THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

Maité Murphy, Circuit Court Judge

Case No. 2023-CP-18-02145
Appellate Case No. 2025-001032

Steve Rickenbaker,

Respondent,

v.

Oakbrook Healthcare, LLC
d/b/a Oakbrook Health and Rehabilitation Center,

Appellant.

RECORD ON APPEAL

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Attorneys for Appellant

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CIVIL ACTION NO.: 2021-CP-18-01410
	)	
Steve Rickenbaker,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
Oakbrook Healthcare, LLC d/b/a Oakbrook Health and Rehabilitation Center, Floyd Brace Company, Inc. Trident Medical Center, LLC d/b/a Trident Medical Center,	)	
Defendants.	)	

This matter came before the Court on April 13, 2022, on a Motion to Compel Arbitration filed by Defendant Oakbrook Health Care, LLC d/b/a Oakbrook Health and Rehabilitation Center pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. Present at the video conference hearing and arguing on behalf of Defendants was Russell G. Hines. Appearing and arguing on behalf of Plaintiff was Neil E. Alger. After reviewing the submissions of the parties, the pleadings, and hearing the arguments of counsel, the Court denies Defendant's Motion to Compel Arbitration for the reasons set forth herein.

Plaintiff Steve Rickenbaker filed this action on August 9, 2021, in the Dorchester County Court of Common Pleas after a fall in which he fractured his spine and right knee. Rickenbaker alleges that while he was admitted to Oakbrook's facility, an occipital scalp pressure ulcer that originally developed at Trident

Medical Center worsened, and that he sustained a deep tissue wound/ulcer to his sacrum. Eventually, the wound developed into a stage IV ulcer with bone exposure and required debridement and a wound vac. Rickenbaker has alleged claims for negligence and gross negligence against Oakbrook for its conduct while he was being cared for at its facility.

The basis of Oakbrook's Motion is that a valid and enforceable arbitration agreement exists between the parties. The Arbitration Agreement relied upon by Oakbrook was signed by Rickenbaker's wife at the time of his admission to Oakbrook's facility, and it appears that no valid power of attorney had been filed at that time with a register of deeds in South Carolina for Ms. Rickenbaker to make healthcare or financial decisions on Rickenbaker's behalf. Evidence presented by Rickenbaker indicates that he was suffering from dementia and did not have the capacity to sign the facility's Admission Agreement or Arbitration Agreement at the time he was admitted. However, Rickenbaker does not contest that his wife likely had authority to enter the Admission Agreement on his behalf under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10 *et seq.*

Even if Ms. Rickenbaker had authority under the Act to enter the Admission Agreement as an act in furtherance of Rickenbaker's health care needs, it does not necessarily follow that she had authority to enter a separate Arbitration Agreement under the Act. Therefore, the Court must determine (1) if the Arbitration Agreement merged with and was a part of the Admission Agreement such that Rickenbaker would be equitably estopped from denying the Arbitration Agreement's

validity, and (2) if Ms. Rickenbaker had actual or apparent authority to enter the Arbitration Agreement on behalf of Rickenbaker. The answer to both inquiries is "no".

While a signed Arbitration Agreement exists in this case, it is not a valid, enforceable agreement for the simple reason that Rickenbaker's wife, Faye Rickenbaker, did not have any authority to execute the Arbitration Agreement at the time it was entered by the parties. A spouse is authorized to make decisions concerning health care under the Adult Health Care Consent Act. S.C. Code Ann. § 44-66-30(A). In contrast, arbitration is a means of resolving a legal dispute outside of the typical civil litigation process – a definition unrelated to physical or mental condition. *See* Black's Law Dictionary, 125 (10th ed. 2014).

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

Oakbrook's Arbitration Agreement is optional and separate from its Admission Agreement and contains no provision for medical, nursing, or health care services to be provided to residents, nor does it require any financial commitment to pay for such services. The agreement is separately titled "Facility – Resident/Representative Arbitration Agreement", is paginated as "Page 1 of 1", and contains its own signature lines. The agreement does not contain the name of Rickenbaker anywhere within the document and is signed by Ms. Rickenbaker as "Resident/Representative." Further, the Arbitration Agreement by its very language distinguishes between itself and the Admission Agreement, stating that the Arbitration Agreement will survive any "breach of this Agreement or the Admission Agreement." While the Admission Agreement purports to incorporate admissions materials into itself "by reference herein", when viewed alongside the other details of the agreements, it creates at best an ambiguity as to merger when taken in context of the totality of the circumstances, and "the law is clear that any ambiguity in such a clause is construed against the drafter", i.e., Oakbrook. *See Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

In sum, the Act provides statutory authority for family members to make an incapacitated loved one's health care decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code. Ms. Rickenbaker had no legal authority to sign the Arbitration Agreement, and Oakbrook knew or should have known this fact, as she did not present them with documentation demonstrating power of attorney or

guardianship. Since Ms. Rickenbaker lacked legal authority, the Arbitration Agreement is void and unenforceable.

Further, Rickenbaker cannot be equitably estopped from denying enforcement of the Arbitration Agreement. "Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements." *Kelly v. Logan, Jollev & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped acted in a way amounting to a false representation. *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). Oakbrook cannot meet its burden to establish this element. There is no evidence Rickenbaker himself acted in a way amounting to a false representation to Oakbrook regarding Ms. Rickenbaker's status or that Rickenbaker intended for Oakbrook to act in reliance on her conduct. If anything, the evidence shows that, more likely than not, Rickenbaker was not consciously aware of anything that was occurring at the time of his admission. Further, the Admission Agreement and Arbitration Agreement are separate contracts that do not merge. *See Hodge v. UniHealth Post-Acute Care of Bamberg LLC*, 422 S.C. 544, 561-63, 813 S.E.2d 292, 308 (Ct. App. 2018); *Thompson v. Pruitt Corp*, 416 S.C. 43, 50, 784 S.E.2d 679, 683 (Ct. App. 2016); *Coleman*, 407 S.C. at 352, 755 S.E.2d at 450.

Oakbrook's assertion that Rickenbaker is equitably estopped from denying the validity of the Arbitration Agreement seems to hinge on a direct benefits theory of estoppel, i.e., that since Rickenbaker benefited from the terms of the Admission

Agreement, he should be estopped from denying the validity of the Arbitration Agreement. *See Wilson v. Willis*, 426 S.C. 326, 340, 827 S.E.2d 167, 175 (2019). Virtually all of the Circuit Court orders filed by Oakbrook in support of its Motion rely in some form or another on this theory. However, as the Supreme Court explained in *Wilson*, to successfully assert direct benefits estoppel, the arbitration agreement must be a clause within the larger admissions agreement, and the plaintiff must be seeking to assert causes of action that arise from and are created by the contract. Here, as explained above and below, the Admission Agreement and optional Arbitration Agreement are separate documents that did not merge. Second, Rickenbaker does not assert breach of contract, or a violation of contractual duties, and instead has brought his lawsuit under a negligence theory arising from common law duties. *See Wilson*, 426 S.C. at 342, 827 S.E.2d at 176. If anything, Rickenbaker's claims are indirectly related to the Arbitration Agreement, as it was optional, ancillary to, and separate from the Admission Agreement. *See id.* (stating that under direct benefits estoppel a nonsignatory's claim must be directly, not just indirectly, based on the contract containing the arbitration agreement).

Additionally, Ms. Rickenbaker did not have any authority independent of the Adult Health Care Consent Act to enter the Arbitration Agreement. The legal consequences of an agent's actions can only be attributed to the principle when the agent has actual or apparent authority. *Charleston Registry v. Young Clement*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). South Carolina law requires that to prove apparent authority, the defendant must show that the purported principal

consciously or impliedly represented another to be his agent. *Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). For the reasons mentioned above, the Adult Health Care Consent Act did not bestow Ms. Rickenbaker with the authority to enter the Agreement. The simple fact that Ms. Rickenbaker signed the agreements so that her husband could be admitted to Oakbrook and receive health care in no way indicates a manifestation of authority by Rickenbaker to waive his right to a jury trial or agree to arbitration. There is no evidence that Rickenbaker ever manifested any form of assent establishing Ms. Rickenbaker as his agent, nor could he have in his condition at the time of admission.

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

In the alternative, Oakbrook has requested that the Court grant additional discovery on the nature of Ms. Rickenbaker's agency relationship with her husband. Here, the only relevant and necessary evidence for the Court to make its determination is already available for the Court's review. Any further discovery

with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, waste judicial resources, and increase costs for both parties unnecessarily.

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

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

IT IS SO ORDERED.

_____
The Honorable R. Markley Dennis, Jr.

_____, 2022.
Moncks Corner, South Carolina

Dorchester Common Pleas

Case Caption: Steve Rickenbaker VS Oakbrook Healthcare Llc , defendant, et al

Case Number: 2021CP1801410

Type: Order/Other

R. Markley Dennis Jr., 2060

R. Markley Dennis Jr., 2060

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CASE NO.: 2021-CP-18-1410
	)	
STEVE RICKENBAKER,	)	
	)	
Plaintiff,	)	
	)	**CONSENT ORDER TO STRIKE CASE FROM DOCKET PURSUANT TO RULE 40(J)**
vs.	)	
	)	
OAKBROOK HEALTHCARE, LLC D/B/A OAKBROOK HEALTH AND REHABILITATION CENTER, FLOYD BRACE COMPANY, INC., TRIDENT MEDICAL CENTER, LLC D/B/A TRIDENT MEDICAL CENTER,	)	
	)	
Defendants.	)	
	)	

IT APPEARING to the satisfaction of the Court that the parties hereto have agreed to strike the above-captioned case from the trial docket by agreement, pursuant to SCRCP Rule 40(j),

NOW THEREFORE, upon Motion of Lee D. Cope and John E. Parker, Jr., attorneys for Plaintiff and with the consent of the attorneys for the Defendants, it is

ORDERED, ADJUDGED AND DECREED that the above-captioned case is hereby stricken from the trial docket in accordance with the agreement of the parties pursuant to SCRCP Rule 40(j), without prejudice, with leave to restore within one (1) year of the date stricken. The parties are permitted and encouraged to engage in additional discovery, conduct depositions, and participate in mediation while the above captioned case is in 40(j) status.

IT IS SO ORDERED.

This _____ day of February, 2023.
Dorchester, South Carolina

Chief Administrative Judge
First Judicial Circuit

WE SO MOVE AND CONSENT:

PARKER LAW GROUP

By: *s/ Lee. D. Cope*

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Attorneys for Plaintiff

WE CONSENT:

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By: *s/ Katherine Walker*

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Attorneys for Floyd Brace Company, Inc.

WE CONSENT:

HALL BOOTH SMITH, P.C.

By: *s/ Jennie M. Smith*

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Attorneys for Trident Medical Center, LLC d/b/a Trident Medical Center

WE CONSENT:

CLEMENT RIVERS, LLP

By: *s/ D. Jay Davis*

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Attorneys for Oakbrook Healthcare, LLC d/b/a Oakbrook Health and Rehabilitation Center

Dorchester Common Pleas

Case Caption: Steve Rickenbaker VS Oakbrook Healthcare Llc , defendant, et al

Case Number: 2021CP1801410

Type: Order/Dismissal Rule 40J

So Ordered

s/ Maite Murphy 2166

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CASE NO.: 2021-CP-18-1410
	)	
STEVE RICKENBAKER,	)	
	)	
Plaintiff,	)	
	)	**CONSENT ORDER TO RESTORE**
vs.	)	
	)	
OAKBROOK HEALTHCARE, LLC D/B/A OAKBROOK HEALTH AND REHABILITATION CENTER,	)	
	)	
Defendants.	)	
	)	

By consent order with ongoing discovery, this action was formerly stricken from the trial docket pursuant to Rule 40(j), SCRCP.

The parties, by and through their undersigned counsel, hereby consent to restore this action to the General Docket, with a new case number assigned. The parties agree that any and all discovery conducted prior to and during the time the case was stricken shall carry over and me made a part of the new action.

NOW, THEREFORE, with consent of the parties, it is hereby ORDERED, ADJUDGED, AND DECREED that this action is restored to the General Docket with a new case number and upon payment of the filing fee.

AND IT IS SO ORDERED!

This _____ day of December, 2023.
Dorchester, South Carolina

Chief Administrative Judge
First Judicial Circuit

WE SO MOVE AND CONSENT:

PARKER LAW GROUP

By: *s/ Lee. D. Cope*

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Attorneys for Plaintiff

WE CONSENT:

CLEMENT RIVERS, LLP

By: *s/James D. Gandy*

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Attorneys for Oakbrook Healthcare, LLC d/b/a Oakbrook Health and Rehabilitation Center

Dorchester Common Pleas

Case Caption: Steve Rickenbaker VS Oakbrook Healthcare Llc , defendant, et al

Case Number: 2021CP1801410

Type: Order/Consent Order

So Ordered

s/ Maite Murphy 2166

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2023CP1802145

Steve Rickenbaker
PLAINTIFF(S)

Oakbrook Healthcare 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:

A motion to compel was set to be heard on July 16, 2024. At the call of the case plaintiff attorney was not present, therefore, this case is hereby dismissed.

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 07/31/2024 .

Russell Grainger Hines for Oakbrook Healthcare Llc,Oakbrook Health And Rehabilitation Center
Dylan Carlyle Kidd
Gaillard Townsend Dotterer, III for Oakbrook Healthcare Llc,Oakbrook Health And Rehabilitation Center
James D. Gandy, III for Oakbrook Healthcare Llc,Oakbrook Health And Rehabilitation Center
Lee Deer Cope for Steve Rickenbaker
Donald Jay Davis, Jr. for Oakbrook Healthcare Llc,Oakbrook Health And Rehabilitation Center

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.

Dorchester Common Pleas

Case Caption: Steve Rickenbaker VS Oakbrook Healthcare Llc , defendant, et al

Case Number: 2023CP1802145

Type: Order/Electronic Form 4

It is so Ordered!

s/Diane S. Goodstein

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2023CP1802145

Steve Rickenbaker
PLAINTIFF(S)

Oakbrook Healthcare 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:

Based on the filing of a Form 4 Order on July 31, 2024, the Court has reviewed the record and notes and thereby issues this AMENDED ORDER.

Defendant Oakbrook Healthcare, LLC d/b/a Oakbrook Health and Rehabilitation Center's Motion to Compel Arbitration was scheduled to be heard on July 16, 2024. Counsel for the Defendant failed to be present, therefore the Motion to Compel Arbitration is dismissed without prejudice.

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 11/26/2024 .

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.

Dorchester Common Pleas

Case Caption: Steve Rickenbaker VS Oakbrook Healthcare Llc , defendant, et al

Case Number: 2023CP1802145

Type: Order/Electronic Form 4

It is so Ordered!

s/Diane S. Goodstein

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CIVIL ACTION NO.: 2023-CP-18-02145
	)	
Steve Rickenbaker,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
Oakbrook Healthcare, LLC d/b/a Oakbrook Health and Rehabilitation Center,	)	
	)	
Defendants.	)	

This matter came before the Court on January 21, 2025, on a Motion to Compel Arbitration filed by Defendant Oakbrook Health Care, LLC d/b/a Oakbrook Health and Rehabilitation Center pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. Present at the video conference hearing and arguing on behalf of Defendant was Russell G. Hines. Appearing and arguing on behalf of Plaintiff was John E. Parker, Jr. After reviewing the submissions of the parties, the pleadings, and hearing the arguments of counsel, the Court denies Defendant's Motion to Compel Arbitration for the reasons set forth herein.

Plaintiff Steve Rickenbaker filed this action on August 9, 2021, in the Dorchester County Court of Common Pleas after a fall in which he fractured his spine and right knee. Rickenbaker alleges that while he was admitted to Oakbrook's facility, an occipital scalp pressure ulcer that originally developed at Trident Medical Center worsened, and that he sustained a deep tissue wound/ulcer to his

sacrum. Eventually, the wound developed into a stage IV ulcer with bone exposure and required debridement and a wound vac. Rickenbaker has alleged claims for negligence and gross negligence against Oakbrook for its conduct while he was being cared for at its facility.

The basis of Oakbrook's Motion is that a valid and enforceable arbitration agreement exists between the parties. The Arbitration Agreement relied upon by Oakbrook was signed by Rickenbaker's wife at the time of his admission to Oakbrook's facility, and it appears that no valid power of attorney had been filed at that time with a register of deeds in South Carolina for Ms. Rickenbaker to make healthcare or financial decisions on Rickenbaker's behalf. Evidence presented by Rickenbaker indicates that he was suffering from dementia and did not have the capacity to sign the facility's Admission Agreement or Arbitration Agreement at the time he was admitted. However, Rickenbaker does not contest that his wife likely had authority to enter the Admission Agreement on his behalf under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10 *et seq.*

Even if Ms. Rickenbaker had authority under the Act to enter the Admission Agreement as an act in furtherance of Rickenbaker's health care needs, it does not necessarily follow that she had authority to enter a separate Arbitration Agreement under the Act. Therefore, the Court must determine (1) if the Arbitration Agreement merged with and was a part of the Admission Agreement such that Rickenbaker would be equitably estopped from denying the Arbitration Agreement's validity, and (2) if Ms. Rickenbaker had actual or apparent authority to enter the

Arbitration Agreement on behalf of Rickenbaker. The answer to both inquiries is "no".

While a signed Arbitration Agreement exists in this case, it is not a valid, enforceable agreement for the simple reason that Rickenbaker's wife, Faye Rickenbaker, did not have any authority to execute the Arbitration Agreement at the time it was entered by the parties. A spouse is authorized to make decisions concerning health care under the Adult Health Care Consent Act. S.C. Code Ann. § 44-66-30(A). In contrast, arbitration is a means of resolving a legal dispute outside of the typical civil litigation process – a definition unrelated to physical or mental condition. *See* Black's Law Dictionary, 125 (10th ed. 2014).

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

Oakbrook's Arbitration Agreement is optional and separate from its Admission Agreement and contains no provision for medical, nursing, or health care

services to be provided to residents, nor does it require any financial commitment to pay for such services. The agreement is separately titled "Facility – Resident/Representative Arbitration Agreement", is paginated as "Page 1 of 1", and contains its own signature lines. The agreement does not contain the name of Rickenbaker anywhere within the document and is signed by Ms. Rickenbaker as "Resident/Representative." Further, the Arbitration Agreement by its very language distinguishes between itself and the Admission Agreement, stating that the Arbitration Agreement will survive any "breach of this Agreement or the Admission Agreement." While the Admission Agreement purports to incorporate admissions materials into itself "by reference herein", when viewed alongside the other details of the agreements, it creates at best an ambiguity as to merger when taken in context of the totality of the circumstances, and "the law is clear that any ambiguity in such a clause is construed against the drafter", i.e., Oakbrook. *See Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

In sum, the Act provides statutory authority for family members to make an incapacitated loved one's health care decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code. Ms. Rickenbaker had no legal authority to sign the Arbitration Agreement, and Oakbrook knew or should have known this fact, as she did not present them with documentation demonstrating power of attorney or guardianship. Since Ms. Rickenbaker lacked legal authority, the Arbitration Agreement is void and unenforceable.

Further, Rickenbaker cannot be equitably estopped from denying enforcement of the Arbitration Agreement. "Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements." *Kelly v. Logan, Jollev & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped acted in a way amounting to a false representation. *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). Oakbrook cannot meet its burden to establish this element. There is no evidence Rickenbaker himself acted in a way amounting to a false representation to Oakbrook regarding Ms. Rickenbaker's status or that Rickenbaker intended for Oakbrook to act in reliance on her conduct. If anything, the evidence shows that, more likely than not, Rickenbaker was not consciously aware of anything that was occurring at the time of his admission. Further, the Admission Agreement and Arbitration Agreement are separate contracts that do not merge. *See Hodge v. UniHealth Post-Acute Care of Bamberg LLC*, 422 S.C. 544, 561-63, 813 S.E.2d 292, 308 (Ct. App. 2018); *Thompson v. Pruitt Corp*, 416 S.C. 43, 50, 784 S.E.2d 679, 683 (Ct. App. 2016); *Coleman*, 407 S.C. at 352, 755 S.E.2d at 450.

Oakbrook's assertion that Rickenbaker is equitably estopped from denying the validity of the Arbitration Agreement seems to hinge on a direct benefits theory of estoppel, i.e., that since Rickenbaker benefited from the terms of the Admission Agreement, he should be estopped from denying the validity of the Arbitration Agreement. *See Wilson v. Willis*, 426 S.C. 326, 340, 827 S.E.2d 167, 175 (2019).

Virtually all of the Circuit Court orders filed by Oakbrook in support of its Motion rely in some form or another on this theory. However, as the Supreme Court explained in *Wilson*, to successfully assert direct benefits estoppel, the arbitration agreement must be a clause within the larger admissions agreement, and the plaintiff must be seeking to assert causes of action that arise from and are created by the contract. Here, as explained above and below, the Admission Agreement and optional Arbitration Agreement are separate documents that did not merge. Second, Rickenbaker does not assert breach of contract, or a violation of contractual duties, and instead has brought his lawsuit under a negligence theory arising from common law duties. *See Wilson*, 426 S.C. at 342, 827 S.E.2d at 176. If anything, Rickenbaker's claims are indirectly related to the Arbitration Agreement, as it was optional, ancillary to, and separate from the Admission Agreement. *See id.* (stating that under direct benefits estoppel a nonsignatory's claim must be directly, not just indirectly, based on the contract containing the arbitration agreement).

Additionally, Ms. Rickenbaker did not have any authority independent of the Adult Health Care Consent Act to enter the Arbitration Agreement. The legal consequences of an agent's actions can only be attributed to the principle when the agent has actual or apparent authority. *Charleston Registry v. Young Clement*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). South Carolina law requires that to prove apparent authority, the defendant must show that the purported principal consciously or impliedly represented another to be his agent. *Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). For the reasons mentioned

above, the Adult Health Care Consent Act did not bestow Ms. Rickenbaker with the authority to enter the Agreement. The simple fact that Ms. Rickenbaker signed the agreements so that her husband could be admitted to Oakbrook and receive health care in no way indicates a manifestation of authority by Rickenbaker to waive his right to a jury trial or agree to arbitration. There is no evidence that Rickenbaker ever manifested any form of assent establishing Ms. Rickenbaker as his agent, nor could he have in his condition at the time of admission.

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

In the alternative, Oakbrook has requested that the Court grant additional discovery on the nature of Ms. Rickenbaker's agency relationship with her husband. Here, the only relevant and necessary evidence for the Court to make its determination is already available for the Court's review. Any further discovery with the goal of revisiting the arbitrability of this case would only serve to protract

this litigation, waste judicial resources, and increase costs for both parties unnecessarily.

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

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

IT IS SO ORDERED.

_____
The Honorable Maite Murphy

_____, 2025.
Dorchester, South Carolina

Dorchester Common Pleas

Case Caption: Steve Rickenbaker VS Oakbrook Healthcare Llc , defendant, et al

Case Number: 2023CP1802145

Type: Order/Compel

So Ordered

s/ Maite Murphy 2166

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2023CP1802145

Steve Rickenbaker
PLAINTIFF(S)

Oakbrook Healthcare 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 on Defendant's Motion to Alter, Amend, and/or Reconsider the Court's Order Denying the previously addressed Motion to Compel Arbitration. Upon review of the record, relevant law, and arguments before the Court, the Court finds no error of law or fact nor new evidence presented and respectfully DENIES this motion.

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 05/23/2025 .

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.

Dorchester Common Pleas

Case Caption: Steve Rickenbaker VS Oakbrook Healthcare Llc , defendant, et al

Case Number: 2023CP1802145

Type: Order/Electronic Form 4

So Ordered

s/ Maite Murphy 2166

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CIVIL ACTION NO.: 2021-CP-18-
	)	
Steve Rickenbaker,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**SUMMONS**
	)	
Oakbrook Healthcare, LLC d/b/a Oakbrook Health and Rehabilitation Center, Floyd Brace Company, Inc. Trident Medical Center, LLC d/b/a Trident Medical Center,	)	
	)	
Defendant.	)	

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at P.O. Box 457 Hampton, SC 29924, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: *s/ Lee D. Cope*

Lee D. Cope
SC Bar No.: 14361
John E. Parker
SC Bar No.: 4442
P.O. Box 457
Hampton, SC 29924
(803) 943-2111

ATTORNEYS FOR THE PLAINTIFF

August 9, 2021.
Hampton, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CIVIL ACTION NO.: 2021-CP-18-
	)	
Steve Rickenbaker,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**COMPLAINT**
	)	
Oakbrook Healthcare, LLC d/b/a Oakbrook Health and Rehabilitation Center, Floyd Brace Company, Inc. Trident Medical Center, LLC d/b/a Trident Medical Center,	)	
	)	
Defendant.	)	

The Plaintiff alleges:

1. That the Plaintiff is a citizen and resident of Dorchester County, South Carolina and brings this action for all damages authorized by said statute.

2. That upon information and belief, Oakbrook Healthcare d/b/a Oakbrook Health and Rehabilitation Center (herein referred to as "Oakbrook") a foreign limited liability company authorized to do business in South Carolina and was doing business in Dorchester County, South Carolina.

3. That upon information and belief Defendant, Floyd Brace Company, Inc., (herein after referred to as "Floyd") is a South Carolina Corporation which sells, markets, and distributes custom orthotic braces.

4. That upon information and belief, Trident Medical Center, LLC d/b/a Trident Medical Center (herein after referred to as "Trident") is organized under the laws of South Carolina with its principal place of business in Charleston County.

5. That on May 11, 2018, Mr. Rickenbaker was admitted to Trident after suffering a fall that resulted in multiple c-spine fractures and a right knee fracture of the proximal fibula.

6. Defendant, Floyd, provided a neck collar to stabilize his cervical spine and a knee immobilizer to his right knee.

7. Throughout the duration of Mr. Rickenbaker's stay at Trident, his condition deteriorated, and he developed complications, including but not limited to, an occipital scalp pressure ulcer and hospital-associated delirium.

8. On June 18, 2018, Mr. Rickenbaker was admitted to Oakbrook.

9. During his stay at Defendant's facility, Mr. Rickenbaker's occipital scalp pressure ulcer worsened, and he sustained a deep tissue wound to his sacrum.

10. On June 26, 2018, Mr. Rickenbaker's occipital wound was determined to be a stage IV wound measuring 3x10x0.5 cm with bone exposure and required debridement and a wound vac for treatment.

FOR A FIRST CAUSE OF ACTION

(Negligence/Gross Negligence)

11. As to all Defendants, while in the care, custody and control, Plaintiff did suffer grave and severe injuries and humiliation at the facility as a direct and proximate result of the following negligent, reckless, willful, carless, negligent per se and grossly negligent acts of the Defendants, combining and concurring:

a. In failing to provide proper and adequate medical attention;

b. In failing to provide adequate assessments and monitoring of Mr. Rickenbaker's skin condition;

c. In failing to properly monitor and document changes in Mr. Rickenbaker's condition;

d. In failing to implement appropriate skin prevention measures;

e. In failing to turn and reposition Mr. Rickenbaker;

f. In failing to properly adjust Mr. Rickenbaker's neck collar;

g. In failing to complete a timely assessment;

h. In failing to have sufficient nursing and nursing assist time to provide the care that was needed for Mr. Rickenbaker;

i. In failing to manage its revenue and income such that appropriate care may be rendered to Mr. Rickenbaker;

j. In failing to exercise reasonable care for the well-being of Mr. Rickenbaker under the circumstances;

k. In failing to exercise that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances; and

l. In such other particulars as the evidence may establish.

12. That as a direct and proximate result of the aforesaid deviations from the standard of care, which constituted negligent, reckless, willful, careless, negligent *per se.* and grossly negligent acts of the Defendant, Mr. Rickenbaker suffered damages which caused him to incur medical bills, endure pain, suffering, mental anguish, loss of enjoyment of life, and other damages recognized by law.

13. That by reason of the foregoing, Plaintiff is entitled to judgment against the Defendant for both actual and punitive damages; all of which damages were proximately caused by the Defendants' acts and/or missions as are more fully set forth above, in an amount as may be set and determined by the trier of fact in this matter.

WHEREFORE, Plaintiff prays for judgment against the Defendant for actual damages, together with punitive damages in an appropriate amount, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: *s/ Lee D. Cope*

Lee D. Cope
SC Bar No.: 14361
John E. Parker
SC Bar No.: 4442
P.O. Box 457
Hampton, SC 29924
(803) 943-2111

ATTORNEYS FOR THE PLAINTIFF

August 9, 2021.
Hampton, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
STEVE RICKENBAKER,	)	CASE NO. 2021-CP-18-01410
	)	
PLAINTIFF,	)	
	)	
vs.	)	**ANSWER TO PLAINTIFF'S COMPLAINT ON BEHALF OF OAKBROOK HEALTH CARE, LLC D/B/A OAKBROOK HEALTH AND REHABILITATION CENTER**
	)	
OAKBROOK HEALTHCARE, LLC D/B/A OAKBROOK HEALTH AND REHABILITATION CENTER, FLOYD BRACE COMPANY, INC. TRIDENT MEDICAL CENTER, LLC D/B/A TRIDENT MEDICAL CENTER,	)	
	)	
DEFENDANTS.	)	
	)	

TO: LEE DEER COPE , ATTORNEY FOR THE PLAINTIFF:

The Defendant, Oakbrook Health Care, LLC d/b/a Oakbrook Health and Rehabilitation Center (hereinafter referred to as the "Facility" or this "Defendant"), by and through its undersigned counsel, *and without waiving and hereby expressly reserving all defenses, including any and all rights to compel this matter to arbitration*, hereby responds and answers the Plaintiff's Complaint as follows:

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

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

3. Responding to the allegations set forth in Paragraph 2 of Plaintiff's Complaint, this Defendant states that its proper name is Oakbrook Health Care, LLC and admits that this Defendant is a Delaware limited liability company which operates the skilled nursing facility at issue in Plaintiff's Complaint located in Dorchester County, South Carolina. Any allegations inconsistent with this response are denied and strict proof is demanded thereof.

4. The allegations set forth in Paragraphs 3 and 4 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 allege liability and/or damages against this Defendant.

