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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-Smalls,

Appellants.

RECORD ON APPEAL
VOLUME II
(PAGES 350-673)

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

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, William Haynes, as Personal Representative of the Estate of Elizabeth Varner ("Plaintiff"), respectfully submits this Motion to Reconsider and supporting Memorandum of Law regarding the Court's Order Granting Defendants' Motion to Compel Arbitration and Related Stays.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff William Haynes ("Plaintiff") is the Personal Representative for the Estate of Elizabeth Varner, who was admitted as a resident at Riverside Health and Rehab ("Defendant

Riverside") on May 20, 2019. Jerrolyn Montgomery-Smalls was the Administrator at the time Elizabeth Varner's residency and throughout her admission. Prior to her admission to Defendant Riverside's facility, Elizabeth Varner was a resident at a skilled nursing facility located in Saint George, South Carolina, and was being transferred from that facility to Defendant Riverside. At all times relevant to this litigation, Michael Bennett was recognized by the Facility as the Power of Attorney for Elizabeth Varner. Exhibit B. The Admission Communication document provided by Defendant Riverside clearly show the Facility identified Michael Bennett as the Responsible Party for Elizabeth Varner. Id.

Mr. Bennett had multiple conversations with representatives at Riverside Health and Rehab prior to his grandmother's transfer to this facility. Exhibit D. Mr. Bennett was unable to be present during the admission of Elizabeth Varner and notified the staff at Riverside Health and Rehab that Williams Haynes, the son of Elizabeth Varner, or Deborah Colvard, the daughter of Elizabeth Varner, had authority to complete any admission paperwork. Id. Mr. Bennett did not authorize Kimberly Haynes to sign any admission paperwork on behalf of Elizabeth Varner and Riverside was aware of this fact. Id. Mr. Bennett did not authorize William Haynes nor Deborah Colvard to sign an arbitration agreement. Id. The FACILITY–RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT ("Arbitration Agreement") was signed by Kimberly Haynes, the daughter-in-law of Elizabeth Varner. Exhibit C. The name of the resident to be bound by the Agreement, Elizabeth Varner, is blank.

It is undisputed the staff at Riverside Health and Rehab recognized Mr. Bennett as the Responsible Party for Elizabeth Varner and as her Power of Attorney. Exhibit B. It is also undisputed the staff at Riverside Health and Rehab knew Mr. Bennett only authorized William Haynes or Deborah Colvard to sign any admission paperwork. Id.

Kimberly Haynes is the wife of William Haynes and the daughter-in-law of Elizabeth Varner. She and William Haynes met with Chandra Bryant on the day of Ms. Varner's admission in the room being assigned to Ms. Varner. Exhibit E. Ms. Bryant said someone needed to sign the paperwork and it did not matter who. Ms. Haynes offered to sign the admission paperwork since Ms. Varner was on the way to the facility and William wanted to greet her upon arrival. Id. Ms. Bryant asked Mrs. Haynes to follow her to a different room that was either a dining room or a snack room located behind the front desk. William remained in the room to meet his mom upon her arrival. Id. Ms. Bryant presented Mrs. Haynes with paperwork and asked that she sign it. Id. Ms. Bryant seemed to be in a hurry to get the paperwork signed and quickly reviewed the documents with Mrs. Haynes. Id. Part of the paperwork was the arbitration agreement and Mrs. Haynes specifically told Ms. Bryant she was not authorized to waive my mother-in-law's right to a jury trial. Id. Ms. Bryant responded along the lines of, "Don't worry about it. It just has to be signed for her admission." Id. Neither Ms. Bryant nor anyone else from the Facility asked Mr. Haynes to sign the paperwork even though he was present at the Facility. Exhibit F.

Plaintiff filed a separate lawsuit alleging Defendants Fundamental Administrative Services, LLC ("Defendant FAS"), Fundamental Clinical and Operational Services, LLC (Defendant FCOS"), and Defendant Smalls are believed to be involved in a joint venture regarding the operation of Riverside Health and Rehab. Plaintiff has alleged the legal theories of corporate negligence, joint venture, and alter ego against Defendants FAS, FCOS, and Smalls. Plaintiff has filed a separate lawsuit against THI of South Carolina, LLC d/b/a Riverside Health and Rehab ("Riverside") alleging negligence by the facility's employees in the care and treatment of Elizabeth Varner.

In their respective Answers to Plaintiff's Complaint, Defendants FCOS, FAS, and Smalls disclaim providing any direct care to the decedent, Elizabeth Varner. See generally Fundamental Administrative Services, LLC Answer, Fundamental Clinical and Operational Services, LLC, and Jerrolyn Montgomery-Smalls Answers. Defendants FCOS and FAS also assert the following affirmative defense, "This Defendant hereby gives notice that Plaintiff's claims against this Defendant should be submitted to arbitration pursuant to a binding arbitration agreement." Id. at ¶¶ 37 and 38, respectively. Defendants did not file any motion regarding arbitration but instead filed Motions to Stay proceedings relying on the Federal Arbitration Act ("FAA").

This Honorable Court entered an Order on February 24, 2022, granting Defendants' Motions to Compel Arbitration and Related Stays. Exhibit A.

BRIEF SUMMARY OF ARGUMENTS

1. **The Order misstates the applicable law regarding the favorability of arbitration.**

2. **The Arbitration Agreement is invalid on its face due to absence of the party to be bound.**

3. **The Court did not rule on Plaintiff's claim the Arbitration Agreement is unenforceable due to lack of consideration.**

4. **The Arbitration Agreement is unenforceable because Kimberly Haynes did not possess authority, either express or apparent, and specifically disclaimed her authority to waive Mrs. Varner's right to a jury trial.**

5. **Equitable estoppel does not apply based on the facts of this case.**

6. **Merger does not apply based on the four corners of the Arbitration Agreement and misrepresentations made by staff at Defendant THI.**

7. **The Arbitration Agreement is unconscionable in that it did not offer any meaningful choice and the terms are oppressive.**

8. **The Federal Arbitration Act does not apply to the claims of corporate negligence against Defendants FAS, FCOS, and Smalls and therefore the stays were erroneously entered based on a plain reading of the law.**

ARGUMENT AND LEGAL ANALYSIS

1. The Order misstates the applicable law regarding public policy favoring arbitration.

Our Supreme Court recently analyzed the oft-cited claim that state law "favors' arbitration. In Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 432 S.C. 633 (2021), the Court held arbitration agreements are on equal footing with all other contracts.

> Our courts' statements that the law 'favors' arbitration were never intended to elevate a contractual right of arbitration above the procedural rules of the court or other contractual provisions....Neither the [United States] Supreme Court nor this Court, however, meant to give the law of arbitration such a special status that it would supplant state procedural law....Therefore, when considered in the proper context, our statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy—federal or state—'favoring' arbitration.

Placing the Arbitration Agreement on equal footing with other contracts and rejecting the presumption of favorability, this Court must first determine whether a valid arbitration agreement exists in this case.

2. The Arbitration Agreement is invalid on its face due to the absence of the party to be bound.

The Order fails to address Plaintiff's contention the Arbitration Agreement is invalid due to the absence of Mrs. Varner's name appearing anywhere within the four corners of the contract. "A contract is an agreement entered into by **two or more** parties in which **each party** agrees to perform, or not to perform, certain acts. The parties must manifest their mutual assent to all essential terms of the contract in order for an enforceable obligation to exist. If one of the parties has not agreed, then a prerequisite to formation of the contract is lacking. Without the

actual agreement of the parties, there is no contract." Stanley Smith & Sons v. Limestone College, 283 S.C. 430, 432 (Ct. App. 1984)(internal citations omitted). There is no contract because there is no identified party to be bound by the terms of the Arbitration Agreement.

South Carolina courts have made it clear that mutual assent and a meeting of the minds is necessary for an enforceable arbitration agreement. South Carolina law requires that "in order to have a valid and enforceable contract, there must a meeting of the minds between all parties with regard to all essential terms and material terms of the agreement." Grant v. Magnolia Manor - Greenwood, Inc., 678 S.E. 435 (2009). Parties cannot be said to have had a meeting of the minds on matters that are indefinite, vague, uncertain, or even incomprehensible. The Arbitration Agreement at issue is indefinite, vague, ambiguous, uncertain, and incomprehensible as to **who is to be bound** because there **is no person to be bound.** An agreement that omits material terms may be determined to be unenforceable for indefiniteness. Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997); Ellis v. Taylor, 449 S.E.2d (S.C. App. 1994). What could be more material to a contract than the person being bound by said contract?

"Generally, if the terms of a contract are clear and unambiguous, this Court must enforce the contract according to its terms regardless of its wisdom or folly. Ambiguous language in a contract, however, should be construed liberally and interpreted strongly in favor of the non-drafting party. After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings." Southern Atl. Fin. Serv. v. Middleton, 356 S.C. 444 (2003)(internal citations omitted).

The "Resident" and the "Resident's Durable Power of Attorney for Healthcare/Resident's Legal Guardian/Resident's Responsible Party" hereinafter collectively "Representative" is

conspicuously and inexplicably blank on the Arbitration Agreement. It is up to Riverside, as the exclusive drafting party of the arbitration agreement, to identify the parties intended to be bound. Defendant Riverside has failed to identify the party intended to be bound and there can be no contract without a party to the contract. There is no indicia Mrs. Varner was the party to be bound and it is uncontested Mrs. Varner did not sign the Arbitration Agreement. Hence, the Arbitration Agreement must fail because two parties have not agreed to perform, or not to perform, certain acts and manifested their respective intent to be so bound.

Plaintiff requests this Court amend its previous ruling to address this issue.

3. The Court did not rule on Plaintiff's claim the Arbitration Agreement is unenforceable due to lack of consideration.

Plaintiff specifically argued the Arbitration Agreement is unenforceable due to lack of consideration. The Court's Order is silent as to this particular claim. Plaintiff's respectfully request this Court amend its previous ruling to address this issue. Plaintiff expressly incorporates by reference his arguments from his Memorandum Opposing Arbitration relating to this issue.

4. The Arbitration Agreement is unenforceable because Kimberly Haynes did not possess authority, either express or apparent, and specifically disclaimed her authority to waive Mrs. Varner's right to a jury trial.

Kimberly Haynes did not possess the legal authority to execute the Arbitration Agreement on behalf of Mrs. Varner – a fact Defendant Riverside noted in its records and was expressly told by Mrs. Haynes. Exhibits B and E. Defendant Riverside's staff recognized Michael Bennett as Ms. Varner's Power of Attorney and knew Mr. Bennett only authorized William Haynes and/or Deborah Colvard to sign any paperwork. Exhibit C. The Order misapplies the tests set forth in Coleman v. Mariner Health Care, Inc. 407 S.C. 346 (2014), Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 SC 544 (Ct.App.2018), and

Thompson v. Pruit Corp., 416 S.C. 43 (Ct.App.2016) in ruling Ms. Haynes was an agent of Mrs. Varner, especially in the face of her express disclaimer of any such authority. Exhibit E.

An agency relationship may only be formed by the resident's representations to the nursing home and a resident can make no such representations if he/she is absent when the arbitration contract is presented. Thompson v. PruittHealth Corp., 416 S.C. 43 (Ct. App. 2016). Moreover, when admission and arbitration agreements are governed by separate contracts, a resident does not create an agency relationship or ratify the arbitration contract simply by silently remaining in the nursing home. Hodge v. Unihealth Post-Acute Care of Bamburg, LLC, 422 S.C. 573-74 (Ct. App. 2018) (noting nursing home argued resident "represented" her husband had authority by "allowing him to procure her admission" but still finding "no evidence . . . that [the resident], as the principal, represented husband was her agent"). Hodge is directly on point with the matter before this Court.

The Order states Mrs. Haynes became Mrs. Varner's agent because Mr. Haynes decided to wait in the room where his mother was being admitted upon the signing of the Arbitration Agreement. This ignores Mrs. Haynes' express disclaimer to have any authority to waive Mrs. Varner's right to a jury trial. Exhibit E. The ruling by the Court is a misapplication of the express holding in Hodge.

Finally, the legal burden is on the party asserting that an agency exists. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244 (Ct. App. 1996). In this case, Defendant must show that all necessary elements of an agency relationship are "clearly established" by the facts. Id. A party dealing with an agent has a duty to use due care to ascertain the scope of the agent's authority to act. Id. The doctrine of apparent authority focuses on the principal's manifestations to the to the third party the agent has certain authority. Rickborn v. Liberty Life

Ins., 468 S.E. 2d 292, 297 (1996). Mrs. Haynes made no such manifestation and specifically disclaimed having the authority to waive Mrs. Varner's right to a jury trial. Exhibit E. Defendants did not present any evidence it attempted to communicate with Mr. Haynes but instead state he was present at the time of the signing, a statement disputed by both Mr. Haynes and Mrs. Haynes. Exhibits E and F.

5. Equitable estoppel does not apply based on the facts of this case.

The Order's finding that equitable estoppel applies is a misapplication of the tests set forth in Coleman v. Mariner Health Care, Inc. 407 S.C. 346 (2014), Hodge v. UniHealth Post-Acut Care of Bamberg, LLC, 422 SC 544 (Ct.App.2018), and Thompson v. Pruitt Corp., 416 S.C. 43 (Ct.App.2016). In all three of these cases, either the South Carolina Supreme Court or the South Carolina Appellate Court found arbitration agreements to be unenforceable where a family member signed an arbitration agreement at or near the time of admission to a skilled nursing facility and the family member did not have actual authority to do so. In all three cases the Courts found no implied authority and that estoppel did not apply. The same legal principles apply to the case at bar and the Order reaches a conclusion of law specifically denied by our appellate courts.

The Court largely bases its order regarding equitable estoppel on the fact merger applied. This is an erroneous conclusion of law as discussed in the next section.

6. Merger does not apply based on the four corners of the Arbitration Agreement and misrepresentations made by staff at Defendant THI.

The Court's Order specifically finds the Arbitration Agreement is enforceable based on the merger of the Arbitration Agreement and the Admission Agreement, which misapplies our Supreme Court's holding in Coleman. The Agreement to Arbitrate and the resident admission agreement are separate and distinct documents. There is no conjecture or speculation, as stated in

the Order, relating to the distinct and separate nature of the documents based on the four corners of the respective documents. The Arbitration Agreement consists of one (1) page and it is noted at the bottom of the page it is page 1 of 1. Exhibit C. It does not contain a merger clause and, based on its pagination, is a stand-alone document. It specifically references the Admissions Agreement as a separate document by including the provision that it [the Arbitration Agreement] "shall survive any termination or breach of this Agreement or the Admissions Agreement." Exhibit C. The Order contains contradictory conclusions of law by stating the Arbitration Agreement was not required for admission but then merges the two documents by citing a provision in the Admissions Agreement.

Finally, the Order expressly identifies an ambiguity in the Arbitration Agreement relating to merger yet dismisses it based on direct evidence regarding intent. The Order focuses on "other Admission materials...are made part of this Agreement by reference herein." Nothing in the Admissions Agreement defines the Arbitration Agreement as part of the Admissions materials. On the contrary, Defendants expressly admit the Arbitration Agreement was not required as part of the admission process.

Further, the Admission Agreement contains an "Entire Agreement" clause, indicating its scope being limited to the Admission Agreement, and the Arbitration Agreement contains a provision stating is "shall survive any termination of...the Admissions Agreement." Rather than being ambiguous, these two provisions conclusively demonstrate the intent of the documents being separate and distinct. An admission contract with an "Entirety of Agreement" provision is separate "on its face." Coleman, 755 S.E.2d at 455. In fact, when the arbitration and admission contracts have different pagination (as is the case here), with different signature pages (as is the case here), and the arbitration contract has "Arbitration Agreement atop its first page (as is the

case here), these factors further "indicate the parties' intent for it to stand by itself as an independent contract." Thompson, 784 S.E.2d. at 685 n.1; Hodge, 813 S.E.2d at 302.

The contract language at issue in this case tracks Coleman and its progeny almost verbatim. In Coleman, the Court focused on the fact the admission contract's "Entire Agreement" provision reference "[t]his Agreement...and the Arbitration Agreement." Referencing the two writings distinctly was "the admission agreement's recognition of the arbitration agreement as a separate document." Thompson, 416 S.C. at 52 (citing Coleman, 407 S.C at 355). Hodge, 422 at 562 applied the same principle using language from an arbitration contract that referenced an admission contract in distinct terms. If an arbitration contract explains its scope extends to disputes arising from "this Agreement or the...Admission Agreement," then the parties "recognized a separateness" between the two contracts. Id. The Arbitration Agreement in this case does exactly what Coleman, Thompson, and Hodge identify as proof against merger, i.e., specifically cites "this Agreement or the Admission Agreement."

It is counterintuitive to conclude the Arbitration Agreement was a "Admissions material" as reached by this Order. Thompson rejected a similar argument when a nursing home claimed its admission contract's "entire agreement" provision incorporated a separate arbitration contract by referring broadly to "exhibits." Since "exhibit" was undefined and not referenced elsewhere in either contract, the term was ambiguous and must be interpreted against the nursing home." Thompson, 416 S.C. at 53-54.

The Order determines this ambiguity, as created by the Facility's own admission the Arbitration was not required for admission, the Admission Agreement was the "Entire Agreement," the Admission Agreement is limited to 12 pages (page 12 of 12), the Arbitration Agreement is separately paginated (page 1 of 1), and the language in the Arbitration Agreement

citing the Admissions Agreement, does not invoke the rule that such ambiguities ought to be interpreted strongly in favor of the non-drafting party. "Generally, if the terms of a contract are clear and unambiguous, this Court must enforce the contract according to its terms regardless of its wisdom or folly. Ambiguous language in a contract, however, should be construed liberally and interpreted strongly in favor of the non-drafting party. After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings." See Southern Atl. Fin. Serv, 356 S.C. at 444 (2003).

7. The Arbitration Agreement is unconscionable in that it did not offer any meaningful choice and the terms are oppressive.

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. See Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554 (2004). If an arbitration agreement prevents a Plaintiff from receiving statutory remedies to which they would be entitled under the law or if it requires the weaker party to waive statutory remedies pursuant to an adhesion contract, the arbitration agreement will not be enforceable. See Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14 (2007). The "[a]bsence of meaningful choice" requirement "speaks to the fundamental fairness of the bargaining process in the contract at issue." Id. at 25. Even if an arbitration clause is technically conspicuous, it may be improper if it is "sprung on [a consumer] along with a flurry of other" documents during a hasty transaction. Doe v. TCSC, LLC, 430 S.C. 602, 613-14 (Ct. App. 2020).

"Unconscionability is gauged at the time the contract was made." Id. at 612. The following should be taken into account by courts in determining unconscionability: "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." Id. (quoting Simpson, 373 S.C. at 25).

All of these elements are clearly met in this case. Mrs. Haynes' statement she was told the arbitration agreement "has to be signed for [Mrs. Varner's] admission" left her with no meaningful choice. Exhibit E. It must be kept in mind Mrs. Varner was en route to the Facility and there was a "rush job" to get the paperwork signed before her arrival. Id. Even though Mrs. Haynes expressly stated she was not authorized to waive her mother-in-law's constitutional right to a jury trial, Defendant's employee told her it had to be signed for her admission. Mrs. Haynes was thus confronted with refusing to sign and thereby losing the room being assigned to Mrs. Varner or signing the arbitration agreement. This removed any meaningful choice for Mrs. Haynes. The Facility clearly had superior bargaining power – if you want the room, sign the contract. Essentially, Mrs. Haynes was given a take it or leave it contract while Mrs. Varner was en route to the facility.

The second prong is also met due to the oppressive nature of the Arbitration Agreement. The inherent nature of the FAA is not known to general laypersons and substantially limit the plaintiff's ability to proceed with the case. While lawyers who deal with the FAA may be able to advise clients of their rights **before** the signing of an arbitration agreement, residents and their families are not. Plaintiff was not even afforded the opportunity to wait until Mrs. Varner was in the facility to consider the terms of the Arbitration Agreement. In fact, Mrs. Haynes expressly

said she was not authorized to sign it yet was told she had to sign it for Mrs. Varner's to be admitted.

The arbitration agreement at issue does not allow for any discovery. It does not provide the rules of the arbitration including evidence. The costs of the arbitration are not disclosed and residents are more often than not without the financial resources to pursue their claims. The lack of discovery alone makes the agreement unconscionable when Defendants possess all the material information about the operation of the nursing home and what happened to Mrs. Varner at their facility. Residents are not told when presented with an arbitration agreement they are also agreeing to waive their rights to discovery, waive their rights to compel witnesses to appear, and that they have to pay thousands of dollars in advance to simply have their case heard by an arbitrator. Defendants are keenly aware of this fact, as sophisticated business entities, yet rely on the ignorance of family members when presenting these unconscionable arbitration agreements under emotional and chaotic times for families.

8. The Federal Arbitration Act does not apply to the claims of corporate negligence against Defendants FAS, FCOS, and Smalls and therefore the stays were erroneously entered based on a plain reading of the law.

The Order's reliance on the FAA in support of its granting the Motions for Stays is misplaced. The FAA requires a stay **only** when there are issues referable to arbitration **and** when there is an enforceable arbitration agreement. Section 3 of the FAA states:

> Section 3. Stay of proceedings where issue therein referable to arbitration
>
> 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.

Title 9, US Code.

