Act").

Here, Defendant argues that the Plaintiff falls within the definition of "resident" and Wilda Boyd within the definition of "representative." As such, the Defendant argues Wilda Boyd had the authority to contract with the Defendant on behalf of Mr. Boyd. However, the Defendant has not pointed to a specific statute prescribing the representative's authority to contract on behalf of a competent resident. In fact, the statute does not confer such a right aside from contracting individuals to perform sitter services. The fact that the Bill of Rights provides that a "resident's representative must be given by the facility a written and oral explanation of the rights, grievance procedures, and enforcement provision...at the time of admission to a long-term care facility[, and] [w]ritten acknowledgement...must be made part of the resident's file" is of no consequence. Therefore, the Court finds South Carolina's Bill of Rights does not provide a basis to enforce the Arbitration Agreement against the Plaintiff.

IV. THIRD-PARTY BENEFICIARY

Defendant argues the Arbitration Agreement is enforceable because the Plaintiff was a third-party beneficiary. Where an arbitration agreement has not merged with the admissions agreement, a third-party beneficiary cannot be required to arbitrate when he has not attempted to enforce the contract containing the arbitration agreement. See Thompson v. Pruitt Corp., 416 S.C. 43, 57, 784 S.E.2d 679, 784 (Ct. App. 2016); see also Hodge, 422 S.C. at 574, 813 S.E.2d at 308. "A third-party beneficiary is a party that the contracting parties intend to directly benefit." Thompson, 416 S.C. at 57, 784 S.E.2d at 687 (quoting Helms Realty, Inc. v. Gibson-Wall Co.,

363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005)). A third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement. Id.

In Thompson, 416 S.C. at 48, 784 S.E.2d at 682, Son signed an admission agreement and arbitration agreement on behalf of Mother when admitting Mother to a nursing home facility due to her dementia. Mother was not present at the time of the signing. Id. After Mother died as a result of falling out of a bed, Daughter brought suit for wrongful death against the nursing home facility. Id. The nursing home facility moved to compel arbitration, which the circuit court denied on the grounds that Son did not have authority to execute the arbitration agreement on Mother's behalf. Id. 416 S.C. at 48-49, 784 S.E.2d at 682. The Court of Appeals affirmed the circuit court, ruling that because Daughter was not attempting to enforce the arbitration agreement on behalf of Mother's estate, Mother's estate should not be required to arbitrate the claim. Thompson, 416 S.C. at 57, 784 S.E.2d at 687.

In this case, as discussed above, the admissions agreement and arbitration agreement did not merge. The Plaintiff has not attempted to enforce the arbitration agreement; rather, he has asserted claims against Facility arising out of the separate admissions agreement. Therefore, the Court finds the arbitration agreement cannot be enforced against the Plaintiff as a third-party beneficiary because he has not attempted to enforce the arbitration agreement.

V. UNCONSCIONABILITY

The Plaintiff, in his Response in Opposition to Defendant's Motion to Dismiss and Compel Arbitration, argues the Arbitration Agreement is unenforceable because it is unconscionable. "Arbitration is a matter of contract law and is available only when the parties involved agreed to arbitrate." Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d

839, 844-45 (Ct. App. 1999). Accordingly, a party may seek revocation of a contract under such grounds as exist at law or equity, including fraud, duress, and unconscionability. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). South Carolina defines unconscionability "as the absence of a meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Id. at 24-25, 644 S.E.2d at 668 (citing Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). In analyzing a claim of unconscionability in the context of arbitration agreements, courts should focus on whether the arbitration clause is geared toward achieving an unbiased decision by a neutral decision-maker. Id. at 25, 644 S.E.2d at 668-69.

i. Meaningful Choice

"Absence of a meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." Id. at 25, 644 S.E.2d at 669. In determining whether a contract was "tainted by an absence of a meaningful choice, courts should take into account the nature of the injuries suffered by the plaintiff; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id. Furthermore, under general principles of state contract law, an adhesion contract is a standard form contract offered on a "take-it-or-leave-it" basis with terms that are not negotiable. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 356 (2001). However, adhesion contracts are not per se unconscionable. Simpson. at 26, 644 S.E.2d at 669.