5. Responding to the allegations set forth in Paragraph 5 of Plaintiff's Complaint, this Defendant would crave reference to Mr. Rickenbacker's medical records for their contents concerning the dates of Mr. Rickenbaker's admission to Trident and the details concerning his presentation and care. Any allegations inconsistent with those contents or which are intended to assert or imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof.

6. The allegations set forth in Paragraphs 6 Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required.

7. The allegations set forth in Paragraphs 7 Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant would crave reference to Mr. Rickenbaker's medical records for their contents concerning his condition and alleged complications. Any allegations inconsistent with those contents or which are intended to assert or imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof.

8. Responding to the allegations set forth in Paragraph 8 of Plaintiff's Complaint, this Defendant would crave reference to Mr. Rickenbaker's skilled nursing chart for the date he was admitted to the Facility. Any allegations inconsistent with this response or intended to assert or imply liability and/or damages as to this Defendant are denied.

9. Responding to the allegations set forth in Paragraphs 9 and 10 of Plaintiff's Complaint, this Defendant would crave reference to Mr. Rickenbaker's skilled nursing chart for their contents. Any allegations inconsistent with those contents or which are assert or imply liablity and/or damages as to this Defendant are denied and strict proof is demanded thereof. Further, this Defendant asserts that at all times, it complied with the applicable care.

10. This Defendant denies the allegations set forth in Paragraph 11 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

11. This Defendant denies the allegations set forth in Paragraphs 12 and 13 of Plaintiff's Complaint and demands strict proof thereof.

12. The Defendant denies the allegations set forth in the Plaintiff's Prayer for Relief in full.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

14. Plaintiff's 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, et. seq., including S.C. Code Ann. §15-32-520, §15-32-530, and §15-32-540.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

15. The Defendant asserts entitlement to all benefits, privileges, protections and limitations on any punitive damages award under the South Carolina Fairness in Civil Justice Act of 2011, as codified 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

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

17. Plaintiff's right to a recovery in this 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 SC Code §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

18. The Defendant would affirmatively assert that, to the extent that it is liable to Plaintiff, which is vehemently denied, it would be entitled to any and all benefits, joint and several liability protections, emergency situations limitations on liability, any and all monetary limitations or caps of liability and/or damages under the Uniform Contributions Among Tortfeasors Act, Noneconomic Damages Award Act, and Medical Malpractice Reform Bill,

including but not limited to §15-38-15; §15-32-200 et. seq.; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

23. This Defendant would affirmatively state that at all times, it complied with the applicable standard of care.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

25. This Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and thus reserves the right to amend the Answer to assert any such defenses. The Defendant additionally would incorporate as further affirmative defenses those raised by the co-defendants to this litigation to the extent they are applicable to this Defendant

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

CLEMENT RIVERS, LLP

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

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Charleston, South Carolina

Dated: September 30, 2021

STATE OF SOUTH CAROLINA * COURT OF COMMON PLEAS
*
COUNTY OF DORCHESTER * TRANSCRIPT OF RECORD

----------x
STEVE RICKENBAKER, *
*
Plaintiff, *
*
vs. * Case No. 2021-CP-18-01410
*
OAKBROOK HEALTHCARE, LLC, *
*
Defendant. *
----------x

January 21, 2025

B E F O R E:

The Honorable Maite Murphy, Presiding Judge

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

Russ Hines, Esq.
Attorney for the Plaintiff

Jay Parker, Esq.
Attorney for the Defendant

Recorded by: WebEx Recording

Court Transcriber: Bobbi Fisher, RPR
SC Official Court Reporter III

I N D E X

E X H I B I T S

(None.)

COURT REPORTER LEGEND

Dash (--)	Indicates an interruption in speech
Ellipses (...)	Indicates trailing off in speech
(ph)	Indicates phonetic word
[Verbatim]	Indicates the word is said as written
(Indiscernible)	[Transcription] Indicates word(s) is not known due to audio recording quality

P R O C E E D I N G S

THE COURT: The next case is Case No. 2023-CP-18-02145, Steve Rickenbaker versus Oakbrook Healthcare, LLC, and this is a Motion to Compel filed by the defendants.

THE COURT: Good afternoon, Mr. Hines.

MR. HINES: Good afternoon.

THE COURT: And who else do we have here for this matter?

MR. PARKER: I'm here, Your Honor.

MR. HINES: It looks like Jay Parker, Your Honor, for the plaintiff.

THE COURT: All right. Mr. Hines, this is your motion, sir?

MR. HINES: Yes, Your Honor. And thank you and may it please the Court.

It's a Motion to Compel Arbitration on behalf of Defendant Oakbrook Healthcare, LLC, d/b/a Oakbrook Healthcare -- or Health and Rehabilitation Center.

Your Honor, as you may recall -- and perhaps shudder when you do -- I've argued a motion like this a time or two before you, and this is very similar to what I've argued to you in the past. It's, again, a Motion to Compel Arbitration. We've got a nursing home facility.

We filed a -- well, a Memo in Support, and I am perfectly pleased for that really to do the lion's share of the work as opposed to me taking up too much of Your Honor's time with the

argument.

But to hit the high points, I'm arguing to you merger and equitable estoppel. And what that -- what merger means is the merger of an admission agreement and an arbitration agreement.

In this particular case, that paperwork for the admission of Mr. Rickenbaker to our facility was signed by his wife, and it wasn't signed by Mr. Rickenbaker. So we're not able to argue -- obviously, the argument is -- well, requires us to either deal with it one way or another, the question of authority. And that being the authority that Ms. Rickenbaker had to sign -- the question of whether or not she had authority to sign those documents on his behalf.

We're not arguing that she had authority per se. We're arguing that, by virtue of merger and equitable estoppel, Plaintiff, Mr. Rickenbaker, is estopped to deny the validity of the arbitration agreement.

So the starting point for this is the Doctrine of Merger, and there's a case called Coleman vs. Mariner Healthcare. In that case, the Supreme Court -- it was also a case about an arbitration agreement and an admission agreement for a nursing home and the question of compelling arbitration.

Although the Court ruled against the proponent of arbitration in Coleman, the Court did recognize the validity of the Doctrine of Merger, which says, when you have multiple instruments that are executed at the same time by the same

parties for the same purpose and in the course of the same transaction, they would be merged and considered -- should be construed as a single contract, absent evidence of a contrary intention -- an intention contrary to merger.

And so we argue here, Your Honor, that we have those things. We have an admission agreement and an arbitration agreement that were signed at the same time, they were signed by Mrs. Rickenbaker in conjunction with his admission to our facility.

And I think it's pretty well-established by virtue of that Coleman case that, when you have that set of circumstances, it does check the boxes of time, parties, purpose, and transaction. And so if you've checked all those boxes, then the question becomes: Is there any intention contrary to a merger?

In a number of the cases that have looked at the question of merger -- Coleman being, I guess, the start of it; there's a couple of cases that follow Coleman more directly called Thompson and another case called Hodge, and then, more recently, there's a case I need to deal with called Solesbee vs. Fundamental.

In all those cases -- let me -- but I like to break it in sort of two. In Coleman, Thompson, and Hodge, those cases dealt with different types of different language in the respective admission and arbitration agreements than what

we're dealing with here.

And to give you an example, for instance, in the Coleman case, the Court found that there was intent contrary to merger that arose from the face of the admission agreement itself; because, in that case, there was an admission agreement that had language in it, an entire agreement clause, that referenced the arbitration agreement separately.

On its face, the Court indicated that that -- they used the language "the separatedness," that, on its face, that was evidence of the intended separateness of these two documents.

We don't have that here in our case. In our case, the admission agreement does contain an entire agreement clause, but it specifically says that it's for a specifically -- refutes the idea that this admission agreement was intended to stand alone and be separated by saying that the admission agreement -- other admissions materials are made part of the agreement by reference.

Well, we take that position and think that it's the only position that is reasonably supported by the evidence; that the arbitration agreement is such an other admission agreement; and therefore, it is, by virtue of this language, expressly incorporated or made part of the admission agreement.

And we explain this in a little more detail in our memo, and I realize, when I argue these motions -- and I know it's

been a long or quite a full calendar for Your Honor today, there's a lot of ground to sort of try to plow through. So I will just try to hit the high point to say that our merger argument is that admission agreement and arbitration agreement merged, and we point, in particular, to this language in the admission agreement that talks about other admissions materials being made a part of this.

We do -- for instance, as far as this being an admission material -- the arbitration agreement, that is -- it's signed in conjunction with admissions, it wouldn't be signed but for the admission to the facility.

And so if you will go with us there, Your Honor, insofar as to say that they are merged, the second part of the argument is the estoppel part, and it is pretty straightforward, which is to say, if they're merged, then this agreement, which, now by virtue of merger, would include the arbitration agreement, it includes all sorts of benefits that would be received by Mr. Rickenbaker and that were received by Mr. Rickenbaker.

And in the case called Wilson vs. Willis, it's probably the most in-depth that our case law gets into, but talking about what's called the direct benefits estoppel. And the bottom line is there that you can't receive direct benefits from an agreement and then essentially accept and embrace part of the agreement under which you receive those benefits and

then deny the validity of other provisions that you don't like. You can't sort of pick and choose. That's what that direct benefits of estoppel says.

So our argument is, you merge the admission and the arbitration agreements by virtue of the merger doctrine. And then, once they are both together in one contract through the merger, the benefits that were received under the admission agreement -- room, board, various services -- are sufficient to estop under the direct benefits estoppel to estop the plaintiff from the validity, which means to stop the plaintiff from making the argument, "Oh, my wife didn't have authority to sign the admission -- the arbitration agreement for me."

And, Your Honor, there are certainly some nuances to this, and we do get into them. I guess the one that I need to make sure that I mention to the Court directly, because it is adverse to me, but we argue it's not controlling -- it's just, I've mentioned it before, the case called Solesbee.

In that Solesbee case, the documents involved are the same form documents that we have here. In that case, the Court rejected our argument about merger. But we do explain in our briefing how that case isn't controlling because that Court -- one, we take the position, respectfully, that the decision that -- that its analysis is erroneous, but more than that, we take the position that its analysis leaves gaps in it through which our argument still fits.

For instance, I mentioned to Your Honor that the entire agreement clause in our admission agreement specifically contemplates reaching beyond the four corners of that documents to embrace other admissions materials. The Solesbee Court never addressed that.

The Solesbee Court never addressed the fact that, well, there's a -- well, it gets a little bit complicated, but the Solesbee Court pointed out certain things but didn't continue its analysis, we would contend, to fully address all the arguments that we're presenting to you today. And we've got those presented fully in our memo.

So I realize that was probably not the best at keeping it brief, but, Your Honor, I just sort of at least wanted to alert you to the basic lay of the land, which is merger of the admission and arbitration agreements and direct benefits estoppel.

And I admit, I have to win on both of those to win, and I've got to win both of them. If you find against us on merger, then I lose. So I have to have merger, one, and the direct benefits estoppel, two, and I also have to get around that Solesbee case. And I believe that we do that and it's explained fully in our written brief.

Other than perhaps allowing me to briefly address what Mr. Parker might have to say, I'll rest with that.

THE COURT: Thank you, Mr. Hines.

Mr. Parker, your response, sir?

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

I just want to actually go through a little bit of the procedural history of this case. This case was actually 40(j)'d. And before it was 40(j)'d, this Motion to Compel or Motion to Dismiss and Compel Arbitration came up on the exact same arguments that Mr. Hines is making today. It was in front of Judge Dennis.

Judge Dennis denied their motion. They filed a Motion for Reconsideration, and before he could rule on that, it was 40(j)'d.

So, for starters, given the exact same facts that are before you right now and the ones that are particular to this specific action, Judge Dennis has already ruled on that and said, you know, these agreements do not merge, they're separate agreements, and that the individual who signed the arbitration agreement, who would be Ms. Rickenbaker, the plaintiff's wife, she didn't have authority at the time to sign any sort of arbitration agreement on his behalf.

But it is true that it was 40(j)'d, so we do have a new case number. It is a new action. I'm not saying they don't get second bite at the apple, but I'd just say that as a citation to something persuasive as to why you should deny their motion today.

But I don't even have to reference that, Your Honor, because you've, in fact, looked at this exact same arbitration agreement and admission agreement twice and found that they didn't merge.

And what we have today is the exact same to-the-word agreements as you found. And I'll show you those cases in just a minute.

And I'll show you this. I have put together an Excel spreadsheet. The defendant in this case is part of a group of entities that owned, I think, maybe around two dozen assisted living facilities in South Carolina. And this is something they do, which is that they have these admission agreements and arbitration agreements that are two separate agreements. They know, when an elderly person is coming into their facility, typically, they don't have capacity to sign these agreements. They know that the person with them, whether that be a son or a niece or a nephew or whoever, doesn't have authority to enter those agreements on their behalf, but they tried to do this thing where they come in after the lawsuit has been filed and that person has been injured and they try to make this argument that the third party, who didn't have authority, somehow shouldn't be allowed on the back end to say that these agreements aren't valid.

And they keep doing this. And the reason they're doing this -- and they know they're going to lose -- is because they

want to appeal this and drag the process out by an extra two or three years and try to leverage my clients into taking less money to settle the case. And that's -- you know, that's legal, I think strictly from the legal argument standpoint.

And certainly I'm not faulting Mr. Hines for doing his job in being a zealous advocate, but I tell you that to give you some sort of sense of what we're seeing here.

And I want to show this to you. I don't know if you've ever seen that movie "Groundhog Day" that had Bill Murray in it where he keeps waking up over and over again; it's the same thing over and over and over again.

I'm going to share my screen with you for a moment, if you don't mind, if I don't terribly mess this up.

Can you see that, Your Honor?

THE COURT: I can.

MR. PARKER: It's an Excel spreadsheet.

What I have on here is -- and this isn't current; I haven't updated this in a month. But this has got 21 matters on it. There's two highlighted that you'll see. One is called Walker and one is called White. Those are actually two actions where you denied this Motion to Compel Arbitration based on the exact same arbitration agreement and admission agreement.

And Mr. Hines has conceded that there is no authority in this case for Ms. Rickenbaker, the wife of Steve Rickenbaker,

to have signed these agreements.

And so the argument is the exact same. It's solely confined to the language of these agreements and whether or not they merge.

You have already twice looked at these agreements and said they do not merge. I cannot compel arbitration. The Court of Appeals has affirmed you both times in these two highlighted cases that I have on here, and they have actually petitioned the Supreme Court for cert on those two, and the Supreme Court denied cert.

So what you're looking at is, like I said, 21 matters of which the Court of Appeals -- 19 times in one published decision, and 18 unpublished decisions had said these agreements do not merge.

The plaintiff is not estopped from denying their validity if there was no authority, and that's the exact situation that we have here.

And, again, on the back end, my last tally that I did on it, currently, the Supreme Court denied cert on these 14 times. So they haven't had a single favorable result. They're still using the same arbitration agreement and admission agreement as they were the two times that they argued this in front of you before.

And so I think that there's actually zero rational basis for having any sort of expectation that this motion would be

successful in front of you.

And I will very briefly address one argument Mr. Hines made, which is this reference to a sentence in the admission agreement that purports to include other admissions materials. I'm not going to make the argument in front of you. This argument has been briefed before the Court of Appeals.

Mr. Hines and I have both briefed it in cases that we have handled. I think my law firm has now had six or seven of these go up before the Court of Appeals on this exact same issue. And the Court of Appeals has not bitten on Mr. Hines's argument. And it is briefed out. We resubmitted our memoranda from when this case was -- when this motion was originally argued before it was 40(j)'d -- the action was 40(j)'d, and we have the same memos in this argument. It's addressed and they're concerning their reference "other admission materials" and why that isn't sufficient to create proof that these documents merge with each other.

Thank you, Your Honor. I tried to keep it short as well because the day has been a little long, and this isn't the most exciting material in the world. So I appreciate it. Thank you.

THE COURT: Thank you, Mr. Parker.

Mr. Hines, any response?

MR. HINES: Very briefly, Your Honor. Well, I enjoy arguing against Mr. Parker very much, and on a personal level,

find him -- well, I like him very much. So my point is to say I take his -- you know, I take -- well, I appreciate his zealous advocacy.

MR. PARKER: Whatever you were going to say, Russ, will not offend me.

MR. HINES: Thank you.

When he talks about other cases and sort of this narrative about this is what this company does and so forth, I do have to push back to say, you know, there's no evidence in support of those things. I realize that's an argument from a lawyer, and I can understand that.

But as far as, you know, I would have to just remind the Court that there's not evidence of -- to support the idea, but I think that they know this and that about what's going to happen.

And we do have in this case that we've submitted -- well, there is a declaration of the -- explaining the process of the admissions and going over these documents with the people when they are admitted.

The other thing I'd mentioned -- oh, about -- you know, Mr. Parker is right. There's certainly -- we have to acknowledge there's an uphill battle here that we have, and we have not succeeded in many trips to the Court of Appeals.

But the Court of Appeals has seen fit in all but one case to dispose of our challenge and unpublished opinions. And the

very top of every one of those unpublished opinions, in all-caps, bold letters, it reads, "This opinion has no precedential value. It should not be cited or relied on as precedent in any proceeding except as provided by Rule 268(d)(2) of the Appellate Court Rules.

And, suffice it to say, Rule 68(d)(2) [sic] doesn't provide -- there's no cause here to rely on those cases either because they're unpublished.

So it -- just as Jay mentioned in his memo, they get into their position as to why the language from the admission agreement about incorporating by reference other documents, shouldn't -- you know, doesn't carry the day for us.

Well, one of the points that I was trying to make earlier is that, while Jay might address it, it's not addressed in that Solesbee case about that. You know, we haven't gotten any indication from the Solesbee Court as to how that -- any response to that in our argument. That's an example of what I would call unanswered questions that are still fair game to ask.

So with that, Your Honor, I thank you very much for your time and your consideration as always. And, you know, we just rely upon what we've got in our memo to supplement what I've said here today and ask that the Court to compel arbitration.

THE COURT: All right. Thank you, gentlemen. I will certainly try to use as much rational basis as I can muster up

to issue an opinion. So I appreciate your arguments on both sides.

MR. HINES: Thank you, Your Honor.

MR. PARKER: Thank you.

THE COURT: Have a good day.

(The proceedings concluded.)

Certificate of Transcriber

CASE NAME: Rickenbaker v. Oakbrook Healthcare, LLC

DATE OF HEARING: 1/21/25

RECORDING METHOD: WebEx Recording

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

/s/ Bobbi Fisher

Bobbi Fisher, SC Official Court Reporter III, RPR

Transcript Prepared: 8/6/25

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
STEVE RICKENBAKER,	)	CASE NO. 2021-CP-18-01410
	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	**DEFENDANT OAKBROOK HEALTH CARE, LLC D/B/A OAKBROOK HEALTH AND REHABILITATION CENTER'S MOTION TO COMPEL ARBITRATION**
	)	
OAKBROOK HEALTHCARE, LLC D/B/A OAKBROOK HEALTH AND REHABILITATION CENTER, FLOYD BRACE COMPANY, INC. TRIDENT MEDICAL CENTER, LLC D/B/A TRIDENT MEDICAL CENTER,	)	
	)	
DEFENDANTS.	)	
	)	

TO: LEE COPE, ATTORNEY FOR THE PLAINTIFF:

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

This Defendant further requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any motions

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

CLEMENT RIVERS, LLP

By:*/s/ D. Jay Davis, Jr.*
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Attorneys for the Defendant Oakbrook Health Care, LLC d/b/a Oakbrook Health and Rehabilitation Center

Charleston, South Carolina

Dated: November 15, 2021

FACILITY - RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT

This Agreement is made between Oakbrook 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.

Jay S Richardson (06/18/18))
Resident/Representative Signature — Date

/
Printed Name of Resident/Representative

Dan Owens (06/18/18))
Authorized Agent of Facility — Date

Dan Owens Admissions

Original: Business File • Photocopy: Resident/Representative

DEFENDANT'S EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
STEVE RICKENBAKER,	)	CASE NO. 2021-CP-18-01410
	)	
PLAINTIFF,	)	
	)	
vs.	)	**DEFENDANT OAKBROOK HEALTHCARE, LLC D/B/A OAKBROOK HEALTH AND REHABILITATION CENTER'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ARBITRATION**
	)	
OAKBROOK HEALTHCARE, LLC D/B/A OAKBROOK HEALTH AND REHABILITATION CENTER, FLOYD BRACE COMPANY, INC. TRIDENT MEDICAL CENTER, LLC D/B/A TRIDENT MEDICAL CENTER,	)	
	)	
DEFENDANTS.	)	
	)	

TO: LEE COPE, ATTORNEY FOR PLAINTIFF:

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

The Plaintiff, Steve Rickenbacker, has sued the Defendants in negligence and gross negligence based on an occipital scalp ulcer he developed from a neck brace. The Plaintiff's allegations against this Defendant concern his residency at Oakbrook Health and Rehabilitation Center (hereinafter the "Facility" or "Oakbrook"). On admission to Oakbrook, Mr. Rickenbacker through his wife, Mrs. Faye Rickenbacker, entered into an arbitration agreement with the Facility that covers all allegations raised in the Complaint.

For the reasons set forth herein, this Defendant respectfully requests that the action be dismissed, or in the alternative, stayed and that this matter be compelled to arbitration.

BACKGROUND

With the help of Mrs. Rickenbaker, Mr. Rickenbaker, age 71, was admitted to the Facility on June 18, 2018, for skilled nursing care following an approximately one-month hospitalization at Trident Medical Center for several c-spine fractures. He presented to the Facility with preexisting wounds on the back of his head from his neck brace.

Mrs. Rickenbaker handled the paperwork in conjunction with Mr. Rickenbaker's admission, and in so doing, Mrs. Rickenbaker executed an Admission Agreement and an Arbitration Agreement on Mr. Rickenbaker's behalf, both of which were duly countersigned by the Facility's representative Dan Owens. (See **Exhibits 1** and **2**, respectively, attached hereto). Mrs. Rickenbaker also signed certain consents, authorizations, and acknowledgements directly related to Mr. Rickenbaker's residency and care. (See **Exhibit 3**).

Based on the Admission Agreement and pursuant to the terms thereof, Mr. Rickenbaker was admitted to the Facility and received skilled nursing care and treatment. During his stay at the Facility, Mr. Rickenbaker received and accepted the benefits of the Admission Agreement, which included the Facility furnishing Mr. Rickenbaker a room, providing routine meals, and rendering nursing, personal, and custodial care. Mr. Rickenbaker has never challenged any agreement's validity until now. Notably, Plaintiff does not assert that the Admission Agreement is invalid or that he entered the Facility unwillingly or without consent.

Upon admission, Mrs. Rickenbaker explicitly represented that she was authorized to admit Mr. Rickenbaker to the Facility and execute the documents she executed on his behalf, including the Arbitration Agreement. Indeed, the very first provision of the Admission Agreement states that

all information provided to the Facility is truthful and correct, including Mrs. Rickenbaker's authority to bind Mr. Rickenbaker. (See **Ex. 1**). Mrs. Rickenbaker signed the Admission Agreement on behalf of Mr. Rickenbaker as his responsible party and representative.

The Arbitration Agreement provides:

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

The Arbitration Agreement further provides:

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

Regarding Mrs. Rickenbaker's authority to sign on behalf of her husband, the Arbitration Agreement states:

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

(See **Ex. 2**).

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

ARGUMENT

I. BOTH STATE AND FEDERAL POLICY FAVOR OF ARBITRATION.

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

II. THE FAA GOVERNS THE ARBITRATION AGREEMENT.

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

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

(*See* **Ex. 2**.) This must be enforced like any other contract term. *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 196, 844 S.E.2d 66, 70 (Ct. App. 2020) ("We first consider whether the FAA applies. We hold it does, for two reasons. First, the [subject contract] provides the parties

'specifically agree that this transaction involves interstate commerce.' We must enforce this agreement like any other contract term.") (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001) (finding the FAA applied because the parties had agreed the subject contract involved interstate commerce)).

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

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

"[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate"[1] and "ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). To that end, the FAA provides that an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "By its terms, the [FAA] leaves no place for the exercise of discretion by a . . . court, but instead *mandates* that . . . courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed."

[1] *Allied–Bruce*, 513 U.S. at 270.

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985) (emphasis added); *see also* 9 U.S.C. § 4 ("The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement*.") (emphasis added).

While a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not do so based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). Under the FAA, "courts *must* place arbitration agreements on *equal footing with other contracts* . . . ." *Concepcion* at 339 (emphasis added); *see also Allied–Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted).[2]

Under the FAA, a party seeking arbitration must show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is

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

contained within a contract involving interstate commerce. 9 U.S.C. § 2. A binding and enforceable written agreement to arbitrate disputes exists in this case; therefore, Plaintiff's claims should be stayed and compelled to arbitration.

IV. THE ARBITRATION AGREEMENT IS VALID ON ITS FACE.

The Arbitration Agreement is valid on its face. In other words, there is nothing within the four corners of the document itself that calls its validity into question. It bears Mrs. Rickenbaker's signature on behalf of Mr. Rickenbaker, along with Mrs. Rickenbaker's express representation that she is authorized to sign for Mr. Rickenbaker.[3] It is countersigned by Mr. Owens 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 defined scope of disputes to binding arbitration[4] 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. 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.

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[3] By virtue of her signature, Mrs. Rickenbaker 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 Mr. Rickenbaker'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 Mrs. Rickenbaker is no less bound by this covenant than the Facility.

[4] 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.").

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 party alleging that the enforcement of a contract would be unconscionable bears the burden of proving both prongs of the definition. *Green Tree Fin. Corp.-Ala. v. Randolph*, 53 l U.S. 79, 92 (2000); *accord Marzulli v. Tenet S.C.*, Inc., No. 2015-002363, 2018 WL 1531507, at *3 (S.C. Ct. App. Mar. 28, 2018). In this case, Plaintiff bears that burden. "Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Simpson*, 373 S.C. 14, 25, 644 S.E.2d 663, 669. "Meaningful choice" refers specifically to the bargaining process involved in entering into the Arbitration Agreement. The Arbitration Agreement clearly articulates that the resident entering into the Agreement is fully aware of his or her healthcare options and other potential providers of nursing home facilities. The Agreement states:

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

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

By signing the Arbitration Agreement and Admission Agreement, Mrs. Rickenbaker, acting on behalf of Mr. Rickenbaker, represented that she understood and assented to their terms.

Indeed, she was given the option of entering into the Arbitration Agreement – *or not* – and she freely and voluntarily made the decision to proceed. The Arbitration Agreement by its plain language was not a precondition of admission to the Facility and simply could not have been an adhesion or "take it or leave it" contract. Mrs. Rickenbaker had the option not to enter into the Arbitration Agreement on behalf of her husband, yet she voluntarily did so, voluntarily did not retract her agreement thereto, and her mother stayed at the Facility and received skilled nursing care after admission.

The Declaration of the Facility's representative, Dan Owens, attached hereto as **Exhibit 4**, further confirms that the Facility gave Mrs. Rickenbaker a meaningful choice whether to enter into the Arbitration Agreement. With regard to the Admissions Agreement, Mr. Owens stated that the resident has the option to enter the agreement, but that it is "not a condition for admission to the facility." *See* **Ex. 4** ¶ 7, 10. Mr. Owens confirmed that he "personally reviewed and explained each of the admissions documents" to Mrs. Rickenbaker and "she made Mrs. Rickenbaker aware that completion of the Arbitration Agreement was not a condition of her husband's admission to the Facility. *See id.* at ¶ 10. Mrs. Rickenbaker indicated that she understood Mr. Owens as he explained each of the admissions documents, including the Arbitration Agreement. *See id.* at ¶ 11. This Declaration and the surrounding circumstances set forth above establish that Mrs. Rickenbaker was coherent and understood the admissions materials at the time of her husband's admission to the Facility. *See id.* at ¶ 9-14. Mrs. Rickenbaker understood the terms of the Arbitration Agreement, understood that she was not required to enter into the Agreement, and voluntarily chose to consent to its terms on behalf of her husband.

The fact that this Defendant is a commercial entity is also not sufficient grounds, standing alone, to prove the absence of a "meaningful choice." While disparity in bargaining power and

relative sophistication are factors to be considered under *Simpson*, the fact that the Facility unilaterally drafted this agreement and presented it to Mr. Rickenbaker's representative for consideration cannot justify a finding of unconscionability. *See Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 542 S.E.2d 360, 365 n. 5 (2001) ("[I]nequality of bargaining power alone will not invalidate an arbitration agreement.").

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

When determining this aspect of unconscionability, this Court must focus on "whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision maker." *Id.* at 25, 644 S.E.2d at 668. Under the terms of the Arbitration Agreement, the parties are to select a third party arbitrator *jointly* "from a panel having experience and knowledge of the health care industry." *See* **Ex. 2.** If the parties are unable to agree upon such an arbitrator, the agreement vests the Court with authority to make a selection. The selected neutral arbitrator is vested with authority to hear the case and make a decision which is "binding on all parties." As a result, it can only be said that the Arbitration Agreement allows for complete mutuality of remedies. Neither party is given an advantage by its terms. The Arbitration Agreement simply binds the parties (both sides) to resolve disputes via arbitration, something that, again, is expressly favored as a matter of both

state and federal policy. 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. 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."

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

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

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

> It is . . . understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury,

> negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

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

VI. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE.

A. <u>The Plain Language of the Agreement Binds Plaintiff.</u>

According to the plain language of the Arbitration Agreement and consistent with her actions during the admissions process, Mrs. Rickenbaker represented herself to admissions personnel at the Facility as her husband's representative with the authority to sign documents and enter agreements on her his behalf.[5] It was clearly Mrs. Rickenbaker's intention to bind Mr. Rickenbaker according to the terms of the Admission Agreement and Arbitration Agreement. Moreover, Mrs. Rickenbaker evinced no intentions or directions to the contrary. Accordingly, the plain language of the Arbitration Agreement confirms that Mrs. Rickenbaker was authorized to enter this Agreement binding her husband to arbitration, and the Agreement directly applies to the instant dispute. The Court should find this Agreement is valid and enforceable, and the present action must be stayed and compelled to arbitration.