Defendants FCOS and FAS explicitly and unambiguously argue they are not subject to any arbitration agreement. As such, they are arguing there are no issues contained in Plaintiff's Complaint against them that are referable to arbitration. They also are arguing there is no enforceable arbitration agreement between themselves and the Plaintiff. Based on Defendants' own arguments, there is no issue in this suit referable to arbitration and a stay is not required.

The United States Supreme Court has stated the FAA provides a means for enforcing an arbitration agreement. "The Act provides two parallel devices for enforcing an arbitration agreement: **a stay of litigation in any case raising a dispute referable to arbitration**, 9 U.S.C. § 3, and an affirmative order to engage in arbitration, § 4." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 103 S.Ct. 927, 22 (1983)(emphasis added). In upholding a reversal of a stay entered by the state court, the held, "[I]n a case such as this, where the party opposing arbitration is the one from whom payment or performance is sought, a stay of litigation alone is not enough. It leaves the recalcitrant party free to sit and do nothing—neither to litigate nor to arbitrate. If the state court stayed litigation pending arbitration...[plaintiff] would have no sure way to proceed with its claims...." Id. at 27.

In this case, Defendants have argued there is no arbitration agreement between the parties and there is no dispute referable to arbitration. Therefore, Section 3 of the FAA does not apply and a stay would prevent Plaintiff from proceeding with his claims. As the United Supreme Court has stated, to allow such a result would allow the recalcitrant parties to do nothing and prevents the plaintiff from moving forward with his substantive right to litigate his claims.

In Defendants' respective Answers, they disclaim providing any direct care to the decedent, Elizabeth Varner. Defendants FAS and FCOS admit in their Answers they provide "administrative support services to the facility pursuant to a contract." Plaintiff alleges corporate negligence alter ego, and joint venture against these Defendants. These causes of action are separate and distinct claims from the issues being alleged against Riverside.

Defendants FCOS and FAS have decided not to avail themselves of the Arbitration Agreement presented to the Court yet the Order denies Plaintiff the right to pursue his claims against them through the application of the FAA. This approach ignores the plain language of the FAA.

PRAYER FOR RELIEF

For the reasons set forth above, Plaintiff respectfully asks this Court to reconsider its prior Order Granting Defendants' Motions to Compel Arbitration and Related Motions to Stay.

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Date: March 7, 2022
Mount Pleasant, South Carolina

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

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

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

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

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

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

I.

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

II.

ANALYSIS

A. Re: the Motions to Compel Arbitration

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

1. Both state and federal policy favor arbitration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Merger

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

> Appellants contend that even if Sister lacked capacity to execute the AA under the Act, she is nevertheless equitably estopped to deny the AA's enforceability. The circuit court held there was no estoppel here, and we agree.
>
> Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the AAs merged. In South Carolina,

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

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

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

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

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

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

Although the Admission Agreement does contain an "Entire Agreement" clause, it does not refer to the Arbitration Agreement as a separate contract but rather expressly states, "other Admissions materials . . . are made a part of this Agreement by reference herein." Clearly, the Arbitration Agreement is among these other admissions materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) (recognizing "admission documentation" to include an arbitration agreement: "The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's *admission documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted). This directly contradicts the notion of any intended "separatedness" (in the parlance of the *Coleman* Court[17]) between the Admission Agreement and the Arbitration Agreement.

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

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-Smalls contend Plaintiff is estopped to deny the validity of the Arbitration Agreement here. *See Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added).

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

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

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

B. Re: the Motions to Stay

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

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

III.

CONCLUSION

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

IT IS SO ORDERED.

_____

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

Charleston, South Carolina

Dated: _____

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

Resident Face Sheet: Elizabeth Annette Varner (Full Code)

Unit:	UNIT 100	Preferred Name:	
Room/Bed:	113/A	Attending:	Leo Jesion - (803) 655-7101
Status:	In House	Email:	

Admit Date:	08/20/2019 01:45 PM (latest return) 05/20/2019 03:35 PM (current)	Last Qualifying Hospital Stay:	08/15/2019 - 08/20/2019
Admitted From:	Med U of SC - University Hosp, 29403 - SC (latest return) Other - SNF - Other - SNF (current)	Referral Source:	
Discharged:		Discharged To:	
Primary Discharge Diagnosis:		Discharge Reason:	
		Condition on Discharge:	

Primary Payer:	Medicaid Pending	Birth Date:	[redacted]
SSN:	[redacted]	Age:	76
Medicare A #:		Sex:	F
Medicare B #:		Marital Status:	Widowed
Medicaid #:		Mother's Maiden Name:	
MR#:		Religion:	Baptist
Pharmacy:			
Race:	White, not of Hispanic origin	Prev Occupation:	
Preferred Language:	English	Address:	349 North Mano Street Moncks Corner, SC 29461
Is Responsible for Self:	No		
Smoking Status:	Unknown if ever smoked	County:	Berkeley
		Phone:	
Service Connected Disability & %:	No 0.00%	Military Svc:	
VA Claims Number:		Veteran Elig (10-5588):	No
Service Number:		Last Branch of Service:	
		Last Branch of Service Dates:	-

Insurance Information:

Insurance	Group Name	Group #	Insured's ID #	Payer Address	Payer Phone
Medicaid Coinsurance			5725301901		
Medicaid SNF			5725301901		
Medicaid Pending			5725301901		

dditional Fields:

Case Mgr Name/Number: LeQuisha Lesane/8435634602

dvanced Directives:

Directive	Copy On File?	Notes
ull Code	Yes	

Plaintiff's Exhibit B

Resident Face Sheet: Elizabeth Annette Varner (Full Code)

Unit:	UNIT 100	**Preferred Name:**	
Room/Bed:	113/A	**Attending:**	Leo Jesion - (803) 655-7101
Status:	In House	**Email:**	

Admit Date:	10/06/2019 06:41 PM (latest return) 05/20/2019 03:35 PM (current)	**Last Qualifying Hospital Stay:**	08/15/2019 - 08/20/2019
Admitted From:	Other - SNF - Other - SNF (current)	**Referral Source:**	
Discharged:		**Discharged To:**	
Primary Discharge Diagnosis:		**Discharge Reason:**	
		Condition on Discharge:	

Primary Payer:	Medicaid Pending	**Birth Date:**	[redacted]
SSN:	[redacted]	**Age:**	76
Medicare A #:		**Sex:**	F
Medicare B #:		**Marital Status:**	Widowed
Medicaid #:		**Mother's Maiden Name:**	
MR#:		**Religion:**	Baptist
Pharmacy:			
Race:	White, not of Hispanic origin	**Prev Occupation:**	
Preferred Language:	English	**Address:**	349 North Mano Street Moncks Corner, SC 29461
Is Responsible for Self:	No		
Smoking Status:	Unknown if ever smoked	**County:**	Berkeley
		Phone:	
Service Connected Disability & %:	No 0.00%	**Military Svc:**	
		Veteran Elig (10-5588):	No
VA Claims Number:		**Last Branch of Service:**	
Service Number:		**Last Branch of Service Dates:**	-

Insurance Information:

Insurance	Group Name	Group #	Insured's ID #	Payer Address	Payer Phone
Medicaid Coinsurance			[redacted]		
Medicaid SNF					
Medicaid Pending					

Additional Fields:

Case Mgr Name/Number: LeQuisha Lesane/8435634602

Advanced Directives:

Directive	Copy On File?	Notes
Full Code	Yes	

Allergies: morphine, Sulfa (Sulfonamide Antibiotics)

Resident Face Sheet: Elizabeth Annette Varner (Full Code)

Unit:	UNIT 100	**Preferred Name:**	
Room/Bed:	113/A	**Attending:**	Leo Jesion - (803) 655-7101
Status:	In House	**Email:**	

Diagnoses: Z86.711 Personal history of pulmonary embolism(Admission), M25.561 Pain in right knee, N93.9 Abnormal uterine and vaginal bleeding, unspecified, R10.30 Lower abdominal pain, unspecified, R11.0 Nausea, R14.1 Gas pain, G25.81 Restless legs syndrome, R19.7 Diarrhea, unspecified, R30.0 Dysuria, N39.0 Urinary tract infection, site not specified, C34.90 Malignant neoplasm of unspecified part of unspecified bronchus or lung, F01.51 Vascular dementia with behavioral disturbance, R13.10 Dysphagia, unspecified, M25.572 Pain in left ankle and joints of left foot, M62.81 Muscle weakness (generalized), M62.81 Muscle weakness (generalized), R41.841 Cognitive communication deficit, R27.8 Other lack of coordination, R41.82 Altered mental status, unspecified, R13.11 Dysphagia, oral phase, F03.90 Unspecified dementia without behavioral disturbance, E08.40 Diabetes mellitus due to underlying condition with diabetic neuropathy, unspecified, E78.5 Hyperlipidemia, unspecified, G89.29 Other chronic pain, I10 Essential (primary) hypertension, I95.89 Other hypotension, J44.9 Chronic obstructive pulmonary disease, unspecified

Alerts: MCD SNF - ID# [redacted]

MCR# 1QN8J67EH25

** LTC transfer from St. George SNF **

Face Sheet Notes: MCD SNF - ID# [redacted]

MCR# [redacted]

** LTC transfer from St. George SNF **

** 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 (843) 263-6723	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 (843) 926-3721	349 North Mano Street Moncks Corner, SC 29461	
Daughter	Deborah Colvard	Emergency Contact	3	Primary (843) 200-6010	unknown unknown, SC	

Resident Face Sheet: Elizabeth Annette Varner (Full Code)

Unit:	UNIT 100	**Preferred Name:**	
Room/Bed:	113/A	**Attending:**	Leo Jesion - (803) 655-7101
Status:	In House	**Email:**	

Providers

Provider Name	Type	Contact	Phone/Email	Address
	Physician	Leo Jesion DO **-Attending**	Primary (803) 655-7101 Pager (803) 834-6050 Fax (803) 655-7180 Email ljesion2@elitepatientcare.com	207 OlympicClub Drive, Summerville, SC 29483
	Physician	Daniel Game MD -Alternate	Primary (843) 766-6646 Fax (000) 000-0000 Email xxx@yyy.zzz	1866 RAOUL WALLENBERG BLVD, CHARLESTON, SC 29407
	Physician	Shantae Jenkins MD -Alternate	Primary (843) 696-7440 Pager (843) 696-7440 Fax (843) 821-5005 Email sjenkins@elitepatientcare.com	3901 Spicewood, Austin, TX 78759
	NP/PA	Rhonda Cartee NP	Primary (704) 692-2187 Pager (704) 692-2187 Fax (888) 746-1787 Email RCarteeNP@gmail.com	1213 Culbreth Drive, Wilmington, NC 28405-3639
	NP/PA	Kara Ellis FNP	Primary (843) 203-2245 Fax (000) 000-0000 Email xxx@yyy.zzz	8901 UNIVERSITY BLVD, NORTH CHARLESTON, SC
	NP/PA	MARY SHERMAN PA	Primary (843) 906-3694 Fax (843) 875-7334 Email marybsherman@gmail.com	P.O BOX 118008, N. CHARLESTON, SC 29423
	NP/PA	Keyonna Williams NP	Primary (843) 212-8070 Fax (000) 000-0000 Email xxx@yyy.zzz	1114 N MAIN ST, SUMMERVILLE, SC 29483

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

Original: Business File • Photocopy: Resident/Representative

Plaintiff's Exhibit C

COUNTY OF BERKELEY)
) AFFIDAVIT OF MICHAEL BENNETT
STATE OF SOUTH CAROLINA)

PERSONALLY APPEARED before me, Michael Bennett, 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 was the legally appointed Power of Attorney for Elizabeth Varner from February 7, 2018 until her death on October 29, 2019. A copy of my Power of Attorney is attached to this Affidavit.

3. On May 5, 2019, my grandmother was being transferred to Riverside Health and Rehab. There were multiple conversations between myself and representatives from Riverside Health and Rehab prior to my grandmother being transferred since I was the Power of Attorney. We discussed how the transfer was to take place, who would be authorized to sign admission and financial paperwork, and other items relating to the transfer and admission. There is no question Riverside Health and Rehab knew I was Elizabeth Varner's Power of Attorney.

4. I told the staff at Riverside Health and Rehab I unable to be present when my grandmother arrived and gave permission for Elizabeth Varner's son, William Haynes, or daughter, Deborah Colvard, to complete any admission paperwork for my grandmother's admission.

5. I did not authorize anyone other than William Haynes or Deborah Colvard to sign any of the admission paperwork. I did not authorize anyone to sign an arbitration agreement that waived my grandmother's right to a jury trial.

6. I did not give Kimberly Haynes authorization to sign any paperwork regarding my grandmother's admission. I did not give Kimberly Haynes authorization to sign an arbitration agreement waiving my grandmother's right to a jury trial.

7. No one from Riverside Health and Rehab provided me with any of the admission paperwork prior to or after my grandmother's admission to the facility.

8. At no time did the staff at Riverside Health and Rehab ask me to review any paperwork that was signed by Kimberly Hayes.

9. At no time did any staff member of Riverside Health and Rehab discuss with me the arbitration agreement that was presented to Kimberly Haynes. No one from Riverside Health and Rehab mentioned an arbitration agreement when we discussed my grandmother's transfer. In fact, I was not aware of an arbitration agreement until it was presented to me by the attorney representing my grandmother's estate in this litigation.

Plaintiff's Exhibit D

10. At no time did any staff member at Riverside Health and Rehab seek my authority to sign the arbitration agreement.

11. I would not have waived my grandmother's right to a trial by jury and did not authorize anyone to do so on my behalf.

FURTHER AFFIANT SAYETH NAUGHT.

Subscribed and sworn to me this 27th day of January, 2022.

Michael Bennett

Notary Public
My commission expires on:

COUNTY OF BERKELEY)
) AFFIDAVIT OF KIMBERLY HAYNES
STATE OF SOUTH CAROLINA)

PERSONALLY APPEARED before me, Kimberly Haynes, 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 the wife of William Haynes and the daughter-in-law of Elizabeth Varner.

3. I met with Chandra Bryant on the day of Ms. Varner's admission.

4. We initially met at the room that was being assigned to Ms. Varner.

5. Present with me at this initial meeting was William Haynes, my husband, and Ms. Bryant.

6. Ms. Bryant said someone needed to sign the paperwork and it did not matter who. I offered to sign the admission paperwork on behalf of Ms. Varner since she was on the way to the facility ad William wanted to greet her upon her arrival.

7. Ms. Bryant asked me to follow her to a different room that was either a dining room or a snack room located behind the front desk. William remained in the room to meet his mom upon her arrival.

8. Ms. Bryant presented me with paperwork and asked that I sign it. Ms. Bryant seemed to be in a hurry to get the paperwork signed and quickly reviewed the documents with me. It seemed to be a rush job since Ms. Varner was being transported from the other nursing home facility and was already on the way to Riverside.

9. Part of the paperwork was the arbitration agreement. I specifically told Ms. Bryant I was not authorized to waive my mother-in-law's right to a jury trial.

Plaintiff Exhibit E

10. Ms. Bryant responded along the lines of, "Don't worry about it. It just has to be signed for her admission."

11. Even though I told Ms. Bryant I did not have authority to waive my mother-in-law's right to a jury trial, I signed the paperwork based on Ms. Bryant saying it had to be signed in order for Ms. Varner to be admitted to her room upon her arrival.

FURTHER AFFIANT SAYETH NAUGHT.

Kimberly Haynes

Subscribed and sworn to me this 8th day of February, 2022.

Notary Public
My commission expires on: October 10, 2021

SHAWN PINKSTON
COM. EXP.
NOTARY PUBLIC
SOUTH CAROLINA

COUNTY OF BERKELEY)
) AFFIDAVIT OF WILLIAM HAYNES
STATE OF SOUTH CAROLINA)

PERSONALLY APPEARED before me, William Haynes, 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 the son of Elizabeth Varner. My nephew Michael Bennette was recognized by the staff at Riverside as having a Power of Attorney at the time of my Mom's transfer to Riverside.

3. The administrator and admissions director at Riverside did not recognize me as my Mom's Power of Attorney and instead spoke directly to Michael. No one at Riverside asked me if I was the Power of Attorney for my Mom and no one asked me if I gave permission for my wife, Kimberly, to sign any paperwork. They only talked with Michael about my Mom's transfer and listed Michael as her Power of Attorney.

4. My wife, Kimberly, and I met with Chandra Bryant in the room that was assigned to my Mom on the day she was transferred to Riverside. Ms. Bryant told us the paperwork had to be signed before my Mom arrived at Riverside. Since my Mom was already on the way to Riverside, I stayed in the room to meet her and Kimberly went with Ms. Bryant. Ms. Bryant did not seem to care who signed the paperwork since she was in a hurry to get it filled out before my Mom arrived.

5. Ms. Bryant's statement that I "represented" to her that I was authorized to sign the arbitration agreement is an outright lie. It is also not true that she "personally explained each of the admission documents," including the arbitration agreement, to me. I was not present when Ms. Bryant had Kimberly sign the arbitration agreement. No one from Riverside told me about

Plaintiff Exhibit F

the arbitration agreement nor asked me to sign it. I was in my Mom's room the entire time Ms. Bryant met with Kimberly and met my Mom when she arrived at her room in Riverside.

6. Kimberly and I did not discuss any of the paperwork being signed and I did not know what documents were being signed. All I cared about that day was my Mom getting to her new room and being comfortable. Kimberly and I did not discuss the arbitration agreement and I would not have given Kimberly permission to waive my Mom's right to a jury trial. Any statement that I knew about the arbitration agreement or gave permission for anyone to sign it is false.

FURTHER AFFIANT SAYETH NAUGHT.

William Haynes

Subscribed and sworn to me this 8th day of February, 2022.

SHAWN PINKSTON NOTARY PUBLIC SOUTH CAROLINA COM. EXP. MARCH 10, 2031

Notary Public
My commission expires on:

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

COMES NOW William Haynes, as Personal Representative of the Estate of Elizabeth Varner ("Plaintiff"), by and through undersigned counsel, and moves this Court to enter a Final Order incorporating the Confidential Arbitration Order issued by Doyet A. Early, III, on May 16, 2023. A Proof of ADR was filed with this Court on May 22, 2023, acknowledging the parties complied with the Court's order to arbitrate this matter.

Plaintiff states the Confidential Arbitration Order issued by Doyet A. Early, III, concludes the arbitration as ordered by this Court on February 24, 2022, and requests this Court

enter a Final Order in this matter regarding arbitration and lifting the corresponding stays associated with case CAFN: 2021CP1002744. Plaintiff does not waive any right to appeal any Order previously entered in this matter by the filing of this Petition. Undersigned counsel consulted with counsel for Defendants prior to filing this Petition and no objections were noted.

Respectfully submitted this 7th day of December, 2023.

PINKSTON LAW FIRM, LLC

/s/Shawn Pinkston
Shawn Pinkston
856 Lowcountry Blvd., Suite 101
Mount Pleasant, SC 29464
shawnpinkston@me.com
(843) 814-5472
Attorneys for Plaintiff

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

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

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

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

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

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

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

CLEMENT RIVERS, LLP

By: s/ Matthew O. Riddle.
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Russell G. Hines
SC State Bar ID No.: 72100
Matthew O. Riddle
SC State Bar ID No.: 76650
Gaillard T. Dotterer, III
SC State Bar ID No.:103620
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rhines@ycrlaw.com, mriddle@ycrlaw.com,
gdotterer@ycrlaw.com
Attorneys for the Defendants

Charleston, South Carolina

Dated: December 8, 2023

L4

0000292070	PINKSTON LAW FIRM LLC	04-09-2024	0000025087

BU-VOUCHER-ID COMMENT	INVOICE NUMBER	INVOICE DATE	GROSS AMOUNT	DISCOUNT TAKEN	PAID AMOUNT
11004 00060875	1	03-27-2024	87,007.00	0.00	87,007.00
E/O Elizabeth Varner / arbitration award.			FACILITY	11004-Fundamental Administrati	

TOTAL GROSS AMOUNT	TOTAL DISCOUNT TAKEN	TOTAL PAID AMOUNT
87,007.00	0.00	87,007.00

THIS CHECK IS VOID IF GREEN PANTOGRAPH AND MICROPRINTING ARE ABSENT

86-105/1031 **Payable through Bank of Oklahoma, Bartlesville, OK**
Transit No. Routing Symbol: 86-105/1031

0000025087

Pay Date: 04-09-2024 **Pay Amount:** **********$87,007.00**

CHECK NOT VALID AFTER 180 DAYS

Pay ****EIGHTY-SEVEN THOUSAND SEVEN AND 00/100 DOLLARS****

To The Order Of

PINKSTON LAW FIRM LLC
SUITE C117
295 SEVEN FARMS DRIVE
CHARLESTON SC 29492

Ken Tabler

⑈0000025087⑈ ⑆103101055⑆309060549⑈

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2021CP-1002744
	)	
Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner,	)	**MOTION TO COMPEL**
Plaintiff,	)	
v.	)	
	)	
Fundamental Administrative Services LLC, And Fundamental Clinical and Operational Services, LLC, and Jerrolyn Montgomery-Smalls.	)	
Defendants.	)	

TO: MATTHEW RIDDLE., ATTORNEY FOR THE DEFENDANT.