Here, the Plaintiff, already in a bad state of health, suffered severe injuries including sepsis, sacral wounds, and a stage IV pressure ulcer. It is unclear whether the Plaintiff and Wilda

Boyd are sophisticated; however, it is clear Mr. Boyd did not read the contract and it is not unfair to assume that there is a relative disparity in sophistication between the Plaintiff and Defendant. However, the arbitration agreement at issue is not complex, nor would it have come at a surprise to Wilda Boyd or the Plaintiff. The arbitration agreement is on its own separate page, and the entire agreement constitutes one page composed of four or five paragraphs. The arbitration agreement contains an express provision that he or she is not required to use the facility, and that there are numerous other healthcare providers. Moreover, the arbitration agreement states in conspicuous bolded letters **"I understand and agree that I am giving up and waiving my right to a jury trial."** In light of this, it seems the Plaintiff was left with a meaningful choice regarding whether to sign the arbitration agreement. Therefore, the arbitration agreement is not unconscionable based on lack of a meaningful choice.

ii. Oppressive and one-sided terms

In considering whether terms are oppressive and one-sided, courts typically assess whether the contract requires waiver of rights, and whether there is a lack of mutuality of remedy. See York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 88-90, 749 S.E.2d 139, 150-151 (Ct. App. 2013). Here, the arbitration agreement provides that "the parties shall select an arbitrator from a panel having experience and knowledge of the health care industry." On its face this clause recognizes the benefit of an arbitrator who has experience with the health care industry. The neutrality of the arbitrator is bolstered by the fact that both parties must reach a mutual decision. If the parties cannot reach a mutual decision, the arbitration agreement provides that the arbitrator shall be selected by the Court. Based on the mutuality of the provision and absence of waiver of rights, the arbitration agreement is not unconscionable due to oppressive or one-sided terms.

CONCLUSION

In conclusion, the Court finds equitable estoppel does not prevent the Plaintiff from denying the validity of the Arbitration Agreement. The Court also finds that the South Carolina Bill of Rights does not provide Wilda Boyd with the authority to contract on behalf of the Plaintiff. Furthermore, the Court does not find the arbitration agreement unenforceable under the doctrine of unconscionability. However, the Court will allow discovery on the issue of agency to determine whether Wilda Boyd had actual or apparent authority to sign the arbitration agreement on behalf of Mr. Boyd. Finally, the Court will hold Defendants Administrative Services and Operational Services Motion to Stay in abeyance until final ruling on the Motion to Compel Arbitration.

IT IS SO ORDERED.

Perry H. Gravely
Presiding Judge

Greenville, South Carolina

July _____, 2018

Electronic Signature Page of Judge Gravely to Follow

ⁱ "This [a]greement, including all Exhibits hereto, and the [a]rbitration agreement between Facility and the Resident, if the parties sign one, supersede all other agreements, either oral or in writing between the parties, and contain all of the promises and agreements between the parties. Each party to this agreement acknowledges that no

representations, inducements, or promises have been made by any party or anyone acting on behalf of any party, that are not contained in the [a]greement or in the [a]rbitration [a]greement. This [a]greement may be amended only by a written agreement signed on behalf of the Facility and the Resident."

ii "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*." (emphasis added).



Greenville Common Pleas

Case Caption: James Boyd Jr vs. Thi Of South Carolina Llc , defendant, et al
Case Number: 2018CP2301934
Type: Order/Other

So Ordered

s/ Honorable Perry H. Gravely, #2755

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
PRISCILLA BROWN, AS PERSONAL	)	DOCKET NO. 2019-CP-40-00516
REPRESENTATIVE OF THE ESTATE	)	
OF JAMES E. BROWN,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
THI OF SOUTH CAROLINA AT	)	ORDER
COLUMBA, LLC, D/B/A MAGNOLIA	)	
MANOR, D/B/A MIDLANDS HEALTH	)	
AND REHABILITATION AND JOHN	)	
AND JANE DOES 1-10, WHOSE TRUE	)	
NAMES ARE UNKNOWN ,	)	
	)	
DEFENDANTS.	)	
	)	

This matter came before the Court on August 13, 2019 for a hearing on a Motion to Compel Arbitration and Stay State Court Proceedings filed by THI of South Carolina at Columbia, LLC (“the Facility”) and any John or Jane Does’ (collectively the “Defendants”). Present at the hearing were Jenkins Mann, Esq. on behalf of Priscilla Brown (“Plaintiff”). Perry Buckner, IV, Esq., appeared on behalf of THI of South Carolina at Columbia LLC (“Defendants”).

FACTUAL BACKGROUND

On January 16, 2017, James E. Brown (“Mr. Brown”) was transferred from Palmetto Health Richland Hospital to Defendant THI of South Carolina at Columbia, LLC for treatment consistent with his diagnoses. Plaintiff, Mr. Brown’s wife, alleges that Mr. Brown was transferred without his consent or his family. Immediately upon arrival at the Facility, Mr. Brown’s family asked that he be transferred to another nursing facility. Plaintiff alleges no efforts were made by the Facility to transfer Mr. Brown.

As part of Mr. Brown’s admission to the Facility, Plaintiff was presented with an Admission Agreement to be completed by the resident or his representative for admission to the Facility. The Admission Agreement states, “all information provided, including her authority to bind her husband to certain agreements, is truthful and correct.” Mrs. Brown was also presented

with an Arbitration Agreement, the completion of which was not a condition for admission to the Facility. Mrs. Brown executed the Arbitration Agreement.