[5] See **Ex. 2** ("By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident…")

This Court has recently found the plain language of arbitration agreements to support enforceability in at least two other cases with circumstances nearly identical to the case at bar. *See e.g. Macie Price v. THI of South Carolina at Magnolia Manor Inman, LLC et. Al*, 2018-CP-42-01054 (S.C. Com. Pls. August 7, 2018) (attached hereto as **Exhibit 5**); *Josephine Spears v. Rehab Center of Cheraw, LLC et al.* 2019-CP-13-00308 (January 10, 2020) (attached hereto as **Exhibit 6**). In both cases, the plaintiff was the wife of a resident at a skilled nursing facility in South Carolina. The resident's wife in each case executed an admissions agreement and an arbitration agreement *identical* to the ones in the case at bar, and as here represented to the facility that she had authority to enter these agreements on her husband's behalf. (See **Ex. 5**, p. 2-3; see **Ex. 6**, p. 1). Unlike the present case, the plaintiffs in *Price* and *Spears* later executed contradictory affidavits in opposition to the Defendants' motion to compel arbitration, disclaiming their authority to enter the agreements. Nevertheless, this Court found that the signatory plaintiffs' attestations of authority in the arbitration agreements prevailed over the contradictory affidavits, and bound plaintiffs in both cases to the terms of the agreements. The Court should reach the same conclusion in the present case, and enforce the Arbitration Agreement, particularly in the apparent absence of any affidavits or other evidence to contradict the plain language of the Agreement.

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

in *Spears* held, in part, that the wife's authority to sign the arbitration agreement at issue was "valid on its face" by its plain language (and indeed the arbitration agreement as a whole was found to be valid on its face) and that the skilled nursing facility had no obligation whatsoever to inquire as to the signatory plaintiff's authority beyond her own attestation. (See **Ex. 6**, p. 4). As in *Price* and in *Spears*, Mrs. Rickenbaker in this matter expressly attested to her own authority to enter into the Arbitration Agreement on behalf of her husband, Mr. Rickenbaker. He has not submitted an affidavit or other evidence disclaiming her authority to enter such an agreement on his behalf. Therefore, the Court should find that Plaintiff is bound by the plain language of the Arbitration Agreement and compel this matter to arbitration.

B. <u>Mrs. Rickenbaker Possessed the Apparent and Inherent Authority to Execute and Bind Mr. Rickenbaker to the Arbitration Agreement and/or Plaintiff Should be Estopped to Deny Mrs. Rickenbaker's Authority.</u>

1. Agency Relationship

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

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

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

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

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

the arbitration agreement specifically provided that any person authorized by the resident may execute it on her behalf. *Id.* See also, *Tenn. Health Mgmt. v. Johnson*, 49 So. 3d 175 (Ala. 2010) (holding that a daughter possessed the apparent authority to enter into an arbitration agreement on her mother's behalf). Notably, the Supreme Court of Alabama's holding in *Carraway* was applied as "persuasive authority" by this Court in *Price, supra.* (**Ex. 5**, p. 8).

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

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

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

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

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

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

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

2. Agency by Estoppel

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

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

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

(See **Ex. 5**, p. 9). Accordingly, the court concluded that the arbitration agreement was valid and enforceable.

Similarly, in *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011) the United States District Court of South Carolina concluded the plaintiff was estopped from denying he had authority to bind his wife to arbitration. (Attached hereto as **Exhibit 7**). As in the present case, the husband in *McCutcheon* executed a number of documents on his wife's behalf upon her admission to a nursing home facility, including an admissions agreement and an arbitration agreement. As in this case, the admissions agreement in *McCutcheon* provided that the husband was his wife's legal representative for the purposes of admission, as he was her next-of-kin and represented himself as authorized to make health care decisions on her behalf. The court held:

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

> plaintiff is estopped form denying the enforceability of the Arbitration Agreement.

Id. at *5.

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

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

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

1. Merger

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

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

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

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

As in the above cases, the Admission Agreement and the Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction.[6] They should be considered merged, i.e., they should be considered and construed together as effectively one contract.

[6] To be clear, *Coleman* unequivocally answers the question of whether the Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly observed regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of

2. Equitable Estoppel of Merged Agreement

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

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merger is rebutted—are no different from the instant agreements), "the documents *were* executed at *the same time, by the same parties, for the same purposes, and in the course of the same transaction*." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

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

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

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

> It is an axiomatic rule of contract law that a party may not rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.
>
> . . . .
>
> [W]here . . . a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from

> claiming that he is not bound to the arbitration agreement when he receives a direct benefit from a contract containing an arbitration clause.

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

Of note, this Court applied this precise reasoning in *Spears,* referenced above. (See **Ex. 6**, pg. 9). In that case and as discussed above, a woman admitted her husband to a skilled nursing facility and in connection with his admission, executed admission and arbitration agreements *identical* to the ones here. The agreements were both executed by the woman and a representative of the skilled nursing facility at the same time. This Court considered the agreements as merged and held that the plaintiff was estopped from refusing to comply with the arbitration agreement where, like here, the resident received "direct benefits from the Admission Agreement in the form of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein." *Id.*, pg. 10 (footnote omitted).

The Court in *Haynes,* referenced above, also applied the same reasoning in holding that the Plaintiff was estopped from denying the validity of an arbitration agreement, where the resident received "direct benefits from the Admission Agreement throughout her residency at the

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

facility, including, without limitation, the room, board, care/treament she received therein." **(Ex. 10** at 18). The Court went on to explain that the resident "effectively embraced and directly benefited from the Admission Agreement" and therefore the Plaintiff could not deny the enforceability of the arbitration agreement, which had merged with the admission agreement. (*id.*).

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

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

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

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

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

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

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

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

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

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

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

Instead, in the present case, the agreements "were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction" and, therefore, the documents merged. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts*, *supra*, 268 S.C. at 88, 232 S.E.2d at 24).[8] Specifically, the Admission and Arbitration Agreements were signed by Mrs. Rickenbaker, on her husband's behalf, and the Facility on June 18, 2018. The documents were signed by the exact same people: Mrs. Rickenbaker as representative for her husband and by Dan Owens for the Facility. The documents were signed for the same purpose and transaction of establishing Mr. Rickenbaker's residency at the skilled nursing facility.

While the Admission Agreement in this case does contain an "Entire Agreement" clause, unlike the admission agreements in those other cases, the provision in this case does not separately reference the Arbitration Agreement (in fact, it doesn't refer to it at all). Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[9]), the "Entire Agreement" clause in the instant Admission Agreement expressly states that "other Admissions materials" are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed "separatedness." And without question, the Arbitration Agreement

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

[9] 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike in the instant case—the "Entire Agreement" clause expressly referred to a separate arbitration agreement and, thus, "recognize[d] the '*separatedness*' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.") (emphasis added).

is among these other admissions materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) ("The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's ***admission*** *documentation—including the* ***Arbitration Agreement***."") (emphasis added) (internal footnote omitted).

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

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

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

The merger question examines whether, "where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,"[10] as indeed the admission and arbitration agreements were here, there is evidence to upset the *default presumption* that the contracting parties intended the instruments to be construed together as effectively one contract. As a practical matter, if this presumption is to mean anything, upsetting it must require actual evidence of sufficient probity that, notwithstanding the concurrence of all the circumstances that must come together for the presumption of merger to even arise in the first place—i.e., same time, parties, purpose, and transaction—a reasonable, non-speculative inference can be drawn that the parties' possessed a contrary intention. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). No such inference can be drawn here. It does not even make sense that the parties would not have intended the Admission Agreement and the Arbitration Agreement to merge.

Such superficial things as the fact that the admission arbitration agreements have their own titles, are separately paginated, and/or are separately signed cannot suffice to show evidence of intent contrary to merger. To point to such things is really to do no more than to point out that the admission agreement and arbitration agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether

[10] *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. The very nature of merger is to *merge* separate documents.

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

Even though, as noted above, the Arbitration Agreement was not a precondition to admission, this does not mean that the two instruments did not work hand-in-hand once the arbitration agreement came into existence (i.e., once it was in fact entered into). While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not

true; the Admission Agreement is indeed necessary to the Arbitration Agreement. In other words, yes, the Admission Agreement *could* have stood on its own, without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with; *but that is not what happened*. The Arbitration Agreement was in fact executed, of course, and it was executed under circumstances giving rise to a presumption of merger—again, same time, parties, purpose, and transaction. Unlike the Admission Agreement, however, which is capable of making sense either standing alone or, alternatively, together with the Arbitration Agreement, the Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitrations Agreement's) sole reason for being.

It matters not whether the Arbitration Agreement was a condition of admission, only that it was in fact agreed to in conjunction with admission; and, here, there can be no question that the Arbitration Agreement—once agreed upon—was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument, governing various interrelated aspects of Mr. Rickenbaker's relationship with the Facility. Indeed, this conclusion finds direct support in the Admission Agreement's "Entire Agreement" provision, which states, "[t]he undersigned further acknowledges that he/she has received and read the Admission Handbook and other Admissions materials and understand that these documents are made a part of this Agreement by reference herein." (**Ex. 2**, p. 12 (emphasis added)). Had the Arbitration Agreement not been executed, it would not constitute admissions material, but, of course, it was executed, and it does constitute admissions material; most respectfully, to conclude otherwise simply does not make sense.

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

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

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

In a case involving similar issues, the Honorable Perry Gravely allowed the parties to conduct additional discovery on the issue of a mother's authority to execute an Arbitration Agreement on her son's behalf in connection with his admission to a skilled nursing facility. *See James Boyd v. THI of South Carolina, LLC d/b/a* at *Magnolia Place-Greenville, et. Al*, 2018-CP-23-01934 (S.C. Com. Pls. July 9, 2018)(attached hereto as **Exhibit 11**). Critical to the court's decision in that case was whether the son's conduct and admissions director's understanding of that conduct created apparent agency so as to bind the son to an arbitration agreement. The court permitted the parties to take the depositions of the mother, the son, the admissions coordinator for the skilled nursing facility, and the case manager for the hospital the son was transferred from. After considering the testimony of those individuals, the court found there was evidence to support a finding of apparent agency.

Likewise, the Honorable Alison Lee allowed the parties to conduct additional discovery on a wife's authority to execute an arbitration agreement on behalf of her husband. *See Priscilla Brown, as Personal Representative of the Estate of James Brown v. THI of South Carolina at Columbia at Magnolia Manor d/b/a Midlands Health and Rehabilitation Center*, 2017-CP-40-

00516 (S.C. Com. Pls. Nov. 7, 2019) (attached hereto as **Exhibit 12**). The case at the bar involves Mrs. Rickenbaker's own authority to execute the Arbitration Agreement and the circumstances surrounding its execution. As in *Boyd* and *Brown*, if the Court determines the record is insufficient to properly rule on the issues before it, additional discovery should be permitted as necessary.

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

CONCLUSION

For the reasons set forth herein, this Defendant respectfully requests that this Court enter an Order dismissing or staying the pending action and compelling arbitration. Alternatively, and if the Court is not inclined to grant the instant motions on any of the grounds asserted above, this

Defendant requests that the parties be permitted to conduct additional discovery. This Defendant also requests permission to be heard after such discovery is conducted and requests that they be permitted to submit supplemental memoranda along with any additional evidence procured.

CLEMENT RIVERS, LLP

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

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Charleston, South Carolina

Dated: April 11, 2022

ADMISSION AGREEMENT – SOUTH CAROLINA

RESIDENT NAME: STEVE RICKENBAKER

RESIDENT NUMBER:

DATE OF ADMISSION: (06/18/18))

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

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

I. GENERAL CONDITIONS

1. **Inducement:** Resident and/or Representative verifies that all information submitted to Facility, including without limitation, financial information, medical history and medical diagnosis, is true and correct and acknowledges that providing false information constitutes a breach of this Agreement.

2. **Personal Property:** It is understood that Facility is not responsible for either damage to or theft/loss of Resident's valuables, monies or clothing unless the item(s) are held in trust by Facility and the damage, theft, loss was caused by the negligent or willful conduct of Facility personnel. Personal property will not be considered to be held in trust unless the policies and procedures outlined in the *Admission Handbook*, which is made a part of this Agreement by reference herein, and any future amendments thereto, have been followed. Facility reserves the right to prohibit certain personal effects, funds or other property in accordance with state and federal law. Facility is not liable for either damages to or theft/loss of any personal belongings or personal care items, such as dentures, hearing aids and eyeglasses, except with respect to damage, theft or loss caused by the negligent or willful conduct of Facility personnel.

3. **Emergency Care:** In case of an emergency and Resident's personal physician is not available, Resident and/or Representative allows Facility to retain a physician on Resident's behalf. The physician will bill Resident directly and Facility will not be responsible for payment of the bill for such service.

4. **Representative:** When Resident has a Representative, Representative will act on Resident's behalf for all purposes permitted under applicable law. Representative will pay all fees and charges incurred hereunder by or on behalf of Resident using proceeds from Resident's assets or estate. Representative may act in more than one capacity and will be bound by the applicable terms and conditions of this Agreement. Except when Representative has access to Resident's assets, or as otherwise expressly provided to the contrary herein, or as permitted by state or federal law, Representative will not become personally liable for the payment of Resident's fees and charges by signing this Agreement. To the extent possible, Resident acknowledges and consents to the execution of this Agreement by Representative.

5. **Terms and Conditions:** By signing this Agreement, Resident and/or Representative agree(s) to comply with all terms and conditions set forth in this Agreement and Facility's policies, as same apply and as may change from time to time.

II. AGREEMENT FOR CARE

A. FACILITY AGREES TO:

1. Admit Resident upon receipt of a physician's order; assist in obtaining physician services if a personal physician becomes unavailable; obtain emergency physician services when required. *Resident is not deemed admitted until such time as all agreements required by law and Facility have been appropriately executed.* This provision may be waived in writing by Facility, at its sole discretion.

2. Maintain written records of financial transactions with Resident and/or Representative responsible for payment. Resident has the right to have personal funds held in trust in accordance with applicable state and federal law, as may be amended from time-to-time.

3. Furnish room, routine meals, nursing care, personal care, or custodial care to Resident in accordance with applicable State and Federal law. This provision expressly excludes extraordinary services, including but not limited to, physician care, private duty nursing, private sitters, specialty foods and therapies not required by law. Resident will be placed in a semi-private room, absent medical need for a private room as determined by Facility staff. Residents residing in private rooms will be billed accordingly.

4. Assist in applying for private insurance benefits, but not to accept assignment thereof unless otherwise noted as an exception herein.

5. Assist Resident and/or Representative in applying for Medicare or Medicaid benefits where applicable.

6. Provide assistance in daily living and restorative nursing care in accordance with Resident's care plan, where appropriate. Resident and/or Representative reserve the right to refuse said treatment. If said treatment is refused, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.

7. Arrange for transfer of Resident to a hospital upon physician's order or in an emergency situation. Expenses of transfer and care of Resident at the hospital are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment of those services.

8. Obtain and administer medication as prescribed. Expenses for the cost of obtaining the medications are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment for the medications. Resident and/or Representative have the right to refuse medication. If Resident refuses medication, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.

9. Provide an activities program for Resident, components of which will be at the discretion of Facility.

10. Furnish Resident bed linens and hospital gowns. All personal clothing will be supplied by Resident or Representative and will be properly labeled as outlined in the *Admission Handbook* for identification purposes.

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

1. Provide complete and accurate information regarding Resident to Facility as requested. This information must be updated on a regular basis and when any substantial change occurs.

2. Provide Facility, prior to or at the time of admission, orders from Resident's attending physician for the immediate care of Resident, medical history, physical examination, current physician's orders and physician's statement that Resident is free from communicable disease at the time of Resident's admission or within the required time limitation. If Resident is suffering from communicable disease, Resident and/or Representative will provide a physician's certificate that the disease is not in a transferable stage, or that adequate or appropriate isolation measures are being carried out to control transmission of the disease. Facility retains the right to refuse admission to any Resident suffering from a communicable disease, whether that disease is in a transferable stage or not, so long as said refusal is in compliance with state and federal law. Resident's attending physician will provide, at Resident's expense, a physical examination performed either within five (5) days prior to admission or within forty-eight (48) hours following admission.

3. Allow Facility staff to perform such functions as may be necessary to maintain Resident's well-being, including but not limited to, assistance with bathing and hygiene, dressing, toileting, daily activities, performance of restorative nursing care as appropriate (including bowel and bladder training), and the performance of therapies determined necessary by a physician, but limited to those therapies for which Resident has funding. Resident and/or Representative have the right to refuse medication and treatment as prescribed by Resident's physician. In accordance with the policies of Facility, in the event that Resident and/or Representative refuses to abide by the physician's orders, Facility retains the right to discharge Resident from Facility if, in the judgment of appropriate Facility staff, it is determined that discharge or transfer is appropriate under applicable federal and state law. In addition, if Resident and/or Representative refuses to abide by the physician's order, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.

4. Pay all fees and charges described in this Agreement upon the terms agreed to herein.

5. Adhere to Facility's *Bed Reservation Policy* as outlined in the *Admission Handbook* and the *Facility's Policy and State Requirements for a Temporary Leave Bed-Hold.*

6. Provide and be responsible for personal items of clothing and property.

7. (a) Vacate/remove Resident from Facility within thirty (30) days, upon receipt of a Notice of Discharge and Transfer for any of the reasons required or allowable under state or federal law; (b) cooperate with Facility's efforts to locate alternative placement; (c) Vacate/remove Resident from Facility in less than thirty (30) days if the situation warrants immediate removal. All transfers and discharges will be carried out in accordance with state and federal law.

8. In the event Resident no longer requires Medicare or Medicaid services, Resident and/or Representative agree that Resident will be relocated to a bed certified for the appropriate level of care needed. Please note, room-to-room changes within the same certified unit of Facility are not considered a transfer for purposes of this section.

9. Notify Facility at least three (3) days in advance of Resident's voluntary discharge from Facility, excepting discharge as the result of an emergency. If advance notice is not provided, Resident and/or Representative will be liable for payment of three (3) days.

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

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

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

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

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

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

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

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

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

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

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

III. FINANCIAL AGREEMENT

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

1. Room and board, including meals, laundering of linens and bedding, nursing care, personal care or custodial care for the health, grooming and well-being of Resident in (☐-private) (☐-semi-private) accommodations, for a basic fee of $221.00 per day, payable one month in advance. In the event Resident is unable or unwilling to receive any of the services included in the room and board charge, such as meals, laundry, etc., no adjustment will be made to the daily rate. Payment for all invoices is due upon receipt. In the event public aid funds are denied for services for which coverage has been expected, Resident and/or Representative will be responsible for payment and will pay such charges upon receipt of invoice. Resident and/or Representative agree(s) to pay any rate change charged to Resident so long as each party to this Agreement is given at least thirty (30) days written notice of the new rate, including any increases or adjustments in Resident's liability by any financial third party or regulatory agency. Additional notice may be provided under applicable state regulations.

a. Additional services and items may be provided at a separate charge. The current rates charged for additional services and items are set out in Exhibit B. These charges may change from time to time. Resident and/or Representative agree(s) to pay the charges in effect at the time that the service is performed or the item supplied. Facility agrees to give thirty (30) days advance notice to Resident and/or Representative of any price changes.

b. Services or items not provided by Facility may be supplied by third-party vendors. Facility will assist Resident and/or Representative in securing such items or services, but will assume no liability for providing the services and makes no representations or warranties regarding the quality of such items or services. Facility assumes no liability for payment of any services provided by third-party vendors.

c. The daily rate will be charged for the day of admission. Private pay residents will not be charged the daily charge for the day of discharge if discharge occurs before 12:00 p.m., unless the discharge is for emergency medical treatment. Medicare and Medicaid Residents will not be charged a daily charge for the day of discharge. The daily rate will be charged, if applicable, on the day of death.

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

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

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

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

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

IV. TERMINATION

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

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

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

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

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

V. MEDICAID BENEFICIARIES

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

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

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

3. **Non-Covered Services.**

a. Medicaid is a cost-sharing program. Resident's monthly income must be contributed to the cost of his or her care. Medicaid determines how much of the Resident's monthly income must be paid to the Facility (also called "patient liability"). To the extent permitted by law, Resident's monthly Social Security and pension funds, minus the personal allowance retained by Resident (or other allowance as set by law), will be paid to Facility.

b. Resident and/or Representative may purchase from Facility certain miscellaneous products and services that are not covered by Medicaid. An itemized list of fees for these additional products and services is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office.

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

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

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

VI. MEDICARE BENEFICIARIES

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

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

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

a. Fees for certain products and services not covered under the Medicare program. Fees for such services will be identical those charged to private pay residents of Facility for the same products and services.

b. Fees for certain products and services that are more expensive than the products and services covered under the Medicare program (*e.g.,* a private room), as requested by a Resident and/or Representative. Fees charged for the more expensive products and services will be based on the difference between the fees charged to private pay residents of Facility and the customary charge for the same products and services under Medicare. Facility staff will inform Resident and/or Representative requesting additional or more expensive products or services that there will be a specified charge.

c. Certain deductibles and co-insurance amounts under the Medicare Program.

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

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

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

VII. PRIVATE PAY/INSURANCE

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

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

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

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

5. **Application/ Appeals.** Resident and/or Representative authorize Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but n

6. Not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remain responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VIII. NOTICES

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

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

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

IX. GOVERNING LAW

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

X. SEVERABILITY

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

XI. CAPTIONS

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

XII. MODIFICATIONS

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

XIII. WAIVER

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

XIV. RESIDENT

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

XV. ASSIGNABILITY

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

XVI. INFORMATION RELEASE/BILLING AUTHORIZATION

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

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

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

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

XVII. MISCELLANEOUS

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

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

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

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

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

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

XVIII. ENTIRE AGREEMENT

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

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

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

_____ (06/18/18))
Signature of Resident Date STEVE RICKENBAKER

_____
Social Security Number

_____ _____
Witness Signature Date Printed Name of Witness

OR
Jaye B. Rickenbaker (06/18/18)) _____
Signature of Representative, if any Date Printed Name of Representative

_____ _____
Witness Signature Date Printed Name of Witness

_____
Representative Social Security No. (Voluntary Info.)

_____
Signature of Facility Official Printed Name of Facility Official & Title

(06/18/18))_____
Date

Original: Business File • Photocopy: Resident/Representative

AUTHORIZATIONS, CONSENTS & ACKNOWLEDGMENTS

Please read, review and acknowledge each the following:

Treatment/Health Care Professionals:
Authorization for Treatment

☐ JSR (Initial) I hereby authorize Facility's professional staff to administer nursing procedures, podiatric procedures, therapies, skin scrapings, nonsurgical dental procedures and laboratory and x-ray procedures on me/Resident. I understand that I may withdraw this consent at any time by notifying Facility in writing. I further understand that an additional consent will be required for any surgical treatment or for any treatment requiring the use of general anesthesia.

Medical Treatment

☐ JSR (Initial) It is understood and agreed that Resident is under the control of his/her elected physician and/or his/her designee and that Facility in not liable for any act or omission as a result of following instructions of said physician(s)/designee(s). Resident consents to diagnostic imaging procedures, laboratory procedures, or medical treatment rendered to Resident under the general and special instructions of Resident's physician or physician's designee.

General Duty Nursing

☐ JSR (Initial) Facility provides general duty nursing care. Under this system, nurses are called to the resident's bedside by a signal system. If Resident is in such condition as to need continuous or special duty nursing care, it is agreed that Resident, Resident's legal representative or Resident's physician(s) will make the necessary arrangements for such care. It is understood and agreed that Facility shall not, in any way, be responsible for the failure to provide such care and is hereby released from any and all liability arising from the fact Resident is not provided with such care.

Independent Status of Health Care Providers and their Agents/Designees

☐ JSR (Initial) Resident and/or Resident's legal representative acknowledges that any and all health care providers and their agents/designees are not agents or employees of Facility. Resident and/or Resident's legal representative understands and agrees that each health care provider or their agent/designee who renders services to Resident will independently bill and collect fees for these services. Resident and/or Resident's legal representative agrees and understands that the health care provider's bills will be separate and apart from Facility's.

Selection of Medical Professionals:

You have the right to use your personal health care providers during your stay. In the event you do not have a current provider, the facility has a list of independent providers who are available to provide on-site care. If you have difficulty contacting any of these professionals, please notify our staff. Please indicate your choice of health care providers below, including the provider's phone number and address.

PHYSICIAN:

Name: Antonio Gamboa MD
Address: 920 Travelers Blvd. Summerville SC 29485
Phone: 843 875-9053

DEFENDANT'S EXHIBIT 3

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative FFUS003

DENTAL ☐ Yes ☒ No Examination Charge $_____

I would like to receive dental services at the above charge and have selected the following provider:

Name: _____
Address: _____
Phone: _____

VISION ☐ Yes ☒ No Examination Charge $_____

I would like to receive vision services at the above charge and have selected the following provider:

Name: _____
Address: _____
Phone: _____

PODIATRY ☐ Yes ☐ No Examination Charge $_____

I would like to receive podiatry services at the above charge and have selected the following provider:

Name: Rapha Family Footcare_____
Address: 172 Spring St Chas, SC 29403_____
Phone: 843 722-8628_____

Mental Health Counselor ☐ Yes ☐ No Examination Charge $100.00

I would like to receive dental services at the above charge and have selected the following provider:

Name: Dr. Stephen Williams @ **Calvary Counseling Associates**_____
Address: 2810 Ashley Phosphate Rd Ste. 12B North Charleston SC 29418
Phone: (843) 558-8502_____

Self-Administration of Medications

Please indicate whether or not you wish to invoke your right to self-administer medications prescribed by your physician as outlined in the Admission Handbook.

☐ _____ I wish to invoke my right to self-administer medications prescribed by my physician. I (Initial) authorize and consent to an evaluation by the Interdisciplinary Team in order to determine my ability to carry out this responsibility.

✠ JAL I wish to waive my right to self-administer medications. I request and authorize Facility's (Initial) nursing staff to administer medications prescribed by my physician. **I understand that I am entitled to this right and that I may invoke this right any time in the future by written notification to the facility.**

Personal Property/Valuables/Money:

☐ JBR (Initial) I acknowledge that I have received, read or had read to me, and understand Facility's policy on personal property, valuables and money. I understand that all personal belongings should be labeled properly and entered on a personal inventory list. I understand that all items removed from or brought into the facility after admission should be documented on the inventory list and that missing items must be reported to appropriate staff as soon as possible.

☐ JBR (Initial) I acknowledge and understand that Facility is not responsible for damage to or theft/loss of any personal property/valuables/money not kept in compliance with Facility policies.

Deposit of Personal Funds:

Please indicate below whether or not you wish to deposit personal funds with Facility in accordance with the *Protection of Resident's Funds* policy outlined in the Admission Handbook. **Please note that you are not required to deposit any funds with the facility.**

☐ _____ (Initial) I do not wish to deposit personal funds with the facility at this time.

☐ JBR (Initial) I authorize Facility to accept, hold and account for my personal funds in accordance with the policies outlined herein. I acknowledge that I have the right to revoke this authorization at any time upon written notice to Facility. I acknowledge that authorized State agencies may audit this account, regardless of my payer source.

Beneficiary Designation: (THIS PORTION TO BE FILLED IN BY RESIDENT ONLY)

In the event of my death, I authorize Facility to transfer all personal funds and property held by Facility to the following person(s): _____. If I have not named a beneficiary or the beneficiary cannot be located, I understand that Facility will hold and pay the funds in line with the State's regulations.

Advance Directive Acknowledgment:

☐ JBR (Initial) I acknowledge that I have received, read or have had read to me, and understand *Facility's Policy and State Requirements for Advance Directives* and have executed the following advance directive measures and **a photocopy has been provided to the facility for inclusion with my Medical Records**:

- ☐ Living Will
- ☐ Durable Power of Attorney for Health Care or similar agent designation
- ☐ "Do-Not-Resuscitate" Identification (CPR)
- ☐ Other: _____

☐ _____ (Initial) I acknowledge that I have received, read or have had read to me, and understand *Facility's Policy and State Requirements for Advance Directives* and have elected **NOT** to execute any advance directive at this time, including DNR Identification. **I understand that facility staff will respond to medical emergencies with CPR measures and a full code will be instituted.**

Special Services:

Please indicate whether or not you authorize the following services to be provided. All associated fees with be charged to your account:

Telephone	☐Yes	☒ No	☐ N/A	Charge $ _____
Television	☒Yes	☐ No	☐ N/A	Charge $ _____
Newspaper	☐Yes	☒ No	☐ N/A	Charge $ _____
Laundry	☒Yes	☐ No	☐ N/A	Charge $ _____
Beauty Shop	☒Yes	☐ No	☐ N/A	See charge list

Other(s) (Please Specify Below)

_____ ☐Yes ☐ No Charge $ _____
_____ ☐Yes ☐ No Charge $ _____

Photographs by State/Federal Survey Agencies

I acknowledge and understand that, during my/Resident's stay, Federal and/or State surveyors (investigators) may take my/Resident's photograph as part of their independent survey/investigation process and in line with conditions of my/Resident's participation in the Medicare and/or Medicaid program. I understand that, in line with CMS guidelines, the surveyors must obtain written consent from Resident or his/her surrogate **before** any photographs are taken. I understand that the Federal/State Survey Agency is wholly responsible for acquiring and securing any photographs they may take.

☐ JAR (Initials) I acknowledge and understand that neither Facility nor its parent, affiliates, officers, directors, employees, attorneys, assigns or any other person acting on its behalf, has any oversight or responsibility for the surveyors actions or inactions as it relates to taking photographs for their independent investigations.

Photograph/Audiotape/Videotape ☐ Yes _____ (Initial) ☐ No _____ (Initial)

I hereby authorize Facility to photograph/audiotape/videotape me/Resident for its use in resident identification, infection control, surveillance and/or other medical purposes. I understand that, if the facility wishes to photograph/audiotape/video tape me for any other reason, (activities, marketing, media coverage, etc.), the facility will secure permission from me through a separate written authorization.