YOU WILL PLEASE TAKE NOTICE that on the tenth (10th) day after service of this motion or as soon thereafter as practicable, the undersigned will move before the presiding judge of the Charleston County Court of Common Pleas for an order compelling the Defendants to provide full and complete responses to Plaintiff's Interrogatories and Requests to Produce. Plaintiff files pursuant to Rule 37 of the South Carolina Rules of Civil Procedure, after good faith attempts to confer with opposing counsel.

Plaintiff's First Interrogatories and Requests for Production of Documents were served on Fundamental Administrative Services and Fundamental Clinical and Operational Services on February 14, 2024, and on Jerrolyn Montgomery-Smalls on February 14, 2024. Plaintiff has granted multiple extensions of time for Defendants to provide responses. To date, Defendants have failed to respond to any discovery in this matter.

WHEREFORE the Plaintiff requests this court for an Order compelling Defendants to provide full and complete discovery responses within 10 days of the order, and award fees and costs associated with bringing this motion.

Respectfully submitted this 29th day of May, 2024.

PINKSTON LAW FIRM, LLC

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

Mount Pleasant, South Carolina

CERTIFICATE OF SERVICE

I hereby certify a copy of the above referenced *PLAINTIFF'S MOTION TO COMPEL* has been delivered to the following counsel of record:

Matthew Riddle
Clement Rivers LLP
25 Calhoun Street – Suite 400
Charleston, S.C. 29401
jdavis@ycrlaw.com

Pinkston Law Firm, LLC

/s/ Shawn Pinkston
Shawn Pinkston

Date: May 29, 20214

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

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

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

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

This Motion will be supported by the pleadings and motions filed in this case, all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to hearing on this Motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

CLEMENT RIVERS, LLP

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

Charleston, South Carolina

Dated: June 28, 2024

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CIVIL ACTION NO.: 2021CP-1002744
)	
Williams Haynes, as Personal)	
Representative of the Estate of Elizabeth)	**PLAINTIFF'S MEMO IN OPPOSITION**
Varner,)	**TO DEFENDANTS MOTION FOR**
Plaintiff,)	**SUMMARY JUDGMENT**
v.)	
)	
Fundamental Administrative Services, LLC,)	
Fundamental Clinical and Operational)	
Services, LLC, and Jerrolyn)	
Montgomery-Smalls.)	
)	
Defendants.)	

COMES NOW William Haynes, as Personal Representative of the Estate of Elizabeth Varner ("Plaintiff"), and files this Memorandum in Opposition to Defendants' Motion for Summary Judgment, showing this Court as follows:

STATEMENT OF FACTS

Plaintiff William Haynes ("Plaintiff") is the Personal Representative for the Estate of Elizabeth Varner, who was admitted as a resident at Riverside Health and Rehab ("Riverside") on May 20, 2019. Jerrolyn Montgomery-Smalls ("Defendant Smalls") was the Administrator at the time Elizabeth Varner's residency and throughout her admission. Plaintiff filed the instant lawsuit on June 11, 2021, alleging corporate negligence, joint venture, alter ego/piercing the corporate veil, neglect of a vulnerable adult, wrongful death, and survivorship. The Complaint alleges Fundamental Administrative Services LLC ("Defendant FAS"), Fundamental Clinical and Operational Services LLC ("Defendant FCOS"), and Defendant Smalls were engaged in a joint venture to manage and control the operations of THI of South Carolina d/b/a Riverside Health and Rehab ("Riverside") and that these defendants were negligent in said management and operations. A companion lawsuit was filed against Riverside, alleging negligence, wrongful death, and

survivorship against the employees of Riverside. *William Haynes, as Personal Representative of the Estate of Elizabeth Varner vs. THI of South Carolina at Charleston LLC d/b/a Riverside Health and Rehab,* CAFN: 2021CP1001437.

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

A hearing was held on February 10, 2022, before the Honorable Roger M. Young, Sr. During the hearing and in support of their Motions for Stay, counsel for Defendants specifically stated the allegations against FAS and FCOS were separate and distinct. Judge Young granted Riverside's (and by extension Defendant Smalls as an employee) Motion to Compel Arbitration on February 24, 2022, along with Defendants FAS and FCOS Motions to Stay all matters in the instant lawsuit. The only issues compelled to arbitration were those involving Case No. 1437 and Defendant Smalls in her role as an employee of Riverside. "Case 2477 is stayed in favor of arbitration between Plaintiff and Ms. Montgomery-Smalls, with Plaintiff's claims against FAS and FCOS stayed pending the ultimate outcome of arbitration between Plaintiff, the Facility, and Ms. Montgomery-Smalls." Order Compelling Arbitration, p. 20. Again, the claims in Case No. 1437 involved employee negligence and vicarious liability; the claims in this lawsuit involve corporate negligence claims.

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

ARGUMENT AND CITATION TO AUTHORITY

"[A] stay is a stopping." Graham v. Graham, 301 S.C. 128, 130 (Ct. App. 1990). A stay refers to a judicial order to temporarily halt a proceeding. Black's Law Dictionary.

"The Morrows correctly assert that the theory of vicarious liability is different than the theory of direct corporate liability....[T]he two theories of vicarious liability and corporate liability can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other." Morrow v. Fundamental Long-Term Care Holding, LLC, 412 S.C. 534, 538 (2015)

Defendants' central contention is the issues claimed in the instant lawsuit were fully litigated, or could have been litigated, in the arbitration. This argument is contradictory to previous arguments put forth by Defendants to Judge Young, contrary to the holding in Morrow, and legally inconsistent with the stays requested by these Defendants. Essentially, Defendants are arguing they should receive some benefit from the arbitration even though they moved for and were granted stays that excluded their participation in arbitration. Put simply, Defendants' arguments are disingenuous, frivolous, and are an unnecessary waste of Court resources.

I. Summary Judgment is inapplicable to the corporate negligence claims asserted against FCAS, FOS, and necessarily involve Defendant Smalls.

Defendants FOS, FCAS, and Smalls are not entitled to pursue summary judgment on any of the corporate negligence claims for two reasons: 1) Our Supreme Court's holding in Morrow, which specifically rejected Defendants' argument; and 2) The corporate negligence claims asserted

against these Defendants in the instant case were stayed at Defendants' request and Plaintiff was barred from litigating them at arbitration. In essence, Plaintiff was stopped from proceeding on his corporate negligence claims in this lawsuit. Defendants specifically argued they were not subject to the arbitration agreement, they were separate and distinct entities from Riverside and its employees, they were not third-party beneficiaries of the arbitration agreement, and they were not in privity with the parties to the arbitration agreement.

Based on the grounds asserted by Defendants, the corporate negligence claims in this lawsuit were not subject to arbitration by virtue of the stays. There is no confusion regarding that issue based on the Order Compelling Arbitration – the corporate negligence claims in this lawsuit were stayed pending arbitration of those claims asserted against Riverside and those involving Defendant Smalls as an employee of Riverside. Defendants are essentially arguing that all claims against them could have, and should have, been brought in arbitration. However, the imposition of stays at the request of these Defendants prohibited any of these claims from being brought in arbitration. Alternatively, Defendants are also arguing the arbitration Order effectively gives them the right to pursue summary judgment on the corporate negligence claims even though the issues addressed in arbitration did not involve those claims. This argument is in direct opposition to the holding in Morrow and Defendants' previous arguments to Judge Young.

Our Supreme Court addressed the exact issue argued by these same Defendants in Morrow, where Defendants argued the allegations of corporate negligence were to be bifurcated from allegations of negligence against its skilled nursing facility. Counsel went on to candidly admit that if the allegations against the nursing home were unsuccessful, the corporate entities would be entitled to summary judgment on the corporate negligence claims. Morrow, 412 S.C. at fn.1. This argument was rejected by our Supreme Court:

The Morrows alleged the Fundamental Entities were vicariously liable for the negligence of Magnolia Place, and furthermore were directly responsible for Lawrence's injuries by way of their conscious disregard for his health in underfunding Magnolia Place, which led to issues with staffing, training, and nutrition.

The Fundamental Entities thereafter filed a motion to bifurcate the trial pursuant to Rule 42(b), SCRCP between the nursing home negligence claims and the corporate negligence claims, and further, to stay discovery related to the corporate negligence claims. The Fundamental Entities argued bifurcation was proper because the issues of nursing home negligence and corporate negligence were distinct, and the Morrows could only move forward on the corporate negligence claims if they were first successful against Magnolia Place.

The Morrows correctly assert that the theory of vicarious liability is different than the theory of direct corporate liability. See Martin C. McWilliams, Jr. & Hamilton E. Russell, III, Hospital Liability for Torts of Independent Contractor Physicians, 47 S.C. L. Rev. 431 (1996). Vicarious liability attaches to a parent company or employer as the result of negligence on behalf of its employees, such as through the doctrine of respondeat superior. Id. at 439. **Conversely, direct corporate liability attaches due to a breach of a duty which runs directly between a parent company and a patient, arising from negligence in actions such as leaving a hospital underfunded, understaffed, or undertrained so as to provide substandard care**. Id. at 462. **Accordingly, the two theories of vicarious liability and corporate liability can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other.** See Scampone v. Highland Park Care Ctr., 618 Pa. 363, 57 A.3d 582, 596–600 (2012) (holding that claims of vicarious liability and direct liability could be brought either concomitantly or alternately in case against nursing home); see also Montgomery Health Care Facility, Inc. v. Ballard, 565 So.2d 221, 225–26 (Ala.1990) (finding parent corporation of nursing home could be held liable for patient's death where corporation controlled day-to-day operations of home); cf. Forsythe v. Clark USA, Inc., 224 Ill.2d 274, 309 Ill.Dec. 361, 864 N.E.2d 227, 237 (2007) (recognizing direct corporate liability as a valid theory of recovery in the context of workplace accidents).

> The order treats these claims as based solely on vicarious liability that can be tried only after a finding of negligence on the part of Magnolia Place, when instead they are grounded in direct corporate liability which follows independent, albeit interconnected, duties owed to the Morrows. By considering the Morrow's claims against the Fundamental Entities as dependent upon their claim against Magnolia Place, the trial court's order effectively grants the Fundamental Entities potential summary judgment on the issues of direct corporate liability.
>
> The effect of this order is to prevent the Morrows from being architects of their own complaint, and deprives them of bringing their case against the defendant of their own choosing. See Neeltec Enters., Inc., v. Long, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012) ("The right of the plaintiff to choose her defendant is a substantial right within the meaning of [section 14–3330(2)(a)]").

Id. at 536-539(emphasis added).

As our Supreme Court noted in Morrow, the issue of corporate negligence involves separate and distinct duties. For all intents and purposes, the issues of employee negligence and vicarious liability were judicially bifurcated with the arbitration. At the direct request of these Defendants, only those issues involving the negligence of Riverside's employees were included in the arbitration. Likewise, all issues relating to corporate negligence as contained in this lawsuit were stayed at the request of all Defendants in this lawsuit.

It is worth noting Defendants admitted the corporate entities and the issues involved in this lawsuit were separate and distinct from Riverside during the hearing before Judge Young:

> Our contention is that the Fundamental defendants are separate and distinct....
> Exhibit A, Tr. of Record, Feb. 10, 2022, at 6: 8-9
>
> And certainly what I know today is I'm not in a position to consent to have the Fundamental defendants lumped in with the facility and the individual defendant, Ms. Montgomery-Smalls, she's the administrator of the facility.
> Id., at 6: 12-14

> [W]e're saying the arbitration should be Mr. Pinkston's clients against the facility and Ms. Montgomery-Smalls, and then outside of that arbitration, not as a part of that arbitration, should be the Fundamental defendants.
> Id., at 29: 13-16

> We'd be agreeable to having the facility and Ms. Montgomery-Smalls in the arbitration, but the Fundamental defendants are separate....
> Id., at 29: 20-22

Defendants have now done an about face on their previous arguments made to Judge Young about not being subject to and bound by the arbitration agreement. They are likewise ignoring the holding in Morrow, of which these Defendants are acutely aware since they were the respondents in that case. They have no grounds to pursue summary judgment on any claims contained in the instant lawsuit as those claims were stayed at Defendants' request. Additionally, the parties are separate and distinct, the duties of these corporate defendants are separate and distinct, and the claims asserted against these parties are separate and district from those decided in arbitration.

II. Res judicata does not apply because there was no adjudication of the corporate negligence claims, the actions involve separate parties, and these claims could not have been properly included in arbitration based on the stays.

Res judicata applies where: (1) the judgment in the prior action was final, valid, and on the merits; (2) both actions involve the same parties; and (3) the second action involved claims properly included in the first action. Town of Sullivan's Island v. Felger, 318 S.C. 340, 344 (Ct. App. 1995). "Under the doctrine of *res judicata,* `[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.'" Palmetto Homes Inc. v. Bradley, 357 S.C. 485 (Ct. App. 2003). Res judicata is inapplicable to this lawsuit because the arbitration did not adjudicate any of the corporate

negligence claims, it did not involve the same parties, and the corporate negligence claims were barred from inclusion due to the stays requested by these Defendants.

Defendants fail to mention or even address the different duties that flow from corporate negligence, the centerpiece of the instant lawsuit. Those duties were addressed in Morrow and discussed above. None of the allegations dealing with the corporate negligence claims were adjudicated or might have been raised in arbitration due to the stays. Defendants' argument that all facts were alleged and litigated in the arbitration is simply without merit based on the stays they requested. It simply defies logic to claim a plaintiff could have or should have litigated claims when s stay entered at a defendant's request prohibited that plaintiff from litigating said claims. The issuance of the stays is fatal to any claim the issues were raised and adjudicated in the arbitration.

III. Collateral estoppel does not apply to FCOS nor FAS because the stays granted at their request prohibited Plaintiff from litigating the claims asserted in this lawsuit, including those claims against Defendant Smalls.

Collateral estoppel applies when an issue was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554 (Ct. App. 2009). Collateral estoppel can be used defensively against a plaintiff who was a party in a prior action, even if the defendant was not a party to the prior litigation, so long as the plaintiff "had a full and fair opportunity to previously litigate the issue." Id. at 555. Defendants' attempted use of defensive collateral fails the first prong because the allegations of corporate negligence were not litigated in the arbitration action. The reason is straightforward: Defendants requested and were granted stays that prohibited Plaintiff from "actually" litigating those claims.

Defendants are again taking a contradictory position to the one they argued in front of Judge Young. Plaintiff argued every Defendant, including FOS and FCAS, should be compelled to arbitration, which Defense vehemently opposed:

> Your Honor, he's saying to have every defendant involved in the arbitration, we're saying the arbitration should be Mr. Pinkston's clients against the facility and Ms. Montgomery-Smalls, and then outside of that arbitration, not as a part of that arbitration, should be the Fundamental defendants. So that's the difference, Your Honor, is what Mr. Pinkston is proposing is to have every defendant in the arbitration proceedings; what we're saying is that we're not agreeable to that. We'd be agreeable to having the facility and Ms. Montgomery-Smalls in the arbitration, but the Fundamental defendants are separate and the allegations that are made against those defendants, we deny and very strongly dispute the allegations in terms of any role or responsibility that they have in the alleged injuries.
> Exhibit A, Tr. of Record, Feb. 10, 2022, at 29: 12-25
>
> [The Fundamental defendants are] not third-party beneficiaries to this arbitration agreement. The arbitration agreement talks about agents, servants, and employees, they are none of those things. That's why there's a very clear distinction between an employee like Ms. Montgomery-Smalls and these other entities.
> Id., at 30: 3-8
>
> And as for the Fundamental defendants, that the action should be stayed as to them. He has no right to compel them to arbitration, the third-party beneficiary theory doesn't work for two, at least two very significant reasons. One, they're not third-party beneficiaries; two, he doesn't have the ability to compel them to arbitration as third-party beneficiaries; three, there's no motion to do it
> Id., at 34: 6-12.

Despite these past arguments regarding the inapplicability of the arbitration agreement that these Defendants should be excluded from arbitration, Defendants are now arguing collateral estoppel applies because Plaintiff had a full and fair opportunity to previously litigate the issue at arbitration. This is in direct contradiction to their previous position that every claim against them was not proper for arbitration and they could not be compelled to arbitration.

Finally, it is worth noting the inherently contradictory positions being put forth by Defendants as exemplified by their statement regarding the joint venture claim. Defendants state, "The arbitrator's implicit determination that Defendant Smalls was *not* part of the joint venture therefore defeats Plaintiff's joint-venture theory." Def. Memo. in Support of Mot. for Summary Judgment, fn. 3. The arbitrator could not determine any issue relating to joint venture because that issue was stayed and therefore not part of the arbitration agreement. It was not part of Case No. 1437, which was compelled to arbitration. Therefore, the issue of joint venture with FCAS and FCOS could not have been determined due to the stays requested by these Defendants.

Defendants previously took the position the corporate entities and the claims against them were separate and distinct, they could not be compelled to arbitrate those claims, and there was a very clear distinction between the employees at Riverside and themselves. Yet now they take the position the arbitrator implicitly determined those very allegations even though stays were in place. Defendants' arguments that res judicata and collateral estoppel apply are disingenuous, contradictory, and in direct opposition to their previous arguments.

IV. Collateral estoppel does not apply to damages from two separate tortfeasors.

Defendants claim that collateral estoppel applies to damages, including punitive damages, is likewise without support in case law and subsequently without merit. Morrow conclusively states damages against the corporate defendants for corporate negligence are separate and distinct from those damages stemming from vicarious liability. "[D]irect corporate liability attaches due to a breach of a duty which runs directly between a parent company and a patient, arising from negligence in actions such as leaving a hospital underfunded, understaffed, or undertrained so as to provide substandard care. Accordingly, the two theories of vicarious liability and corporate liability can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of

the other." Morrow, 412 S.C. at 462. Defendants cannot assert collateral estoppel when two theories of liability can co-exist in a lawsuit and a finding of one does not preclude a finding against the other. Put differently, damages that result from a breach of one duty from one tortfeasor do not preclude a finding for damages that flow from a separate duty relating to a separate tortfeasor.

A case directly on point is Boiter v. South Carolina Dep't of Transp., 393 S.C. 123, 712 S.E.2d 401 (2011). The plaintiff was injured in a car wreck and alleged two separate and distinct acts of negligence, or occurrences, against two defendants. The jury found both defendants negligent and awarded separate verdicts against each. Our Supreme Court affirmed the jury verdict against each individual tortfeasor and determined two independent and separate acts of negligence occurred. The Supreme Court specifically stated, "[H]ad the jury not found SCDOT negligent, the verdict against SCDPS could still stand, and the converse is true." Id, at 407. This is the exact situation presented in this lawsuit. As admitted by Defendants, the allegations against the corporate entities are separate and distinct. A jury could find that Riverside was not negligent and still find the Fundamental corporate entities negligent, or vice versa. Or the jury could determine both were negligent, as in Boiter and contemplated in Morrow, and the individual verdicts would stand.

Regardless of any determination by the arbitrator relating to the allegations of gross negligence as to the care providers at Riverside, any such finding has nothing to do with the actions of Defendants in a corporate negligence setting. A factfinder could find the corporate defendants acted wantonly, wilfully, or in reckless disregard of Plaintiff's rights in underfunding or understaffing the nursing home. Again, the Morrow Court specifically addressed this issue and held the finding of one does not preclude the finding of the other. Taken to its logical conclusion, the arbitrator's determination regarding any punitive conduct against the employees of Riverside

does not preclude a finding of punitive conduct for or against FOS and FCAS based on the different duties and actions accompanying those duties.

CONCLUSION

For the above stated reasons, Plaintiff respectfully requests Defendants' Motion for Summary Judgment be DENIED.

Respectfully submitted this 8th day of September, 2024.

PINKSTON LAW FIRM, LLC

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STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF CHARLESTON)	**2021-CP-10-01437 & 02477**

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

Plaintiff,

vs.

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

Defendant.

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

Plaintiff,

vs.

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

Defendant.

Transcript of Record

February 10, 2022

B E F O R E:

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

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

Shawn Pinkston, Esquire
Attorney for Plaintiff

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

Sallie Beth Todd
Official Court Reporter

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FACTUAL BACKGROUD

A. The Lawsuits

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

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

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

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

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

B. The Court's Order Compelling Arbitration

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

C. The Arbitration Order

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

D. The Arbitration Award

The arbitration hearing was held from April 3, 2023 to April 6, 2023. (Exhibit G at 1.) On May 16, 2023, the arbitrator issued his award ("Arbitration Award"). In the Arbitration Award, [redacted]. The arbitrator noted that [redacted] (Ex. G at 1.)

In the Arbitration Award, the arbitrator determined:

(1) [redacted]

(2) [redacted];

(3) [redacted];

(4) [redacted];

(5) [redacted]

(6) [redacted].

Based on these findings, the arbitrator [redacted]. (Ex. G at 1-2.)

On May 26, 2023, the arbitrator, at the request of the parties, supplemented his Arbitration Award, ruling that [redacted] (Ex. H.) The arbitrator found that [redacted]

E. The Court's Final Order

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Second, Plaintiff's joint-venture and alter-ego/veil-piercing claims (Counts 3 and 4, respectively) must be dismissed. In his Complaint, Plaintiff seeks to impute the Facility's liability to FAS and FCOS based on allegations that FAS and FCOS were part of a joint venture that operated Riverside[3] (Ex. B ¶¶ 33-41), and that FAS and FCOS were alter-egos of the Facility. (Ex. B ¶¶ 42-43.) However, the [redacted] (Ex. I.) Thus, the Facility [redacted]. The Court therefore should grant summary judgment for FAS and FCOS on these causes of action.