On January 16, 2017, Mr. Brown was transferred from Palmetto Health Richland Hospital to the Facility; he subsequently died. Plaintiff brought this wrongful death and survival action on January 25, 2019 alleging negligent acts and omissions by the Defendants. Defendant filed a motion to compel arbitration. Plaintiff opposes the Motion on the basis that Mrs. Brown was not an agent of Mr. Brown for the purpose of executing the Arbitration Agreement.

LEGAL STANDARD

There is a strong presumption in favor of the validity of arbitration agreements because of the policy favoring arbitration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir. 1997). Both federal and state policy favor arbitrating disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). “Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Id.*, 338 S.C. at 41, 524 S.E. 2d at 846 (internal quotations and citations omitted). “A party seeking to compel arbitration under the FAA must establish that: (1) there is a valid agreement, and (2) the claims fall within the scope of the agreement. *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 173 (2019) (citation omitted).

DISCUSSION

Defendants moved to compel arbitration arguing Mrs. Brown possessed the authority to sign the Arbitration Agreement on her husband’s behalf, or alternatively, she is estopped from denying she had the authority to do the same. Plaintiff opposed the motion to compel arbitration arguing that Mrs. Brown did not have authority to execute the Arbitration Agreement on her husband’s behalf.

“Agency” is the fiduciary relationship that arises when one person, a principal, manifests assent to another person, an agent, that the agent shall act on the principal’s behalf and subject to the principal’s control. *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC.*, 422 S.C. 544, 564, 813 S.E.2d 292 (Ct. App. 2018). An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. *Hodge*, 422 S.C. at 565. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties. *Id.*

The doctrine of apparent authority provides that a principal may be bound by the acts of his agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996). “While actual authority is that which is expressly conferred upon the agent by the principal, apparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which the principal holds the agent out as possessing.” *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). If a principal holds another out as having the authority to act on his behalf or knowingly permits another to act as his agent, “either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances.” *R & G Const., Inc. v. Lowcountry Reg’l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000)(emphasis added).

At the hearing, the Facility stated it relied on the conduct and representations of Mr. Brown and the Plaintiff during the admission process and over the course of Mr. Brown’s residency. The Facility asserted Mr. Brown allowed his wife to participate in the admission process and to sign documents on his behalf, including the Arbitration Agreement and the Admission Agreement, when he was admitted to the Facility. Further, Mrs. Brown represented to the Facility that she was his representative by signing the Arbitration and Admission agreement on Mr. Brown’s behalf. Defendants contend that Mr. Brown never repudiated this authority.

Plaintiff argued Mrs. Brown does not possess actual or apparent authority to sign the Arbitration Agreement on behalf of Mr. Brown and that the Court should deny Defendant's Motion to Compel Arbitration. Defendant then requested permission to conduct limited discovery on representations made by Mrs. Brown and her husband and conduct relating to their authority as well as the Facility’s understanding of that conduct. Defendants asserted that if the record is incomplete regarding its authority or agency then discovery on these issues is necessary.

Arbitration is appropriate only if Mrs. Brown possessed the authority to execute the Arbitration Agreement and bind her husband to its terms. The record is incomplete and limited discovery on the issues of the agency relationship between the Plaintiff and Mr. Brown at the time the Arbitration Agreement and Admissions Agreement were signed and executed is necessary to

a resolution of the motion. The Court further finds that any such discovery conducted by the Defendants must be limited and relevant only as to Mrs. Brown's agency and authority to execute the Admission Agreement and the Arbitration Agreement and to act for Mr. Brown during the admissions process. Limited discovery on these issues will not constitute a waiver of Defendant's claim that it is entitled to arbitration.

The Court also finds that all of the remaining issues, raised in the motion to compel and in opposition thereto, are contingent upon the authority to execute the Arbitration Agreement and the Admission Agreement. Therefore, this Court makes no findings or rulings on the remaining arguments of counsel regarding arbitration. All other arguments are held in abeyance until the parties complete discovery on the actual or apparent authority to execute the documents on behalf of Mr. Brown and may be raised prior to the final ruling on the Motion to Compel Arbitration.

ORDER

Based upon the foregoing, **IT IS ORDERED**, that the Court will allow discovery on the issue of agency to determine whether Priscilla Brown had actual or apparent authority to sign the arbitration agreement on behalf of her husband, James E. Brown.

AND IT IS SO ORDERED.

Signature page to follow



Richland Common Pleas

Case Caption: Priscilla Brown , plaintiff, et al vs Thi Of South Carolina At Columbia Llc , defendant, et al

Case Number: 2019CP4000516

Type: Order/Other

IT IS SO ORDERED!

s/ Alison Renee Lee

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