Posted Information ☐ Yes _____ (Initial) ☐ No _____ (Initial)

To better serve you and meet your health care need, permission is needed to post information regarding your/Resident's health care needs within your room and the facility as needed. The information to be disclosed will be the minimum amount necessary and shall serve as a means of communication, enabling staff to provide service while, at the same time, ensuring your/Resident's rights to privacy. Information to be disclosed may include, but not be limited to, therapy schedules, activities of daily living, ambulation/mobility parameters, swallowing and aspiration precautions, do-not-resuscitate orders.

Authorization to Release and Obtain Information ☐ Yes JSL (Initial) ☐ No _____ (Initial)

I hereby authorize the facility to release and/or obtain medical information or other necessary data which may be necessary for my/Resident's continued treatment and care at the facility, including but not limited to the filing of insurance claims in my/Resident's/Facility's interest. I further authorize the release of information, medical or otherwise, to any government agency without my prior approval or that of my representative, if any.

Authorization to Receive/Open Mail ☐ Yes _____ (Initial) ☐ No JSL (Initial)

I hereby authorize Facility to open all mail received by me/Resident. Further, I would like this mail to be read to me/Resident upon receipt. You have the right to revoke this authorization at any time upon written notice to the facility.

_____ (06/18/18))
Resident Signature Date

STEVE RICKENBAKER

Jay D. Rickenbaker (06/18/18))
Legal Representative Signature, if any Date

_____
Printed Name of Representative

_____
Witness Signature Date

_____
Printed Name of Witness

Dan Owens (06/18/18))
Facility Representative Signature Date

DAN OWENS ADMISSION DIR

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
	)	
STEVE RICKENBAKER,	)	CASE NO. 2021-CP-18-01410
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
OAKBROOK HEALTHCARE, LLC D/B/A OAKBROOK HEALTH AND REHABILITATION CENTER, FLOYD BRACE COMPANY, INC. TRIDENT MEDICAL CENTER, LLC D/B/A TRIDENT MEDICAL CENTER,	)	**DECLARATION OF DAN OWENS**
	)	
DEFENDANTS.	)	
	)	

I, Dan Owens, respectfully submit this Declaration in support of Oakbrook Healthcare, LLC d/b/a Oakbrook Health and Rehabilitation Center ("Oakbrook" or the "Facility") Motion to Compel Arbitration in the above-captioned case:

1. I am over the age of eighteen, am otherwise competent, and a resident of the State of South Carolina.
2. I worked at Oakbrook during the time period at issue in the Plaintiff's Complaint.
3. I personally conducted the admissions process for Steve Rickenbaker, during his admission to the Facility on June 18, 2018. Mr. Rickenbaker's wife, Faye Rickenbaker was present for the admissions process. Mrs. Rickenbaker completed all admissions paperwork, identified and set forth below, on behalf of her husband.
4. Mrs. Rickenbaker represented to me that she was authorized to complete the admissions paperwork, including the Arbitration Agreement.
5. As part of the admissions process, each admitting resident, or their representatives on the resident's behalf, review an Admissions Agreement and various other documents that must be completed by the resident or their representatives for admission to the facility.

DEFENDANT'S EXHIBIT 4

6. The admitting resident and their representatives also receive a written copy of the Facility's Handbook, a written copy of the resident's rights under applicable state laws, a written copy of the facility's policy on Advance Directives, a written explanation of the charges for services provided by facility, a separate listing of local and government resources furnished by the state Ombudsman and other state/local advocacy groups, a separate listing of all medical professionals available to provide on-site services, and a written copy of the facility's policy on the use of physical/chemical restraints, in addition to other administrative documents. The admitting resident, or the resident's representatives on behalf of the resident, initial an Acknowledgement Form as part of this admissions process, acknowledging that they have received and reviewed these respective items.

7. The admitting resident, or the resident's representatives on behalf of the resident, also have the option to enter into an Arbitration Agreement with the Facility during the admissions process, whereby any future claims by and between the resident and the facility based on the admitting resident's residency at the Facility must be submitted to mandatory arbitration. completion of the Arbitration Agreement is not a condition for admission to the Facility.

8. The admissions process normally takes approximately one hour, depending on the admitting resident, but can take longer depending on certain variables, including whether the resident's family members are present for the admission process, whether the resident or family members have any questions about the admissions documents, and what the resident's medical condition is during the admissions process.

9. During the admissions process on June 18, 2018, I personally reviewed and explained each of the admissions documents, described above, to Mrs. Rickenbaker to ensure that she reviewed, was comfortable with, and understood each and every document, including the Admission Agreement and Arbitration Agreement.

10. I specifically told Mrs. Rickenbaker that completion of the Arbitration Agreement was not a condition of Mr. Rickenbaker's admission to the facility.

11. It appeared Mrs. Rickenbaker was listening to me and understood me as I explained each of the admissions documents during the admissions process, and she did not voice any objections as to any of the admissions documents, including the Arbitration Agreement.

12. I believed based on Mrs. Rickenbaker's statements and actions at the time of her husband's admission that Mrs. Rickenbaker was her husband's authorized representative and had the authority to execute the Admission Agreement, Arbitration Agreement, and other admissions documents on her behalf.

13. Mrs. Rickenbaker signed each of the admissions documents, including the Admissions Agreement and Arbitration Agreement, on behalf of her mother-in-law.

14. Mr. Rickenbaker never repudiated or invalidated his wife's actions, and did not otherwise indicate that Mrs. Rickenbaker was not his authorized representative for the purpose of executing the Admission Agreement, Arbitration Agreement, and other admissions documents on her behalf.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on April 11, 2022

Charleston, South Carolina

Dan Owens

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
MACIE PRICE AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MELVIN PRICE,	)	CASE NO. 2018-CP-42-01054
PLAINTIFF,	)	
vs.	)	**ORDER GRANTING DEFENDANT THI OF SOUTH CAROLINA AT MAGNOLIA MANOR-INMAN, LLC'S MOTION TO DISMISS AND COMPEL ARBITRATION**
THI OF SOUTH CAROLINA AT MAGNOLIA MANOR INMAN, LLC D/B/A MAGNOLIA MANOR-INMAN; THI OF SOUTH CAROLINA, LLC; AND NAKEHYA STANTON AS OWNER/MANAGER OF MAGNOLIA MANOR SPARTANBURG ,	)	
DEFENDANTS.	)	

This matter was before the Court on June 6, 2018 upon Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman's ("Magnolia" or "Defendant Magnolia") Motion to Dismiss and Compel Arbitration. Counsel of record for all pertinent parties were present including Perry M. Buckner, IV for Defendant Magnolia and Stefan B. Fielder for the Plaintiff. Having reviewed the submissions by counsel and heard all arguments advanced, the Court hereby **GRANTS** Magnolia's Motion and orders that this matter be compelled to arbitration in accordance with the below findings.

FACTUAL BACKGROUND

Plaintiff's decedent, Mr. Melvin Price, was admitted to Magnolia in February of 2015. Mr. Price was legally blind at the time of his admission with a history of multiple strokes and was recovering from a recent hospitalization. He was admitted to Magnolia with the assistance and aid

of his wife of nearly 50 years, the named Plaintiff, Mrs. Macie Price. Prior to his admission, Mr. Price entered into a number of contracts with Magnolia. The contracts were each signed by the Plaintiff, as representative of Mr. Price, on February 16, 2015. These executed contracts included an Admission Agreement and Arbitration Agreement. Based on the Admission Agreement and pursuant to the agreements set forth therein, Mr. Price was admitted to Magnolia Manor and received skilled nursing care and treatment. During his stay at Magnolia, Mr. Price accepted the benefits of the contracts entered into on his behalf by his representative, Macie Price. Such benefits included, but are not limited to, Mr. Price's admission to Magnolia and his receipt of the skilled nursing care provided therein. Mr. Price never challenged any agreement's validity during his lifetime nor did any representative challenge any agreement until the Arbitration Agreement was challenged by Plaintiff in response to the instant Motion. Notably, Plaintiff does not assert that the Admissions Agreement is invalid or that Mr. Price entered Magnolia unwillingly or without consent.

Upon admission, Mrs. Price explicitly represented that she was authorized to admit Mr. Price to Magnolia and execute necessary documents on his behalf, including an Arbitration Agreement. Indeed, the very first provision of the Admissions Agreement states that all information provided, including her authority to bind her husband to certain agreements, is truthful and correct.

The Arbitration Agreement at issue defines Magnolia Manor as the "Facility," Mr. Price as the "Resident," and Mrs. Price as the "Representative." The relevant provisions of the Arbitration Agreement state the following:

> It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal

> injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

The Arbitration Agreement further provides:

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

Regarding Mrs. Price's authority to sign on behalf of her husband, the Arbitration Agreement states:

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

The Arbitration Agreement was executed by Macie Price as "Representative" and Darlene Lindsay, the Admissions Director of the Facility, on behalf of Magnolia Manor. Because the acts complained of by the Plaintiff fall within the scope of the Arbitration Agreement, the Court finds that matter should be dismissed and compelled to arbitration.

LAW/ANALYSIS

I. POLICY IN FAVOR OF ARBITRATION

At the outset, this Court is mindful of the strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir.1997). Indeed, both federal and state policy favor arbitrating disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) ("The policy of the United States and this State is to favor arbitration of disputes."). "This preference for

arbitration has manifested itself in legislation and judicial decisions supporting the expeditious appeal of decisions denying an application to compel arbitration." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999). Therefore, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.*, 338 S.C. at 41, 524 S.E. 2d at 846 (internal quotations and citations omitted).

II. THE FEDERAL ARBITRATION ACT GOVERNS THE ARBITRATION AGREEMENT AND THE CLAIMS ASSERTED BY THE PLAINTIFF IN THE COMPLAINT

This Court finds that the Arbitration Agreement, by its terms and by law, is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014). Under the FAA, any written provision in "a contract evidencing a transaction involving commerce" providing that disputes be settled by arbitration is "valid, irrevocable, and enforceable." 9 U.S.C. § 2. The language of the Act is mandatory and requires the enforcement of all arbitration agreements. Section 4 of the FAA provides, in pertinent part, as follows:

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.*

9 U.S.C. § 4 (emphasis added). "By its terms, the act leaves no place for the exercise of discretion by a... court, but instead mandates that... courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving interstate commerce. 9 U.S.C. § 2. This Court finds that Defendant Magnolia has demonstrated both.

III. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE

A. The Plain Language of the Agreement Binds Plaintiff

This Court finds that the Plaintiff represented herself to staff and admissions personnel at Magnolia as her husband's representative, with the authority to sign documents on Mr. Price's behalf and bind Mr. Price and the Facility pursuant to those documents.[1] It was clearly Mrs. Price's intention to bind Mr. Price (and herself, as personal representative) according to the terms of the Admissions Agreement and Arbitration Agreement and Mr. Price evinced no intentions or directions to the contrary. The terms of the Arbitration Agreement clearly apply to the instant dispute.

B. Plaintiff Possessed the Apparent and Inherent Authority to Bind Mr. Price under the Arbitration Agreement, and Plaintiff Should be Estopped from Denying the Validity of the Arbitration Agreement

a. Agency Relationship / Apparent Authority / Inherent Agency

A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49,

[1] "It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assignees, **personal representatives**, guardians, or any persons deriving their claims through or on behalf of Resident." (emphasis added).

748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006). "An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145-146, 425 S.E.2d 764, 773 (Ct. App. 1992.)

This Court finds the records presented to it show that Plaintiff held herself out as an agent for her husband without any indication to the contrary. Under the record before this Court, an apparent agency relationship has been fairly demonstrated such that the Arbitration Agreement should be deemed enforceable. While Plaintiff's counsel has asserted that Mr. Price was capable of making his own decisions, no evidence was offered that Mr. Price objected or opposed the execution of any documents whatsoever. To the contrary, these facially valid contracts remained in effect for years without any formal or informal challenge by him or the Plaintiff. While the arbitration agreement is now being formally challenged, Mr. Price does not assert that the Admissions Agreement was invalid or that his wife lacked authority to admit him to Magnolia. *See, Dean v. Heritage Healthcare of Ridgeway*, LLC, 2014 WL 11802563, at *4 (S.C. Com. Pl. September 8, 2014)("To the extent the Plaintiff is correct that [the resident] had capacity to contract, I find that [the resident] gave apparent authority to her daughter to contract on her behalf or she ratified both contracts during her two and a half years residency."); S*ee also*, *Fuller v. Eastern Fire & Cas. Ins Co* 240 S.C.75, 86, 124 S.E.2d 602, 608 (1962)(holding "[r]atification as it relates to the law of agency may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent.").

Even if Plaintiff lacked apparent authority to enter into the terms of the Arbitration Agreement, she still possessed sufficient inherent agency powers to render the agreement enforceable. Such powers are recognized by South Carolina courts and are used to enforce agreements where supposed unauthorized actions "accompany or are incidental to transactions which the agent is authorized to conduct...." *See,* §§ 8A, 161 *Restatement (Second) of Agency* (1958); *Smith v. Fitton & Pittman, Inc.*, 264 S.C. 129, 212 S.E.2d 925 (1975)(*abrogated on unrelated grounds)*(examining whether party had properly demonstrated the existence of inherent agency powers); *Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r,* 309 P.3d 372 (Wash. 2013); *Daly v. Aspen Ctr. for Women's Health, Inc.*, 134 P.3d 450, 452 (Colo. App. 2005); *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210-11 (Ind. 2000); *Cange v. Stotler & Co.,* 826 F.2d 581, 591 (7th Cir. 1987)("[t]he powers of an agent are, prima facia, coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.")(*citing Lumbermen's Mut. Ins. Co. v. Wide Rule & Scale Eng'g Co.*, 177 F.2d 305, 309 (7th Cir. 1949)).

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

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

When signing the arbitration agreement, the brother in *Carraway* left the resident signature line blank and signed it as the "authorized representative" of his sister. Suit was later filed and the facility moved to compel arbitration, which the trial court granted. On appeal, the Alabama Supreme Court affirmed the trial court's decision holding, relevant here, that the resident's brother possessed the apparent authority to enter into the arbitration agreement on his sister's behalf, as evidenced by the fact that she never objected to him signing on her behalf and the arbitration agreement specifically provided that any person authorized by the resident may execute it on her behalf. *Id.* See also, *Tenn. Health Mgmt. v. Johnson*, 49 So. 3d 175 (Ala. 2010)(holding that a daughter possessed the apparent authority to enter into an arbitration agreement on her mother's behalf).

Applying *Carraway* to the instant facts, Plaintiff executed various admission documents on behalf of her husband including the Arbitration Agreement. She executed these documents in her capacity as "representative." Just as in *Carraway*, the Arbitration Agreement provides that

signing was on behalf of the resident. It was Magnolia's reasonable and justified belief that Mrs. Price was her husband's authorized representative and had the authority to execute the documents on his behalf.

b. Agency by Estoppel

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

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

C. **The Arbitration Agreement and Admission Agreement Must be Construed Together, and Plaintiff Should Be Estopped from Denying the Parties' Mutual Right to Arbitration**

a. **Merger**

As additional grounds to compel arbitration, the Court finds the Admissions Agreement and Arbitration Agreement should be construed together and merged such that the Plaintiff is bound to arbitrate her claims against the Facility. The validity of these agreements, including the Arbitration Agreement, must be determined in accordance with the general principles of contract law and agency law that would apply to any other contract. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010).

The Arbitration Agreement provides that "any controversy or dispute between the parties *arising out of or relating to Facility's Admission Agreement* . . . or relating in any way to Resident's stay at Facility" shall be resolved by arbitration pursuant to the terms of the Arbitration Agreement. This Court finds that the Arbitration Agreement and the Admission Agreement were both signed by Mrs. Price on behalf of her husband on the same day, at the same time, upon Mr. Price's admission to Magnolia.

Courts in South Carolina construe contemporaneous instruments together; if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated. *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977). Absent some evidence indicating a contrary intention, when instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will generally consider and construe them together on the theory that the instruments are effectively one instrument or contract. *Id. See also Saro*

Investments v. Ocean Holiday Partnership, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994) (holding that promissory notes and a mortgage agreement executed contemporaneously on the same date, must be construed together). Furthermore, even when instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. *See Plaza Development Services v. Joe Hardin Builder. Inc.*, 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988); *accord Cafe Associates, Ltd v. Gernqross*, 305 S.C. 6, 406 S.E.2d 162 (1991).

The United States District Court for the District of South Carolina in *McCutcheon* analyzed facts almost identical to the case at bar and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011WL6318575 (D.S.C. Dec. 15, 2011). Indeed, this very Court has cited to *McCutcheon* on numerous occasions in holding that a nursing home arbitration agreement merged with the admissions agreement for purposes of equitable estoppel under precisely the same circumstances. *See Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012).

Accordingly, Mr. Price, by and through the acts of his representative, the Plaintiff, and Magnolia, both contemplated that the terms of the agreement to admit Mr. Price were contained in the Admissions Agreement and Arbitration Agreement. Plaintiff executed the Arbitration Agreement at the same time as the Admissions Agreement; the Arbitration Agreement and the Admissions Agreement both covered the same subject matter and transaction (Mr. Price's residency at Magnolia Place); the Arbitration Agreement and Admissions Agreement were

executed by the same parties; the Arbitration Agreement specifically makes citation to and incorporates the Admission Agreement; and thus the Arbitration Agreement and Admissions Agreement should be construed as part and parcel of the same agreement between the parties.

b. Equitable Estoppel of Merged Agreement

This Court finds the doctrine of equitable estoppel applies to the instant case such that Plaintiff cannot dispute the validity of the Arbitration Agreement. "Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." *Int'l Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). "A nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause.'" *Id.* (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)).

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

"Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract." *E.I. DuPont de Nemours & Co. v. Rhone*

Poulenc Fiber & Resin Intermediates. S.A.S., 269 F.3d 187, 200 (3d Cir. 2001)(citing *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)). As noted by the Federal District Court in *Jackson v. Iris.com*:

> It is an axiomatic rule of contract law that a party may not rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.
>
> . . . .
>
> [W]here . . . a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a direct benefit from a contract containing an arbitration clause.

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

c. *Coleman* and *Hodge* are Distinguishable

To the extent Plaintiff argues the Admissions Agreement and Arbitration Agreement are not merged pursuant to *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544,

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

813 S.E.2d 292 (Ct. App. 2018) and *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 350, 755 S.E.2d 450, 452 (2014), such reliance is misplaced.

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

Similarly, in *Hodge*, the admissions agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law. 422 S.C. 544, 813 S.E.2d at 302. Furthermore, like in *Coleman*, the arbitration agreement in *Hodge* recognized a separateness, as it referenced the two documents separately, stating "[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement." *Id.* Finally, the arbitration agreement in *Hodge* stated it could be revoked within thirty days, whereas the admission agreement contained no such indication. *Id.*

Unlike the arbitration agreements in *Coleman* and *Hodge*, the Arbitration Agreement and Admissions Agreement in the case at bar should not be considered "separate" for purposes of denying merger. Unlike *Coleman* and *Hodge*, the Arbitration Agreement in this case does not

state that it can be revoked after it has been signed. Furthermore, it does not state that arbitration is a precondition to admission to the Facility.

Instead, in the present case, the agreements "were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction" and, therefore, the documents merged." *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts*, *supra,* 268 S.C. at 88, 232 S.E.2d at 24). Specifically, the Admissions and Arbitration Agreements were executed for the same parties, by Plaintiff, on her husband's behalf, and the Facility on February 15, 2016. The documents were signed by the exact same people: Macie Price as representative for her husband and by Darlene Lindsay, Admissions Director for Magnolia, as representative for Magnolia. The documents were signed for the same purpose and transaction of establishing Mr. Price's residency at the skilled nursing facility. While the Admissions Agreement in this case does contain an "Entire Agreement" clause, unlike the admission agreements in *Hodge* and *Coleman*, the provision in this case does not separately reference the Arbitration Agreement (in fact, it doesn't refer to it at all). Accordingly, there is no language in either the Admission or Arbitration Agreement akin to the language in *Hodge* or *Coleman* to indicate the parties desired the documents be considered as separate contracts. As such, *Coleman* and *Hodge* are not controlling Plaintiff's claims should be compelled to arbitration pursuant to the contract.

This Court recognizes that the agreements are in fact separately signed and have different terms and provisions. That is to be expected. However, unlike *Coleman* and *Hodge*, the documents are not sufficiently separate such that the presumption of merger can be overcome.

D. The Arbitration Agreement is Not Unconscionable

Lastly, this Court finds that the Arbitration Agreement is unconscionable. As an initial matter, both state and federal courts in South Carolina have consistently ruled that arbitration

agreements identical to the one *sub judice* are not unconscionable. *See McCutcheon v. THI of S.C. at Charleston, LLC*, *supra*, at 6* - *8; *Benson v. THI of S.C. at Charleston, LLC*, No. C.A. No. 7:11-CV-2613-HMH (D.S.C. Nov. 30, 2011); *Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012).

Furthermore, anyone who enters into a written contract has a duty to read the contract which she or he signs. *Maw v. McAlister*, 252 S.C. 280, 284-285, 166 S.E.2d 203, 204 (1969). Anyone who is capable of reading and understanding, but fails to read a contract before signing, is bound by the terms thereof. *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Furthermore, arbitration clauses are not unconscionable and will be enforced if a person who can read fails to read the contract, regardless of whether he was advised of the arbitration terms by the contracting party. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding the plaintiff's failure to read an arbitration provision did not render it unconscionable even though the plaintiffs claimed they were not advised of those terms). Additionally, "inequality of bargaining power alone will not invalidate an arbitration agreement." *Id.*

The Arbitration Agreement clearly articulates that the resident entering into the Agreement is fully aware of his or her healthcare options and other potential providers of nursing home facilities. The Agreement states:

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

Furthermore, on that same signature page, the Arbitration Agreement states clearly in bold

lettering in a separate heading: "**I understand and agree that I am giving up and waiving my right to a jury trial.**" (emphasis in original).

Since Mr. Price's representative and agent, Mrs. Price, had a duty to read and understand the documents she was signing on Mr. Price's behalf under proper authority, she also had a duty to communicate those terms to Mr. Price as his agent. To the extent she did not, Plaintiff cannot now claim that Mr. Price was unaware of the terms of the Arbitration Agreement that Mrs. Price voluntarily and with proper authority executed on her husband's behalf.

CONCLUSION

For the reasons set forth herein, the Defendant's Motion to Compel is hereby **GRANTED** and this matter is compelled to arbitration.

IT IS SO ORDERED!

Honorable Roger E. Henderson
Presiding Judge

Chesterfield ~~Spartanburg~~, South Carolina

August 7, 2018

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 AUG 13 AM 11:51
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTH JUDICIAL CIRCUIT
COUNTY OF CHESTERFIELD	)	CASE NO. 2019-CP-13-00308
JOSEPHINE SPEARS, as power of attorney for Howard Spears,	)	
Plaintiff,	)	
vs.	)	**ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION**
REHAB CENTER OF CHERAW, LLC, d/b/a Chesterfield Convalescent Center,	)	
Defendant.	)	

This matter is before the Court on motion of Defendant, Rehab Center of Cheraw, LLC, d/b/a Chesterfield Convalescent Center (the "Facility"), to compel arbitration (the "Subject Motion").[1] For the reasons set forth below, the Subject Motion is GRANTED.

BACKGROUND

Plaintiff, Josephine Spears ("Plaintiff" or "Mrs. Spears"), is, and at all relevant times has been, married to Howard Spears ("Mr. Spears"). She has brought this action in her capacity as Mr. Spears's attorney-in-fact, asserting claims for damages arising out of alleged deficiencies in the care/treatment provided to Mr. Spears when he was a resident of the Facility.[2]

When Mr. Spears was admitted to the Facility in late January 2016, Mrs. Spears signed a number of documents on his behalf, including an Admission Agreement and the Arbitration Agreement that the Subject Motion seeks to enforce. Although she represented to the Facility that she had authority to sign for her husband, Mrs. Spears did not have power of attorney for Mr. Spears

[1] The Subject Motion was filed on June 21, 2019. It was heard on September 25, 2019, at the Chesterfield County Courthouse, with both parties represented by counsel. Having been duly heard and considered, it is ripe for decision.

[2] The Facility is a skilled nursing facility.

DEFENDANT'S EXHIBIT 6

at the time. It was not until late February 2016, approximately halfway through Mr. Spears's residency at the Facility,[3] that he executed a durable power of attorney in favor of Mrs. Spears.

ANALYSIS

The issue before the Court comes down to this: Is the Arbitration Agreement (which Mrs. Spears signed for Mr. Spears) enforceable against Mr. Spears (or, more precisely, Plaintiff, i.e., Mrs. Spears, as Mr. Spears's attorney-in-fact) even though it was not signed by Mr. Spears himself? The Court concludes that, yes, the Arbitration Agreement is enforceable against Plaintiff. The Court's reasoning is as follows.

1. The Arbitration Agreement is governed by the FAA[4].

Unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce. *Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273–77 (1995). The Arbitration Agreement expressly states that the FAA applies:

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

Moreover, our state Supreme Court has held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014). Clearly, the Arbitration Agreement is governed by the FAA.[5]

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[3] Mr. Spears's residency ended in March 2016.
[4] The "FAA" is the Federal Arbitration Act, 9 U.S.C §§ 1–16.
[5] Indeed, neither party disputes the FAA's applicability here.

2. The Arbitration Agreement must be placed on equal footing with all other contracts.

"[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate"[6] and "ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). "By its terms, the [FAA] leaves no place for the exercise of discretion by a . . . court, but instead *mandates* that . . . courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis added); *see also* 9 U.S.C. § 4 ("The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement*.") (emphasis added). While a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not do so based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (citing *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)); *see also* 9 U.S.C. § 2 (providing that an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."). The FAA requires that the Court place the Arbitration Agreement "on *equal footing with other contracts* . . . ." *Concepcion* at 339 (emphasis added).

[6] *Allied–Bruce*, 513 U.S. at 270.

3. The Arbitration Agreement is valid on its face.

The Court finds that the Arbitration Agreement is valid on its face. In other words, there is nothing within the four corners of the document itself that appears out of order. It sets forth the materials terms of an agreement to arbitrate. It expressly attests to Mrs. Spears's authority to sign on behalf of Mr. Spears. It is duly signed by Mrs. Spears and the Facility's director of admissions.

The Court recognizes that Mrs. Spears has filed an affidavit in opposition to the Subject Motion, wherein she states (contrary to her representation in the Arbitration Agreement itself) that she did not have authority to sign on Mr. Spears's behalf. She also suggests that the Facility should have inquired further into her authority to sign for Mr. Spears and should have explained to her what an arbitration agreement was. To be clear, in observing that the Arbitration Agreement is valid on its face, the Court is not finding that Mrs. Spears in fact had actual or apparent authority to the sign the Arbitration Agreement on Mr. Spears's behalf.[7] The Court, however, is rejecting the notion that the Facility was obligated to investigate Mrs. Spears's authority or to explain the Arbitration Agreement's terms to her.

There is no question here as to Mrs. Spears's competency. Indeed, she expressly attests to her competency in her aforementioned affidavit. Besides that, the fact of her competency is implicit in her service as Mr. Spears's attorney-in-fact. She is thus "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement,[8] including, of course, those whereby she represented herself to the Facility as having authority to act on Mr. Spears's behalf.

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[7] As further explained below, the Court's decision to grant the Subject motion is based on estoppel, not on a finding that Mrs. Spears had actual or apparent authority to bind Mr. Spears at the time she signed the Arbitration Agreement.

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

Moreover, there is an implied covenant of good faith and fair dealing in every contract,[9] and Mrs. Spears is no less bound by this covenant than the Facility. Further still, to require anything more from the Facility as a contracting party just because the contract in issue is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed on equal footing with other contracts. *Concepcion* at 339.

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

In pertinent part, the Arbitration Agreement reads as follows:

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

This plain language clearly embraces the subject matter of Plaintiff's claims against the Facility. Moreover, even were there "any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration . . . ." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999) (quoting *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273–74 (4th Cir. 1997)) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)) (internal quotation marks omitted); *see also Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) ("The policy of the United States and this State is to favor arbitration of disputes.").

[9] *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995).

5. The Arbitration Agreement is enforceable against Plaintiff.

In opposition to the Subject Motion, Plaintiff argues that the Arbitration Agreement is not enforceable against Mr. Spears because he himself did not sign it and, at the time Mrs. Spears signed it for him (January 25, 2016), she did not have authority to do so. In furtherance of this argument, Plaintiff points to the fact that it was not until February 23, 2016,[10] that Mr. Spears gave Mrs. Spears power of attorney.[11]

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

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[10] The Court would note here that, while the power of attorney provides no basis to find that Mrs. Spears was authorized to sign the Arbitration Agreement for Mr. Spears when she signed it, the power of attorney does confirm Mr. Spears's competency through at least the date of its execution, which was approximately one month into his residency. *See In re Thames*, 344 S.C. 564, 570, 544 S.E.2d 854, 857 (Ct. App. 2001) ("[I]n order to execute or revoke a valid power of attorney, *the principal must possess contractual capacity*.") (emphasis added).

[11] Plaintiff also argues that neither the Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80 (the "AHCCA"), nor the Bill of Rights for Residents of Long-Term Care Facilities, S.C. Code Ann. §§ 44-81-10 to -70 (the "Residents Bill of Rights"), gave Mrs. Spears authority to sign the Arbitration Agreement on Mrs. Spears's behalf; however, these arguments are of no moment because neither the Subject Motion nor this order relies on the AHCCA or the Resident's Bill of Rights as having granted Mrs. Spears any authority to sign the Arbitration Agreement for Mr. Spears.

there was a merger."). The Court finds that the Arbitration Agreement is enforceable against Plaintiff based on estoppel.

"The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract." *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (quoting *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)).

The merger question examines whether, "where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,"[12] as the Admission Agreement and the Arbitration Agreement were here, there is evidence to upset the presumption of merger. This is a question of the parties' intention. *Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a contrary *intention* . . ") (emphasis added). "[I]n attempting to ascertain th[e] [parties'] intention," the Court "endeavor[s] to determine the situation of the parties, as well as their purposes, at the time the contract was entered into." *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

It must be remembered that, where, as here, the instruments in question were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For this presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the circumstances giving rise to the merger presumption (same time, parties, purpose, and transaction)—can support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. The*

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

Huffines Co., LLC v. Lockhart, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). No such inference can be drawn here.