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

[3] The joint venture claim must be dismissed in any event because it is explicitly premised on Plaintiff's allegation that FAS, FCOS, *Defendant Smalls* and Riverside *collectively* comprised the joint venture. (Ex. B ¶ 37.) The arbitrator determined, however, that [redacted] therefore defeats Plaintiff's joint-venture theory.

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

CONCLUSION

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

CLEMENT RIVERS, LLP

By:*/s/ Mathew O. Riddle Jr.*
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Attorneys for the Defendants

Charleston, South Carolina

Dated: September 6, 2024

Exhibit A

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

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

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

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

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

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

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

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

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

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

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

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

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

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 Elizbeth 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

Exhibit B

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FACTUAL ALLEGATIONS

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

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

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

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

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

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

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 join venture.

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

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

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

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

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

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

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

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

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 Elizbeth 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

Exhibit C

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

TO: SHAWN PINKSTON, ESQUIRE, ATTORNEY FOR PLAINTIFF:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

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

[Signature block on the following page]

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
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Attorneys for the Defendant Jerrolyn Montgomery-Smalls

Charleston, South Carolina

Dated: July 16, 2021

Exhibit D

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

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

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

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

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

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

I.

BACKGROUND

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

---

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

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

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

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

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

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

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

---

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

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

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

II.

ANALYSIS

A. Re: the Motions to Compel Arbitration

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

1. Both state and federal policy favor arbitration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Merger

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

> Appellants contend that even if Sister lacked capacity to execute the AA under the Act, she is nevertheless equitably estopped to deny the AA's enforceability. The circuit court held there was no estoppel here, and we agree.
>
> Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the AAs merged. In South Carolina,

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

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

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

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

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

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

Although the Admission Agreement does contain an "Entire Agreement" clause, it does not refer to the Arbitration Agreement as a separate contract but rather expressly states, "other Admissions materials . . . are made a part of this Agreement by reference herein." Clearly, the Arbitration Agreement is among these other admissions materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) (recognizing "admission documentation" to include an arbitration agreement: "The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's *admission documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted). This directly contradicts the notion of any intended "separatedness" (in the parlance of the *Coleman* Court[17]) between the Admission Agreement and the Arbitration Agreement.

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

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-Smalls contend Plaintiff is estopped to deny the validity of the Arbitration Agreement here. *See Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added).

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

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

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

B. Re: the Motions to Stay

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

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

III.

CONCLUSION

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

IT IS SO ORDERED.

_____

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

Charleston, South Carolina

Dated: _____

Charleston Common Pleas

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

Case Number: 2021CP1001437

Type: Order/Compel

It is so ordered.

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

Exhibit E

FACILITY - RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT

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

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

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

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

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

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

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

Kimberly Haynes 3/9/19
Resident/Representative Signature Date

Kimberly Haynes
Printed Name of Resident/Representative

Chandra Bryan 3/9/19
Authorized Agent of Facility Date

Riverside Health & Rehab
printed name of facility

Original: Business File • Photocopy: Resident/Representative

Exhibit F

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[SIGNATURE BLOCK ON FOLLOWING PAGE]

9-15-22

AND IT IS SO ORDERED

The Honorable Doyet E. Barly, III

We Consent:

PINKSTON LAW FIRM, LLC

By:

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

We Consent:

CLEMENT RIVERS, LLP

By:

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

Exhibit G

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

William Hayes, as Personal Representative
of the Estate of Elizabeth Varner, Plaintiff.
vs.
THI of South Carolina at Charleston LLC
D/B/A Riverside Health and Rehab and
Jerrolyn Montgomery-Smalls, Defendants.

D.A. EarlyIII
Arbitrator

May16,2023

Exhibit H

-----Original Message-----
From: Jack Early [redacted]>
Sent: Friday, May 26, 2023 10:51 AM
To: Riddle, Matthew <MRiddle@ycrlaw.com>; shawnpinkston@me.com
Subject: State of South Carolina).

State of South Carolina).

Supplemental
) Arbitration Order
County of Charleston.)

William Hayes, as Personal Representative of the Estate of Elizabeth Varner, Plaintiff.
vs.
THI of South Carolina at Charleston LLC
D/B/A Riverside Health and Rehab and
Jerrolyn Montgomery-Smalls, Defendants.

[redacted]

D.A. EarlyIII
Arbitrator

May16,2023

[redacted]

D.A.Early III
May 26, 2023

Sent from my iPad

Exhibit I

L4

[redacted]

Exhibit J

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner, Plaintiff, v. Fundamental Administrative Services LLC, And Fundamental Clinical and Operational Services, LLC, and Jerrolyn Montgomery-Smalls. Defendants.	IN THE COURT OF COMMON PLEAS CASES NO. 2021CP-1001437 & 1002744 **FINAL ORDER**

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner,
Plaintiff,
v.

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

Defendant.

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

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

AND IT IS SO ORDERED.

[*Electronic Signature Page to Follow*]

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

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

TO: THE HONORABLE WILLIAM C. MCMASTER, III, Presiding Judge, and SHAWN T. PINKSTON, ESQUIRE, Attorney for Plaintiff:

NOW COME Defendants Jerrolyn Montgomery-Smalls, Fundamental Administrative Services, LLC ("FAS") , and Fundamental Clinical and Operational Services, LLC ("FCOS") by and through their undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set forth below, hereby moves this Honorable Court to alter, amend, and/or reconsider its Order, filed September 20, 2024, denying Defendant's motion for summary judgment.

As set forth in the motion filed on June 28, 2024, Plaintiff's claims against the Defendants are barred by the doctrines of *res judicata* and collateral estoppel based on the outcome of a prior arbitration proceeding brought by Plaintiff arising out of exactly the same facts and circumstances alleged in this case. In light of the preclusive effect of the arbitration award, *see, e.g., Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 493-96, 593 S.E.2d 480, 484-86 (Ct. App. 2004); *Graham v. State Farm Fire & Cas. Ins. Co.*, 277 S.C. 389, 390-91, 287 S.E.2d

495, 496 (1982), there are no material facts in dispute. Defendants therefore request that this court reconsider its Order and grant judgment to Defendants as a matter of law.

1. **Permitting the Plaintiff to relitigate claims and issues that have already been decided at arbitration would create duplicative litigation and would be a waste of judicial resources.**

The present suit involves allegations of nursing home negligence at Riverside Health and Rehab skilled nursing facility ("Facility" or "Riverside"), where Plaintiff's decedent Elizabeth Varner was a resident. Contrary to Plaintiff's erroneous argument to this Court in opposition to the present motion, Judge Roger M. Young, Sr. ordered all of Plaintiff's claims to arbitration, to include all claims raised in the present suit and the Plaintiff's related action against Riverside (C/A No. 2021-CP-10-01437). Judge Young further ordered that Riverside and Defendant Smalls were parties to the arbitration, and that Defendants FAS and FCOS were not parties to the arbitration. Finally, Judge Young ordered a judicial stay as to both the present suit and the suit against Riverside, to promote "efficiency and judicial economy," and to prevent "duplicative discovery and litigation." (*See* Feb. 24, 2022 Order at Page 19).

The parties presented testimony and evidence at arbitration. Retired Judge Doyet E. Early, III served as the arbitrator. Judge Early issued a ruling awarding compensatory damages as to Riverside for Plaintiff's femur fracture, denying punitive damages, and denying any liability as to Defendant Smalls. Judge Early further denied the Plaintiff's wrongful death claim. This court entered an order confirming Judge Early's arbitration award, and Riverside paid the arbitration award.

Judge Early's ruling was a final, binding award on the merits of all claims that were or could have been asserted. As a result, the Plaintiff's present claims against Defendant Jerrolyn Montgomery-Smalls are barred according to the doctrine of *res judicata*. The Plaintiff's claims

against Defendants FAS and FCOS, who were not parties to the arbitration, are barred by collateral estoppel. Permitting the Plaintiff to relitigate these claims and issues that have already been decided at arbitration would create duplicative discovery and litigation, and would be a complete waste of judicial resources. Accordingly, the Defendants request that this Court reconsider its Order and grant judgment to the Defendants as a matter of law.

2. All of Plaintiff's claims in this lawsuit were or should have been raised at arbitration.

All claims asserted in the present lawsuit arose from the residency of Plaintiff's decedent at Riverside. As a result, all claims were within the scope of the subject arbitration agreement. Contrary to Plaintiff's erroneous argument in opposition to Defendants' motion, all claims asserted in the present lawsuit were or should have been raised at arbitration, *including Plaintiff's causes of action for corporate negligence, joint-venture liability, and corporate veil-piercing liability*. *Res judicata* applies where: (1) the judgment in the prior action was final, valid, and on the merits; (2) both actions involve the same parties; and (3) the second action involved claims properly included in the first action. *See Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995). *Res judicata* applies to arbitration awards and bars a litigant from asserting claims in a later action that were or "*could have been* arbitrated in the original proceeding." *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 496, 593 S.E.2d 480, 486 (Ct. App. 2004). As to Defendant Smalls, these claims are therefore barred by *res judicata*.

Contrary to Plaintiff's fallacious argument to this Court, the Defendants have never argued that any cause of action asserted in the present lawsuit should have been excluded from arbitration. The Defendants argued that FAS and FCOS were not *parties* to the arbitration agreement and therefore should not be *parties* to the arbitration. The Defendants requested a stay

of all litigation in circuit court pending the outcome of arbitration. However, the Defendants never argued that any particular cause of action should be excluded from arbitration. Indeed, each and every cause of action the Plaintiff asserted against FCOS and FAS he also asserted against Defendant Smalls, who of course *was* a party to the arbitration. Judge Young granted a stay of both lawsuits to promote judicial economy and to avoid duplicative discovery and trials. ***However, nothing in Judge Young's Order or any order of this court or the arbitrator excluded any of Plaintiffs' claims from arbitration.*** Accordingly, the Plaintiff had the opportunity to assert corporate negligence, joint venture, and veil piercing claims against Defendant Smalls at arbitration, in addition to the other causes of action that Plaintiff admittedly asserted and that were without question decided at arbitration. He cannot now reassert these claims in a separate proceeding in circuit court. *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) (holding that *res judicata* "prohibits the owner of a single cause of action from either dividing or splitting the cause of action so as to make it the subject of several causes of action"). The Plaintiffs' claims against Defendant Smalls are therefore clearly barred. Respectfully, the Court must reconsider its Order and grant summary judgment to Defendant Smalls as a matter of law.

3. **The Plaintiff's claims against Defendants FAS and FCOS are barred by the collateral estoppel effect of the arbitration award, and there is no viable legal or equitable theory to the contrary that should allow these claims to proceed.**

As set forth in the Defendants' motion for summary judgment, supporting memorandum of law, and arguments presented at the hearing before this court, issues determined at arbitration were dispositive as to all claims against Defendants FAS and FCOS. As a result, Defendants FAS and FCOS are entitled to summary judgment, based on the collateral estoppel effect of the arbitration award. "Collateral estoppel, also known as issue preclusion, prevents a party from

relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). Collateral estoppel applies when an issue was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *See id.* All the elements of collateral estoppel are met here as to each cause of action Plaintiff has asserted against the Defendants. As a result, the Court should reconsider its order and grant summary judgment to the Defendants as a matter of law.

First, there can be no dispute that the Plaintiff raised causes of action for negligence/gross negligence, neglect of a vulnerable adult, wrongful death, and survivorship at arbitration, and that these causes of action were determined. The arbitrator determined the Plaintiff's compensatory damages relative to Ms. Varner's femur fracture, and the Facility paid this award. The arbitrator also determined that the Ms. Varner's femur fracture was not the proximate cause of her death. The Plaintiff now asserts these identical claims/causes of action as to Defendants FAS and FCOS. These claims are clearly barred by collateral estoppel. The court should reconsider its Order and grant summary judgment to FAS and FCOS on these claims as a matter of law.

With regard to the joint venture and veil piercing causes of action (Counts 3 and 4 of Plaintiff's Complaint) the only damages that may be awarded for these claims are the imputed liability of the Facility. Again, the liability of the Facility has been determined, and the Facility has paid the arbitrator's award. This liability is therefore extinguished. There is no additional liability of the Facility that may be imputed to these Defendants. As a result, these claims are also barred by collateral estoppel.

Additionally, as set forth in the Defendants' Memorandum of Law supporting the motion for summary judgment, Plaintiff's claim against FAS and FCOS for corporate negligence also seek the same damages that Plaintiff sought to (and did) recover at arbitration. Because the arbitrator already awarded all damages that Plaintiff was entitled to recover, and because the Facility has paid the award, Plaintiff is estopped from seeking additional damages from FAS and FCOS. *See Carolina Renewal*, 385 S.C. at 558, 684 S.E.2d at 784 (plaintiff estopped from re-litigating damages that were decided in a prior action). Plaintiff's reliance on *Morrow v. Fundamental Long-Term Care Holdings, LLC* is misplaced. . In *Morrow,* 412 S.C. 534, 773 S.E.2d 144 (2015), the S.C. Supreme Court ruled that direct corporate-liability claims and vicarious-liability claims against a nursing home's affiliated entities "can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other." But that principle has nothing to do with the present case. Here, the issue is not whether Plaintiff is bringing direct or vicarious liability claims against FAS/FCOS. For the reasons set forth herein and in the Defendants' prior memorandum, and argued at the hearing, the determination of the various issues raised at arbitration in this case does in fact preclude the present claims against FAS and FCOS.

Furthermore, contrary to Plaintiff's argument in opposition to the motion, the Plaintiff cannot maintain a standalone claim for punitive damages against FAS and FCOS. *Cook v. Atlantic Coast Line R.R. Co.,* 183 S.C. 279, 190 S.E. 923 (1937); see also Monroe v. Bankers Life & Cas. Co., 232 S.C. 363, 367, 102 S.E.2d 207, 208 (1958). The present case is distinguishable from *McGee v. Bruce Hospt. System*, 344 S.C. 466, 545 S.E.2d 286, cited by Plaintiff in support of his argument. *McGee* involved separate allegations of medical malpractice against multiple physicians who performed various procedures, that allegedly causing separate

and distinct injuries to the Plaintiff's decedent. By contrast, here the Plaintiff alleges a single injury to Plaintiff's decedent (femur fracture) which Plaintiff alleged resulted from nursing negligence. The arbitrator determined Plaintiff's damages related to this femur fracture. The arbitrator further determined there was no willful or wanton conduct on the part of the Facility, or on the part of Defendant Smalls as it relates to the management of the facility, and therefore denied punitive damages. There is therefore no viable theory pursuant to which Plaintiff could seek additional punitive damages as it relates to the FAS and FCOS. The court should reconsider its Order and grant summary judgment to the Defendants.

Finally, as noted above, the Plaintiff had the opportunity to present evidence of corporate negligence and seek punitive damages at arbitration. Defendant Smalls was a party to the arbitration, and the Plaintiff asserted the same claims against Defendant Smalls in the Complaint as he has asserted against FAS and FCOS, including corporate negligence, joint venture, and veil piercing. To grant Defendants' motion would not permit these Defendants to unjustly avoid liability, as Plaintiff has argued. To the contrary, the Plaintiff has "had his day in court," and has had a full and fair opportunity to litigate his claims. *Graham*, 277 S.C. at 391. The Plaintiff is therefore collaterally estopped from asserting the present claims against these Defendants. The Court should reconsider its order and grant summary judgment.

4. **The Defendants request that the Court reconsider and expressly rule on each and every distinct issue/argument raised in support of its motion for summary judgment (whether raised in writing or orally at the motion hearing), all of which Defendants incorporate herein by reference.**

Following the hearing on September 11, 2024, this Court issued a Form 4 Order denying the subject motion. The Court's Form 4 Order did not include reasoning or order instructions. The Defendants therefore request that the Court reconsider its decision and expressly rule on each issue/argument raised in support of Defendants' motion. *See Elam v. S.C. Dep't of Transp.*,

361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original). The Defendants therefore respectfully request a ruling on each distinct issue/argument raised in support of the motion.

This Motion will be supported by the pleadings and motions filed in this case, all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any previous or subsequent memoranda of law, affidavits or other evidence which may be submitted prior to hearing on this Motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

CLEMENT RIVERS, LLP

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

Charleston, South Carolina

Dated: September 30, 2024

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CIVIL ACTION NO.: 2021CP1002744
)	
Williams Haynes, as Personal)	
Representative of the Estate of Elizabeth)	**PLAINTIFF'S NOTICE OF RULE TO**
Varner,)	**SHOW CAUSE**
Plaintiff,)	
v.)	
)	
Fundamental Administrative Services, LLC,)	
Fundamental Clinical and Operational)	
Services, LLC, and Jerrolyn)	
Montgomery-Smalls.)	
)	
Defendants.)	

TO: MATTHEW RIDDLE., ATTORNEY FOR THE DEFENDANT.

YOU WILL PLEASE TAKE NOTICE that on the tenth (10th) day after service of this motion or as soon thereafter as practicable, the undersigned will move before the presiding judge of the Charleston County Court of Common Pleas for an order to Show Cause as to why Defendants should not be held in contempt and sanctioned for failing to comply with this Court's Order Granting Plaintiff's Motion to Compel. Plaintiff brings this motion pursuant to Rules 1, 26, 33, 34, and 37 of the South Carolina Rules of Civil Procedure.

Plaintiff's First Interrogatories and Requests for Production of Documents were served on Fundamental Administrative Services and Fundamental Clinical and Operational Services on February 14, 2024, and on Jerrolyn Montgomery-Smalls on February 14, 2024. Plaintiff granted multiple extensions of time for Defendants to provide responses. After failing to receive responses, Plaintiff filed a Motion to Compel on May 29, 2024. Defendants then filed a Motion for Summary Judgment along with a Motion for Protective Order requesting protection until dispositive motions were heard and adjudicated. All motions were heard before the Honorable William C. McMaster, III, on September 11, 2024. On September 20, 2024, Judge McMaster denied Defendants' Motion

for Summary Judgment and granted Plaintiff's Motion to Compel. Judge McMaster ordered Defendants "to comply with discovery within 30 days." Exhibit A. To date, Defendants have failed to comply with Judge McMaster's order granting Plaintiff's Motion to Compel. Exhibit B.

WHEREFORE the Plaintiff requests this Court schedule a Rule to Show Cause Hearing as to whether this Court's Order Compelling Discovery has been violated.

Respectfully submitted this 22nd day of October, 2024.

PINKSTON LAW FIRM, LLC

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

Mount Pleasant, South Carolina

CERTIFICATE OF SERVICE

I hereby certify a copy of the above referenced *PLAINTIFF'S RULE TO SHOW CUASE* has been delivered to the following counsel of record:

Matthew Riddle
Clement Rivers LLP
25 Calhoun Street – Suite 400
Charleston, S.C. 29401
jdavis@ycrlaw.com

Pinkston Law Firm, LLC

/s/ Shawn Pinkston
Shawn Pinkston

Date: October 22, 2024

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1002744

William Haynes et al
PLAINTIFF(S)

Fundamental Administrative Services Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

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

It Is So Ordered.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

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

Williams Haynes Personal Representative
Elizabeth Varner Estate

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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

Charleston Common Pleas

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

Case Number: 2021CP1002744

Type: Order/Electronic Form 4

So Ordered

William C. McMaster, III

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF SHAWN PINKSTON, ESQ.
COUNTY OF CHARLESTON)

PERSONALLY APPEARED before me, Shawn Pinkston, Esq., who after being duly sworn now states as follows:

1. I am over the age of eighteen (18) and am competent to give this affidavit.

2, I am counsel of record in the case of CAFN: 2021CP1002744, Williams Haynes, as Personal Representative of the Estate of Elizabeth Varner v. Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, and Jerrolyn Montgomery-Smalls.

3. The Honorable William C. McMaster, III, granted Plaintiff's Motion to Compel Discovery Responses against all Defendants on September 20, 2024, ordering Defendants "to comply with discovery within 30 days."

4. As of the date of this affidavit, Defendants have willfully failed to comply with Judge McMaster's Order.

FURTHER AFFIANT SAYETH NAUGHT.

Shawn Pinkston, Esq.

Subscribed and sworn to me on this
22 day of October, 2024.
Kathryn W Kellett
Notary Public

KATHRYN W. KELLETT NOTARY PUBLIC SOUTH CAROLINA

My commission expires on:
March 1, 2032

PLAINTIFF'S EXHIBIT B

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

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

PLEASE TAKE NOTICE that Defendants Jerrolyn Montgomery-Smalls, Fundamental Administrative Services, LLC ("FAS"), and Fundamental Clinical and Operational Services, LLC ("FCOS") will move before this Honorable Court pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq*. for a further order (1) compelling Plaintiff to arbitrate any and all claims that he is asserting against Defendant Smalls in this case and (2) staying all proceedings as to Defendants FAS and FCC until any arbitration of Plaintiff's claims against Defendant Smalls is concluded.

Importantly, on February 24, 2022, *this Court already ordered the very relief requested by this Motion*. Thereafter, an arbitrator (Hon. Doyet E. Early III) heard Plaintiff's causes of action in arbitration and entered an award absolving Defendant Smalls of any liability. Even so, Plaintiff now contends that he has remaining claims for corporate negligence, joint venture liability, and alter ego/veil-piercing liability that are directed to Defendant Smalls (and Defendants FAS and

FCOS) which Plaintiff purportedly did not raise against Defendant Smalls in arbitration. Moreover, in denying Defendants' Motion for Summary Judgment based on the *res judicata* and collateral estoppel effect of the arbitration, this Court signaled that it intends to allow Plaintiff to proceed on his corporate negligence, joint venture, and veil-piercing claims as to Defendant Smalls even though the Court's February 24, 2022 order already determined that all of Plaintiff's claims against Defendant Smalls must be arbitrated. Accordingly, to the extent Plaintiff seeks to pursue such arbitrable claims against Defendant Smalls in this Court, those claims must be sent back to the arbitrator for resolution pursuant to the February 24, 2022 order.

In addition, as further required by the Court's February 24, 2022 order, pursuant to FAA § 3 and in the interests of efficiency and judicial economy, Plaintiff's claims against non-arbitrating Defendant FAS and FCOS must be stayed pending the completion of any arbitration of Plaintiff's claims against Defendant Smalls.

This Motion will be supported by the pleadings and motions filed in this case, all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to hearing on this Motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

CLEMENT RIVERS, LLP

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

Attorneys for the Defendants Jerrolyn Montgomery-Smalls, Fundamental Administrative Services, LLC, and Fundamental Clinical and Operational Services, LLC

Charleston, South Carolina

Dated: November 14, 2024

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

DECLARATION OF MATTHEW O. RIDDLE, ESQ.

I, Matthew O. Riddle, hereby declare as follows:

1. I am an attorney with the law firm of Clement Rivers, LLP and a counsel of record for Defendants Jerrolyn Montgomery-Smalls, Fundamental Administrative Services, LLC, and Fundamental Clinical and Operational Services, LLC in the above-captioned action. I respectfully submit this Declaration in support of Defendants' Motion to Compel Arbitration and Stay Proceedings. The information contained in this Declaration is based on my personal knowledge, unless otherwise indicated. If called to testify, I would state as follows:

2. Attached hereto as **Exhibit A** is a true and correct copy of a complaint filed in this Court on March 25, 2021 in *Haynes v. THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab*, Civil Action No. 2021-CP-10-01437 ("*Riverside* Lawsuit").

3. Attached hereto as **Exhibit B** is a true and correct copy of Plaintiff's complaint in this case that was filed on June 11, 2021.

4. Attached hereto as **Exhibit C** is a true and correct copy of Defendant Jerrolyn Montgomery-Smalls' Answer that was filed in this case on July 16, 2021.

5. Attached hereto as **Exhibit D** is true and correct copy of the Court's February 24, 2022 Order Granting Motions to Compel Arbitration and Related Motions to Stay ("Arbitration Order") that was entered both in this case and the *Riverside* Lawsuit.

6. Attached hereto as **Exhibit E** is a true and correct copy of the arbitration agreement that was the subject of the Court's Arbitration Order in this case and the *Riverside* Lawsuit.

7. Attached hereto as **Exhibit F** is a true and correct copy of a May 16, 2023 order announcing the arbitrator's award in the arbitration proceeding.

8. Attached hereto as **Exhibit G** is a true and correct copy of a May 26, 2023 order issued by the arbitrator supplementing his arbitration award in the Arbitration Proceeding. [

9. Attached hereto as **Exhibit H** is a true and correct copy of a check dated April 9, 2024 in the amount of $87,007.00 payable to Plaintiff's counsel's law firm, Pinkston Law Firm LLC, representing full payment of the award issued against THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab in the Arbitration Proceeding.

10. Attached hereto as **Exhibit I** is a true and correct copy of the Court's Final Order entered in this case and the Riverside Lawsuit on February 12, 2024.

11. Attached hereto as **Exhibit J** is a true and correct copy of a Memorandum of Law in Support of Defendants' Motion for Summary Judgment that was filed in this case on September 9, 2024.

12. Attached hereto as **Exhibit K** is a true and correct copy of Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment that was filed in this case on September 8, 2024.

13. Attached hereto as **Exhibit L** is a true and correct copy of a Form 4 order that was entered by the Court in this case on September 20, 2024. This order, in part, denied Defendants' Motion for Summary Judgment.

14. Attached hereto as **Exhibit M** is a true and correct copy of the Court's Form 4 order entered on October 4, 2024 denying Defendants' Motion to Alter, Amend, and/or Reconsider Order Denying Motion for Summary Judgment.

15. Attached hereto as **Exhibit N** is a true and correct copy of Defendants' Motion to Alter, Amend, and/or Reconsider Order Denying Motion for Summary Judgment that was filed in this case on September 30, 2024.

I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on November 14, 2024

Matthew O. Riddle, Esq.

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

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS

On February 24, 2022, this Court issued an order ("Arbitration Order") compelling Plaintiff to arbitrate *all* of his claims against Defendant Jerrolyn Montgomery-Smalls ("Defendant Smalls") in this case and staying all proceedings against non-arbitrating Defendants Fundamental Administrative Services, LLC ("FAS") and Fundamental Clinical and Operational Services, LLC ("FCOS") pending the outcome of the arbitration between Plaintiff and Defendant Smalls. After the arbitration between Plaintiff and Defendant Smalls was completed, the arbitrator (Hon. Doyet E. Early, III) entered an award absolving Defendant Smalls of any liability. Now, Plaintiff attempts to continue pursuing claims in this Court against Defendant Smalls for corporate negligence, joint venture, and veil-piercing liability—all of which this Court previously ordered Plaintiff to arbitrate—because Plaintiff says those claims were not raised or decided in the arbitration.

On September 20, 2024, this Court entered a Form 4 Order denying Defendants' Motion for Summary Judgment, which argued, in part, that the *res judicata* effect of the arbitration award precluded Plaintiff from bringing any claims against Defendant Smalls in this lawsuit. Although the Form 4 order provided no explanation for the Court's ruling, it signaled the Court's intention to allow Plaintiff to continue to pursue claims against Defendant Smalls for corporate negligence, joint venture, and alter ego/veil-piercing liability, notwithstanding the arbitrator's decision in favor of Defendant Smalls. Because the Arbitration Agreement continues to apply to Defendant Smalls, the Arbitration Order should be enforced, and to the extent there are any remaining claims against Defendant Smalls, they must be referred to the arbitrator. Likewise, in accordance with the Arbitration Order, Plaintiff's claims against non-arbitrating Defendant FAS and FCOS must be stayed pending the completion of any further arbitration of Plaintiff's claims against Defendant Smalls. Accordingly, this Motion should be granted.

FACTUAL BACKGROUD

A. Plaintiff's Lawsuit

On March 25, 2021, Plaintiff, as the personal representative of the Estate of Elizabeth Varner, brought a personal injury and wrongful-death lawsuit ("*Riverside* Lawsuit") against non-party THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab ("Facility" or "Riverside"), a skilled-nursing facility where Ms. Varner was a resident in October 2019. (Declaration of Matthew O. Riddle, Esq. ("Decl.") ¶ 2, Exhibit A ¶¶ 2, 4.)

On June 11, 2021, Plaintiff filed this case against Defendants Smalls, FAS, and FCOS based on the same factual allegations regarding Ms. Varner's care and treatment at the Facility that were alleged in the *Riverside* Lawsuit. (Decl. ¶ 3, Exhibit B ¶¶ 11-21.) Defendant Smalls was the

Administrator of the Facility. (Decl. ¶ 4, Exhibit C ¶ 18.) Plaintiff alleges that FAS and FCOS provided various consulting services to the Facility. (Decl. ¶ 3 Ex. B ¶¶ 8, 9.)

In his complaint, Plaintiff asserted claims against all Defendants for negligence/gross negligence (Count 1) (Decl. ¶ 3, Ex. B ¶¶ 22-25); corporate negligence (Count 2) (Decl. ¶ 3, Ex. B ¶¶ 26-32); joint venture (Count 3) (Decl. ¶ 3, Ex. B ¶¶ 33-41); alter ego/piercing the corporate veil (Count 4) (Decl. ¶ 3, Ex. B ¶¶ 42-43); neglect of a vulnerable adult (Count 5) (Decl. ¶ 3, Ex. B ¶¶ 44-55); wrongful death (Count 6) (Decl. ¶ 3, Ex. B ¶¶ 56-58); and, survivorship action (Count 6) (Decl. ¶ 3, Ex. B ¶¶ 59-61). On July 16, 2021, Defendant Smalls filed an Answer denying any liability and affirmatively asserting the right to demand arbitration. (Decl. ¶ 4, Ex. C ¶ 35.)

B. The Court's Order Compelling Arbitration

On February 24, 2022, the Court in both cases entered an order granting the Facility's and Defendant Smalls' respective motions to compel arbitration (Decl. ¶ 5, Exhibit D) pursuant to the parties' Arbitration Agreement. (Decl. ¶ 6, Exhibit E.) The Court specifically ruled that because the Arbitration Agreement is valid on its face and applies to both the Facility and the Facility's "agents, employees, and servants," "the Arbitration Agreement covers Plaintiff's claims against both the Facility and [Defendant Smalls]." (Decl. ¶ 5, Ex. D at 10.) In the "interest of efficiency and judicial economy," the Court also stayed Plaintiff's claims against Defendants FAS and FCOS (which are non-parties to the Arbitration Agreement), pending the completion of the arbitration of Plaintiff's claims against the Facility *and Defendant Smalls*. (Decl. ¶ 5, Ex. D at 18-20.)

C. The Arbitration Award

The arbitration hearing was held from April 3, 2023 to April 6, 2023. (Decl. ¶ 7, Exhibit F at 1.) On May 16, 2023, the arbitrator issued his award ("Arbitration Award") in which he awarded $87,007 in compensatory damages against Riverside (but not Defendant Smalls) for

injuries that Ms. Varner sustained but rejected Plaintiff's claims for wrongful death and Plaintiff's request for punitive damages. (Decl. ¶ 7, Ex. F at 1-2.) In addition, on May 26, 2024, the arbitrator, at the request of the parties, specifically determined that "Plaintiff is not entitled to a judgment against [Defendant] Smalls." (Decl. ¶ 8, Ex. G.) On April 9, 2024, the Facility paid the award in full. (Decl. ¶ 9, Exhibit H.)

D. The Court's "Final Order"

Meanwhile, on February 12, 2024, the Court granted Plaintiff's petition for entry of a Final Order that incorporated the Arbitration Award and lifted the stay of this lawsuit. (Decl. ¶ 10, Exhibit I.)

E. The Court Denies Defendants' Motion for Summary Judgment

After Plaintiff indicated that he wanted to continue pursuing this case against Defendants—including Defendant Smalls—notwithstanding the outcome of the arbitration, on June 28, 2024, Defendants moved for summary judgment. In their summary judgment motion, Defendants argued, in part, that the Arbitration Award is *res judicata* and precluded Plaintiff from pursuing further claims against Defendant Smalls in this case. (Decl. ¶ 11, Exhibit J.) In response, Plaintiff argued incorrectly that *res judicata* did not bar his claims for corporate negligence, joint venture, and alter ego-veil/piercing liability against Defendant Smalls because Plaintiff was prevented from raising those claims against Defendant Smalls in the arbitration in light of the Court's stay of this case against non-arbitrating Defendants FAS and FCOS. (Decl. ¶ 12, Exhibit K.)

On September 20, 2024, the Court entered a Form 4 order denying Defendants' Motion for Summary Judgment. (Decl. ¶ 13, Exhibit L.) While the Form 4 order contained no explanation for the Court's ruling, it signaled the Court's intention to allow Plaintiff to continue pursuing claims against Defendant Smalls for corporate negligence, joint venture, and alter ego/veil-

piercing liability notwithstanding the Arbitration Award that absolved her of any liability. On September 30, 2024, Defendant Smalls asked the Court to reconsider the denial of her motion for summary judgment because: (1) the Arbitration Order required Plaintiff to arbitrate all of his claims against Defendant Smalls, and (2) nothing about the Court's stay of proceedings as to non-arbitrating Defendants FAS and FCOS prevented Plaintiff from litigating his corporate negligence, joint venture, and alter ego/veil-piercing claims against Defendant Smalls in the already-concluded arbitration. (Decl. ¶ 15, Exhibit N at 2-4.) On October 4, 2024, the Court issued another Form 4 order (Decl. ¶ 14, Exhibit M) denying Defendants' Motion for Reconsideration.

ARGUMENT

I. THE COURT SHOULD ENFORCE THE ARITRATION ORDER AND COMPEL ARBITRATION OF PLAINTIFF'S CLAIMS AGAINST DEFENDANT SMALLS

Because the Court's recent Form 4 orders permit Plaintiff to continue pursuing his corporate negligence, joint venture, and alter-ego/veil-piercing claims against Defendant Smalls, the Court should compel arbitration of all such arbitrable claims, as previously required by this Court's Arbitration Order.[1]

[1] In his prior briefing, Plaintiff has argued that his corporate negligence, joint venture, and alter ego/veil-piercing claims against Defendants Smalls (and Defendants FAS and FCOS) somehow were excluded from the now-concluded arbitration due to the stay of proceedings as to FAS and FCOS. (*See, e.g.,* Decl. ¶ 12, Ex. K at 3-4 ("The corporate negligence claims asserted against [Defendants Smalls, FAS, and FCOS] in the instant case were stayed at Defendants' request and Plaintiff was barred from litigating them at arbitration."); *id.* at 10 ("The arbitrator could not determine any issue relating to joint venture because that issue was stayed and therefore not part of the arbitration agreement.").) The Arbitration Order, however, says no such thing. Rather, the Arbitration Order expressly compelled Plaintiff to arbitrate *all* of his claims against Defendant Smalls—including Plaintiffs' claims for corporate negligence, joint venture, and alter ego/veil-piercing; the Arbitration Order stayed only "Plaintiff's claims against FAS and FCOS [] pending the ultimate outcome of arbitration between Plaintiff, the Facility, and [Defendant Smalls]." (Decl. ¶ 5, Ex. D at 20.) Thus, Plaintiff was required to present *all* of his claims against Defendant Smalls in the arbitration, where Defendant Smalls prevailed on the merits. (*See* Decl. ¶ 8, Ex. G.) The Arbitration Award thus conclusively resolved all of Plaintiff's causes of action against Defendant Smalls that were or could have been presented in arbitration. Accordingly, there should be no

The Arbitration Order could not be clearer: The parties' Arbitration Agreement is governed by the Federal Arbitration Act ("FAA") (Decl. ¶ 5, Ex. D at 5), the Arbitration Agreement is valid and enforceable (Decl. ¶ 5, Ex. D at 7), and "[w]ithout question, Plaintiff's claims against . . . [Defendant] Smalls are within the scope of the Arbitration Agreement." (Decl. ¶ 5, Ex. D at 9.) Under the Arbitration Order, Plaintiff therefore is required to assert *all* of his claims against Defendant Smalls in arbitration.

Plaintiff's contention that he could not raise his corporate negligence, joint venture, and alter ego/veil-piercing claims as to Defendant Smalls in the first arbitration in light of the stay of proceedings as to non-arbitrating Defendants FAS and FCOS wrongly presumes that because these claims are asserted against all three Defendants (Smalls, FAS and FCOS), they only can be adjudicated in a forum in which all three Defendants are present. (*E.g.,* Decl. ¶ 12, Ex. K at 8 ("the corporate negligence claims were barred from inclusion [in the arbitration] due to the stays requested by these Defendants.").) Indeed, the United States Supreme Court specifically has held the FAA "leaves no place for the exercise of discretion" by the courts; "when a complaint contains both arbitrable and nonarbitrable claims, the [FAA] requires courts to 'compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.'" *KPMG LLP v. Cocchi*, 565 U.S. 1, 4 (2011) (per curiam) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985)); *see id.* at 1 ("The [FAA] has been interpreted to require that if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation.").

---

further claims against Defendants Smalls that are still outstanding. To the extent the Court thinks otherwise, however, any remaining claims against Defendant Smalls should be sent back to the arbitrator for resolution.

In his complaint, every cause of action that Plaintiff has asserted against Defendants FAS and FCOS also is asserted against Defendant Smalls—including Plaintiff's claims for corporate negligence, joint venture, and alter ego/veil-piercing liability. (Decl. ¶ 3, Ex. B ¶¶ 26-43.) Thus, under *Cocchi* and *Dean Witter*, to the extent those claims are asserted against Defendant Smalls, they are arbitrable claims and must be arbitrated. By the same token, to the extent those claims are asserted against non-arbitrating Defendants FAS and FCOS (which are non-parties to the Arbitration Agreement), they are non-arbitrable and must be stayed under the Arbitration Order (as explained below). Accordingly, the Court should grant Defendant Smalls' request for a further order compelling Plaintiff to arbitrate any remaining claims that the Court intends to permit Plaintiff to pursue against Defendant Smalls, so that those claims can be sent back to the arbitrator for final resolution.

II. THE COURT SHOULD ENFORCE THE ARITRATION ORDER AND STAY PLAINTIFF'S CLAIMS AGAINST DEFENDANTS FAS AND FCOS

In the Arbitration Order, the Court ruled that pursuant to FAA § 3 and in the interests of efficiency and judicial economy, all proceedings against non-arbitrating Defendants FAS and FCOS in this case must be stayed pending the ultimate outcome of arbitration between Plaintiff and Defendant Smalls. (Decl. ¶ 5, Ex. D at 20.) This aspect of the Court's Arbitration Order must be enforced as well.

CONCLUSION

For all the foregoing reasons, Defendants' Motion to Compel Arbitration and Stay Proceedings should be granted. Specifically, as required by the Arbitration Order, this Court should enter a further order compelling Plaintiff to arbitrate, and thus send back to the arbitrator, any remaining claims that the Court intends to allow Plaintiff to pursue against Defendant Smalls in this case. In the meantime, the Court should enforce the Arbitration Order by entering a stay of

proceedings as to all of Plaintiff's claims against non-arbitrating Defendants FAS and FCOS pending the completion of any arbitration between Plaintiff and Defendant Smalls.

CLEMENT RIVERS, LLP

By:*/s/ Matthew O. Riddle*
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com, mriddle@ycrlaw.com
Attorneys for the Defendants Jerrolyn Montgomery-Smalls, Fundamental Administrative Services, LLC, and Fundamental Clinical and Operational Services, LLC

Charleston, South Carolina

Dated: November 14, 2024

Exhibit A

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

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

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

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

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

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

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

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

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

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

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

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

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

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 Elizbeth 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

Exhibit B

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FACTUAL ALLEGATIONS

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

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

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

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

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

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

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 join venture.

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

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

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

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

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

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

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

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

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 Elizbeth 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

Exhibit C

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

TO: SHAWN PINKSTON, ESQUIRE, ATTORNEY FOR PLAINTIFF:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

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

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

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

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

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

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

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

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

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

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

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

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

[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
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Attorneys for the Defendant Jerrolyn Montgomery-Smalls

Charleston, South Carolina

Dated: July 16, 2021

Exhibit D

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

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

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

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

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

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

I.

BACKGROUND

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

---

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

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

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

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

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

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

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

---

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

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

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

II.

ANALYSIS

A. Re: the Motions to Compel Arbitration

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

1. Both state and federal policy favor arbitration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Merger

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

> Appellants contend that even if Sister lacked capacity to execute the AA under the Act, she is nevertheless equitably estopped to deny the AA's enforceability. The circuit court held there was no estoppel here, and we agree.
>
> Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the AAs merged. In South Carolina,

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

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

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

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

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

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

Although the Admission Agreement does contain an "Entire Agreement" clause, it does not refer to the Arbitration Agreement as a separate contract but rather expressly states, "other Admissions materials . . . are made a part of this Agreement by reference herein." Clearly, the Arbitration Agreement is among these other admissions materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) (recognizing "admission documentation" to include an arbitration agreement: "The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's *admission documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted). This directly contradicts the notion of any intended "separatedness" (in the parlance of the *Coleman* Court[17]) between the Admission Agreement and the Arbitration Agreement.

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

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-Smalls contend Plaintiff is estopped to deny the validity of the Arbitration Agreement here. *See Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added).

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

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

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

B. Re: the Motions to Stay

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

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

III.

CONCLUSION

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

IT IS SO ORDERED.

_____

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

Charleston, South Carolina

Dated: _____

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

Exhibit E

FACILITY - RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT

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

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

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

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

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

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

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

Kimberly Haynes 9/9/19
Resident/Representative Signature Date

Kimberly Haynes
Printed Name of Resident/Representative

Chandra Bryan 9/9/19
Authorized Agent of Facility Date

Riverside Health & Rehab
printed name of facility

Original: Business File • Photocopy: Resident/Representative

Exhibit F

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

William Hayes, as Personal Representative
of the Estate of Elizabeth Varner, Plaintiff.
vs.
THI of South Carolina at Charleston LLC
D/B/A Riverside Health and Rehab and
Jerrolyn Montgomery-Smalls, Defendants.