The cases Plaintiff cites in opposition to merger are inapposite. The "Entire Agreement" clause in the subject Admission Agreement expressly states that other admissions materials are deemed a part of it. While it is true that the Arbitration Agreement was not required for Mr. Spears's admission to the Facility, all this means is that it did not have to be agreed to for Mr. Spears to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact agreed to. In other words, even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Mr. Spears's relationship with the Facility: the Admission Agreement setting forth the terms of his admission, the Arbitration Agreement providing for arbitration of disputes arising out of his admission.

Indeed, the fact that the Arbitration Agreement was not required for admission underscores its connectedness to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement). The Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitrations Agreement's) sole reason for being.

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. To point to such things is to do no more than to point out that the

Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

Moreover, to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. Again, where, as here, the instruments in question are signed at the same time, by the same parties, for the same purpose, in the course of the same transaction, merger is presumed. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger presumption to be upset based on evidence that is at best ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention—is to allow the exception to devour the rule.

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement under the "direct benefits" test our Supreme Court endorsed in *Wilson*, 426 S.C. 326, 827 S.E.2d 167. The *Wilson* Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals' earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which it is now contended that Plaintiff is estopped from refusing to comply with the Arbitration Agreement here. *Wilson*, 426 S.C. at 340–345, 827

S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in non-arbitration cases") (emphasis added). "Under direct benefits estoppel, '[a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause.'" *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)).

Without question, Mr. Spears received direct benefits from the Admission Agreement in the form of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein.[13] Plaintiff cannot now deny the validity of the Arbitration Agreement with which the Admission Agreement merged.

[13] To deny Mr. Spears's receipt of any benefit one would have to accept the absurd premise that every single aspect of his residency—every instance of care/treatment, every meal, all day every day—was deficient. Plaintiff herself does not even suggest this.

CONCLUSION

For the reasons set forth herein, the Subject Motion is hereby GRANTED, this action is STAYED, and this matter is compelled to ARBITRATION.

IT IS SO ORDERED.

_____
ROGER E. HENDERSON
Presiding Judge – Fourth Judicial Circuit
Court of Common Pleas – Chesterfield County

Chesterfield, South Carolina
Dated: _____

Chesterfield Common Pleas

Case Caption: Josephine Spears , plaintiff, et al VS Rehab Center Of Cheraw Llc , defendant, et al

Case Number: 2019CP1300308

Type: Order/Other

So Ordered

s/Roger E. Henderson 2754

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

ELIJAH R. MCCUTCHEON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CARMELA MCCUTCHEON, Plaintiff, vs. THI OF S.C. AT CHARLESTON, LLC, d/b/a DRIFTWOOD REHABILITATION AND NURSING CENTER, n/k/a RIVERSIDE HEALTH AND REHAB, Defendant.	No. 2:11-CV-02861 **ORDER**

This matter is before the court on a motion to dismiss and to compel arbitration brought by defendant THI of South Carolina at Charleston, LLC, d/b/a Driftwood Rehabilitation and Nursing Center, n/k/a Riverside Health and Rehab ("Driftwood"). For the reasons set forth below, the court grants defendant's motion.

I. BACKGROUND

Elijah R. McCutcheon, individually and as personal representative of the estate of Carmela B. McCutcheon, originally filed suit on September 15, 2011, in the South Carolina Court of Common Pleas for the Ninth Judicial District. Driftwood filed a notice of removal in federal court on October 20, 2011, asserting diversity jurisdiction under 28 U.S.C. § 1332. Driftwood then answered the complaint on October 24, 2011. On November 1, 2011, Driftwood filed a motion to dismiss and to compel arbitration. On November 30, 2011, McCutcheon filed a response in opposition. Driftwood filed a reply on December 6, 2011.

Plaintiff brings this action against Driftwood for: negligence; negligence per se; breach of contract; fraud and misrepresentation; violation of the South Carolina Unfair Trade Practices Act; negligence – wrongful death; and negligence – survivorship. The dispute arises from Carmela McCutcheon's care while residing at the Driftwood Rehabilitation and Nursing Center in Charleston.

Upon her admittance into the facility, Carmela McCutcheon and Driftwood entered into an Admissions Agreement and an Arbitration Agreement. Def.'s Mot. 2. These documents were signed by Elijah McCutcheon, Carmela McCutcheon's husband, as Carmela's "'Durable Power of Attorney for Health Care' / 'Legal Guardian' / 'Responsible Party.'" See id. Ex. A. The Arbitration Agreement provided in part,

> **[I]n the event of any controversy or dispute between the parties** arising out of or relating to Health Care Center's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Health Care Center, or to the provisions of care or services to Resident, included but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then **the parties agree that such Dispute(s) shall be resolved by arbitration**, as provided by the South Carolina Alternate Dispute Resolution/Media Rules.
>
> . . .
>
> **The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act** (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law.
>
> . . .
>
> **By his/her signature below, the executing party represents that he/she has the authority to sign on the Resident's behalf so as to bind the Resident as well as the Representative**.

Id. (emphasis added).

II. DISCUSSION

Driftwood moves to compel arbitration under Section 4 of the Federal Arbitration Act ("FAA"), which provides in part that a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . [A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 23-24 (1983). Section 2 of the FAA states that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

> A court shall compel arbitration pursuant to the FAA if a party demonstrates:
>
> (1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of [a party] to arbitrate the dispute.

Am. Gen. Life & Accident Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005) (internal quotation marks omitted). Plaintiff only contests the second and third elements of the four-part test, arguing that the dispute is not arbitrable because there is no valid and enforceable arbitration agreement, and that the FAA does not apply because the transaction does not "in fact" involve interstate or foreign commerce. While federal law governs the arbitrability of disputes, state law governs issues regarding contract formation. Hill v. PeopleSoft USA, Inc., 412 F.3d 540, 543 (4th Cir. 2005). Because this

case involves the question of whether the Arbitration Agreement was a valid contract, the court looks to South Carolina law, as the agreement was entered into in South Carolina and contemplated services to be rendered in South Carolina.

A. Existence of Enforceable Arbitration Agreement

Driftwood argues plaintiff should be equitably estopped from denying the validity of the Arbitration Agreement, and that Carmela McCutcheon is bound to the agreement as a third party beneficiary. Plaintiff responds that the arbitration agreement is not enforceable.

1. Equitable Estoppel

First, Driftwood argues plaintiff should be equitably estopped from denying that Elijah McCutcheon had authority to bind Carmela McCutcheon. "[T]he doctrine of estoppel is equitable in nature." Ahrens v. State, 709 S.E.2d 54, 58 (S.C. 2011). "Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do." Parker v. Parker, 443 S.E.2d 388, 391 (S.C. 1994). "[N]o party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein." United States v. Bankers Ins. Co., 245 F.3d 315, 323 (4th Cir. 2001); see Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) (internal quotation marks omitted) ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.").

Here, the Arbitration Agreement and Admissions Agreement, while separate documents, were executed by the same parties, at the same time, and regarding the same transaction; therefore, they constitute the entire agreement between the parties. See Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 232 S.E.2d 20, 24 (S.C. 1977) ("The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the instruments together. The theory is that the instruments are effectively one instrument or contract."). Plaintiff attempts to hold Driftwood liable for alleged breach of certain contractual terms while simultaneously denying the enforceability of other terms. Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, plaintiff still takes inconsistent positions regarding these contracts, which were executed by the same parties under the same purported authority. It would be inequitable, for example, to allow plaintiff to assert that Elijah McCutcheon had authority to sign the Admissions Agreement on behalf of Carmela McCutcheon, but lacked such authority to sign the Arbitration Agreement. For these reasons, the court finds that plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

2. Third Party Beneficiary

Alternatively, Driftwood argues Carmela McCutcheon is an intended third party beneficiary and is therefore bound by the Arbitration Agreement. "A third party beneficiary is a party that the contracting parties intend to directly benefit." Helms Realty, Inc. v. Gibson-Wall Co., 611 S.E.2d 485, 488 (S.C. 2005). "[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the

contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." Bob Hammond Const. Co. v. Banks Const. Co., 440 S.E.2d 890, 891 (S.C. Ct. App. 1994). Moreover, "[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." Int'l Paper Co., 206 F.3d at 416-17 (emphasis added).

Carmela McCutcheon's care was the essential purpose of the agreement, as she is named in both the Arbitration Agreement and the Admissions Agreement as the resident to be admitted into the facility. Further, the terms of both agreements refer to the rights and obligations of Carmela McCutcheon as resident of the facility, and Driftwood as the caregiver. As such, Carmela McCutcheon was an intended beneficiary to the contract, and the court finds that the arbitration provision was binding on her and remains binding on her estate. See THI of S.C. at Columbia, LLC v. Wiggins, No 11-888, 2011 WL 4089435, at *6 (D.S.C. Sept. 13, 2011) ("Hall's care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate."); Cook v. GGNSC Ripley, LLC, 786 F. Supp. 2d 1166, 1172 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care bound third-party beneficiary and her estate).

3. Unconscionability

Plaintiff argues the arbitration contract is unconscionable and should not be enforced. "Unconscionability has been recognized as the absence of meaningful choice

on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 472 S.E.2d 242, 245 (S.C. 1996).

> In determining whether a contract was "tainted by an absence of meaningful choice," courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 669 (S.C. 2007) (citation omitted).

Plaintiff argues the Arbitration Agreement is unconscionable because: it is not "geared towards achieving an unbiased decision by a neutral decision-maker"; Elijah McCutcheon was disadvantaged in terms of bargaining power and sophistication; and the clause stating that the agreement is governed by interstate commerce is inconspicuous and constitutes an element of surprise. Pl.'s Resp. 10-11. First, the law does not require that an arbitration agreement specifically state that the arbitrator will be neutral. Even though the Arbitration Agreement does not contain the terms "neutral" or "unbiased," it provides that, in the event the parties fail to agree on an arbitrator, the court will select one. See Def.'s Mot. Ex. A. In addition, the Arbitration Agreement here does not create any unfair process for selection of arbitrators, such as requiring that the arbitrators be chosen from a list created by Driftwood alone. Cf. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938-39 (4th Cir. 1999). Next, any lack of sophistication on the part of Elijah McCutcheon does not overcome the fairness of the terms in the agreement itself. See

Munoz v. Green Tree Fin. Corp., 542 S.E.2d 360, 365 n.5 (S.C. 2001) ("[I]nequality of bargaining power alone will not invalidate an arbitration agreement."). Finally, the clause stating that the agreement is governed by interstate commerce was set in normal text, rather than obscured in smaller text or in a footnote. See Def.'s Mot. Ex. A. "[A] person who can read is bound to read an agreement before signing it," Munoz, 542 S.E.2d at 365, and the law generally presumes that a party to a contract has read and understood the contract's terms. Simpson, 644 S.E.2d at 670. The clause relating to interstate commerce did not constitute an unfair surprise. For these reasons, the court finds that the Arbitration Agreement was not unconscionable.[1]

B. Applicability of Federal Arbitration Act

Plaintiff argues that even if the Arbitration Agreement is enforceable, the FAA does not apply because the transaction between McCutcheon and Driftwood does not "in fact" involve interstate or foreign commerce. For an arbitration agreement to be subject to the FAA, it must involve interstate commerce. 9 U.S.C. § 2. "The FAA has an expansive reach, similar to that of the Commerce Clause, such that an arbitration clause merely 'affecting' interstate commerce would be covered by the statute." Wiggins, No. 11-888, 2011 WL 4089435, at *1 n.3 (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-74 (1995)). "Congress' Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject

[1] Plaintiff also argues that an enforceable arbitration agreement does not exist because Elijah McCutcheon had neither apparent agency authority nor statutory authority to bind Carmela McCutcheon under the contract. Because the court holds that plaintiff is equitably estopped from denying the validity of the Arbitration Agreement, and that Carmela McCutcheon was a third party beneficiary and the Arbitration Agreement remains binding on her estate, the court need not reach plaintiff's additional arguments.

to federal control." Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) (internal quotation marks omitted).

The Arbitration Agreement here clearly states that "the services and reimbursement thereof effects a transaction that involves interstate commerce." Def.'s Mot. Ex. A. Courts look to the terms of the arbitration agreement itself as evidence of whether the transaction involves interstate commerce. Wood, 429 F.3d at 87 (emphasis added) (noting that courts must consider "the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce"). Even without this stipulation in the Arbitration Agreement, the FAA still applies because the type of nursing home care involved here affects interstate commerce. Driftwood's Administrator, Jim Thomas, submitted an affidavit wherein he attested that food is supplied to Driftwood, located in South Carolina, by Sysco Corporation, which is headquartered in Texas. Def.'s Mot. Ex. E, ¶ 6. Thomas further stated that supplies used at Driftwood are purchased from manufacturers in California, Colorado, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, and Wisconsin. Id. at ¶¶ 7-13. These supplies must be shipped across state lines to reach Driftwood's facility. Finally, Driftwood participates in the federal Medicare and Medicaid programs. Id. at ¶ 14. The court finds this evidence sufficient to fulfill the interstate commerce requirement.

Plaintiff cites to Timms v. Greene, 427 S.E.2d 642 (S.C. 1993), as support for his argument that the transaction at issue does not involve interstate commerce. In Timms, the South Carolina Supreme Court found that an affidavit from the administrator of a health care center, in which the administrator averred that the center engaged in interstate commerce, was "insufficient to form the basis of the contract between the parties." Id. at

644. Timms is distinguishable from the present case, because the Arbitration Agreement signed by plaintiff specifically stated that the underlying transaction involves interstate commerce. Thus, the Arbitration Agreement "on its face evidences commerce." Id. The court finds that the FAA applies in this case.

III. CONCLUSION

For the foregoing reasons, the court **GRANTS** defendant's motion to compel arbitration.

The court dismisses this matter, but retains jurisdiction to select an arbitrator in the event that the parties cannot reach a mutual decision.

AND IT IS SO ORDERED.

DAVID C. NORTON
CHIEF UNITED STATES DISTRICT JUDGE

December 15, 2011
Charleston, South Carolina

.STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
ROBERT ABRAMS,	)	CASE NO. 2010-CP-42-6861
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL LONG-TERM CARE HOLDINGS, LLC D/B/A MAGNOLIA MANOR-INMAN; THI OF SOUTH CAROLINA AT MAGNOLIA MANOR-INMAN, LLC D/B/A MAGNOLIA MANOR-INMAN; ROBERT CROOKS; DALE LYLES; AND CAROL CLARK,	)	**ORDER**
	)	
DEFENDANTS.	)	

Date of Hearing:	July 21, 2011
Date of Re-hearing:	March 13, 2012
Attorneys for Plaintiff:	Gary W. Poliakoff and Raymond P. Mullman, Jr.
Attorneys for Defendant:	Lori Proctor

This matter is before the Court on Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark, and a Motion to Stay on behalf of Defendant Fundamental Long-Term Care Holdings, LLC. The Court denied these motions by Order dated August 25, 2011, after a hearing on July 21, 2011. Defendants filed a Motion to Alter, Amend or Reconsider the August 25, 2011 Order. For the reasons set forth below, the Court vacates the August 25, 2011 Order and grants Defendants' motions.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff has sued Defendants for Negligence, Negligence per Se, Intentional and Negligent Infliction of Emotional Distress, Breach of Fiduciary Duty and Unjust Enrichment,

pursuant to the Plaintiff's residency at the Magnolia Manor-Inman nursing facility. Plaintiff was a resident of the Magnolia Manor-Inman facility from approximately November 23, 2008, to January 23, 2009. Pursuant to Plaintiff's admission to Magnolia Manor-Inman, his wife Rebecca Abrams, acting as his representative, executed an Admissions Agreement and an Arbitration Agreement.

The Arbitration Agreement defines Magnolia Manor-Inman as the "Health Care Center," Robert J. Abrams as the "Resident" and Rebecca Abrams as "Representative." Mot. Exh. A. The relevant provisions of the Arbitration Agreement state the following:

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

Id. The Arbitration Agreement further states that:

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

Id. Regarding Rebecca Abrams authority to sign on behalf of her husband, the Arbitration Agreement states:

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

The Arbitration Agreement was executed by Rebecca Abrams as "Representative" and the admissions director at Magnolia Manor-Inman as the "Authorized Agent for Healthcare Center."

II. DISCUSSION

A. Arbitration Under the Federal Arbitration Act

Defendants move for arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. The FAA and its expression of the federal policy favoring arbitration are binding in state and federal courts. Zabinski v. Bright Acres Associates, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). Arbitration is available "only when the parties involved contractually agree to arbitrate." Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (Citations omitted.). State law governs issues of contract formation. See Hill v. PeopleSoft USA, Inc., 412 F.3d 540, 543 (4th Cir. 2005); Davis v. KB Home of S. Carolina, Inc., 394 S.C. 116, 124, 713 S.E.2d 799, 803 (Ct. App. 2011)("[E]ven in cases where the FAA otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause."); 9 U.S.C. §2. The Court must "decide whether there is an agreement to arbitrate according to common law principles of contract law" and "apply ordinary state-law principles that govern the formation of contract." Towles, 338 S.C. at 37, 524 S.E.2d at 844.

There is a "strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). "The policy of the United States and this State is to favor arbitration of disputes." Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). "[T]he heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989). Any doubts concerning the "scope of arbitrable issues" should be resolved in favor of arbitration.

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983).

The FAA establishes a "broad principle of enforceability;" arbitration agreements must not be singled out for suspect status, but rather it is required that arbitration provisions are "placed upon the same footing as other contracts." Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 682, 684-85, 116 S. Ct. 1652, 1653, 1655 (1996).

Thus, the court may not deny a party's request to arbitrate an issue "unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute." Towles, 338 S.C. at 41-42, 524 S.E.2d at 846 (Ct. App. 1999).

B. Application of the FAA

Plaintiff argues that the South Carolina Uniform Arbitration Act applies to the Arbitration Agreement and that the FAA does not apply to the Arbitration Agreement because the parties' agreement does not touch on interstate commerce.

The FAA will govern the enforcement of an arbitration agreement when a contract provides that it shall be governed by the FAA. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-364 (2001); Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248 (1989). "Arbitration agreements, like other contracts, are enforceable in accordance with their terms." Id. Clearly, the parties here have agreed that the Arbitration Agreement will be governed by the FAA.

Because the FAA applies, the requirements as set forth under the South Carolina Uniform Arbitration Act, ("SCUAA") S.C. Code §15-48-10 et seq., are not applicable. In passing the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed

to resolve by arbitration . . . Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." Perry v. Thomas, 482 U.S. 483, 489, 107 S. Ct. 2520, 2525 (1987). Therefore, the FAA supersedes state acts governing arbitration agreements, including the SCUAA, in situations such as the case here.

Furthermore, the parties' transaction and relationship in fact involve interstate commerce. As required, this court has "examine[d] the agreement, the complaint, and the facts to ascertain whether the transaction is one involving commerce within the meaning of the [the FAA]." Mathews v. Fluor Corp., 312 S.C. 404, 407, 440 S.E.2d 880, 881 (1994). "[T]he FAA applies in federal and state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." Munoz, 343 S.C. at 538-539, 542 S.E.2d at 363, citing Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 115 S. Ct. 834 (1995); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996). "The FAA has an expansive reach, similar to that of the Commerce Clause, such that an arbitration clause merely 'affecting' interstate commerce would be covered by the statute." THI of S. Carolina at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. 2011), citing Allied-Bruce, 513 U.S. 265, 273-74. "Congress' Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject to federal control." Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) (internal quotation marks omitted).

The Arbitration Agreement here clearly states that "the services and reimbursement thereof effects a transaction that involves interstate commerce." Mot. Ex. A. Courts look to the terms of the arbitration agreement itself as evidence of whether the transaction involves interstate

commerce. Am. Gen. Life & Acc. Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005)(noting that courts must consider "the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce"). "Arbitration agreements, like other contracts, are enforceable in accordance with their terms." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001), citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Even without this stipulation in the Arbitration Agreement, the FAA must apply because the type of nursing home care involved here affects interstate commerce. Magnolia Manor-Inman's Administrator, Dale Lyles, submitted an affidavit wherein he attested that medical supplies used in the care of residents and personal supplies used at the facility come from outside the state of South Carolina. Mtn. Ex. D. These supplies must be shipped across state lines to reach Magnolia Manor-Inman's facility. Dale Lyles further attested that part of Mr. Abrams stay at the facility was paid for by the federal Medicare program; insurance companies outside of South Carolina electronically deposited payments in the facility's bank accounts which are also outside of South Carolina. Id. These are clear examples of interstate commerce.

Furthermore, arbitration agreements have consistently been interpreted under the FAA in similar nursing home negligence cases. See Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012); McCutcheon v. THI of S.C. at Charleston, LLC, 2011 WL 6318575 (D.S.C. 2011); Wiggins.

Plaintiff cites to Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642, (1993), as support for his argument that the transaction at issue does not involve interstate commerce as necessary to apply the FAA. In Timms, the administrator of a nursing home set forth via affidavit a number of factors indicating how the nursing home engaged in interstate commerce. The Court held that

"[a]lthough these factors could evidence the [nursing home]'s involvement in interstate commerce, we find that their relationship to the agreement between the [nursing home] and the [plaintiff] is insufficient to form the basis of the contract between the parties." Id., 310 S.C. at 473, 427 S.E.2d at 644. Timms is distinguishable from the present case for a number of reasons, namely that the parties here explicitly agreed that the FAA would apply and that "the services and reimbursement thereof effects a transaction in interstate commerce." Mot. Exh. A. Furthermore, the reasoning used in Timms has been subsequently implicitly overruled by the United States Supreme Court. In Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 123 S. Ct. 2037 (2003), the Court discussed the relationship between the arbitration agreement and interstate commerce such as to require the application of the FAA. The Court held:

> We have interpreted the term "involving commerce" in the FAA as the functional equivalent of the more familiar term "affecting commerce"- words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power. Because the [FAA] provides for "the enforcement of arbitration agreements within the full reach of the Commerce Clause," it is perfectly clear that the FAA encompasses a wider range of transactions than those actually "in commerce"- that is, "within the flow of interstate commerce," . . . [A]pplication of the FAA [is not] defeated because the [the transactions at issue,] taken alone, did not have a "substantial effect on interstate commerce." **Congress' Commerce Clause power "may be exercised in individual cases without showing any specific effect upon interstate commerce" if in the aggregate the economic activity in question would represent "a general practice ... subject to federal control." Only that general practice need bear on interstate commerce in a substantial way.**

Id., 539 U.S. at 56-57, 123 S. Ct. at 2040. (Citations omitted.)(Emphasis added.) When determining effect on interstate commerce, it is the general practice, not the particular transaction at issue, which must be analyzed. Here, the nursing home at issue is clearly involved in interstate commerce, and provision of nursing home services effects interstate commerce in a substantial way. See Mot. Exh. D. As such, the Timms analysis of the interstate commerce question is effectively overruled, and must not be given credence by this Court.

The Court finds this evidence sufficient to fulfill the interstate commerce requirement.

C. Existence of Enforceable Arbitration Agreement

Plaintiff denies the validity of the Arbitration Agreement with Magnolia Manor-Inman.

1. Equitable Estoppel

Magnolia Manor-Inman argues the Plaintiff should be equitably stopped from denying that Rebecca Abrams had authority to bind Robert Abrams.

"[T]he doctrine of estoppel is equitable in nature." Ahrens v. State, 392 S.C. 340, 348, 709 S.E.2d 54, 58 (2011). "Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do." Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). "[N]o party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein." United States v. Bankers Ins. Co., 245 F.3d 315, 323 (4th Cir. 2001); see Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) (internal quotation marks omitted) ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.").

Here, the Arbitration Agreement and Admissions Agreement, while separate documents, were executed by the same parties, at the same time, and regarding the same transaction; therefore, the two instruments constitute the entire agreement between the parties and must be construed together. See Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88-89, 232 S.E.2d 20, 24, (1977) ("The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the

instruments together. The theory is that the instruments are effectively one instrument or contract.").

Plaintiff admits he was a resident of Magnolia Manor-Inman pursuant to the terms of the Admissions Agreement. (See Complaint ¶34: Plaintiff states he "resided at the [] facility pursuant to the terms of the admissions agreement.") Yet Plaintiff simultaneously denies the enforceability of terms of the Arbitration Agreement. The Admissions Agreement and Arbitration Agreement must be construed as one agreement; Plaintiff cannot claim the benefits of one while denying the perceived burdens of the other.

Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, Plaintiff still takes inconsistent positions regarding these contracts. It would be inequitable, for example, to allow Plaintiff to assert that Rebecca Abrams had authority to sign the Admissions Agreement on behalf of Robert Abrams, but lacked such authority to sign the Arbitration Agreement.

Plaintiff further argues that no cause of action for breach of contract has been pled, and thus the doctrine of equitable estoppel should not apply. However, the doctrine of equitable estoppel has a much broader application than suggested by Plaintiff. It is well settled that when a duty arises from contractual obligations, equitable estoppel may apply with equal effect to a related tort action. The Fourth Circuit Court of Appeals examined this exact issue in American Bankers Ins. Group v. Long, 453 F.3d 623 (4th Cir. 2006). In reversing the trial court's denial of the defendant's motion to compel arbitration, the Court stated:

> The legal principle [underlying the theory of equitable estoppel] rests on a simple proposition: it is unfair for a party to rely on a contract when it works to its advantage, and repudiate it when it works to its disadvantage. To be equitably estopped from denying the applicability of an arbitration clause, therefore, the [plaintiff] need not necessarily assert a cause of action for breach of contract containing the arbitration clause. Instead, **estoppel is appropriate if in**

> **substance the [plaintiff]'s complaint [is] based on the [defendant's] alleged breach of the obligations and duties assigned to it in the agreement, regardless of the legal label assigned to the claim.**

Id. (Emphasis added.)(Internal citations omitted.) South Carolina District Courts have continually endorsed this precise proposition as well. See Thomas v. Matrix Sys. Auto. Finishers, LLC, 2010 WL 147956, at 8 (D.S.C. 2010); Wiggins. Because Plaintiff's claim in substance is based on the breach of certain duties assigned the Defendants pursuant to their contractual agreements, equitable estoppel may be applied to prevent Plaintiff from denying the validity of the Arbitration Agreement.

For these reasons, the Court finds that Plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

2. Third Party Beneficiary

Magnolia Manor-Inman alternatively argues that Robert Abrams is a third-party beneficiary and is therefore bound by the Arbitration Agreement.

"A third party beneficiary is a party that the contracting parties intend to directly benefit." Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). "[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." Bob Hammond Const. Co. v. Banks Const. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). Moreover, "[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-417 (4th Cir. 2000).

Robert Abrams' care was the essential purpose of the parties' agreement, as he is named in both the Arbitration Agreement and the Admissions Agreement as the resident to be admitted into the facility. Further, the terms of both agreements refer to the rights and obligations of Robert Abrams as resident of the facility, and Magnolia Manor-Inman as the caregiver. As such, Robert Abrams was an intended beneficiary to the contract, and the Court finds that the arbitration provision is binding on him. See Wiggins ("Hall's care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate."); Cook v. GGNSC Ripley, LLC, 786 F. Supp. 2d 1166, 1172 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care bound third-party beneficiary and her estate).

3. Unconscionability

Plaintiff further argues the Arbitration Agreement is invalid because it is unconscionable.

"[A]n adhesion contract is not per se unconscionable." Munoz, 343 S.C. at 541, 542 S.E.2d at 365. "Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996). "Further, a person who can read is bound to read an agreement before signing it." Munoz, 343 S.C. at 541, 542 S.E.2d at 365 (holding that arbitration provision was not unconscionable even though plaintiffs did not read it and were not advised of those terms). In

addition, "inequality of bargaining power alone will not invalidate an arbitration agreement." Id. at n.5.

In Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, (2007), our Supreme Court held that:

> In determining whether a contract was "tainted by an absence of meaningful choice," courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

373 S.C. at 25, 644 S.E.2d at 669 (citation omitted).

"[W]here the contract is subject to the FAA, this court must defer to that legislative policy and may not view arbitration as an inherently less beneficial form of dispute resolution." Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 400, 498 S.E.2d 898, 905 (Ct. App. 1998). In addition, "a party desiring to avoid an arbitration clause on the grounds that no reasonable person would have agreed to it merely because it precludes judicial remedies must demonstrate how he or she has been prejudiced by compelled arbitration. This requires, at the least, identification of judicial relief not available in arbitration." Id. "The loss of the right to a jury trial is an obvious result of arbitration." Simpson, 373 S.C. at 27, 644 S.E.2d at 670 (holding that arbitration clause was unconscionable because in addition to "the inconspicuous nature of [the] provision, which was drafted by the superior party," the provision "also required Simpson to forego certain [significant] remedies that were otherwise required by statute").

The Arbitration Agreement clearly states that the party entering into the Agreement is fully aware of his healthcare options and other potential providers of nursing home facilities. The Agreement states:

It is understood by Resident/Representative that he/she is not required to use the

> aforesaid Health Care Center for Resident's healthcare needs and that there are numerous other health care providers in the State where Health Care Center is located that are qualified to provide such care to Resident.

Mot. Exh. A. Furthermore, the Arbitration Agreement states clearly in bold lettering in a separate heading: "**I understand and agree that I am giving up and waiving my right to a jury trial.**" Mot. Exh. A (Emphasis in Original.).

Any lack of sophistication on the part of Rebecca Abrams does not overcome the fairness of the terms in the agreement itself. See Munoz. All judicial remedies available in a jury trial are available to Abrams in arbitration, and as such Robert Abrams is not prejudiced by enforcement of the Arbitration Agreement. Furthermore, the express terms of the Arbitration Agreement, which Rebecca Abrams was bound to read, indicate she understood and agreed that she was giving up the right to a jury trial. There is no fine print or convoluted language here; the Arbitration Agreement is fair, clear and unambiguous.

Further, the Arbitration Agreement does not create any unfair process for selection of arbitrators, such as requiring that the arbitrators be chosen from a list created by Magnolia Manor-Inman alone. Cf. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938-39 (4th Cir. 1999). The Arbitration Agreement is not unconscionable, as it applies equally to both the resident and the facility. Each party is given equal rights to seek arbitration of disputes.

For these reasons, the court finds that the Arbitration Agreement is not unconscionable.

4. Federal Statutes and Regulations Governing Medicare and/or Medicaid

Abrams' further argues that the Arbitration Agreement is not enforceable because it amounts to an additional charge for admission into the facility pursuant to 42 U.S.C. §1396r(c)(5)(A)(iii) and 42 C.F.R. §483.12(d)(3), which prohibit the requirement of "other consideration as a precondition of admission." This argument too is unpersuasive.

In Sanford v. Castleton Health Care Ctr., LLC, 813 N.E.2d 411, 419 (Ind. Ct. App. 2004), the Indiana Court of Appeals noted that requiring a nursing-home admittee to sign an arbitration agreement is not akin to charging an additional fee or other consideration as a prerequisite of admittance. Rather, an arbitration agreement merely establishes a forum for future disputes; both parties are bound to it and both parties receive whatever benefits and detriments accompany the arbitral forum. Id.; Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983, 989 (Ala. 2004) (finding that the argument that arbitration agreement violated 42 U.S.C. §1396r(c)(5)(A)(iii) prohibition of "other consideration" failed and noting that "[i]f we were to agree with Owens, virtually any contract term Owens decided she did not like could be construed as requiring other consideration in order to gain admittance to the nursing home and thus be disallowed by the statute); Owens v. Nat. Health Corp., 263 S.W.3d 876, 887 (Tenn. 2007) (finding no violation); Broughsville v. OHECC, LLC, 2005 WL 3483777 (Ohio Ct. App. 2005) (unpublished); Gainesville Health Care Ctr., Inc. v. Weston, 857 So.2d 278, 288 (Fla. Ct. App. 1 Dist. 2003) ("We have found no authority from any jurisdiction which holds that an arbitration provision constitutes 'consideration' in this sense; nor do we believe that the federal regulation was intended to apply to such a situation."). The Court agrees with the reasoning in the above cited cases and finds that 42 U.S.C. § 1396r(c)(5)(A)(iii) and 42 C.F.R. § 483.12(d)(3) are not intended to apply to this case and further, that an arbitration agreement is not considered an additional charge as contemplated therein.

5. Plaintiff's Claims Fall within the Scope of the Arbitration Agreement

Plaintiff further argues that his claims do not fall within the scope of the Arbitration Agreement. However, the Arbitration Agreement is broadly worded to include "any controversy or dispute . . . relating in any way to Resident's stay at Health Care Center, or to the provisions of

care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim . . ." Mot. Exh. A. Furthermore, the FAA's "text includes no exception for personal-injury [] claims" but rather "requires courts to enforce the bargain of the parties to arbitrate." Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203 (2012). Clearly the disputes raised in Plaintiff's Complaint fall under the terms of the Arbitration Agreement.

6. Defendants have not Waived their Right to Arbitrate

Plaintiff further argues Defendants have by their conduct nullified the Arbitration Agreement and waived their right to Arbitrate. Defendants filed their Motion to Dismiss and Petition to Compel Arbitration at their first opportunity for a responsive pleading i.e. at the same time as answering the Plaintiff's Complaint. No action was pending against the Defendants prior to Plaintiff filing his Complaint, and as such no assertion of the right to arbitration was required and no possibility of waiver existed. Defendants have not waived or abandoned their right to enforce a proper arbitration agreement.

D. Defendants Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark Have Standing to Assert Arbitration

The express written language of the Arbitration Agreement indicates the following:

> This Agreement is made between Magnolia Manor-Inman ("Health Care Center"), its agents, employees and servants, and Robert J. Abrams ("Resident") or Rebecca Abrams [as "Representative"]. . . It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.

Mot. Exh. A. It is well established that non-signatories have the right to enforce arbitration agreements in certain situations. See Am. Bankers Ins. Group, Inc. v. Long, 453 F.3d 623 (4th Cir. 2006). Robert Crooks, Dale Lyles and Carol Clark were members of Magnolia Manor-

Inman's governing body. Further, it appears Dale Lyles was the facility administrator and Carol Clark was the director of nursing at all times relevant to Plaintiff's claim. Plaintiff does not contest this. As such, Robert Crooks, Dale Lyles and Carol Clark are all agents of Magnolia Manor-Inman pursuant to their roles as members of the governing body. Further, Dale Lyles and Carol Clark are employees of Magnolia Manor-Inman. As such, each individual has a right to assert the terms of the Arbitration Agreement.

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark. The Court **STAYS** the matter as to the remaining Defendant, Fundamental Long-Term Care Holding, LLC, until the arbitration process has been completed. The Court retains jurisdiction of the matter as to the Dismissed Defendants only to the following extent: should the parties to the Arbitration Agreement be unable to select an arbitrator or unable to agree on one pursuant to the terms of the Arbitration Agreement, this Court retains jurisdiction of the matter to assist the parties in selecting an arbitrator.

It is therefore

ORDERED that Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark are **GRANTED** and the matter is **STAYED** for the remaining Defendant until arbitration has been completed.

IT IS SO ORDERED.

Honorable Roger L. Couch
Presiding Judge Seventh Judicial Circuit

Spartanburg, South Carolina

Dated: 6/22/12

RDL P.17
10-CP-42-6861
6/22/12

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
FRANK A. CAMPSEN BY AND THROUGH HIS ATTORNEY-IN-FACT LARRY F. CAMPSEN,	)	CASE NO. 2011-CP-42-0438
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	
FUNDAMENTAL LONG-TERM CARE HOLDINGS, LLC; FUNDAMENTAL CLINICAL CONSULTING, LLC; FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; THI OF BALTIMORE, INC.; THI OF SOUTH CAROLINA, LLC; THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT SPARTANBURG, LLC D/B/A MAGNOLIA PLACE AT SPARTANBURG; EDWARD WARREN, MD; NETWORK GERIATRICS SERVICES, P.A.; ROBERT CROOKS; PATRICIA HARRIS; AND MARGARET KELLER,	)	**ORDER**
	)	
DEFENDANTS.	)	

Date of Hearing:	July 21, 2011
Date of Re-hearing:	March 13, 2012
Attorneys for Plaintiff:	Gary W. Poliakoff and Raymond P. Mullman, Jr.
Attorneys for Defendant:	Lori Proctor

This matter is before the Court on Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg ("Magnolia Place"), Robert Crooks, Patricia Harris and Margaret Keller, and Motions to Stay on behalf of Defendants Fundamental Long-Term Care Holdings, LLC, Fundamental Administrative Services, LLC, Fundamental Clinical

Consulting, LLC, THI of Baltimore, Inc. and THI of South Carolina, LLC. The Court denied these motions by Order dated August 25, 2011, after a hearing on July 21, 2011. Defendants filed a Motion to Alter, Amend or Reconsider the August 25, 2011 Order. For the reasons set forth below, the Court vacates the August 25, 2011 Order and grants Defendants' motions.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff has sued Defendants for Negligence, Negligence per Se, Breach of Fiduciary Duty and Unjust Enrichment, pursuant to Frank A. Campsen's residency at the Magnolia Place nursing facility. Mr. Campsen was a resident of the Magnolia Place facility from approximately October 21, 2009, to December 20, 2009. Pursuant to Mr. Campsen's admission to Magnolia Place, Larry F. Campsen, acting as his representative, executed an Admissions Agreement and an Arbitration Agreement. Frank Campsen had previously designated Larry F. Campsen as his General Durable Power of Attorney and Healthcare Power of Attorney, and given him authority to enter into agreements on his behalf. Mtn. Exh. D.

The Arbitration Agreement defines Magnolia Place as the "Facility," Frank A. Campsen as the "Resident" and Larry Campsen as "Resident's Durable Power of Attorney for Healthcare" and "Representative." Id. The relevant provisions of the Arbitration Agreement state the following:

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

Id. The Arbitration Agreement further states that:

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

Id. Regarding Larry Campsen's authority to sign on behalf of Frank Campsen, the Arbitration Agreement states:

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

The Arbitration Agreement clearly sets forth the parties to be bound by the Agreement:

> It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.

Id. The Arbitration Agreement was executed by Larry Campsen as "Representative" of Frank Campsen and by the "Authorized Agent of Facility."

II. DISCUSSION

A. Arbitration Under the Federal Arbitration Act

Defendants move for arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. The FAA and its expression of the federal policy favoring arbitration are binding in state and federal courts. Zabinski v. Bright Acres Associates, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). Arbitration is available "only when the parties involved contractually agree to arbitrate." Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). (Citations omitted.). State law governs issues of contract formation. See Hill v. PeopleSoft USA, Inc., 412 F.3d 540, 543 (4th Cir. 2005); Davis v. KB Home of S. Carolina, Inc., 394 S.C. 116, 124, 713 S.E.2d 799, 803 (Ct. App. 2011)("[E]ven in cases where the FAA otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability

of an arbitration clause."); 9 U.S.C. §2. The Court must "decide whether there is an agreement to arbitrate according to common law principles of contract law" and "apply ordinary state-law principles that govern the formation of contract." Towles, 338 S.C. at 37, 524 S.E.2d at 844.

There is a "strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). "The policy of the United States and this State is to favor arbitration of disputes." Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). "[T]he heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989). Any doubts concerning the "scope of arbitrable issues" should be resolved in favor of arbitration. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983).

The FAA establishes a "broad principle of enforceability;" arbitration agreements must not be singled out for suspect status, but rather it is required that arbitration provisions are "placed upon the same footing as other contracts." Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 682, 684-85, 116 S. Ct. 1652, 1653, 1655 (1996).

Thus, the court may not deny a party's request to arbitrate an issue "unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute." Towles, 338 S.C. at 41-42, 524 S.E.2d at 846 (Ct. App. 1999).

B. Application of the FAA

Plaintiff argues that the South Carolina Uniform Arbitration Act applies to the Arbitration Agreement and that the FAA does not apply to the Arbitration Agreement because the parties' agreement does not touch on interstate commerce.

The FAA will govern the enforcement of an arbitration agreement when a contract provides that it shall be governed by the FAA. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-364 (2001); Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248 (1989). "Arbitration agreements, like other contracts, are enforceable in accordance with their terms." Id. Clearly, the parties here have agreed that the Arbitration Agreement will be governed by the FAA.

Because the FAA applies, the requirements as set forth under the South Carolina Uniform Arbitration Act, ("SCUAA") S.C. Code §15-48-10 et seq., are not applicable. In passing the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration . . . Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." Perry v. Thomas, 482 U.S. 483, 489, 107 S. Ct. 2520, 2525 (1987). Therefore, the FAA supersedes state acts governing arbitration agreements, including the SCUAA, in situations such as the case here.

Furthermore, the parties' transaction and relationship in fact involve interstate commerce. As required, this court has "examine[d] the agreement, the complaint, and the facts to ascertain whether the transaction is one involving commerce within the meaning of the [the FAA]." Mathews v. Fluor Corp., 312 S.C. 404, 407, 440 S.E.2d 880, 881 (1994). "[T]he FAA applies in federal and state court to any arbitration agreement regarding a transaction that in fact involves

interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." Munoz, 343 S.C. at 538-539, 542 S.E.2d at 363, citing Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 115 S. Ct. 834 (1995); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996). "The FAA has an expansive reach, similar to that of the Commerce Clause, such that an arbitration clause merely 'affecting' interstate commerce would be covered by the statute." THI of S. Carolina at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. 2011), citing Allied-Bruce, 513 U.S. 265, 273-74. "Congress' Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject to federal control." Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) (internal quotation marks omitted).

The Arbitration Agreement here clearly states that "the services and reimbursement thereof effects a transaction that involves interstate commerce." Mot. Ex. A. Courts look to the terms of the arbitration agreement itself as evidence of whether the transaction involves interstate commerce. Am. Gen. Life & Acc. Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005)(noting that courts must consider "the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce"). "Arbitration agreements, like other contracts, are enforceable in accordance with their terms." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001), citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Even without this stipulation in the Arbitration Agreement, the FAA must apply because the type of nursing home care involved here affects interstate commerce. Magnolia Place's Business Office Manager, Lynn Henderson, submitted an affidavit wherein she attested that medical supplies used in the care of residents and

personal supplies used at the facility come from outside the state of South Carolina. Mtn. Ex. F. These supplies must be shipped across state lines to reach Magnolia Place's facility. Timothy Johnson further attested that part of Mr. Campsen stay at the facility was paid for by the federal Medicare program; insurance companies outside of South Carolina electronically deposited payments in the facility's bank accounts which are also outside of South Carolina. Id. These are clear examples of interstate commerce.

Furthermore, arbitration agreements have consistently been interpreted under the FAA in similar nursing home negligence cases. See Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012); McCutcheon v. THI of S.C. at Charleston, LLC, 2011 WL 6318575 (D.S.C. 2011); Wiggins.

Plaintiff cites to Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642, (1993), as support for his argument that the transaction at issue does not involve interstate commerce as necessary to apply the FAA. In Timms, the administrator of a nursing home set forth via affidavit a number of factors indicating how the nursing home engaged in interstate commerce. The Court held that "[a]lthough these factors could evidence the [nursing home]'s involvement in interstate commerce, we find that their relationship to the agreement between the [nursing home] and the [plaintiff] is insufficient to form the basis of the contract between the parties." Id., 310 S.C. at 473, 427 S.E.2d at 644. Timms is distinguishable from the present case for a number of reasons, namely that the parties here explicitly agreed that the FAA would apply and that "the services and reimbursement thereof effects a transaction in interstate commerce." Mot. Exh. A. Furthermore, the reasoning used in Timms has been subsequently implicitly overruled by the United States Supreme Court. In Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 123 S. Ct. 2037

(2003), the Court discussed the relationship between the arbitration agreement and interstate commerce such as to require the application of the FAA. The Court held:

> We have interpreted the term "involving commerce" in the FAA as the functional equivalent of the more familiar term "affecting commerce"- words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power. Because the [FAA] provides for "the enforcement of arbitration agreements within the full reach of the Commerce Clause," it is perfectly clear that the FAA encompasses a wider range of transactions than those actually "in commerce"- that is, "within the flow of interstate commerce," . . . [A]pplication of the FAA [is not] defeated because the [the transactions at issue,] taken alone, did not have a "substantial effect on interstate commerce." **Congress' Commerce Clause power "may be exercised in individual cases without showing any specific effect upon interstate commerce" if in the aggregate the economic activity in question would represent "a general practice ... subject to federal control." Only that general practice need bear on interstate commerce in a substantial way**.

Id., 539 U.S. at 56-57, 123 S. Ct. at 2040. (Citations omitted.)(Emphasis added.) When determining effect on interstate commerce, it is the general practice, not the particular transaction at issue, which must be analyzed. Here, the nursing home at issue is clearly involved in interstate commerce, and provision of nursing home services effects interstate commerce in a substantial way. See Mot. Exh. D. As such, the Timms analysis of the interstate commerce question is effectively overruled, and must not be given credence by this Court.

The Court finds this evidence sufficient to fulfill the interstate commerce requirement.

C. Existence of Enforceable Arbitration Agreement

Plaintiff denies the validity of the Arbitration Agreement with Magnolia Place.

1. Larry Campsen As Personal Representative of the Estate of Frank Campsen

In pursuing this action, Larry Campsen acts as personal representative of Frank Campsen's estate. Under South Carolina law, "a personal representative of a decedent domiciled in this State at his death has the same standing to sue and be sued in the courts of this State and the courts of any other jurisdiction as his decedent had immediately prior to death." S.C.Code

Ann. § 62–3–703. Thus, Larry Campsen is bound in his capacity as personal representative if Frank Campsen would have been bound immediately prior to his death.

2. Equitable Estoppel

Magnolia Place argues the Plaintiff should be equitably stopped from denying that Larry Campsen had authority to bind Frank Campsen.

"[T]he doctrine of estoppel is equitable in nature." Ahrens v. State, 392 S.C. 340, 348, 709 S.E.2d 54, 58 (2011). "Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do." Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). "[N]o party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein." United States v. Bankers Ins. Co., 245 F.3d 315, 323 (4th Cir. 2001); see Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) (internal quotation marks omitted) ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.").

Here, the Arbitration Agreement and Admissions Agreement, while separate documents, were executed by the same parties, at the same time, and regarding the same transaction; therefore, the two instruments constitute the entire agreement between the parties and must be construed together. See Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88-89, 232 S.E.2d 20, 24, (1977) ("The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the

instruments together. The theory is that the instruments are effectively one instrument or contract.").

Plaintiff admits Frank Campsen was a resident of Magnolia Place pursuant to the terms of the Admissions Agreement. (See Amended Complaint ¶37: Plaintiff states Frank Campsen "resided at the [] facility pursuant to the terms of the admissions agreement.") Yet Plaintiff simultaneously denies the enforceability of terms of the Arbitration Agreement. The Admissions Agreement and Arbitration Agreement must be construed as one agreement; Plaintiff cannot claim the benefits of one while denying the perceived burdens of the other.

Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, Plaintiff still takes inconsistent positions regarding these contracts. It would be inequitable, for example, to allow Plaintiff to assert that Larry Campsen had authority to sign the Admissions Agreement on behalf of Frank Campsen, but lacked such authority to sign the Arbitration Agreement.

Plaintiff further argues that no cause of action for breach of contract has been pled, and thus the doctrine of equitable estoppel should not apply. However, the doctrine of equitable estoppel has a much broader application than suggested by Plaintiff. It is well settled that when a duty arises from contractual obligations, equitable estoppel may apply with equal effect to a related tort action. The Fourth Circuit Court of Appeals examined this exact issue in American Bankers Ins. Group v. Long, 453 F.3d 623 (4th Cir. 2006). In reversing the trial court's denial of the defendant's motion to compel arbitration, the Court stated:

> The legal principle [underlying the theory of equitable estoppel] rests on a simple proposition: it is unfair for a party to rely on a contract when it works to its advantage, and repudiate it when it works to its disadvantage. To be equitably estopped from denying the applicability of an arbitration clause, therefore, the [plaintiff] need not necessarily assert a cause of action for breach of contract containing the arbitration clause. Instead, **estoppel is appropriate if in**

> **substance the [plaintiff]'s complaint [is] based on the [defendant's] alleged breach of the obligations and duties assigned to it in the agreement, regardless of the legal label assigned to the claim.**

Id. (Emphasis added.)(Internal citations omitted.) South Carolina District Courts have continually endorsed this precise proposition as well. See Thomas v. Matrix Sys. Auto. Finishers, LLC, 2010 WL 147956, at 8 (D.S.C. 2010); Wiggins. Because Plaintiff's claim in substance is based on the breach of certain duties assigned the Defendants pursuant to their contractual agreements, equitable estoppel may be applied to prevent Plaintiff from denying the validity of the Arbitration Agreement.

For these reasons, the Court finds that Plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

3. Third Party Beneficiary

Magnolia Place alternatively argues that Frank Campsen is a third-party beneficiary and is therefore bound by the Arbitration Agreement.

"A third party beneficiary is a party that the contracting parties intend to directly benefit." Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). "[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." Bob Hammond Const. Co. v. Banks Const. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). Moreover, "[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-417 (4th Cir. 2000).

Frank Campsen's care was the essential purpose of the parties' agreement, as he is named in both the Arbitration Agreement and the Admissions Agreement as the resident to be admitted into the facility. Further, the terms of both agreements refer to the rights and obligations of Frank Campsen as resident of the facility, and Magnolia Place as the caregiver. As such, Frank Campsen was an intended beneficiary to the contract, and the Court finds that the arbitration provision is binding on him. See Wiggins ("Hall's care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate."); Cook v. GGNSC Ripley, LLC, 786 F. Supp. 2d 1166, 1172 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care bound third-party beneficiary and her estate).

4. Unconscionability

Plaintiff further argues the Arbitration Agreement is invalid because it is unconscionable.

"[A]n adhesion contract is not per se unconscionable." Munoz, 343 S.C. at 541, 542 S.E.2d at 365. "Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996). "Further, a person who can read is bound to read an agreement before signing it." Munoz, 343 S.C. at 541, 542 S.E.2d at 365 (holding that arbitration provision was not unconscionable even though plaintiffs did not read it and were not advised of those terms). In

addition, "inequality of bargaining power alone will not invalidate an arbitration agreement." Id. at n.5.

In Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, (2007), our Supreme Court held that:

> In determining whether a contract was "tainted by an absence of meaningful choice," courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

373 S.C. at 25, 644 S.E.2d at 669 (citation omitted).

"[W]here the contract is subject to the FAA, this court must defer to that legislative policy and may not view arbitration as an inherently less beneficial form of dispute resolution." Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 400, 498 S.E.2d 898, 905 (Ct. App. 1998). In addition, "a party desiring to avoid an arbitration clause on the grounds that no reasonable person would have agreed to it merely because it precludes judicial remedies must demonstrate how he or she has been prejudiced by compelled arbitration. This requires, at the least, identification of judicial relief not available in arbitration." Id. "The loss of the right to a jury trial is an obvious result of arbitration." Simpson, 373 S.C. at 27, 644 S.E.2d at 670 (holding that arbitration clause was unconscionable because in addition to "the inconspicuous nature of [the] provision, which was drafted by the superior party," the provision "also required Simpson to forego certain [significant] remedies that were otherwise required by statute").

The Arbitration Agreement clearly states that the party entering into the Agreement is fully aware of his healthcare options and other potential providers of nursing home facilities. The Agreement states:

It is understood by Resident/Representative that he/she is not required to use the

aforesaid Facility for Resident's healthcare needs and that there are numerous other health care providers in the State where Facility is located that are qualified to provide such care to Resident.

Mot. Exh. A. Furthermore, the Arbitration Agreement states clearly in bold lettering in a separate heading: "**I understand and agree that I am giving up and waiving my right to a jury trial.**" Mot. Exh. A (Emphasis in Original.).

Any lack of sophistication on the part of Larry Campsen does not overcome the fairness of the terms in the agreement itself. See Munoz. All judicial remedies available in a jury trial are available to Plaintiff in arbitration, and as such Plaintiff is not prejudiced by enforcement of the Arbitration Agreement. Furthermore, the express terms of the Arbitration Agreement, which Larry Campsen was bound to read, indicate he understood and agreed that he was giving up the right to a jury trial. There is no fine print or convoluted language here; the Arbitration Agreement is fair, clear and unambiguous.

Further, the Arbitration Agreement does not create any unfair process for selection of arbitrators, such as requiring that the arbitrators be chosen from a list created by Magnolia Place alone. Cf. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938-39 (4th Cir. 1999). The Arbitration Agreement is not unconscionable, as it applies equally to both the resident and the facility. Each party is given equal rights to seek arbitration of disputes.

For these reasons, the court finds that the Arbitration Agreement is not unconscionable.

5. Federal Statutes and Regulations Governing Medicare and/or Medicaid

Plaintiff further argues that the Arbitration Agreement is not enforceable because it amounts to an additional charge for admission into the facility pursuant to 42 U.S.C. §1396r(c)(5)(A)(iii) and 42 C.F.R. §483.12(d)(3), which prohibit the requirement of "other consideration as a precondition of admission." This argument too is unpersuasive.

In Sanford v. Castleton Health Care Ctr., LLC, 813 N.E.2d 411, 419 (Ind. Ct. App. 2004), the Indiana Court of Appeals noted that requiring a nursing-home admittee to sign an arbitration agreement is not akin to charging an additional fee or other consideration as a prerequisite of admittance. Rather, an arbitration agreement merely establishes a forum for future disputes; both parties are bound to it and both parties receive whatever benefits and detriments accompany the arbitral forum. Id.; Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983, 989 (Ala. 2004) (finding that the argument that arbitration agreement violated 42 U.S.C. §1396r(c)(5)(A)(iii) prohibition of "other consideration" failed and noting that "[i]f we were to agree with Owens, virtually any contract term Owens decided she did not like could be construed as requiring other consideration in order to gain admittance to the nursing home and thus be disallowed by the statute); Owens v. Nat. Health Corp., 263 S.W.3d 876, 887 (Tenn. 2007) (finding no violation); Broughsville v. OHECC, LLC, 2005 WL 3483777 (Ohio Ct. App. 2005) (unpublished); Gainesville Health Care Ctr., Inc. v. Weston, 857 So.2d 278, 288 (Fla. Ct. App. 1 Dist. 2003) ("We have found no authority from any jurisdiction which holds that an arbitration provision constitutes 'consideration' in this sense; nor do we believe that the federal regulation was intended to apply to such a situation."). The Court agrees with the reasoning in the above cited cases and finds that 42 U.S.C. § 1396r(c)(5)(A)(iii) and 42 C.F.R. § 483.12(d)(3) are not intended to apply to this case and further, that an arbitration agreement is not considered an additional charge as contemplated therein.

6. Plaintiff's Claims Fall within the Scope of the Arbitration Agreement

Plaintiff further argues that his claims do not fall within the scope of the Arbitration Agreement. However, the Arbitration Agreement is broadly worded to include "any controversy or dispute . . . relating in any way to Resident's stay at Facility, or to the provisions of care or

services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim . . ." Mot. Exh. A. Furthermore, the FAA's "text includes no exception for personal-injury [] claims" but rather "requires courts to enforce the bargain of the parties to arbitrate." Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203 (2012). Clearly the disputes raised in Plaintiff's Amended Complaint fall under the terms of the Arbitration Agreement.

7. Defendants have not Waived their Right to Arbitrate

Plaintiff further argues Defendants have by their conduct nullified the Arbitration Agreement and waived their right to Arbitrate. Defendants filed their Motion to Dismiss and Petition to Compel Arbitration at their first opportunity for a responsive pleading i.e. at the same time as answering the Plaintiff's Complaint. No action was pending against the Defendants prior to Plaintiff filing his Complaint, and as such no assertion of the right to arbitration was required and no possibility of waiver existed. Defendants have not waived or abandoned their right to enforce a proper arbitration agreement.

D. Defendants Magnolia Place, Robert Crooks, Patricia Harris and Margaret Keller Have Standing to Assert Arbitration

The express written language of the Arbitration Agreement indicates the following:

> This Agreement is made between Magnolia Place at Spartanburg ("Facility"), its agents, employees and servants, and Frank A. Campsen ("Resident") or Larry Campsen [as "Resident's Durable Power of Attorney for Health Care" and "Representative"]. . . It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.

Mot. Exh. A. It is well established that non-signatories have the right to enforce arbitration agreements in certain situations. See Am. Bankers Ins. Group, Inc. v. Long, 453 F.3d 623 (4th Cir. 2006). Robert Crooks, Patricia Harris and Margaret Keller were members of Magnolia Place's governing body. Further, it appears Patricia Harris was the facility administrator and

Margaret Keller was the director of nursing at all times relevant to Plaintiff's claim. Plaintiff does not contest this. As such, Robert Crooks, Patricia Harris and Margaret Keller are all agents of Magnolia Place pursuant to their roles as members of the governing body for the purposes of the Arbitration Agreement. Further, Patricia Harris and Margaret Keller are employees of Magnolia Place for the purposes of the Arbitration Agreement. As such, each individual has a right to assert the terms of the Arbitration Agreement.

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg, Robert Crooks, Patricia Harris and Margaret Keller. The Court **STAYS** the matter as to the Defendants Fundamental Long-Term Care Holdings, LLC, Fundamental Administrative Services, LLC, Fundamental Clinical Consulting, LLC, THI of Baltimore, Inc. and THI of South Carolina, LLC. The Court retains jurisdiction of the matter as to the Dismissed Defendants only to the following extent: should the parties to the Arbitration Agreement be unable to select an arbitrator or unable to agree on one pursuant to the terms of the Arbitration Agreement, this Court retains jurisdiction of the matter to assist the parties in selecting an arbitrator.

It is therefore

ORDERED that Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg, Robert Crooks, Patricia Harris and Margaret Keller are **GRANTED** and the matter is **STAYED** for the remaining Defendants until arbitration has been completed.

IT IS SO ORDERED.

Honorable Roger L. Couch
Presiding Judge Seventh Judicial Circuit

Spartanburg, South Carolina

Dated: 6/22/12

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6/22/12

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.

DEFENDANT'S EXHIBIT 10

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.

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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

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
James Boyd, Jr., Plaintiff, v. THI of South Carolina, LLC, d/b/a Magnolia Place-Greenville; Hunt Valley Holdings, LLC; THI of Baltimore, Inc.; Fundamental Clinical and Operational Services LLC; Fundamental Administrative Services, LLC; Fundamental Clinical Consulting, LLC; Leonard Grunstein Both Individually and as Owner/Operator of Magnolia Place; Murray Forman Both Individually and as Owner/Operator of Magnolia Place; and Rusty Flathmann Both Individually and as Employee/Manager of Magnolia Place, Defendants.	Case No: 2018-CP-23-01934 **ORDER**

This matter comes before the Court upon Defendant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place of Greenville (misidentified in Plaintiff's Complaint and hereinafter referred to as "Defendants" or "Facility") Motion to Dismiss and Compel Arbitration. Defendants Fundamental Administrative Services, LLC ("Administrative Services") and Fundamental Clinical and Operational Services, LLC ("Operational Services") also filed motions to stay any requirement to file further responsive pleadings, motions, or discovery filed or served by Plaintiff until the Court has made a final decision regarding the validity of the arbitration agreement. The hearing was held June 13, 2018 in Greenville, South Carolina. Present on behalf of Plaintiff James Boyd, Jr. ("Boyd" or "Plaintiff" or "Mr. Boyd") was Stefan B. Feidler, Esq. of Anastopoulo Law Firm, LLC. Present on behalf of Defendant THI

of South Carolina at Magnolia Place at Greenville d/b/a Magnolia Place of Greenville was Perry M. Buckner, IV, Esq. of Young Clement Rivers, LLP.

BACKGROUND

The Plaintiff was admitted to Defendants' nursing home facility on June 30, 2016 after he was rendered a quadriplegic in a car accident with an unidentified driver. Prior to his admission, Wilda Boyd – Plaintiff's Mother – entered into several contracts with the Defendants on behalf of the Plaintiff. The contracts were each signed by Wilda Boyd, as representative of the Plaintiff, during his admission. The executed contracts included an Admission Agreement and Arbitration Agreement. Both parties agree that the Plaintiff was oriented and competent at the time of his admission. During his stay at Defendants' facility, the Plaintiff developed a number of health problems which led to the filing of the present action.