By order of the Honorable Roger M. Young,Sr. this case was to be decided by arbitration. By Arbitration Order dated September 15, 2022, the parties agreed I would serve as Arbitrator. The arbitration was conducted on April 3, 2023 and concluded on April 6, 2023. All parties were present and represented by counsel. Each side presented fact and expert witnesses in support of their respective claims and defenses. A complete copy of the relevant medical records were introduced into the proceeding.
Notwithstanding section 19 of the Arbitration Order which required me to issue written findings of facts or conclusions of law, the parties by agreement requested a succinct order without these findings.
I find the Plaintiff proved by the preponderance of the evidence the defendant, THI, breached the standard of care in regards to the manner in which they transferred Mrs.

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

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

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

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

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

D.A. EarlyIII
Arbitrator

May16,2023

Exhibit G

-----Original Message-----
From: Jack Early <jackearly1@gmail.com>
Sent: Friday, May 26, 2023 10:51 AM
To: Riddle, Matthew <MRiddle@ycrlaw.com>; shawnpinkston@me.com
Subject: State of South Carolina).

State of South Carolina).

Supplemental
) Arbitration Order
County of Charleston.)

William Hayes, as Personal Representative of the Estate of Elizabeth Varner, Plaintiff.
vs.
THI of South Carolina at Charleston LLC
D/B/A Riverside Health and Rehab and
Jerrolyn Montgomery-Smalls, Defendants.

By order of the Honorable Roger M. Young,Sr. this was to be decided by arbitration. By Arbitration Order dated September 15, 2022, the parties agreed I would serve as Arbitrator. The arbitration was conducted on April 3, 2023 and concluded on April 6, 2023. All parties were present and represented by counsel. Each side presented fact and expert witnesses in support of their respective claims and defenses. A complete copy of the relevant medical records were introduced into the proceeding.
Notwithstanding section 19 of the Arbitration Order which required me to issue written findings of facts or conclusions of law, the parties by agreement requested a succinct order without these findings.
I find the Plaintiff proved by the preponderance of the evidence the defendant, THI, breached the standard of care in regards to the manner in which they transferred Mrs. Varner, failing to comply with the care plan they had ordered for her. This deviation was the proximate cause of the fracture she sustained to her distal femur and the medical care and surgery necessitated by the fracture.
Her estate is entitled to the reasonable and necessary medical expenses associated with the fracture. The evidence proved $77,007.00 of medical expenses related to the fracture. The only other evidence of compensable damages was for pain and suffering from the fracture. Because of her deteriorated medical condition there was no evidence of loss of enjoyment of life or emotional distress. It was difficult to differentiate between pain and suffering caused by the fracture and her overall condition. The fracture occurred on or about October 6, 2019 and she suffered with it until her cardiac arrest on or about October 27, 2019. I award Plaintiff $10,000.00 for pain and suffering.
I find the Plaintiff failed to prove by the preponderance of the evidence Mrs. Varner's cardiac arrest and death were proximately caused by the fracture.
I find the Plaintiff failed to prove by clear and convincing evidence that any of the defendants acted reckless,willful or with a conscious disregard of Mrs. Varner's care, therefore I award no punitive damages.
IT IS THEREFORE ORDERED Plaintiff is awarded judgement against the defendant THI of South Carolina at Charleston LLC D/B/A Riverside Health and Rehab in the amount of $87,007.00.

D.A. EarlyIII
Arbitrator

May16,2023

Subsequent to issuing the original order, the parties requested a specific finding of liability as to the defendant, Jerrolyn Montgomery-Smalls.
I find the Plaintiff failed to prove by the preponderance of the evidence that defendant Montgomery-Smalls deviated from the standard of care in her care of or investigation of the fall.

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

D.A.Early III
May 26, 2023

Sent from my iPad

Exhibit I

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

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

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

AND IT IS SO ORDERED.

[*Electronic Signature Page to Follow*]

Charleston Common Pleas

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

Case Number: 2021CP1001437

Type: Order/Other

It is so ordered.

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

Exhibit H

L4

[redacted] PINKSTON LAW FIRM LLC 04-09-2024 [redacted]

BU-VOUCHER-ID COMMENT	INVOICE NUMBER	INVOICE DATE	GROSS AMOUNT	FACILITY	DISCOUNT TAKEN	PAID AMOUNT
[redacted]	1	03-27-2024	87,007.00	[redacted]-Fundamental Administrati	0.00	87,007.00
E/O Elizabeth Varner / arbitration award.						

TOTAL GROSS AMOUNT	TOTAL DISCOUNT TAKEN	TOTAL PAID AMOUNT
87,007.00	0.00	87,007.00

THIS CHECK IS VOID IF GREEN PANTOGRAPH AND MICROPRINTING ARE ABSENT

[redacted] Payable through Bank of Oklahoma, Bartlesville, OK [redacted]
Transit No. Routing Symbol: [redacted]

Pay Date: 04-09-2024 Pay Amount: ********$87,007.00**

CHECK NOT VALID AFTER 180 DAYS

Pay ****EIGHTY-SEVEN THOUSAND SEVEN AND 00/100 DOLLARS****

To The Order Of

PINKSTON LAW FIRM LLC
SUITE C117
295 SEVEN FARMS DRIVE
CHARLESTON SC 29492

Ken Tabler

⑈[redacted]⑈ ⑆[redacted]⑆ [redacted]⑈

Exhibit J

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

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

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

FACTUAL BACKGROUD

A. The Lawsuits

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

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

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

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

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

B. The Court's Order Compelling Arbitration

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

C. The Arbitration Order

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

D. The Arbitration Award

The arbitration hearing was held from April 3, 2023 to April 6, 2023. (Exhibit G at 1.) On May 16, 2023, the arbitrator issued his award ("Arbitration Award"). In the Arbitration Award, [redacted]. The arbitrator noted that [redacted] (Ex. G at 1.)

In the Arbitration Award, the arbitrator determined:

(1) [redacted]

(2) [redacted];

(3) [redacted];

(4) [redacted];

(5) [redacted]

(6) [redacted].

Based on these findings, the arbitrator [redacted]. (Ex. G at 1-2.)

On May 26, 2023, the arbitrator, at the request of the parties, supplemented his Arbitration Award, ruling that [redacted] (Ex. H.) The arbitrator found that [redacted]

E. The Court's Final Order

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Second, Plaintiff's joint-venture and alter-ego/veil-piercing claims (Counts 3 and 4, respectively) must be dismissed. In his Complaint, Plaintiff seeks to impute the Facility's liability to FAS and FCOS based on allegations that FAS and FCOS were part of a joint venture that operated Riverside[3] (Ex. B ¶¶ 33-41), and that FAS and FCOS were alter-egos of the Facility. (Ex. B ¶¶ 42-43.) However, the [redacted] (Ex. I.) Thus, the Facility [redacted]. The Court therefore should grant summary judgment for FAS and FCOS on these causes of action.

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

[3] The joint venture claim must be dismissed in any event because it is explicitly premised on Plaintiff's allegation that FAS, FCOS, *Defendant Smalls* and Riverside *collectively* comprised the joint venture. (Ex. B ¶ 37.) The arbitrator determined, however, that [redacted] therefore defeats Plaintiff's joint-venture theory.

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

CONCLUSION

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

CLEMENT RIVERS, LLP

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

Charleston, South Carolina

Dated: September 6, 2024

Exhibit K

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CIVIL ACTION NO.: 2021CP-1002744
)	
Williams Haynes, as Personal)	
Representative of the Estate of Elizabeth)	**PLAINTIFF'S MEMO IN OPPOSITION**
Varner,)	**TO DEFENDANTS MOTION FOR**
Plaintiff,)	**SUMMARY JUDGMENT**
v.)	
)	
Fundamental Administrative Services, LLC,)	
Fundamental Clinical and Operational)	
Services, LLC, and Jerrolyn)	
Montgomery-Smalls.)	
)	
Defendants.)	

COMES NOW William Haynes, as Personal Representative of the Estate of Elizabeth Varner ("Plaintiff"), and files this Memorandum in Opposition to Defendants' Motion for Summary Judgment, showing this Court as follows:

STATEMENT OF FACTS

Plaintiff William Haynes ("Plaintiff") is the Personal Representative for the Estate of Elizabeth Varner, who was admitted as a resident at Riverside Health and Rehab ("Riverside") on May 20, 2019. Jerrolyn Montgomery-Smalls ("Defendant Smalls") was the Administrator at the time Elizabeth Varner's residency and throughout her admission. Plaintiff filed the instant lawsuit on June 11, 2021, alleging corporate negligence, joint venture, alter ego/piercing the corporate veil, neglect of a vulnerable adult, wrongful death, and survivorship. The Complaint alleges Fundamental Administrative Services LLC ("Defendant FAS"), Fundamental Clinical and Operational Services LLC ("Defendant FCOS"), and Defendant Smalls were engaged in a joint venture to manage and control the operations of THI of South Carolina d/b/a Riverside Health and Rehab ("Riverside") and that these defendants were negligent in said management and operations. A companion lawsuit was filed against Riverside, alleging negligence, wrongful death, and

survivorship against the employees of Riverside. *William Haynes, as Personal Representative of the Estate of Elizabeth Varner vs. THI of South Carolina at Charleston LLC d/b/a Riverside Health and Rehab,* CAFN: 2021CP1001437.

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

A hearing was held on February 10, 2022, before the Honorable Roger M. Young, Sr. During the hearing and in support of their Motions for Stay, counsel for Defendants specifically stated the allegations against FAS and FCOS were separate and distinct. Judge Young granted Riverside's (and by extension Defendant Smalls as an employee) Motion to Compel Arbitration on February 24, 2022, along with Defendants FAS and FCOS Motions to Stay all matters in the instant lawsuit. The only issues compelled to arbitration were those involving Case No. 1437 and Defendant Smalls in her role as an employee of Riverside. "Case 2477 is stayed in favor of arbitration between Plaintiff and Ms. Montgomery-Smalls, with Plaintiff's claims against FAS and FCOS stayed pending the ultimate outcome of arbitration between Plaintiff, the Facility, and Ms. Montgomery-Smalls." Order Compelling Arbitration, p. 20. Again, the claims in Case No. 1437 involved employee negligence and vicarious liability; the claims in this lawsuit involve corporate negligence claims.

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

ARGUMENT AND CITATION TO AUTHORITY

"[A] stay is a stopping." Graham v. Graham, 301 S.C. 128, 130 (Ct. App. 1990). A stay refers to a judicial order to temporarily halt a proceeding. Black's Law Dictionary.

"The Morrows correctly assert that the theory of vicarious liability is different than the theory of direct corporate liability....[T]he two theories of vicarious liability and corporate liability can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other." Morrow v. Fundamental Long-Term Care Holding, LLC, 412 S.C. 534, 538 (2015)

Defendants' central contention is the issues claimed in the instant lawsuit were fully litigated, or could have been litigated, in the arbitration. This argument is contradictory to previous arguments put forth by Defendants to Judge Young, contrary to the holding in Morrow, and legally inconsistent with the stays requested by these Defendants. Essentially, Defendants are arguing they should receive some benefit from the arbitration even though they moved for and were granted stays that excluded their participation in arbitration. Put simply, Defendants' arguments are disingenuous, frivolous, and are an unnecessary waste of Court resources.

I. Summary Judgment is inapplicable to the corporate negligence claims asserted against FCAS, FOS, and necessarily involve Defendant Smalls.

Defendants FOS, FCAS, and Smalls are not entitled to pursue summary judgment on any of the corporate negligence claims for two reasons: 1) Our Supreme Court's holding in Morrow, which specifically rejected Defendants' argument; and 2) The corporate negligence claims asserted

against these Defendants in the instant case were stayed at Defendants' request and Plaintiff was barred from litigating them at arbitration. In essence, Plaintiff was stopped from proceeding on his corporate negligence claims in this lawsuit. Defendants specifically argued they were not subject to the arbitration agreement, they were separate and distinct entities from Riverside and its employees, they were not third-party beneficiaries of the arbitration agreement, and they were not in privity with the parties to the arbitration agreement.

Based on the grounds asserted by Defendants, the corporate negligence claims in this lawsuit were not subject to arbitration by virtue of the stays. There is no confusion regarding that issue based on the Order Compelling Arbitration – the corporate negligence claims in this lawsuit were stayed pending arbitration of those claims asserted against Riverside and those involving Defendant Smalls as an employee of Riverside. Defendants are essentially arguing that all claims against them could have, and should have, been brought in arbitration. However, the imposition of stays at the request of these Defendants prohibited any of these claims from being brought in arbitration. Alternatively, Defendants are also arguing the arbitration Order effectively gives them the right to pursue summary judgment on the corporate negligence claims even though the issues addressed in arbitration did not involve those claims. This argument is in direct opposition to the holding in Morrow and Defendants' previous arguments to Judge Young.

Our Supreme Court addressed the exact issue argued by these same Defendants in Morrow, where Defendants argued the allegations of corporate negligence were to be bifurcated from allegations of negligence against its skilled nursing facility. Counsel went on to candidly admit that if the allegations against the nursing home were unsuccessful, the corporate entities would be entitled to summary judgment on the corporate negligence claims. Morrow, 412 S.C. at fn.1. This argument was rejected by our Supreme Court:

The Morrows alleged the Fundamental Entities were vicariously liable for the negligence of Magnolia Place, and furthermore were directly responsible for Lawrence's injuries by way of their conscious disregard for his health in underfunding Magnolia Place, which led to issues with staffing, training, and nutrition.

The Fundamental Entities thereafter filed a motion to bifurcate the trial pursuant to Rule 42(b), SCRCP between the nursing home negligence claims and the corporate negligence claims, and further, to stay discovery related to the corporate negligence claims. The Fundamental Entities argued bifurcation was proper because the issues of nursing home negligence and corporate negligence were distinct, and the Morrows could only move forward on the corporate negligence claims if they were first successful against Magnolia Place.

The Morrows correctly assert that the theory of vicarious liability is different than the theory of direct corporate liability. See Martin C. McWilliams, Jr. & Hamilton E. Russell, III, Hospital Liability for Torts of Independent Contractor Physicians, 47 S.C. L. Rev. 431 (1996). Vicarious liability attaches to a parent company or employer as the result of negligence on behalf of its employees, such as through the doctrine of respondeat superior. Id. at 439. **Conversely, direct corporate liability attaches due to a breach of a duty which runs directly between a parent company and a patient, arising from negligence in actions such as leaving a hospital underfunded, understaffed, or undertrained so as to provide substandard care**. Id. at 462. **Accordingly, the two theories of vicarious liability and corporate liability can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other.** See Scampone v. Highland Park Care Ctr., 618 Pa. 363, 57 A.3d 582, 596–600 (2012) (holding that claims of vicarious liability and direct liability could be brought either concomitantly or alternately in case against nursing home); see also Montgomery Health Care Facility, Inc. v. Ballard, 565 So.2d 221, 225–26 (Ala.1990) (finding parent corporation of nursing home could be held liable for patient's death where corporation controlled day-to-day operations of home); cf. Forsythe v. Clark USA, Inc., 224 Ill.2d 274, 309 Ill.Dec. 361, 864 N.E.2d 227, 237 (2007) (recognizing direct corporate liability as a valid theory of recovery in the context of workplace accidents).

> The order treats these claims as based solely on vicarious liability that can be tried only after a finding of negligence on the part of Magnolia Place, when instead they are grounded in direct corporate liability which follows independent, albeit interconnected, duties owed to the Morrows. By considering the Morrow's claims against the Fundamental Entities as dependent upon their claim against Magnolia Place, the trial court's order effectively grants the Fundamental Entities potential summary judgment on the issues of direct corporate liability.
>
> The effect of this order is to prevent the Morrows from being architects of their own complaint, and deprives them of bringing their case against the defendant of their own choosing. See Neeltec Enters., Inc., v. Long, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012) ("The right of the plaintiff to choose her defendant is a substantial right within the meaning of [section 14–3330(2)(a)]").

Id. at 536-539(emphasis added).

As our Supreme Court noted in Morrow, the issue of corporate negligence involves separate and distinct duties. For all intents and purposes, the issues of employee negligence and vicarious liability were judicially bifurcated with the arbitration. At the direct request of these Defendants, only those issues involving the negligence of Riverside's employees were included in the arbitration. Likewise, all issues relating to corporate negligence as contained in this lawsuit were stayed at the request of all Defendants in this lawsuit.

It is worth noting Defendants admitted the corporate entities and the issues involved in this lawsuit were separate and distinct from Riverside during the hearing before Judge Young:

> Our contention is that the Fundamental defendants are separate and distinct....
> Exhibit A, Tr. of Record, Feb. 10, 2022, at 6: 8-9
>
> And certainly what I know today is I'm not in a position to consent to have the Fundamental defendants lumped in with the facility and the individual defendant, Ms. Montgomery-Smalls, she's the administrator of the facility.
> Id., at 6: 12-14

> [W]e're saying the arbitration should be Mr. Pinkston's clients against the facility and Ms. Montgomery-Smalls, and then outside of that arbitration, not as a part of that arbitration, should be the Fundamental defendants.
> Id., at 29: 13-16

> We'd be agreeable to having the facility and Ms. Montgomery-Smalls in the arbitration, but the Fundamental defendants are separate....
> Id., at 29: 20-22

Defendants have now done an about face on their previous arguments made to Judge Young about not being subject to and bound by the arbitration agreement. They are likewise ignoring the holding in Morrow, of which these Defendants are acutely aware since they were the respondents in that case. They have no grounds to pursue summary judgment on any claims contained in the instant lawsuit as those claims were stayed at Defendants' request. Additionally, the parties are separate and distinct, the duties of these corporate defendants are separate and distinct, and the claims asserted against these parties are separate and district from those decided in arbitration.

II. Res judicata does not apply because there was no adjudication of the corporate negligence claims, the actions involve separate parties, and these claims could not have been properly included in arbitration based on the stays.

Res judicata applies where: (1) the judgment in the prior action was final, valid, and on the merits; (2) both actions involve the same parties; and (3) the second action involved claims properly included in the first action. Town of Sullivan's Island v. Felger, 318 S.C. 340, 344 (Ct. App. 1995). "Under the doctrine of *res judicata,* `[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.'" Palmetto Homes Inc. v. Bradley, 357 S.C. 485 (Ct. App. 2003). Res judicata is inapplicable to this lawsuit because the arbitration did not adjudicate any of the corporate

negligence claims, it did not involve the same parties, and the corporate negligence claims were barred from inclusion due to the stays requested by these Defendants.

Defendants fail to mention or even address the different duties that flow from corporate negligence, the centerpiece of the instant lawsuit. Those duties were addressed in Morrow and discussed above. None of the allegations dealing with the corporate negligence claims were adjudicated or might have been raised in arbitration due to the stays. Defendants' argument that all facts were alleged and litigated in the arbitration is simply without merit based on the stays they requested. It simply defies logic to claim a plaintiff could have or should have litigated claims when s stay entered at a defendant's request prohibited that plaintiff from litigating said claims. The issuance of the stays is fatal to any claim the issues were raised and adjudicated in the arbitration.

III. Collateral estoppel does not apply to FCOS nor FAS because the stays granted at their request prohibited Plaintiff from litigating the claims asserted in this lawsuit, including those claims against Defendant Smalls.

Collateral estoppel applies when an issue was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554 (Ct. App. 2009). Collateral estoppel can be used defensively against a plaintiff who was a party in a prior action, even if the defendant was not a party to the prior litigation, so long as the plaintiff "had a full and fair opportunity to previously litigate the issue." Id. at 555. Defendants' attempted use of defensive collateral fails the first prong because the allegations of corporate negligence were not litigated in the arbitration action. The reason is straightforward: Defendants requested and were granted stays that prohibited Plaintiff from "actually" litigating those claims.

Defendants are again taking a contradictory position to the one they argued in front of Judge Young. Plaintiff argued every Defendant, including FOS and FCAS, should be compelled to arbitration, which Defense vehemently opposed:

> Your Honor, he's saying to have every defendant involved in the arbitration, we're saying the arbitration should be Mr. Pinkston's clients against the facility and Ms. Montgomery-Smalls, and then outside of that arbitration, not as a part of that arbitration, should be the Fundamental defendants. So that's the difference, Your Honor, is what Mr. Pinkston is proposing is to have every defendant in the arbitration proceedings; what we're saying is that we're not agreeable to that. We'd be agreeable to having the facility and Ms. Montgomery-Smalls in the arbitration, but the Fundamental defendants are separate and the allegations that are made against those defendants, we deny and very strongly dispute the allegations in terms of any role or responsibility that they have in the alleged injuries.
> Exhibit A, Tr. of Record, Feb. 10, 2022, at 29: 12-25
>
> [The Fundamental defendants are] not third-party beneficiaries to this arbitration agreement. The arbitration agreement talks about agents, servants, and employees, they are none of those things. That's why there's a very clear distinction between an employee like Ms. Montgomery-Smalls and these other entities.
> Id., at 30: 3-8
>
> And as for the Fundamental defendants, that the action should be stayed as to them. He has no right to compel them to arbitration, the third-party beneficiary theory doesn't work for two, at least two very significant reasons. One, they're not third-party beneficiaries; two, he doesn't have the ability to compel them to arbitration as third-party beneficiaries; three, there's no motion to do it
> Id., at 34: 6-12.

Despite these past arguments regarding the inapplicability of the arbitration agreement that these Defendants should be excluded from arbitration, Defendants are now arguing collateral estoppel applies because Plaintiff had a full and fair opportunity to previously litigate the issue at arbitration. This is in direct contradiction to their previous position that every claim against them was not proper for arbitration and they could not be compelled to arbitration.