FINDINGS

I. EQUITABLE ESTOPPEL

In its Motion, Defendants argue the Plaintiff should be estopped from denying the parties' mutual right to arbitrate. In the arbitration setting, the equitable estoppel doctrine estops a party from asserting the lack of his signature on a "written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 557-78, 813 S.E.2d 292, 299 (Ct. App. 2018) (quoting Thompson v. Pruitt Corp., 416 S.C. 43, 59, 784 S.E.2d 679, 688 (Ct. App. 2016)). "Restated, when a signatory seeks to enforce an arbitration agreement against a nonsignatory, the doctrine prevents the nonsignatory from averring he or she is not bound to the arbitration agreement when he or she receives a direct benefit from a contract that contains an arbitration clause." Id. With regard

to the party to be estopped, the elements of the doctrine of equitable estoppel are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. Id. (citing Thompson, 416 S.C. at 60, 784 S.E.2d at 688) (emphasis omitted).

In the present context, the Defendants' equitable estoppel argument is premised on the contention that the Admissions Agreement and Arbitration Agreement merged. Generally, "in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract." Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (quoting Klutts Resort Realty Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)).

However, merger does not occur where the documents recognize the "separatedness" of the arbitration agreement, which is indicative of an intent that the common law doctrine of merger not apply. See Coleman, 407 S.C. at 355, 755 S.E.2d at 455. In Coleman, 407 S.C. at 350, 755 S.E.2d at 452, Ann Coleman signed several documents, including arbitration agreements, when admitting her sister to a health care facility. Coleman brought suit after her sister's death, and the facility sought to compel arbitration. Id. The circuit court denied the motion to compel. Id. On appeal, the Coleman court found the language in the section titled "Entirety of Agreement"[i] "recognizes the 'separatedness' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts." Coleman, 407 S.C. at 355, 755 S.E.2d at 455. The Court noted, in

addition to the "Entirety of Agreement" clause, the [arbitration agreement] could be disclaimed within thirty days of signing while the admissions agreement could not...." Id. Furthermore, the court noted that the "Entirety of Agreement" clause creates an ambiguity as to merger, and "the law is clear that any ambiguity...is construed against the drafter...." Id. at 355-56, 755 S.E.2d at 455. The Coleman court ruled the circuit court properly denied [the health care facility's] equitable estoppel arguments because no merger occurred. Id. at 356, 755 S.E.2d at 455.

Additionally, merger does not occur where an arbitration agreement and admission agreement are governed by different law, reference each other separately, provide different mechanisms by which they can be revoked, are separately paginated, and have their own signature page. See Hodge, 422 S.C. at 562-563, 813 S.E.2d at 302. In Hodge, 422 S.C. at 550, 813 S.E.2d at 295, Mable Hodge entered a rehabilitation facility. Id. She was "'well developed' and 'in no real distress' and had a full range of motion in her extremities when she entered the [f]acility." Id. Mable's husband executed various documents related to her admission, including an arbitration agreement and an admission agreement. Id. Mable was not present at the time her husband signed these documents on the day before her admission because she was still in the hospital. Id. However, Mable was competent at the time of her admission. Id. 422 S.C. at 550, 813 S.E.2d at 296. Three weeks after her admission, Mable became paralyzed from the waist down and died one year later as a result of her paralysis. Id. 422 S.C. at 553, 813 S.E.2d at 297.

The circuit court denied [the facility's] motion to dismiss or compel arbitration. Id. The facility appealed arguing the circuit court erred in finding the arbitration agreement was separate from the admissions agreement because the two documents were merged. Id. 422 S.C. at 556, 813 S.E.2d at 299. The Court of Appeals upheld the circuit court, finding the admissions agreement and arbitration agreement did not merge. Id. 422 S.C. at 563, 813 S.E.2d at 302. The

Court based its rulings on the fact that the "Admissions Agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law." Id. 422 S.C. at 562, 813 S.E.2d at 302. Additionally, similar to Coleman, the Arbitration Agreement recognized separatedness because it referenced the two documents separately, "stating '[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement.'" Id. Furthermore, the arbitration agreement stated it could be revoked within thirty days, while the admission agreement did not contain such an indication; rather, it provided the admissions agreement could only be amended by the patient with written agreement executed by the facility and the patient. The Court noted that each document was separately paginated and had its own signature page. Finally, signing the arbitration agreement was not a precondition to admission. Id. 422 S.C. at 562-63, 813 S.E.2d at 302. Based on this, the Court of Appeals found the admissions agreement and arbitration agreement did not merge. Id. 422 S.C. at 563, 813 S.E.2d at 302. Therefore, because Mable received no benefit from the arbitration agreement, equitable estoppel did not bar Mable's claims. Id.

In contrast, merger would occur – and equitable estoppel would apply – when the admission agreement contains the arbitration provision. See THI of South Carolina at Magnolia Manor-Inman, LLC v. Gilbert, No. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. 2015). In that case, the District Court of South Carolina distinguished Coleman from the case before it, stating that "the admission agreement *contains* the arbitration provision." Id. at *2 (emphasis in original). Therefore, a signatory's authority to execute a separate, non-essential legal waiver was not implicated by the facts of that case. Id.

Counsel for Plaintiff cites McCutcheon v. THI of S.C. at Charleston, LLC, No. 2:11-CV-

02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011). In that case, the plaintiff was the husband of a resident to a nursing home facility who executed a number of documents on his wife's behalf upon her admission to the facility, including an arbitration agreement. Id. The arbitration agreement was a separate document and not a condition of admission to the facility. Id. In that case, the District Court determined the arbitration agreement and admissions agreement, while separate documents, merged because they were executed by the same parties, at the same time, and regarded the same transaction. Id. at *3. The Court noted it would be inequitable to allow plaintiff to assert that husband had authority to sign the admissions agreement on behalf of the plaintiff, but lacked the authority to sign the arbitration agreement. Id. Based on this, the District Court found the plaintiff was estopped from denying enforceability of the arbitration agreement.

In the present case, the documents present the hallmarks of "separatedness" stated in Coleman and Hodge. Here, the document entitled "Addressing Decisional Capacity" indicates that the Plaintiff was competent to make decisions on behalf of himself. However, despite his competency, Wilda Boyd signed the Admission Agreement and Arbitration Agreement as "Representative" on his behalf. The Arbitration Agreement refers to itself and the Admission Agreement separately.[ii] Additionally, the Arbitration Agreement states that it is governed by federal law, while the admissions agreement states it is governed by state law. The Admissions Agreement states that it can be terminated at any time, upon written notice; however, the Arbitration Agreement does not provide a means of termination. Rather, the Arbitration Agreement "remain[s] in effect for all care rendered at Facility and shall survive any termination or breach of this Agreement or the Admission Agreement." The Arbitration Agreement also contains a "merger clause" entitled "Entire Agreement," which states that the Admissions Agreement "represents the entire agreement and understanding between the parties."

Furthermore, each document is separately paginated and has its own signature page, and the Arbitration Agreement is not contained within the Admissions Agreement. Finally, the Arbitration Agreement is not a precondition to admission.

While the McCutchen case presents a factually analogous scenario, the case was decided several years prior to the Coleman and Hodge. Moreover, the McCutchen case is only persuasive whereas the Coleman and Hodge cases are binding on this Court. In light of this, the Court finds the Admission Agreement and Arbitration Agreement did not merge. Since the Agreements did not merge, it cannot be argued that the Plaintiff received a benefit from the Arbitration Agreement. Therefore, the court finds that equitable estoppel does not bar the Plaintiff from denying the validity of the Arbitration Agreement.

II. AGENCY

Defendants argue Wilda Boyd possessed the actual or apparent authority to bind the Plaintiff under the Arbitration Agreement, and that Plaintiff should be estopped from denying the validity of the arbitration agreement. "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control. Hodge, 422 S.C. at 564, 813 S.E.2d at 303 (quoting Froneberger v. Smith, 406 S.C. 37, 49, 748 S.E.2d 625 631 (Ct. App. 2013)). "An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow." Agency may be proved by circumstantial evidence showing a course of dealing between the parties. Hodge, 422 S.C. at 565, 813 S.E.2d at 303 (quoting Peoples Fed. Sav. & Loan Ass'n, 310 S.C. 132, 145-46, 425 S.E.2d 764, 773 (Ct. App. 1992)). "A party asserting agency as a basis of liability must prove the existence of the agency, and the agency must be clearly established by the facts."

Hodge, 422 S.C. at 565, 813 S.E.2d at 304 (quoting McCall v. Finley, 294 S.C. 1, 6, 362 S.E.2d 26, 29 (Ct. App. 1987).

"A true agency relationship may be established by evidence of actual or apparent authority." Id. (quoting R & G Constr., Inc. v. Lowcountry Reg'l Transp. Autho., 343 S.E. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000)). "To establish apparent authority, the proponent must show (1) 'the purported principal consciously or impliedly represented another to be his agent; (2) the proponent relied on the representation; and (3) there was a change of position to the [proponent's] detriment." Hodge, 422 S.C. at 571-72, 813 S.E.2d at 307 (quoting Thompson, 416 S.C. at 54, 784 S.E.2d at 685). "Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the *principal* which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him." Hodge, 422 S.C. at 572, 813 S.E.2d at 307 (quoting Froneberger, 406 S.C. at 47, 748 S.E.2d at 630).

However, agency may not be established solely by the declarations and conduct of an alleged agent. Id. (quoting Cowburn v. Leventis, 366 S.C. 20, 39-40, 619 S.E.2d 437, 448 (Ct. App. 2005)). In fact, "[t]he law is clear in this state that statements made by an agent concerning the existence or extent of his authority are insufficient standing alone to establish agency." Id. (quoting Klippel v. Mid-Carolina Oil, Inc., 303 S.C. 127, 128-31, 399 S.E.2d 163, 164-65 (Ct. App. 1990).

Furthermore, "the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration...." Id. (quoting Thompson, 416 S.C. at 55, 784 S.E.2d at 686). In Hodge, 422 S.C. at 573-74, 813 S.E.2d at 308, the Court of Appeals upheld the circuit court's finding that Husband

was not Mable's agent. In that case, the Court noted that "Husband's signing of the arbitration agreement, admissions agreement, and other forms does not make him Mable's agent." Hodge, 422 S.C. at 573-74, 813 S.E.2d at 308. While she was not present, the facility knew Mable was competent at the time of admission as indicated by the doctor's examination and allowed her to sign other forms. Hodge, 422 S.C. at 5774, 813 S.E.2d at 308. The record contained no evidence from the facility that Mable, as principal, represented Husband was her agent. Id. Furthermore, since Mable was competent, no argument could be made the Adult Health Care Consent Act gave Husband the right to sign medical forms. Id. The Court of Appeals noted that, "even if Husband had authority to handle finances or make health care decisions…'the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration….'" Id. (quoting Thompson, 416 S.C. at 55, 784 S.E.2d at 686). Accordingly, the Court of Appeals held the circuit court did not err in finding husband was not Mable's agent. Id.

In the present case, the Defendant claims that it relied on the affirmative representations of Wilda Boyd and the Plaintiff in admitting Plaintiff to the its health care facility. Defendant further states that Wilda Boyd possessed sufficient inherent agency to render the agreement enforceable. However, "statements made by an agent concerning the existence or extent of his authority are insufficient standing alone to establish agency." Hodge, 422 S.C. at 572, 813 S.E.2d at 307 (quoting Klippel v. Mid-Carolina Oil, Inc., 303 S.C. 127, 128-31, 399 S.E.2d 163, 164-65 (Ct. App. 1990). Here, there is no evidence that Wilda Boyd possessed actual authority to sign the documents on behalf of the Plaintiff. Nor is there evidence that the Plaintiff explicitly represented to the Defendant that Wilda Boyd was authorized to sign the documents on his behalf. However, at the hearing, counsel for Defendants mentioned that the Plaintiff may have

been in the room while Wilda Boyd signed the papers for him.

In light of this and the lack of record regarding the agency relationship in this case, the Court will allow discovery on the issue of the agency relationship between the Plaintiff and Wilda Boyd at the time the Arbitration Agreement and Admissions Agreement were signed and executed.

III. SOUTH CAROLINA BILL OF RIGHTS

Defendant argues Wilda Boyd possessed statutory authority under the South Carolina Bill of Rights for Residents of Long-Term Care Facilities to Bind the Plaintiff under the Arbitration Agreement. South Carolina provides certain rights to residents of long-term care facilities under South Carolina's "Bill of Rights for Residents of Long-Term Care Facilities" ("Bill of Rights"). S.C. Code Ann. § 44-81-10 et seq. S.C. Code Ann. § 44-81-30 defines "resident" as a person who is receiving treatment or care in a long-term care facility, and "representative" as a resident's legal guardian, committee, or next of kin or other person acting as agent of a resident who does not have a legally appointed guardian. S.C. Code Ann. § 44-81-30(2)-(3). The Act defines "long-term care facility" as an intermediate care facility, nursing care facility or residential care facility subject to regulation and licensure by the State Department of Health and Environmental Control.

South Carolina's Bill of Rights provides residents and their representatives with certain rights, including written and oral explanations of: rights and grievance procedures, available services and related charges, refund policies, change in services, ability to choose attending physician, participate in treatment or changes in care, receive the physician's complete diagnosis, refuse to participate in experimental research, relocate if desired, manage personal finances, keep personal possessions, be treated with respect and dignity, and a number of other rights related to

the autonomy and self-determination of the resident. See S.C. Code Ann. § 44-81-40. However, South Carolina's Bill of Rights does not confer upon representatives the ability to enter into contracts, aside from those relating to sitter services. See S.C. Code Ann. § 44-81-10 et seq. But see S.C. Code Ann. 44-66-10 et seq. ("Adult Health Care Consent Act").

Here, Defendant argues that the Plaintiff falls within the definition of "resident" and Wilda Boyd within the definition of "representative." As such, the Defendant argues Wilda Boyd had the authority to contract with the Defendant on behalf of Mr. Boyd. However, the Defendant has not pointed to a specific statute prescribing the representative's authority to contract on behalf of a competent resident. In fact, the statute does not confer such a right aside from contracting individuals to perform sitter services. The fact that the Bill of Rights provides that a "resident's representative must be given by the facility a written and oral explanation of the rights, grievance procedures, and enforcement provision…at the time of admission to a long-term care facility[, and] [w]ritten acknowledgement…must be made part of the resident's file" is of no consequence. Therefore, the Court finds South Carolina's Bill of Rights does not provide a basis to enforce the Arbitration Agreement against the Plaintiff.

IV. THIRD-PARTY BENEFICIARY

Defendant argues the Arbitration Agreement is enforceable because the Plaintiff was a third-party beneficiary. Where an arbitration agreement has not merged with the admissions agreement, a third-party beneficiary cannot be required to arbitrate when he has not attempted to enforce the contract containing the arbitration agreement. See Thompson v. Pruitt Corp., 416 S.C. 43, 57, 784 S.E.2d 679, 784 (Ct. App. 2016); see also Hodge, 422 S.C. at 574, 813 S.E.2d at 308. "A third-party beneficiary is a party that the contracting parties intend to directly benefit." Thompson, 416 S.C. at 57, 784 S.E.2d at 687 (quoting Helms Realty, Inc. v. Gibson-Wall Co.,

363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005)). A third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement. Id.

In Thompson, 416 S.C. at 48, 784 S.E.2d at 682, Son signed an admission agreement and arbitration agreement on behalf of Mother when admitting Mother to a nursing home facility due to her dementia. Mother was not present at the time of the signing. Id. After Mother died as a result of falling out of a bed, Daughter brought suit for wrongful death against the nursing home facility. Id. The nursing home facility moved to compel arbitration, which the circuit court denied on the grounds that Son did not have authority to execute the arbitration agreement on Mother's behalf. Id. 416 S.C. at 48-49, 784 S.E.2d at 682. The Court of Appeals affirmed the circuit court, ruling that because Daughter was not attempting to enforce the arbitration agreement on behalf of Mother's estate, Mother's estate should not be required to arbitrate the claim. Thompson, 416 S.C. at 57, 784 S.E.2d at 687.

In this case, as discussed above, the admissions agreement and arbitration agreement did not merge. The Plaintiff has not attempted to enforce the arbitration agreement; rather, he has asserted claims against Facility arising out of the separate admissions agreement. Therefore, the Court finds the arbitration agreement cannot be enforced against the Plaintiff as a third-party beneficiary because he has not attempted to enforce the arbitration agreement.

V. UNCONSCIONABILITY

The Plaintiff, in his Response in Opposition to Defendant's Motion to Dismiss and Compel Arbitration, argues the Arbitration Agreement is unenforceable because it is unconscionable. "Arbitration is a matter of contract law and is available only when the parties involved agreed to arbitrate." Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d

839, 844-45 (Ct. App. 1999). Accordingly, a party may seek revocation of a contract under such grounds as exist at law or equity, including fraud, duress, and unconscionability. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). South Caroline defines unconscionability "as the absence of a meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Id. at 24-25, 644 S.E.2d at 668 (citing Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). In analyzing a claim of unconscionability in the context of arbitration agreements, courts should focus on whether the arbitration clause is geared toward achieving an unbiased decision by a neutral decision-maker. Id. at 25, 644 S.E.2d at 668-69.

i. Meaningful Choice

"Absence of a meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." Id. at 25, 644 S.E.2d at 669. In determining whether a contract was "tainted by an absence of a meaningful choice, courts should take into account the nature of the injuries suffered by the plaintiff; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id. Furthermore, under general principles of state contract law, an adhesion contract is a standard form contract offered on a "take-it-or-leave-it" basis with terms that are not negotiable. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 356 (2001). However, adhesion contracts are not per se unconscionable. Simpson. at 26, 644 S.E.2d at 669.

Here, the Plaintiff, already in a bad state of health, suffered severe injuries including sepsis, sacral wounds, and a stage IV pressure ulcer. It is unclear whether the Plaintiff and Wilda

Boyd are sophisticated; however, it is clear Mr. Boyd did not read the contract and it is not unfair to assume that there is a relative disparity in sophistication between the Plaintiff and Defendant. However, the arbitration agreement at issue is not complex, nor would it have come at a surprise to Wilda Boyd or the Plaintiff. The arbitration agreement is on its own separate page, and the entire agreement constitutes one page composed of four or five paragraphs. The arbitration agreement contains an express provision that he or she is not required to use the facility, and that there are numerous other healthcare providers. Moreover, the arbitration agreement states in conspicuous bolded letters "**I understand and agree that I am giving up and waiving my right to a jury trial.**" In light of this, it seems the Plaintiff was left with a meaningful choice regarding whether to sign the arbitration agreement. Therefore, the arbitration agreement is not unconscionable based on lack of a meaningful choice.

ii. Oppressive and one-sided terms

In considering whether terms are oppressive and one-sided, courts typically assess whether the contract requires waiver of rights, and whether there is a lack of mutuality of remedy. See York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 88-90, 749 S.E.2d 139, 150-151 (Ct. App. 2013). Here, the arbitration agreement provides that "the parties shall select an arbitrator from a panel having experience and knowledge of the health care industry." On its face this clause recognizes the benefit of an arbitrator who has experience with the health care industry. The neutrality of the arbitrator is bolstered by the fact that both parties must reach a mutual decision. If the parties cannot reach a mutual decision, the arbitration agreement provides that the arbitrator shall be selected by the Court. Based on the mutuality of the provision and absence of waiver of rights, the arbitration agreement is not unconscionable due to oppressive or one-sided terms.

CONCLUSION

In conclusion, the Court finds equitable estoppel does not prevent the Plaintiff from denying the validity of the Arbitration Agreement. The Court also finds that the South Carolina Bill of Rights does not provide Wilda Boyd with the authority to contract on behalf of the Plaintiff. Furthermore, the Court does not find the arbitration agreement unenforceable under the doctrine of unconscionability. However, the Court will allow discovery on the issue of agency to determine whether Wilda Boyd had actual or apparent authority to sign the arbitration agreement on behalf of Mr. Boyd. Finally, the Court will hold Defendants Administrative Services and Operational Services Motion to Stay in abeyance until final ruling on the Motion to Compel Arbitration.

IT IS SO ORDERED.

Perry H. Gravely
Presiding Judge

Greenville, South Carolina

July _____, 2018

Electronic Signature Page of Judge Gravely to Follow

[i] "This [a]greement, including all Exhibits hereto, and the [a]rbitration agreement between Facility and the Resident, if the parties sign one, supersede all other agreements, either oral or in writing between the parties, and contain all of the promises and agreements between the parties. Each party to this agreement acknowledges that no

representations, inducements, or promises have been made by any party or anyone acting on behalf of any party, that are not contained in the [a]greement or in the [a]rbitration [a]greement. This [a]greement may be amended only by a written agreement signed on behalf of the Facility and the Resident."

[ii] "This Agreement shall remain in effect for all care rendered at Facility and shall survive any termination or breach of *this Agreement or the Admission Agreement*." (emphasis added).

Greenville Common Pleas

Case Caption: James Boyd Jr vs. Thi Of South Carolina Llc , defendant, et al

Case Number: 2018CP2301934

Type: Order/Other

So Ordered

s/ Honorable Perry H. Gravely, #2755

Electronically signed on 2018-07-06 15:24:28 page 17 of 17

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
PRISCILLA BROWN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES E. BROWN, PLAINTIFF, vs. THI OF SOUTH CAROLINA AT COLUMBA, LLC, D/B/A MAGNOLIA MANOR, D/B/A MIDLANDS HEALTH AND REHABILITATION AND JOHN AND JANE DOES 1-10, WHOSE TRUE NAMES ARE UNKNOWN , DEFENDANTS.	)	DOCKET NO. 2019-CP-40-00516 **ORDER**

This matter came before the Court on August 13, 2019 for a hearing on a Motion to Compel Arbitration and Stay State Court Proceedings filed by THI of South Carolina at Columbia, LLC ("the Facility") and any John or Jane Does' (collectively the "Defendants"). Present at the hearing were Jenkins Mann, Esq. on behalf of Priscilla Brown ("Plaintiff"). Perry Buckner, IV, Esq., appeared on behalf of THI of South Carolina at Columbia LLC ("Defendants").

FACTUAL BACKGROUND

On January 16, 2017, James E. Brown ("Mr. Brown") was transferred from Palmetto Health Richland Hospital to Defendant THI of South Carolina at Columbia, LLC for treatment consistent with his diagnoses. Plaintiff, Mr. Brown's wife, alleges that Mr. Brown was transferred without his consent or his family. Immediately upon arrival at the Facility, Mr. Brown's family asked that he be transferred to another nursing facility. Plaintiff alleges no efforts were made by the Facility to transfer Mr. Brown.

As part of Mr. Brown's admission to the Facility, Plaintiff was presented with an Admission Agreement to be completed by the resident or his representative for admission to the Facility. The Admission Agreement states, "all information provided, including her authority to bind her husband to certain agreements, is truthful and correct." Mrs. Brown was also presented

DEFENDANT'S EXHIBIT 12

with an Arbitration Agreement, the completion of which was not a condition for admission to the Facility. Mrs. Brown executed the Arbitration Agreement.

On January 16, 2017, Mr. Brown was transferred from Palmetto Health Richland Hospital to the Facility; he subsequently died. Plaintiff brought this wrongful death and survival action on January 25, 2019 alleging negligent acts and omissions by the Defendants. Defendant filed a motion to compel arbitration. Plaintiff opposes the Motion on the basis that Mrs. Brown was not an agent of Mr. Brown for the purpose of executing the Arbitration Agreement.

LEGAL STANDARD

There is a strong presumption in favor of the validity of arbitration agreements because of the policy favoring arbitration. *O'Neil v. Hilton Head Hosp*., 115 F.3d 272, 273 (4th Cir. 1997). Both federal and state policy favor arbitrating disputes. *Heffner v. Destiny, Inc.,* 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.*, 338 S.C. at 41, 524 S.E. 2d at 846 (internal quotations and citations omitted). "A party seeking to compel arbitration under the FAA must establish that: (1) there is a valid agreement, and (2) the claims fall within the scope of the agreement. *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 173 (2019) (citation omitted).

DISCUSSION

Defendants moved to compel arbitration arguing Mrs. Brown possessed the authority to sign the Arbitration Agreement on her husband's behalf, or alternatively, she is estopped from denying she had the authority to do the same. Plaintiff opposed the motion to compel arbitration arguing that Mrs. Brown did not have authority to execute the Arbitration Agreement on her husband's behalf.

"Agency" is the fiduciary relationship that arises when one person, a principal, manifests assent to another person, an agent, that the agent shall act on the principal's behalf and subject to the principal's control. *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC.*, 422 S.C. 544, 564, 813 S.E.2d 292 (Ct. App. 2018). An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. *Hodge,* 422 S.C. at 565. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties. *Id*.

The doctrine of apparent authority provides that a principal may be bound by the acts of his agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.,* 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996). "While actual authority is that which is expressly conferred upon the agent by the principal, apparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which the principal holds the agent out as possessing." *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). If a principal holds another out as having the authority to act on his behalf or knowingly permits another to act as his agent, "either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances." *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000)(emphasis added).

At the hearing, the Facility stated it relied on the conduct and representations of Mr. Brown and the Plaintiff during the admission process and over the course of Mr. Brown's residency. The Facility asserted Mr. Brown allowed his wife to participate in the admission process and to sign documents on his behalf, including the Arbitration Agreement and the Admission Agreement, when he was admitted to the Facility. Further, Mrs. Brown represented to the Facility that she was his representative by signing the Arbitration and Admission agreement on Mr. Brown's behalf. Defendants contend that Mr. Brown never repudiated this authority.

Plaintiff argued Mrs. Brown does not possess actual or apparent authority to sign the Arbitration Agreement on behalf of Mr. Brown and that the Court should deny Defendant's Motion to Compel Arbitration. Defendant then requested permission to conduct limited discovery on representations made by Mrs. Brown and her husband and conduct relating to their authority as well as the Facility's understanding of that conduct. Defendants asserted that if the record is incomplete regarding its authority or agency then discovery on these issues is necessary.

Arbitration is appropriate only if Mrs. Brown possessed the authority to execute the Arbitration Agreement and bind her husband to its terms. The record is incomplete and limited discovery on the issues of the agency relationship between the Plaintiff and Mr. Brown at the time the Arbitration Agreement and Admissions Agreement were signed and executed is necessary to

a resolution of the motion. The Court further finds that any such discovery conducted by the Defendants must be limited and relevant only as to Mrs. Brown's agency and authority to execute the Admission Agreement and the Arbitration Agreement and to act for Mr. Brown during the admissions process. Limited discovery on these issues will not constitute a waiver of Defendant's claim that it is entitled to arbitration.

The Court also finds that all of the remaining issues, raised in the motion to compel and in opposition thereto, are contingent upon the authority to execute the Arbitration Agreement and the Admission Agreement. Therefore, this Court makes no findings or rulings on the remaining arguments of counsel regarding arbitration. All other arguments are held in abeyance until the parties complete discovery on the actual or apparent authority to execute the documents on behalf of Mr. Brown and may be raised prior to the final ruling on the Motion to Compel Arbitration.

ORDER

Based upon the foregoing, **IT IS ORDERED**, that the Court will allow discovery on the issue of agency to determine whether Priscilla Brown had actual or apparent authority to sign the arbitration agreement on behalf of her husband, James E. Brown.

AND IT IS SO ORDERED.

Signature page to follow

Richland Common Pleas

Case Caption: Priscilla Brown , plaintiff, et al vs Thi Of South Carolina At Columbia Llc , defendant, et al

Case Number: 2019CP4000516

Type: Order/Other

IT IS SO ORDERED!

s/ Alison Renee Lee

STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER	)))	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT CASE NO. 2021-CP-18-01410
STEVE RICKENBAKER, Plaintiff, vs. OAKBROOK HEALTHCARE, LLC d/b/a Oakbrook Health and Rehabilitation Center, FLOYD BRACE COMPANY, INC., and TRIDENT MEDICAL CENTER, LLC d/b/a Trident Medical Center, Defendants.	))))))))))))	**MOTION TO ALTER, AMEND, AND/OR RECONSIDER ORDER DENYING MOTION TO COMPEL ARBITRATION**

TO: THE HONORABLE R. MARKLEY DENNIS JR., Presiding Judge, and LEE D. COPE, ESQUIRE, JOHN E. PARKER, JR., ESQUIRE, and NEIL E. ALGER, ESQUIRE, PARKER LAW GROUP, LLP, Attorneys for Plaintiff

NOW COMES Defendant Oakbrook Healthcare, LLC d/b/a Oakbrook Health and Rehabilitation Center (the "Facility"), by and through its undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set forth below, hereby most respectfully moves this Honorable Court to alter, amend, and/or reconsider its Order filed May 11, 2022, denying the Facility's motion to compel arbitration (the "Subject Order").

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

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

[1] The "Underlying Motion" refers to the motion that was decided via the Subject Order, i.e., the Facility's Motion to Compel Arbitration, which was filed November 15, 2021, and heard April 13, 2022, via WebEx.

[2] The "Memo in Support of the Underlying Motion" refers to the Facility's supporting memorandum filed April 11, 2022.

2. The merger/equitable estoppel analysis in the Subject Order is erroneous, to include, without limitation, the Court's citation to irrelevant authority that pertains to the wrong test for equitable estoppel. The Court should have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Rickenbaker effectively embraced and directly benefitted from the Admission Agreement, he is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.

(a) The Subject Order reflects the Court's misapprehension of the Facility's merger/equitable estoppel argument, as evidenced by the following incorrect and/or inapplicable statements therein:

(i) "The basis of [the Facility's] Motion is that a valid and enforceable arbitration agreement exists between the parties."[3]

(ii) "Since Ms. Rickenbaker lacked legal authority, the Arbitration Agreement is void an unenforceable."[4]

(iii) "[T]he Court must determine (1) if the Arbitration Agreement merged with and was a part of the Admission Agreement such that Rickenbaker would be equitably estopped from denying the Arbitration Agreement's validity, ***and* (2) if Ms. Rickenbaker had actual or apparent authority to enter the Arbitration Agreement on behalf of Rickenbaker."**[5]

The Facility's merger/equitable estoppel argument is a standalone argument. It does not depend on any showing of authority (actual or apparent or otherwise) on the part of Ms. Rickenbaker or otherwise on the existence of any valid and enforceable agreement between the parties. *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) ("South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including . . . estoppel."); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–55, 755 S.E.2d 450, 455 (2014) (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and

[3] (Subject Order p. 2.)
[4] (Subject Order p. 5.)
[5] (Subject Order pp. 2–3.)

equitable estoppel); *id.* (explaining that "Appellants' equitable estoppel argument," which "[wa]s premised on [Appellants'] contention that, under state law, the admission agreements and the [arbitration agreements] merged," as follows: "Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] . . . , she is nevertheless *equitably estopped to deny the [arbitration agreement's] enforceability*.") (emphasis added).