Finally, it is worth noting the inherently contradictory positions being put forth by Defendants as exemplified by their statement regarding the joint venture claim. Defendants state, "The arbitrator's implicit determination that Defendant Smalls was *not* part of the joint venture therefore defeats Plaintiff's joint-venture theory." Def. Memo. in Support of Mot. for Summary Judgment, fn. 3. The arbitrator could not determine any issue relating to joint venture because that issue was stayed and therefore not part of the arbitration agreement. It was not part of Case No. 1437, which was compelled to arbitration. Therefore, the issue of joint venture with FCAS and FCOS could not have been determined due to the stays requested by these Defendants.

Defendants previously took the position the corporate entities and the claims against them were separate and distinct, they could not be compelled to arbitrate those claims, and there was a very clear distinction between the employees at Riverside and themselves. Yet now they take the position the arbitrator implicitly determined those very allegations even though stays were in place. Defendants' arguments that res judicata and collateral estoppel apply are disingenuous, contradictory, and in direct opposition to their previous arguments.

IV. Collateral estoppel does not apply to damages from two separate tortfeasors.

Defendants claim that collateral estoppel applies to damages, including punitive damages, is likewise without support in case law and subsequently without merit. Morrow conclusively states damages against the corporate defendants for corporate negligence are separate and distinct from those damages stemming from vicarious liability. "[D]irect corporate liability attaches due to a breach of a duty which runs directly between a parent company and a patient, arising from negligence in actions such as leaving a hospital underfunded, understaffed, or undertrained so as to provide substandard care. Accordingly, the two theories of vicarious liability and corporate liability can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of

the other." Morrow, 412 S.C. at 462. Defendants cannot assert collateral estoppel when two theories of liability can co-exist in a lawsuit and a finding of one does not preclude a finding against the other. Put differently, damages that result from a breach of one duty from one tortfeasor do not preclude a finding for damages that flow from a separate duty relating to a separate tortfeasor.

A case directly on point is Boiter v. South Carolina Dep't of Transp., 393 S.C. 123, 712 S.E.2d 401 (2011). The plaintiff was injured in a car wreck and alleged two separate and distinct acts of negligence, or occurrences, against two defendants. The jury found both defendants negligent and awarded separate verdicts against each. Our Supreme Court affirmed the jury verdict against each individual tortfeasor and determined two independent and separate acts of negligence occurred. The Supreme Court specifically stated, "[H]ad the jury not found SCDOT negligent, the verdict against SCDPS could still stand, and the converse is true." Id, at 407. This is the exact situation presented in this lawsuit. As admitted by Defendants, the allegations against the corporate entities are separate and distinct. A jury could find that Riverside was not negligent and still find the Fundamental corporate entities negligent, or vice versa. Or the jury could determine both were negligent, as in Boiter and contemplated in Morrow, and the individual verdicts would stand.

Regardless of any determination by the arbitrator relating to the allegations of gross negligence as to the care providers at Riverside, any such finding has nothing to do with the actions of Defendants in a corporate negligence setting. A factfinder could find the corporate defendants acted wantonly, wilfully, or in reckless disregard of Plaintiff's rights in underfunding or understaffing the nursing home. Again, the Morrow Court specifically addressed this issue and held the finding of one does not preclude the finding of the other. Taken to its logical conclusion, the arbitrator's determination regarding any punitive conduct against the employees of Riverside

does not preclude a finding of punitive conduct for or against FOS and FCAS based on the different duties and actions accompanying those duties.

CONCLUSION

For the above stated reasons, Plaintiff respectfully requests Defendants' Motion for Summary Judgment be DENIED.

Respectfully submitted this 8th day of September, 2024.

PINKSTON LAW FIRM, LLC

/s/ Shawn Pinkston
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Mount Pleasant, South Carolina

Exhibit L

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1002744

William Haynes et al
PLAINTIFF(S)

Fundamental Administrative Services Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

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

It Is So Ordered.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

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

Williams Haynes Personal Representative
Elizabeth Varner Estate

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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

Charleston Common Pleas

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

Case Number: 2021CP1002744

Type: Order/Electronic Form 4

So Ordered

William C. McMaster, III

Exhibit M

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1002744

William Haynes et al
PLAINTIFF(S)

Fundamental Administrative Services Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

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

It Is So Ordered.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

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

Williams Haynes Personal Representative
Elizabeth Varner Estate

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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

Charleston Common Pleas

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

Case Number: 2021CP1002744

Type: Order/Electronic Form 4

So Ordered

William C. McMaster, III

Exhibit N

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

TO: THE HONORABLE WILLIAM C. MCMASTER, III, Presiding Judge, and SHAWN T. PINKSTON, ESQUIRE, Attorney for Plaintiff:

NOW COME Defendants Jerrolyn Montgomery-Smalls, Fundamental Administrative Services, LLC ("FAS") , and Fundamental Clinical and Operational Services, LLC ("FCOS") by and through their undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set forth below, hereby moves this Honorable Court to alter, amend, and/or reconsider its Order, filed September 20, 2024, denying Defendant's motion for summary judgment.

As set forth in the motion filed on June 28, 2024, Plaintiff's claims against the Defendants are barred by the doctrines of *res judicata* and collateral estoppel based on the outcome of a prior arbitration proceeding brought by Plaintiff arising out of exactly the same facts and circumstances alleged in this case. In light of the preclusive effect of the arbitration award, *see, e.g., Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 493-96, 593 S.E.2d 480, 484-86 (Ct. App. 2004); *Graham v. State Farm Fire & Cas. Ins. Co.*, 277 S.C. 389, 390-91, 287 S.E.2d

495, 496 (1982), there are no material facts in dispute. Defendants therefore request that this court reconsider its Order and grant judgment to Defendants as a matter of law.

1. **Permitting the Plaintiff to relitigate claims and issues that have already been decided at arbitration would create duplicative litigation and would be a waste of judicial resources.**

The present suit involves allegations of nursing home negligence at Riverside Health and Rehab skilled nursing facility ("Facility" or "Riverside"), where Plaintiff's decedent Elizabeth Varner was a resident. Contrary to Plaintiff's erroneous argument to this Court in opposition to the present motion, Judge Roger M. Young, Sr. ordered all of Plaintiff's claims to arbitration, to include all claims raised in the present suit and the Plaintiff's related action against Riverside (C/A No. 2021-CP-10-01437). Judge Young further ordered that Riverside and Defendant Smalls were parties to the arbitration, and that Defendants FAS and FCOS were not parties to the arbitration. Finally, Judge Young ordered a judicial stay as to both the present suit and the suit against Riverside, to promote "efficiency and judicial economy," and to prevent "duplicative discovery and litigation." (*See* Feb. 24, 2022 Order at Page 19).

The parties presented testimony and evidence at arbitration. Retired Judge Doyet E. Early, III served as the arbitrator. Judge Early issued a ruling awarding compensatory damages as to Riverside for Plaintiff's femur fracture, denying punitive damages, and denying any liability as to Defendant Smalls. Judge Early further denied the Plaintiff's wrongful death claim. This court entered an order confirming Judge Early's arbitration award, and Riverside paid the arbitration award.

Judge Early's ruling was a final, binding award on the merits of all claims that were or could have been asserted. As a result, the Plaintiff's present claims against Defendant Jerrolyn Montgomery-Smalls are barred according to the doctrine of *res judicata*. The Plaintiff's claims

against Defendants FAS and FCOS, who were not parties to the arbitration, are barred by collateral estoppel. Permitting the Plaintiff to relitigate these claims and issues that have already been decided at arbitration would create duplicative discovery and litigation, and would be a complete waste of judicial resources. Accordingly, the Defendants request that this Court reconsider its Order and grant judgment to the Defendants as a matter of law.

2. **All of Plaintiff's claims in this lawsuit were or should have been raised at arbitration.**

All claims asserted in the present lawsuit arose from the residency of Plaintiff's decedent at Riverside. As a result, all claims were within the scope of the subject arbitration agreement. Contrary to Plaintiff's erroneous argument in opposition to Defendants' motion, all claims asserted in the present lawsuit were or should have been raised at arbitration, *including Plaintiff's causes of action for corporate negligence, joint-venture liability, and corporate veil-piercing liability. Res judicata* applies where: (1) the judgment in the prior action was final, valid, and on the merits; (2) both actions involve the same parties; and (3) the second action involved claims properly included in the first action. *See Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995). *Res judicata* applies to arbitration awards and bars a litigant from asserting claims in a later action that were or "*could have been* arbitrated in the original proceeding." *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 496, 593 S.E.2d 480, 486 (Ct. App. 2004). As to Defendant Smalls, these claims are therefore barred by *res judicata.*

Contrary to Plaintiff's fallacious argument to this Court, the Defendants have never argued that any cause of action asserted in the present lawsuit should have been excluded from arbitration. The Defendants argued that FAS and FCOS were not *parties* to the arbitration agreement and therefore should not be *parties* to the arbitration. The Defendants requested a stay

of all litigation in circuit court pending the outcome of arbitration. However, the Defendants never argued that any particular cause of action should be excluded from arbitration. Indeed, each and every cause of action the Plaintiff asserted against FCOS and FAS he also asserted against Defendant Smalls, who of course *was* a party to the arbitration. Judge Young granted a stay of both lawsuits to promote judicial economy and to avoid duplicative discovery and trials. ***However, nothing in Judge Young's Order or any order of this court or the arbitrator excluded any of Plaintiffs' claims from arbitration.*** Accordingly, the Plaintiff had the opportunity to assert corporate negligence, joint venture, and veil piercing claims against Defendant Smalls at arbitration, in addition to the other causes of action that Plaintiff admittedly asserted and that were without question decided at arbitration. He cannot now reassert these claims in a separate proceeding in circuit court. *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) (holding that *res judicata* "prohibits the owner of a single cause of action from either dividing or splitting the cause of action so as to make it the subject of several causes of action"). The Plaintiffs' claims against Defendant Smalls are therefore clearly barred. Respectfully, the Court must reconsider its Order and grant summary judgment to Defendant Smalls as a matter of law.

3. **The Plaintiff's claims against Defendants FAS and FCOS are barred by the collateral estoppel effect of the arbitration award, and there is no viable legal or equitable theory to the contrary that should allow these claims to proceed.**

As set forth in the Defendants' motion for summary judgment, supporting memorandum of law, and arguments presented at the hearing before this court, issues determined at arbitration were dispositive as to all claims against Defendants FAS and FCOS. As a result, Defendants FAS and FCOS are entitled to summary judgment, based on the collateral estoppel effect of the arbitration award. "Collateral estoppel, also known as issue preclusion, prevents a party from

relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). Collateral estoppel applies when an issue was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *See id.* All the elements of collateral estoppel are met here as to each cause of action Plaintiff has asserted against the Defendants. As a result, the Court should reconsider its order and grant summary judgment to the Defendants as a matter of law.

First, there can be no dispute that the Plaintiff raised causes of action for negligence/gross negligence, neglect of a vulnerable adult, wrongful death, and survivorship at arbitration, and that these causes of action were determined. The arbitrator determined the Plaintiff's compensatory damages relative to Ms. Varner's femur fracture, and the Facility paid this award. The arbitrator also determined that the Ms. Varner's femur fracture was not the proximate cause of her death. The Plaintiff now asserts these identical claims/causes of action as to Defendants FAS and FCOS. These claims are clearly barred by collateral estoppel. The court should reconsider its Order and grant summary judgment to FAS and FCOS on these claims as a matter of law.

With regard to the joint venture and veil piercing causes of action (Counts 3 and 4 of Plaintiff's Complaint) the only damages that may be awarded for these claims are the imputed liability of the Facility. Again, the liability of the Facility has been determined, and the Facility has paid the arbitrator's award. This liability is therefore extinguished. There is no additional liability of the Facility that may be imputed to these Defendants. As a result, these claims are also barred by collateral estoppel.

Additionally, as set forth in the Defendants' Memorandum of Law supporting the motion for summary judgment, Plaintiff's claim against FAS and FCOS for corporate negligence also seek the same damages that Plaintiff sought to (and did) recover at arbitration. Because the arbitrator already awarded all damages that Plaintiff was entitled to recover, and because the Facility has paid the award, Plaintiff is estopped from seeking additional damages from FAS and FCOS. *See Carolina Renewal*, 385 S.C. at 558, 684 S.E.2d at 784 (plaintiff estopped from re-litigating damages that were decided in a prior action). Plaintiff's reliance on *Morrow v. Fundamental Long-Term Care Holdings, LLC* is misplaced. . In *Morrow,* 412 S.C. 534, 773 S.E.2d 144 (2015), the S.C. Supreme Court ruled that direct corporate-liability claims and vicarious-liability claims against a nursing home's affiliated entities "can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other." But that principle has nothing to do with the present case. Here, the issue is not whether Plaintiff is bringing direct or vicarious liability claims against FAS/FCOS. For the reasons set forth herein and in the Defendants' prior memorandum, and argued at the hearing, the determination of the various issues raised at arbitration in this case does in fact preclude the present claims against FAS and FCOS.

Furthermore, contrary to Plaintiff's argument in opposition to the motion, the Plaintiff cannot maintain a standalone claim for punitive damages against FAS and FCOS. *Cook v. Atlantic Coast Line R.R. Co.,* 183 S.C. 279, 190 S.E. 923 (1937); see also Monroe v. Bankers Life & Cas. Co., 232 S.C. 363, 367, 102 S.E.2d 207, 208 (1958). The present case is distinguishable from *McGee v. Bruce Hospt. System*, 344 S.C. 466, 545 S.E.2d 286, cited by Plaintiff in support of his argument. *McGee* involved separate allegations of medical malpractice against multiple physicians who performed various procedures, that allegedly causing separate

and distinct injuries to the Plaintiff's decedent. By contrast, here the Plaintiff alleges a single injury to Plaintiff's decedent (femur fracture) which Plaintiff alleged resulted from nursing negligence. The arbitrator determined Plaintiff's damages related to this femur fracture. The arbitrator further determined there was no willful or wanton conduct on the part of the Facility, or on the part of Defendant Smalls as it relates to the management of the facility, and therefore denied punitive damages. There is therefore no viable theory pursuant to which Plaintiff could seek additional punitive damages as it relates to the FAS and FCOS. The court should reconsider its Order and grant summary judgment to the Defendants.

Finally, as noted above, the Plaintiff had the opportunity to present evidence of corporate negligence and seek punitive damages at arbitration. Defendant Smalls was a party to the arbitration, and the Plaintiff asserted the same claims against Defendant Smalls in the Complaint as he has asserted against FAS and FCOS, including corporate negligence, joint venture, and veil piercing. To grant Defendants' motion would not permit these Defendants to unjustly avoid liability, as Plaintiff has argued. To the contrary, the Plaintiff has "had his day in court," and has had a full and fair opportunity to litigate his claims. *Graham*, 277 S.C. at 391. The Plaintiff is therefore collaterally estopped from asserting the present claims against these Defendants. The Court should reconsider its order and grant summary judgment.

4. **The Defendants request that the Court reconsider and expressly rule on each and every distinct issue/argument raised in support of its motion for summary judgment (whether raised in writing or orally at the motion hearing), all of which Defendants incorporate herein by reference.**

Following the hearing on September 11, 2024, this Court issued a Form 4 Order denying the subject motion. The Court's Form 4 Order did not include reasoning or order instructions. The Defendants therefore request that the Court reconsider its decision and expressly rule on each issue/argument raised in support of Defendants' motion. *See Elam v. S.C. Dep't of Transp.*,

361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original). The Defendants therefore respectfully request a ruling on each distinct issue/argument raised in support of the motion.

This Motion will be supported by the pleadings and motions filed in this case, all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any previous or subsequent memoranda of law, affidavits or other evidence which may be submitted prior to hearing on this Motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

CLEMENT RIVERS, LLP

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Attorneys for the Defendants

Charleston, South Carolina

Dated: September 30, 2024

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

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

The Defendants Jerrolyn Montgomery-Smalls ("Defendant Smalls"), Fundamental Administrative Services, LLC ("FAS"), and Fundamental Clinical and Operational Services, LLC ("FCOS"), by and through their undersigned counsel, hereby submit this Memorandum of Law in in Opposition to Plaintiff's Notice of Rule to Show Cause in the above-referenced matter.

The Plaintiff's claims in this case involve allegations of nursing home negligence at Riverside Health and Rehab skilled nursing facility. Arbitration has already been conducted arising from the same facts and circumstances alleged in the present case. The arbitrator, Ret. Judge Doyet E. "Jack" Early, III, rendered an award of $87,007.00 to the Plaintiff relative to a leg fracture sustained by Plaintiff's decedent while she was a resident at the facility. Defendant Riverside has paid this award. Judge Early further found the Plaintiff failed to prove his wrongful death allegations, failed to prove any breach of the standard of care on the part of Defendant Smalls, and that "*Plaintiff is not entitled to judgment against Jerrolyn Montgomery-Smalls*."

Despite Judge Early's arbitration ruling, Plaintiff has continued to pursue claims against Defendant Smalls and has not dismissed her from the present suit. Defendants filed a Motion for Summary Judgment and asserted that all claims asserted against Defendant Smalls had already been addressed at arbitration. As a result, any further claims against were barred pursuant to the doctrine of *res judicata.* In opposition to Defendant Smalls' motion, Plaintiff took the position that certain causes of action asserted against Defendant Smalls in the Complaint were not addressed at arbitration.

Plaintiff's position as it relates to Defendant Smalls is directly contradicted by the plain language of the pertinent agreements of the parties and orders of the court and arbitrator in this case. Nonetheless, Judge William C. McMaster, III denied the Defendants' motions in a Form 4 Order dated September 20, 2024, without providing any reasoning or explanation. He further ordered the Defendants to respond to Plaintiff's discovery requests in the present matter.

Accordingly, to the extent there are any claims or causes of action asserted against Defendant Smalls that were not previously addressed at arbitration, the Defendants assert that those claims must be arbitrated pursuant to the parties' agreement, Judge Young's Order, and Judge Early's rulings as referenced above. (See Defendants' Motion to Compel Arbitration and Memorandum of Law/Exhibits in Support).

While the issue of arbitration remains in dispute, the Defendants cannot participate in discovery, as to do so would risk waiver of any remaining arbitration rights. See, e.g. Rhodes v. Benson Chrysler-Plymouth, Inc. 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007). If the Court grants Defendants' Motion, discovery will be stayed as to the non-arbitrable Defendants, including responses subject to Judge McMaster's Order. As Plaintiff has noted in his Memorandum, should the court deny Defendants' Motion to Compel Arbitration, the ruling would be immediately appealable. See S.C. Code Ann. § 15-48-200(a)(1) (2005); New Hope Missionary Baptist Church v. Paragon

Builders, 379 S.C. 620, 626, 667 S.E.2d 1, 4 (Ct. App. 2008); Towles v. United HealthCare Corp., 338 S.C. 29, 35, 524 S.E.2d 839, 842–43 (Ct.App.1999). An appeal to the Court of Appeals would stay all circuit court proceedings. S.C. Code Ann. § 18-9-220. Therefore, Plaintiff's Rule to Show Cause should not be addressed or ruled upon until such time as Defendants' Motion to Compel Arbitration and to Stay has been fully resolved.

Finally, the Defendants have not acted in a dilatory manner and have not willfully violated an order of this Court. There remains a legitimate dispute regarding the arbitrability of the claims asserted against Defendant Smalls and the associated stay as to the other Defendants. For the reasons set forth above, this dispute directly impacts the parties' ability to engage in discovery. The Defendants' efforts to enforce their arbitration rights are not frivolous, nor interposed for delay or in bad faith, but instead founded upon well-established principles of South Carolina law. Accordingly, there has been no conduct by the Defendants to warrant sanctions under Rule 37, SCRCP, much less striking Defendants' Answer as Plaintiff suggests in his Memorandum. See Karppi v. Greenville Terrazzo Co., Inc., 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997). Accordingly, Plaintiff's request for sanctions should be denied

CONCLUSION

For the foregoing reasons, Plaintiff's Rule to Show Cause should not be ruled upon until the Defendants' Motion to Compel Arbitration and for Stay is fully resolved, and Plaintiff's request for sanctions under Rule 37, SCRCP should be denied.

[SIGNATURE BLOCK ON FOLLOWING PAGE.]

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Charleston, South Carolina

Dated: January 26, 2025

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO. 2021-CP-10-02744
WILLIAM HAYNES, as Personal Representative of the Estate of Elizabeth Verner, Plaintiff, vs. FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, and JERROLYN MONTGOMERY-SMALLS, Defendants.	)	**DEFENDANTS' MOTION TO ALTER, AMEND, AND/OR RECONSIDER ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS AND GRANTING PLAINTIFF'S RULE TO SHOW CAUSE**

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

NOW COME Defendants, Fundamental Administrative Services, LLC ("FAS"), Fundamental Clinical And Operational Services, LLC ("FCOS"), and Jerrolyn Montgomery-Smalls ("Montgomery-Smalls") (collectively, "Defendants"), by and through their undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set forth below, hereby most respectfully move this Honorable Court to alter, amend, and/or reconsider its order filed February 3, 2025 (the "Subject Order"), denying Defendants' Motion to Compel Arbitration and Stay Proceedings, filed November 14, 2024, which asked the Court to (1) compel Plaintiff[1] to arbitrate any and all claims that he is asserting against Montgomery-Smalls in this case and to (2) stay this action as to FAS and FCOS pending the outcome of any arbitration of Plaintiff's claims against

[1] "Plaintiff" refers to William Haynes, as Personal Representative of the Estate of Elizabeth Varner ("Ms. Varner").

Montgomery-Smalls ("Defendants' Underlying Motion"), and granting in part Plaintiff's Notice of Rule to Show Cause, filed October 22, 2024 ("Plaintiff's Underlying Motion") (collectively, the "Underlying Motions").[2]

I. Contending, most respectfully, that Defendants' Underlying Motion should have been (and should now be) granted and that Plaintiff's Underlying Motion should have been (and should now be) denied, Defendants ask the Court to (re)consider and expressly rule on each and every distinct issue/argument raised by Defendants in support of Defendants' Underlying Motion and in opposition to Plaintiff's Underlying Motion, whether written or oral, i.e., each and every distinct issue/argument set forth in Defendants' Underlying Motion itself (as well as in the Declaration of Matthew O. Riddle, Esq., filed contemporaneously therewith); in any briefing or other written submissions by Defendants regarding the Underlying Motions;[3] and via oral argument at the hearing on the Underlying Motions on January 27, 2025, all of which is/are hereby incorporated herein by reference.

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

---

[2] The Subject Order is said to grant Plaintiff's Underlying Motion "in part" because, while it requires Defendants to respond to Plaintiff's interrogatories and requests for production within fifteen (15) days, it does not at this time grant Plaintiff's request for sanctions to be imposed against Defendants. Defendants, of course, take no exception to the Court not granting Plaintiff's request for sanctions.

[3] Such briefing/written submissions by Defendants include the Memorandum of Law in Support of Defendants' Motion to Compel Arbitration and Stay Proceedings (and the exhibits thereto), filed November 14, 2024; Defendants' Memorandum in Opposition to Plaintiff's Notice of Rule to Show Cause, filed January 26, 2025; and the additional exhibit Defendants submitted on January 28, 2025.

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

A. The Court should have found (and should now find) that Defendants' Underlying Motion should be granted.

1. The Court should enforce the Arbitration Order and compel arbitration of Plaintiff's claims against Montgomery-Smalls.

On March 25, 2021, Plaintiff, as the personal representative of Ms. Varner's estate, brought a personal injury and wrongful-death lawsuit (the "*Riverside* Lawsuit") against nonparty THI of South Carolina at Charleston, LLC, d/b/a Riverside Health and Rehab (the "Facility" or "Riverside"), a skilled-nursing facility where Ms. Varner was a resident in October 2019. (Declaration of Matthew O. Riddle, Esq., filed November 14, 2024 ("Decl.") ¶ 2, Ex. A ¶¶ 2, 4.)

On June 11, 2021, Plaintiff filed the instant action against Defendants based on the same factual allegations regarding Ms. Varner's care and treatment at the Facility that were alleged in the *Riverside* Lawsuit. (Decl. ¶ 3, Ex. B ¶¶ 11-21.) Montgomery-Smalls was the administrator of the Facility. (Decl. ¶ 4, Ex. C ¶ 18.) Plaintiff alleges that FAS and FCOS provided various consulting services to the Facility. (Decl. ¶ 3, Ex. B ¶¶ 8, 9.)

Plaintiff's complaint asserts claims against all Defendants for negligence/gross negligence (Count 1) (Decl. ¶ 3, Ex. B ¶¶ 22-25); corporate negligence (Count 2) (Decl. ¶ 3, Ex. B ¶¶ 26-32); joint venture (Count 3) (Decl. ¶ 3, Ex. B ¶¶ 33-41); alter ego/piercing the corporate veil (Count 4) (Decl. ¶ 3, Ex. B ¶¶ 42-43); neglect of a vulnerable adult (Count 5) (Decl. ¶ 3, Ex. B ¶¶ 44-55); wrongful death (Count 6) (Decl. ¶ 3, Ex. B ¶¶ 56-58); and, survivorship action (Count 6) (Decl. ¶ 3, Ex. B ¶¶ 59-61). On July 16, 2021, Montgomery-Smalls filed an answer denying any liability and affirmatively asserting the right to demand arbitration. (Decl. ¶ 4, Ex. C ¶ 35.)

On February 24, 2022, the Court in both cases entered an order (the "Arbitration Order") granting the Facility's and Montgomery-Smalls' respective motions to compel arbitration (Decl. ¶ 5, Ex. D) pursuant to the parties' Arbitration Agreement. (Decl. ¶ 6, Ex. E.) The Court specifically ruled that because the Arbitration Agreement is valid on its face and applies to both the Facility and the Facility's "agents, employees, and servants," "the Arbitration Agreement covers Plaintiff's claims against both the Facility and Ms. Montgomery-Smalls." (Decl. ¶ 5, Ex. D at 10.) In the "interest of efficiency and judicial economy," the Court also stayed Plaintiff's claims against FAS and FCOS (which are non-parties to the Arbitration Agreement), pending the completion of the arbitration of Plaintiff's claims against the Facility and Montgomery-Smalls. (Decl. ¶ 5, Ex. D at 18-20.)

The arbitration hearing was held from April 3, 2023, to April 6, 2023. (Decl. ¶ 7, Ex. F at 1.) On May 16, 2023, the arbitrator issued his award ("Arbitration Award") in which he awarded $87,007 in compensatory damages against Riverside (but not Montgomery-Smalls) for injuries that Ms. Varner sustained, but the arbitrator rejected Plaintiff's claims for wrongful death and punitive damages. (Decl. ¶ 7, Ex. F at 1-2.) In addition, on May 26, 2024, the arbitrator, at the request of the parties, specifically determined that "Plaintiff is not entitled to a judgment against Jerrolyn Montgomery-Smalls." (Decl. ¶ 8, Ex. G.) On April 9, 2024, the Facility paid the award in full. (Decl. ¶ 9, Ex. H.)

Meanwhile, on February 12, 2024, the Court granted Plaintiff's petition for entry of a Final Order that incorporated the Arbitration Award and lifted the stay of this lawsuit. (Decl. ¶ 10, Ex. I.)

After Plaintiff indicated that he wanted to continue pursuing this case against Defendants—including Montgomery-Smalls—notwithstanding the outcome of the arbitration, on June 28, 2024,

Defendants moved for summary judgment. In their summary judgment motion, Defendants argued, in part, that the Arbitration Award is res judicata and precluded Plaintiff from pursuing further claims against Montgomery-Smalls in this case. (Decl. ¶ 11, Ex. J.) In response, Plaintiff argued incorrectly that res judicata did not bar his claims for corporate negligence, joint venture, and alter ego-veil/piercing liability against Montgomery-Smalls because Plaintiff was prevented from raising those claims against Montgomery-Smalls in the arbitration in light of the Court's stay of this case against FAS and FCOS, who were not participants in the arbitration. (Decl. ¶ 12, Ex. K.)

On September 20, 2024, the Court entered a Form 4 order denying Defendants' Motion for Summary Judgment. (Decl. ¶ 13, Ex. L.) While the Form 4 order contained no explanation for the Court's ruling, it signaled the Court's intention to allow Plaintiff to continue pursuing claims against Montgomery-Smalls for corporate negligence, joint venture, and alter ego/veil-piercing liability notwithstanding the Arbitration Award that absolved her of any liability. On September 30, 2024, Montgomery-Smalls asked the Court to reconsider the denial of her motion for summary judgment because: (1) the Arbitration Order required Plaintiff to arbitrate all of his claims against Montgomery-Smalls, and (2) nothing about the Court's stay of proceedings as to FAS and FCOS prevented Plaintiff from litigating his corporate negligence, joint venture, and alter ego/veil-piercing claims against Montgomery-Smalls in the already-concluded arbitration. (Decl. ¶ 15, Ex. N at 2-4.) On October 4, 2024, the Court issued another Form 4 order (Decl. ¶ 14, Ex. M) denying Defendants' Motion for Reconsideration.

Because the aforementioned Form 4 orders permit Plaintiff to continue pursuing his corporate negligence, joint venture, and alter-ego/veil-piercing claims against Montgomery-

Smalls, the Court should compel arbitration of all such arbitrable claims, as previously required by this Court's Arbitration Order.[4]

The Arbitration Order could not be clearer: The parties' Arbitration Agreement is governed by the Federal Arbitration Act ("FAA") (Decl. ¶ 5, Ex. D at 5), the Arbitration Agreement is valid and enforceable (Decl. ¶ 5, Ex. D at 7), and "[w]ithout question, Plaintiff's claims against . . . Ms. Montgomery-Smalls are within the scope of the Arbitration Agreement." (Decl. ¶ 5, Ex. D at 9.) Under the Arbitration Order, Plaintiff therefore is required to assert all of his claims against Montgomery-Smalls in arbitration.

Plaintiff's contention that he could not raise his corporate negligence, joint venture, and alter ego/veil-piercing claims as to Montgomery-Smalls in the first arbitration in light of the stay of proceedings as to FAS and FCOS wrongly presumes that because these claims are asserted against all three Defendants (Montgomery-Smalls, FAS and FCOS), they only can be adjudicated in a forum in which all three Defendants are present. (E.g., Decl. ¶ 12, Ex. K at 8 ("the corporate

[4] In his prior briefing, Plaintiff has argued that his corporate negligence, joint venture, and alter ego/veil-piercing claims against Montgomery-Smalls (and FAS and FCOS) somehow were excluded from the now-concluded arbitration due to the stay of proceedings as to FAS and FCOS. (*See, e.g.,* Decl. ¶ 12, Ex. K at 3-4 ("The corporate negligence claims asserted against [Montgomery-Smalls, FAS, and FCOS] in the instant case were stayed at Defendants' request and Plaintiff was barred from litigating them at arbitration."); *id.* at 10 ("The arbitrator could not determine any issue relating to joint venture because that issue was stayed and therefore not part of the arbitration agreement.").) The Arbitration Order, however, says no such thing. Rather, the Arbitration Order expressly compelled Plaintiff to arbitrate all of his claims against Montgomery-Smalls—including Plaintiffs' claims for corporate negligence, joint venture, and alter ego/veil-piercing; the Arbitration Order stayed only "Plaintiff's claims against FAS and FCOS [] pending the ultimate outcome of arbitration between Plaintiff, the Facility, and Ms. Montgomery-Smalls]." (Decl. ¶ 5, Ex. D at 20.) Thus, Plaintiff was required to present all of his claims against Montgomery-Smalls in the arbitration, where Montgomery-Smalls prevailed on the merits. (*See* Decl. ¶ 8, Ex. G.) The Arbitration Award thus conclusively resolved all of Plaintiff's causes of action against Montgomery-Smalls that were or could have been presented in arbitration. Accordingly, there should be no further claims against Defendants Smalls that are still outstanding. To the extent the Court thinks otherwise, however, any remaining claims against Montgomery-Smalls should be sent back to the arbitrator for resolution.

negligence claims were barred from inclusion [in the arbitration] due to the stays requested by these Defendants.").) Indeed, the United States Supreme Court specifically has held the FAA "leaves no place for the exercise of discretion" by the courts; "when a complaint contains both arbitrable and nonarbitrable claims, the [FAA] requires courts to 'compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.'" *KPMG LLP v. Cocchi*, 565 U.S. 1, 4 (2011) (per curiam) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985)); *see id.* at 1 ("The [FAA] has been interpreted to require that if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation.").

In his complaint, every cause of action that Plaintiff has asserted against FAS and FCOS also is asserted against Montgomery-Smalls—including Plaintiff's claims for corporate negligence, joint venture, and alter ego/veil-piercing liability. (Decl. ¶ 3, Ex. B ¶¶ 26-43.) Thus, under *Cocchi* and *Dean Witter*, to the extent those claims are asserted against Montgomery-Smalls, they are arbitrable claims and must be arbitrated. By the same token, to the extent those claims are asserted against FAS and FCOS (who are non-parties to the Arbitration Agreement), they are non-arbitrable and must be stayed under the Arbitration Order (as explained below). Accordingly, the Court should have granted (and should now grant) Montgomery-Smalls' request for a further order compelling Plaintiff to arbitrate any remaining claims that the Court intends to permit Plaintiff to pursue against Montgomery-Smalls, so that those claims can be sent back to the arbitrator for final resolution

2. Because the Court should enforce the Arbitration Order and compel arbitration of Plaintiff's claims against Montgomery-Smalls, the Court should in turn stay this action as to FAS and FCOS until any arbitration of Plaintiff's claims against Montgomery-Smalls is concluded.

In the Arbitration Order, the Court ruled that pursuant to FAA § 3 and in the interests of efficiency and judicial economy, all proceedings against FAS and FCOS in this case must be stayed pending the ultimate outcome of arbitration between Plaintiff and Montgomery-Smalls. (Decl. ¶ 5, Ex. D at 20.) This aspect of the Court's Arbitration Order must be enforced as well.

Indeed, the relationship between the part of Defendants' Underlying Motion that seek to compel arbitration of Plaintiff's claims against Montgomery-Smalls and the part that seeks a stay of this action as to FAS and FCOS pending the outcome of arbitration between Plaintiff and Montgomery-Smalls is such that the grant of the first part (i.e., Montgomery-Smalls's request to compel arbitration) requires the grant of the second (i.e., FAS and FCOS's requests for a stay)—and thus to show that the first part should be granted (as, most respectfully, has been done) is in turn to show that the second part should as well. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.") (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to

arbitration under an agreement in writing for such arbitration' upon the application of one of the parties.").

B. The Court should have found (and should now find) that Plaintiff's Underlying Motion should be denied.

Plaintiff's claims in this case involve allegations of nursing home negligence at Riverside. Arbitration has already been conducted arising from the same facts and circumstances alleged in the present case. The arbitrator, Ret. Judge Doyen E. "Jack" Early, III, rendered an award of $87,007.00 to the Plaintiff relative to a leg fracture sustained by Ms. Varner while she was a resident at the Facility. Riverside paid this award. Judge Early further found that Plaintiff failed to prove his wrongful death allegations, failed to prove any breach of the standard of care on the part of Montgomery-Smalls, and that "Plaintiff is not entitled to judgment against Jerrolyn Montgomery-Smalls."

Despite Judge Early's arbitration ruling, Plaintiff has continued to pursue claims against Montgomery-Smalls and has not dismissed her from the present suit. Defendants filed a Motion for Summary Judgment and asserted that all claims asserted against Montgomery-Smalls had already been addressed at arbitration. As a result, any further claims against were barred pursuant to the doctrine of res judicata. In opposition to Montgomery-Smalls' motion, Plaintiff took the position that certain causes of action asserted against Montgomery-Smalls in the Complaint were not addressed at arbitration.

Plaintiff's position as it relates to Montgomery-Smalls is directly contradicted by the plain language of the pertinent agreements of the parties and orders of the Court and the arbitrator in this case. Nonetheless, Judge William C. McMaster, III, denied the Defendants' motions in a Form 4 Order dated September 20, 2024, without providing any reasoning or explanation. He further ordered the Defendants to respond to Plaintiff's discovery requests in the present matter.

Accordingly, to the extent there are any claims or causes of action asserted against Montgomery-Smalls that were not previously addressed at arbitration, Defendants assert that those claims must be arbitrated pursuant to the parties' agreement, Judge Young's Arbitration Order, and Judge Early's rulings (as arbitrator) as referenced above.

While the issue of arbitration remains in dispute, Defendants cannot participate in discovery, as to do so would risk waiver of any remaining arbitration rights. *See, e.g. Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007). If Defendants' Underlying Motion is granted (as, most respectfully, it should be), this case (and, along with it, discovery, to include responses subject to Judge McMaster's Order) will be stayed as to FAS and FCOS (i.e., non-arbitrating Defendants).[5] And, on the other hand, as Plaintiff himself observed in his briefing, the denial of Defendants' Underlying Motion is immediately appealable. *See* S.C. Code Ann. § 15-48-200(a)(1) (2005); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 626, 667 S.E.2d 1, 4 (Ct. App. 2008); *Towles v. United HealthCare Corp.*, 338 S.C. 29, 35, 524 S.E.2d 839, 842–43 (Ct.App.1999). An appeal would stay all circuit court proceedings. Rule 241(a), SCACR ("As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision."); *id.* (providing that, upon service of the notice of appeal, the circuit court's jurisdiction extends only to "matters not affected by the appeal"); S.C. Code Ann. § 18-9-220. Therefore, at a minimum, Plaintiff's Underlying Motion should not be addressed or ruled upon until such time as Defendants' Underlying Motion has been fully resolved with finality.

[5] And, of course, if Defendants' Underlying Motion is granted, the claims against Montgomery-Smalls will no longer be before this Court but will instead proceed in the arbitral forum.

Finally, Defendants have not acted in a dilatory manner and have not willfully violated an order of this Court. There remains a legitimate dispute regarding the arbitrability of the claims asserted against Montgomery-Smalls and the associated stay as to FAS and FCOS. For the reasons set forth above, this dispute directly impacts the parties' ability to engage in discovery. Defendants' efforts to enforce their arbitration rights are not frivolous, nor interposed for delay or in bad faith, but instead founded upon well-established principles of South Carolina law. Accordingly, there has been no conduct by the Defendants to warrant sanctions under Rule 37, SCRCP, much less striking Defendants' answer as Plaintiff suggests. *See Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997). Accordingly, Plaintiff's request for sanctions should be denied.

WHEREFORE, for the foregoing reasons (and, again, for that matter, for all of the reasons previously advanced to the Court in and in support of Defendants' Underlying Motion and in opposition to Plaintiff's Underlying Motion (both those advanced in writing and those advanced via oral argument), all of which Defendants incorporate by reference herein and asks the Court to (re)consider and expressly rule upon in full), Defendants ask that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting Defendants' Underlying Motion and denying Plaintiff's Underlying Motion.

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

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

CLEMENT RIVERS, LLP

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Charleston, South Carolina

February 4, 2025

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

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-Smalls,

Appellants.

NOTICE OF APPEAL

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Attorney for Respondent

Defendants/Appellants, Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, and Jerrolyn Montgomery-Smalls ("Appellants"), hereby appeal the following orders of the Honorable Jennifer B. McCoy, Circuit Court Judge:

- **Order filed February 3, 2025, denying Defendants' Motion to Compel Arbitration and Stay Proceedings and granting Plaintiff's Rule to Show Cause**; and

- **Order filed February 7, 2025, denying Defendants' Motion to Alter, Amend, and/or Reconsider Order Denying Defendants' Motion to Compel Arbitration and Stay Proceedings and Granting Plaintiff's Rule to Show Cause**.

Copies of the appealed orders are attached hereto and incorporated herein by reference. Appellants received written notice of entry of the most recent order on February 7, 2025.

Respectfully submitted,

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Attorneys for Appellants

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February 18, 2025

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

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-Smalls,

Appellants.

PROOF OF SERVICE

CLEMENT RIVERS, LLP
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Attorneys for Appellants

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellants, hereby certify that Appellants' **NOTICE OF APPEAL** was served on Respondent on February 18, 2025, by emailing (see attached email) a copy of the same to Respondent's counsel of record:

Shawn T. Pinkston, Esquire
PINKSTON LAW FIRM, LLC
shawnpinkston@me.com

Attorney for Respondent

I also certify that a copy of Appellants' **NOTICE OF APPEAL** was today, February 18, 2025, E-Filed with the lower court (see attached NEF), which also, i.e., in addition to service by email, effected service of the notice today on the above-identified counsel of record via the E-Filing System.

Respectfully submitted,

CLEMENT RIVERS, LLP

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

Attorneys for Appellants

Charleston, South Carolina

February 18, 2025

From:	Hines, Russell
To:	"shawnpinkston@me.com"
Cc:	Riddle, Matthew; Bell, Pollyana (Polly); Wakeham, Rebecca (Becky); Eadie, Christine; Justman, Aimee; Brown, Stephen L.; Davis, Jay; Peterson, Susan; Bohannon, Kiara
Subject:	Haynes v. Fundamental (Case No. 2021-CP-10-02744) -- Notice of Appeal
Date:	Tuesday, February 18, 2025 3:57:00 PM
Attachments:	image001.png Haynes v. Fundamental (Case No. 2021-CP-10-02744) -- Notice of Appeal.pdf Appealed Order 1 -- 2025 02-03 -- Order Denying MTCA and Granting RTS.pdf Appealed Order 2 -- 2025 02-07 -- Order Denying MTR.pdf

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

Russell G. Hines
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****** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2021CP1002744

Official File Stamp:	02-18-2025 03:46:45 PM
Court:	CIRCUIT COURT Common Pleas Charleston
Case Caption:	William Haynes , plaintiff, et al VS Fundamental Administrative Services Llc , defendant, et al
Document(s) Submitted:	Appeal/Notice of Appeal to Court of Appeals - Exhibit/Filing of Exhibits - Exhibit/Filing of Exhibits
Filed by or on behalf of:	Russell Grainger Hines

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

The following people were served electronically:

Donald Jay Davis, Jr. for Fundamental Administrative Services Llc et al
Matthew Oliver Riddle for Fundamental Administrative Services Llc et al
Shawn Travis Pinkston for William Haynes, Elizabeth Varner
Russell Grainger Hines for Fundamental Administrative Services Llc et al

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

Williams Haynes Personal Representative
Elizabeth Varner Estate

CERTIFICATE OF COUNSEL

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

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines

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January 20, 2026