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

Accordingly, as to the Facility's merger/equitable estoppel argument, any analysis by the Court regarding the Admission Agreement/Arbitration Agreement's supposed lack of enforceability—e.g., that Ms. Rickenbaker lacked authority to sign the Admission Agreement/Arbitration Agreement on behalf of Mr. Rickenbaker under the law of agency[6] and/or under the South Carolina Adult Health Care Consent Act (the "AHCCA"), S.C. Code

[6] (*See* Subject Order pp. 6–7 (regarding principles of agency).)

Ann. §§ 44-66-10 to -80,[7] and/or because Ms. Rickenbaker lacked power of attorney or guardianship over Mr. Rickenbaker[8]—is beside the point and unavailing to refute the Facility's merger/equitable estoppel argument, which, again, turns not on the question of whether the Arbitration Agreement is enforceable but whether Mr. Rickenbaker is estopped to deny its enforceability.

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

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

> Appellants contend that even if Sister lacked capacity to execute the AA under the Act, she is nevertheless equitably estopped to deny the AA's enforceability. The circuit court held there was no estoppel here, and we agree.
>
> Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the AAs merged. In South Carolina,
>
> > The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
>
> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> 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.*

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[7] (*See* Subject Order pp. 2–4, 6–7 (regarding the AHCCA).)

[8] (*See* Subject Order pp. 2, 4–5 (regarding power of attorney and guardianship).)

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

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

The Subject Order wrongfully concludes that the Admission Agreement and the Arbitration Agreement are separate contacts that do not merge. (Subject Order pp. 4–6.) 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,"[9] as indeed the Admission Agreement and the Arbitration Agreement were here,[10] there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the contracting parties intended the instruments to be construed together as effectively one contract. This is a question of the parties' intention. *Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a contrary *intention* . . .") (emphasis added). And "in attempting to ascertain th[e] [parties'] intention," our courts "endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into." *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

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[9] *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

[10] To be clear, *Coleman* unequivocally answers the question of whether the instant Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly observes 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).

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

Unlike the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (*See* Arbitration Agreement.) Moreover, while the instant Admission Agreement does contain an "Entire Agreement" clause, it does not reference the Arbitration Agreement as a separate contract. (Admission Agreement p. 12.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[11]), the "Entire Agreement" clause in the instant Admission Agreement expressly states that "other Admissions materials" are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed "separatedness." (Admission Agreement p. 12.) Without question, the Arbitration Agreement is among these other Admissions materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) ("The

[11] 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

same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's *admission documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 ("Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement*.") (emphasis added)). The Court's conclusory finding that there is ambiguity in this regard[12] is unsupported and erroneous.

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

Moreover, while it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give

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agreement and, thus, "recognize[d] the '*separatedness*' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.") (emphasis added).

[12] (Subject Order p. 4 ("While the Admission Agreement purports to incorporate admissions materials into itself "by reference herein", when viewed alongside the other details of

rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement's) sole reason for being. (*See* Arbitration Agreement (providing for arbitration of "any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident . . ."); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at Facility . . .").)

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

Also absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* Admission Agreement p. 10 (providing "This Agreement will be governed by and construed in accordance with applicable

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the agreements, it creates at best an ambiguity as to merger when taken in context of the totality

Federal regulations and those laws of the State in which Facility is located.") *with* Arbitration Agreement (providing that, "because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action;" but also providing that arbitration shall be "as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules").) Essentially, both instruments provide that South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, and contrary to the view expressed in the Subject Order,[13] the survival of the Arbitration Agreement is no evidence of "separatedness." The only reason for the Arbitration Agreement is the Admission Agreement, i.e., the Arbitration Agreement covers disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an

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of the circumstances . . . .").)

intent contrary to merger. Respectfully, to point to such things, as the Subject Order does,[14] is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

And—besides the fact, explained elsewhere, that there is no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement—to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that *merger is the default position*, i.e., it is presumed, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary 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

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[13] (Subject Order p. 4 ("Further, the Arbitration Agreement by its very language distinguishes between itself and the Admission Agreement, stating that the Arbitration Agreement will survive any 'breach of this Agreement or the Admission Agreement.'").)

even go so far as to clearly indicate a contrary intention, but at most might (or might not) reflect a contrary intention—is to allow the exception to devour the rule.

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

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

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[14] (Subject Order p. 4.)

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

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

(i) Direct benefits estoppel applies.

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

Subject Order. (Subject Opinion p. 5 ("Further, Rickenbaker cannot be equitably estopped from denying enforcement of the Arbitration Agreement. 'Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements.' *Kelly v. Logan, Jollev & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped acted in a way amounting to a false representation. *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). [The Facility] cannot meet its burden to establish this element.").)[15]

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

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

(Subject Order p. 6.)

What *Wilson* actually explains is that the key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability but whether benefits to the nonsignatory are direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 ("Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause. In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes

[15] To be clear, neither *Kelly* nor *Strickland* was an arbitration case, and both cases relied on the traditional six-factor test for estoppel, *Kelly*, 383 S.C. at 638, 682 S.E.2d at 7,

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

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

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Mr. Rickenbaker received the benefit of his admission to the Facility, including, without

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Strickland, 375 S.C. at 84–85, 650 S.E.2d at 470, not the direct benefits test.

limitation, the room, board, care, and treatment he received therein. Respectfully, the Court should have found that the Arbitration Agreement merged with the Admission Agreement and that Mr. Rickenbaker is estopped to deny the Admission Agreement/Arbitration Agreement's enforceability, him having effectively embraced the contract with the Facility for the purpose of his admission and receipt of the benefits thereof.

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

The Subject Order states, "Ms. Rickenbaker had no legal authority to sign the Arbitration Agreement, and Oakbrook knew or should have known this fact, as she did not present them with documentation demonstrating power of attorney or guardianship." (Subject Order p. 4.) This violates the FAA's "equal footing" rule by charging the Facility with a heightened duty to determine the existence Ms. Rickenbaker's authority that does not exist under South Carolina's general contract law. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (Under the FAA, "courts *must* place arbitration agreements on *equal footing with other contracts* . . . ."); *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (While a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not do so based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.") (citing *Concepcion*, 563 U.S. at 339); *Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any

contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted)).

At the same time, the Subject Order disregards applicable state law in respect of the legal significance of Ms. Rickenbaker's act of signing the Arbitration Agreement and her duty of good faith and fair dealing. The Arbitration Agreement itself reflects (by virtue of her signature upon it) Ms. Rickenbaker's express representation that she had all due authority to sign it for Mr. Rickenbaker. (Arbitration Agreement ("By . . . her signature below, the executing party [(i.e., Ms. Rickenbaker)] represents that . . . she has the authority to sign on [Mr. Rickenbaker's] behalf so as to bind [Mr. Rickenbaker] as well as [herself].").) There is no question raised as to Ms. Rickenbaker's competency. She is thus "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement,[16] including, of course, the terms whereby she represented herself to the Facility as having authority to act on Mr. Rickenbaker's behalf. Moreover, the covenant of good faith and fair dealing implied in every contract[17] is no less binding on Ms. Rickenbaker than the Facility.

[16] *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.").

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

3. The Subject Order incorrectly states—in conclusory fashion, without actually citing any legal or factual support—that "the only relevant and necessary evidence for the Court to make its determination is already available for the Court's review. Any further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, waste judicial resources, and increase costs for both parties unnecessarily."[18]

A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). "An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145–46, 425 S.E.2d 764, 773 (Ct. App. 1992). The doctrine of apparent authority provides that a principal may be bound by the acts of it agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

"When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of

[18] (Subject Order pp. 7–8.)

reasonable prudence dealt with the agent on the faith of such appearances." *R & G Const.*, 343 S.C. at 433, 540 S.E.2d at 118 (Ct. App. 2000).

Moreover, authority can be supplied to an agent retroactively by express or implied ratification. *See Brazell Bros. Contractors v. Hill*, 245 S. C. 69, 74, 138 S.E.2d 835, 837 (1964) ("Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent."). "Ratification, as it relates to the law of agency, may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into on his behalf by another who at the time assumed to act as his agent." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S. C. 75, 89, 124 S.E.2d 602, 608 (1962). It is not necessary for a principal to be present at the time of the commission of his agent's act in order for him to ratify that act. *See State v. Waldrop*, 73 S. C. 60, 52 S.E. 793, 795 (1905) ("The presiding judge ruled that he could ratify the act of the agent, whether he was present or not, and in this we see no error.").

These principles relating to the law of agency potentially provide an additional, independent basis on which to grant the Underlying Motion. Their application is fact dependent, and in no reasonable way can it be said "that the only relevant and necessary evidence for the Court to make its determination [thereon] is already available for the Court's review" such that "further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, waste judicial resources, and increase costs for both parties unnecessarily."

WHEREFORE, for the foregoing reasons—and, again, for that matter, for all of the reasons previously advanced to the Court in and in support of the Underlying Motion, both those

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

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

Respectfully submitted,

CLEMENT RIVERS, LLP

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Attorneys for Defendant
Oakbrook Healthcare, LLC d/b/a
Oakbrook Health and Rehabilitation Center

Charleston, South Carolina

May 20, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CASE NO.: 2021-CP-18-01410
	)	
STEVE RICKENBAKER,	)	
	)	
Plaintiff,	)	
	)	**STIPULATION OF DISMISSAL WITH PREJUDICE**
vs.	)	
	)	**[DOES NOT END THE CASE]**
OAKBROOK HEALTHCARE, LLC D/B/A OAKBROOK HEALTH AND REHABILITATION CENTER, FLOYD BRACE COMPANY, INC., TRIDENT MEDICAL CENTER, LLC D/B/A TRIDENT MEDICAL CENTER,	)	
	)	
Defendants.	)	
	)	

Pursuant to Rule 41(a)(1)(B) of the South Carolina Rules of Civil Procedure, Plaintiff hereby stipulates to the dismissal ***with prejudice*** of all claims asserted or that could have been asserted against Floyd Brace Company, Inc. in the above-captioned action.

This Stipulation of Dismissal with prejudice shall include all claims, which were made, might have been made, or may hereafter have been made in the above-captioned matter against Floyd Brace Company, Inc. It is the intent of Steve Rickenbaker and Floyd Brace Company, Inc. to forever end this litigation as to Floyd Brace Company, Inc. ***with prejudice***. Each party herein agrees to bear its own costs, expenses, and attorney's fees. This does not impact Plaintiff's claims against any other parties and this does not end the case.

IT IS SO AGREED AND STIPULATED.

SIGNATURE PAGE TO FOLLOW

WE STIPULATE AND CONSENT:

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CIVIL ACTION NO.: 2021-CP-18-01410
	)	
Steve Rickenbaker,	)	
	)	
Plaintiff,	)	**STIPULATION OF DISMISSAL WITH PREJUDICE AS TO DEFENDANT TRIDENT MEDICAL CENTER, LLC D/B/A TRIDENT MEDICAL CENTER**
v.	)	
	)	
Oakbrook Healthcare, LLC d/b/a Oakbrook Health and Rehabilitation Center, Floyd Brace Company, Inc., and Trident Medical Center, LLC d/b/a Trident Medical Center	)	
	)	
Defendants.	)	

Pursuant to Rule 41(a)(1)(B) of the South Carolina Rules of Civil Procedure, Plaintiff, Steve Rickenbaker, by and through his undersigned counsel, herein dismisses with prejudice all claims and causes of action against Defendant Trident Medical Center, LLC d/b/a Trident Medical Center in the above-captioned action.

Plaintiff hereby stipulates that this matter be dismissed against Defendant with prejudice, and forever ended, with each party bearing their own respective costs with regard to this matter. Nothing herein is intended nor shall it be construed to limit or affect any remaining claims against Trident Medical Center, LLC d/b/a Trident Medical Center.

[SIGNATURE BLOCK TO FOLLOW]

WE CONSENT:

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Counsel for Defendant Trident Medical Center, LLC d/b/a Trident Medical Center

Date: December 7, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
STEVE RICKENBAKER,	)	CASE NO. 2023-CP-18-02145
	)	
PLAINTIFF,	)	**DEFENDANT OAKBROOK HEALTHCARE, LLC d/b/a OAKBROOK HEALTH AND REHABILITATION CENTER'S MOTION TO COMPEL ARBITRATION**
	)	
vs.	)	
	)	
OAKBROOK HEALTHCARE, LLC d/b/a OAKBROOK HEALTH AND REHABILITATION CENTER	)	
	)	
DEFENDANTS.	)	
	)	

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

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

This Defendant further requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any motions or discovery filed or served by Plaintiff while the current motion is pending. This Motion is supported by the attached Arbitration Agreement, the statutory and case law of the State of South

Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

CLEMENT RIVERS, LLP

By: *s/ James D. Gandy, III*

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Attorneys for the Defendant Oakbrook Health Care, LLC d/b/a Oakbrook Health and Rehabilitation Center

Dated: April 18, 2024
Charleston, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF DORCHESTER)	FIRST JUDICIAL CIRCUIT
STEVE RICKENBAKER,)	CASE NO. 2023-CP-18-02145
)	
PLAINTIFF,)	**DEFENDANT OAKBROOK HEALTHCARE, LLC d/b/a OAKBROOK HEALTH AND REHABILITATION CENTER'S MOTION TO COMPEL ARBITRATION**
)	
vs.)	
)	
OAKBROOK HEALTHCARE, LLC d/b/a OAKBROOK HEALTH AND REHABILITATION CENTER)	
)	
DEFENDANTS.)	
)	

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

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This Defendant further requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any motions or discovery filed or served by Plaintiff while the current motion is pending. This Motion is supported by the attached Arbitration Agreement, the statutory and case law of the State of South

Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

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Attorneys for the Defendant Oakbrook Health Care, LLC d/b/a Oakbrook Health and Rehabilitation Center

Dated: December 11, 2024
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CIVIL ACTION NO.: 2023-CP-18-02145
	)	
Steve Rickenbaker,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL ARBITRATION**
	)	
Oakbrook Healthcare, LLC d/b/a Oakbrook Health and Rehabilitation Center, Floyd Brace Company, Inc. Trident Medical Center, LLC d/b/a Trident Medical Center,	)	
Defendants.	)	

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

[1] Plaintiff has attached unreported Circuit Court orders supporting his arguments as Exhibit D.

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

FACTUAL BACKGROUND

On May 11, 2018, Plaintiff Steve Rickenbaker was admitted to Defendant Trident Medical Center after falling and fracturing his spine and right knee. (Compl. ¶ 5). During his stay at Trident, his condition worsened and he developed hospital-associated delirium and an occipital scalp pressure ulcer. (*Id.* at ¶ 7). On June 18, 2018, Plaintiff was admitted to Oakbrook, where his occipital scalp pressure ulcer worsened and he sustained a deep tissue wound to his sacrum. (*Id.* at ¶ 9). Eventually, the wound developed into a stage IV wound with bone exposure and required debridement and a wound vac. (*Id.* at ¶ 10).

Plaintiff commenced this action on August 9, 2021, alleging negligence and gross negligence in his care and treatment while a patient at Defendants' facilities. (*See generally* Compl.). On November 15, 2021, Oakbrook filed a Motion to Compel

Arbitration, relying on an Arbitration Agreement that was signed by Plaintiff's wife, Faye, on June 18, 2018. (Mot. Compel Arbitration, Ex. A). Presumably, Ms. Rickenbaker signed the Agreement because Plaintiff was unable to consent due to dementia. A July 2, 2018 certification signed by Plaintiff's attending physician indicates that he was unable to provide consent due to dementia. (Ex. B). A June 18, 2018 review of Plaintiff's condition by the South Carolina Department of Health and Human Services indicated that Plaintiff was suffering from hallucinations. (Ex. C). The review did not contain any findings as to Plaintiff's capacity to consent.

ARGUMENT

While a signed Arbitration Agreement exists in this case, it is not a valid, enforceable agreement for the simple reason that Plaintiff's wife, Faye Rickenbaker, did not have authority to execute the Arbitration Agreement at the time it was entered by the parties. While there is a presumption in favor of arbitration, it only applies to the scope of an arbitration agreement; "it does not apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement." *Wilson v. Willis*, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019). "Moreover, because arbitration, while favored, exists solely by agreement of the parties, a presumption against arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate." *Id.*

To the extent that Oakbrook may maintain that Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement due to his wife's execution of an admission agreement, there was no merger of the agreements, as

the language of the Admissions and Arbitration Agreements indicate that Oakbrook considered it to be a separate agreement. Additionally, there is no evidence that Ms. Rickenbaker had actual or apparent authority to act on Plaintiff's behalf at the time she entered the Arbitration Agreement, as there is no evidence that Plaintiff consciously represented or implied to Oakbrook that she was his agent for the purposes of entering an arbitration agreement. For these and the following reasons, Oakbrook's motion should be denied.

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

"It is essential that the parties to a contract have the capacity to contract . . . . Furthermore, a capacity to contract relates to the status of the person rather than to the circumstances surrounding the transaction." 17 C.J.S. Contracts § 45. At the time Plaintiff was admitted to Oakbrook's facility, he had not executed and filed a healthcare or general power of attorney granting Ms. Rickenbaker authority to waive legal rights or do anything and everything necessary to handle his affairs. There is no evidence that he ever represented to Oakbrook or anyone else, including Ms. Rickenbaker, that she had authority to act on his behalf. Thus, any authority Ms. Rickenbaker had to act would have been derived from the Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10 *et seq.*[2]

While a DHHS review conducted on the day of Plaintiff's admission to Oakbrook's facility does not document that Plaintiff lacked capacity to consent, or

[2] Plaintiff is not aware of any evidence that has been produced by Oakbrook demonstrating that he lacked capacity to enter the agreements himself on the day of his admission.

that he was suffering from dementia, a physician documented that he was suffering from dementia after he was admitted to Oakbrook's facility. The Act pertains to adults who are "unable to appreciate the nature and implications of [their] condition and proposed health care, to make a reasoned decision concerning the proposed health care, or to communicate that decision in an unambiguous manner."[3] S.C. Code Ann. § 44-66-20(8).

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

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

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

Therefore, the Act gave Ms. Rickenbaker authority to consent on behalf of Plaintiff to the provision of medical care, including placement in Oakbrook, as well as authority to make certain financial decisions on behalf of Plaintiff which he would be obligated to pay. This authority "extends primarily to traditional health

[3] While a certification does exist indicating that Plaintiff did not have capacity to consent to medical treatment, that certification was not signed by a physician until July 2, 2018, several weeks after Plaintiff was admitted to the facility. Additionally, Plaintiff's medical records indicate that he was suffering from dementia prior to and while admitted to Trident, prior to being admitted to Oakbrook.

care decisions, and only secondarily to the financial decisions necessitated by those decisions." *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 353, 755 S.E.2d 450, 454 (2014). Most jurisdictions, including South Carolina, have ruled execution of an arbitration agreement is not a health care decision. *See Johnson v. Kindred Healthcare, Inc.*, 466 Mass. 779, 789-90, 2 N.E.3d 849, 857-58 (Mass. 2014) (collecting cases).

Upon seeking admission of Plaintiff to Oakbrook's facility, Ms. Rickenbaker was presented with two documents, an Admission Agreement and an Arbitration Agreement. The Arbitration Agreement is separate from the Admission Agreement and contains no provision for medical, nursing, or health care services to be provided to Plaintiff, nor does it require any financial commitment to pay for such services.[4] The agreement is separately titled "Facility – Resident/Representative Arbitration Agreement", is paginated as "Page 1 of 1", and contains its own signature lines. The agreement does not contain the name of Plaintiff anywhere within the document and is signed by Ms. Rickenbaker as "Resident/Representative." Further, the Arbitration Agreement by its very language distinguishes between itself and the Admission Agreement, stating that the Arbitration Agreement will survive any "breach of this Agreement or the Admission Agreement." While the Admission Agreement purports to incorporate admissions materials into itself "by reference herein", when viewed alongside the

[4] The Arbitration Agreement was presumptively optional under federal law. *See* 42 C.F.R. § 483.70(n). There is no language within the Arbitration Agreement indicating that it was a prerequisite to admission, and Oakbrook has represented that the Arbitration Agreement was optional.

other details of the agreements, it creates an ambiguity as to merger when taken in context of the totality of the circumstances, and "the law is clear that any ambiguity in such a clause is construed against the drafter", i.e., Oakbrook. *See Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

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

The Act "provides statutory authority for family members to make an incapacitated loved one's 'health care' decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code." *Murphy v. Hunt Valley Holdings, LLC*, No. 2018-CP-46-01459, 2018 WL 11033620, at *6 (S.C. Com. Pl. Dec. 17, 2018). Ms. Rickenbaker had no legal authority to sign the Arbitration Agreement, and Oakbrook knew or should have

known this fact, as she did not present them with documentation demonstrating power-of-attorney or guardianship. Since Ms. Rickenbaker lacked legal authority to enter into a contract, the Arbitration Agreement is void and unenforceable.

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

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

Oakbrook has not met its burden to establish these elements. There is no evidence Plaintiff acted in a way amounting to a false representation to Oakbrook regarding Ms. Rickenbaker's status or that Plaintiff intended for Oakbrook to act in reliance on her conduct. If anything, the evidence shows that, more likely than not, Plaintiff was not consciously aware of anything that was occurring at the time of his admission. Additionally, the evidence shows Oakbrook cannot meet its burden of proving it lacked knowledge or the means of knowledge of the truth of the facts in

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

In this case, Oakbrook had the ability to determine whether Ms. Rickenbaker had authority to sign an arbitration agreement on Plaintiff's behalf. Under the Adult Healthcare Consent Act, it should be clear to facilities such as Oakbrook that a spouse without a general durable power of attorney only has authority to make healthcare decisions and not waive other rights when a potential resident lacks capacity. Oakbrook is a sophisticated business entity frequently interacting with residents and their families during the rehabilitation center admission process. Oakbrook is or should be familiar with the legal concepts of guardianship and powers-of-attorney. Oakbrook had the ability to ask Ms. Rickenbaker whether she was Plaintiff's attorney-in-fact, and it had the ability to request supporting documentation proving authority. Since Oakbrook has not cited or provided evidence on all required elements of equitable estoppel, Plaintiff is not equitably estopped from denying the Arbitration Agreement.

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

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

Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). Any ambiguity as to merger is to be construed against the drafter. *See Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 129 n.4, 713 S.E.2d 799, 805 n.4 (Ct. App. 2011).

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

Oakbrook's assertion that Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement seems to hinge on a direct benefits theory of estoppel, i.e., that since Plaintiff benefited from the terms of the Admission Agreement, he should be estopped from denying the validity of the Arbitration Agreement. *See Wilson*, 426 S.C. at 340, 827 S.E.2d at 175. Virtually all of the

Circuit Court orders filed by Oakbrook in support of its Motion rely in some form or another on this theory. However, as the Supreme Court explained in *Wilson*, to successfully assert direct benefits estoppel, the arbitration agreement must be a clause within the larger admissions agreement, and the plaintiff must be seeking to assert causes of action that arise from and are created by the contract. Here, as explained above and below, the Admission Agreement and optional Arbitration Agreement are separate documents that did not merge. Second, Plaintiff does not assert breach of contract, or a violation of contractual duties, and instead has brought his lawsuit under a negligence theory arising from common law duties. *See Wilson*, 426 S.C. at 342, 827 S.E.2d at 176. If anything, Plaintiff's claims are indirectly related to the Arbitration Agreement, as it was optional, ancillary to, and separate from the Admission Agreement. *See id.* (stating that under direct benefits estoppel a nonsignatory's claim must be directly, not just indirectly, based on the contract containing the arbitration agreement).

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

Coleman and *Thompson*, in which the Supreme Court found such language to be proof that an admission agreement was separate and did not merge with an arbitration agreement:

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

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

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

Oakbrook argues that such details are "superficial things" and that they cannot be relied on by Plaintiff as proof that the two separate agreements never merged. However, to do so flies in the fact of binding precedent from our Supreme Court indicating that such details are exactly what should be looked to by courts in determining whether merger exists. *See Hodge*, 422 S.C. at 562-63, 813 S.E.2d at 302 ("Further, each document was separately paginated and had its own signature page. Additionally, the Arbitration Agreement stated signing it was not a precondition to admission."); *Thompson*, 416 S.C. at 52, 784 S.E.2d at 684 (noting

that evidence of parties' intent to keep two agreements separate includes language from agreements recognizing and referring to agreements as separate documents). The details of Oakbrook's Admission Agreement and Arbitration Agreement are nearly identical to those addressed by our Supreme Court in *Coleman*, *Hodges*, and *Thompson*. Oakbrook cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit, and any equitable estoppel argument should be denied by the Court.

III. Ms. Rickenbaker did not have actual or apparent authority to enter the Arbitration Agreement.

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

The basis of apparent authority is representations **made by the principal to the third party** and reliance by the third party on those representations. *Young v. S.C. Dep't of Disabilities and Special Needs*, 374 S.C. 360, 367, 649 S.E.2d 488, 491

(2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that **between the principal and the third party**. *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 428, 412 S.E.2d 425, 428 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists. *Id.*

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

In fact, Oakbrook's position has been directly addressed and disagreed with by the Supreme Court in *Hodge*. In *Hodge*, the facility argued that a husband had

taken over his wife's medical affairs and had authority to enter an arbitration agreement on her behalf. The court described the apparent authority as follows:

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

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

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

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

In *Thompson*, other circumstances similar to the instant facts were addressed by the Supreme Court and found not to constitute evidence of apparent or actual authority. In *Thompson*, the facility asserted that the resident "allowed, passively or otherwise" a family member to sign her admissions agreement and arbitration agreement, and to handle other financial affairs for her, as evidence of apparent or

actual authority. *Thompson*, 426 S.C. at 55, 784 S.E.2d at 686. The court did not take the same view of the circumstances:

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

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

Oakbrook's assertion that Ms. Rickenbaker held "inherent agency powers" to act on behalf of Plaintiff is unsupported by South Carolina law. First, the theory proposed by Oakbrook has no supporting South Carolina authorities outside of a passing mention of the term in an abrogated case. *See Smith v. Fitton and Pittman, Inc.*, 264 S.C. 129, 212 S.E.2d 925 (1975). If anything, *Smith* makes clear that the inherent agency powers theory finds no support in South Carolina law. *Id.* ("[A]ppellant has offered no authority, and we have found none, that [individual] would have inherent agency power . . . ."). Second, South Carolina law is clear that an individual does not have inherent agency powers concerning health care, financial, and other affairs of their spouse. *Hinson v. Roof*, 128 S.C. 470, 475, 122 S.E. 488, 490 (1924) ("The marriage relation of the parties . . . is not necessarily

enough to establish the fact that the one is the agent of the other. There must be other proof."); S.C. Jur. *Agency* § 6 (1994) ("No presumption arises from the fact of the marital relationship, without more, that [a spouse] is the agent of [the other spouse]."") (footnote omitted).

Regardless of whether Ms. Rickenbaker "held herself out as an agent for her husband", there is no evidence that at any point Plaintiff himself made representations, or voluntarily placed Ms. Rickenbaker in a position, which would indicate a conscious or implied representation that she was authorized to enter arbitration agreements on his behalf. Ms. Rickenbaker's position and sole authority was derived from the Adult Healthcare Consent Act, a statutory construct, which did not bestow authority to enter arbitration agreements for the reasons described above. Despite Oakbrook's contentions, Plaintiff never consciously "held Ms. Rickenbaker out" or represented that she was authorized to act on his behalf in connection with arbitration, and Oakbrook has produced no evidence supporting its argument, making the Arbitration Agreement invalid and unenforceable.[5] There is no evidence that Ms. Rickenbaker had actual or apparent authority to enter the Arbitration Agreement.

IV. Plaintiff is not a third-party beneficiary to the Arbitration Agreement.

"A third-party beneficiary is a party that the contracting parties intend to directly benefit." *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). "However, there can be no third-party beneficiary unless a

[5] For similar reasons, Plaintiff is not estopped from denying Ms. Rickenbaker was his agent, since he never knowingly caused or permitted her to appear to be his agent. Plaintiff appears to have been incapacitated at the time of his admission.

valid contract exists." *Thompson*, 416 S.C. at 57, 784 S.E.2d at 687. Since Ms. Rickenbaker was not authorized to execute the Arbitration Agreement on Plaintiff's behalf, there was no valid contract, and Plaintiff could not be the third-party beneficiary of the Arbitration Agreement between Ms. Rickenbaker and Oakbrook. Additionally, a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement. *Thompson*, 426 S.C. at 57, 784 S.E.2d at 687. Plaintiff is not attempting to enforce the Arbitration Agreement; instead, he is asserting tort claims arising from common law duties. Therefore, Plaintiff was not a third party beneficiary to the Arbitration Agreement signed by Ms. Rickenbaker, and it cannot be enforced against him independently of any authority she did not have to enter the agreement.

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

In the alternative, Oakbrook has requested that the Court grant additional discovery on the nature of Ms. Rickenbaker's agency relationship with her husband. S.C. Code Ann. § 15-48-20 only permits a court to "summarily" proceed to the determination of whether arbitration is appropriate when an agreement to arbitrate has been contested. Here, the only relevant and necessary evidence for the Court to make its determination is already available for the Court's review. Any further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, offend section 15-48-20's mandate for an expedient determination of arbitrability, waste judicial resources, and increase costs for both

parties unnecessarily. The Court should deny Oakbrook's request for additional discovery.

CONCLUSION

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

PARKER LAW GROUP, LLP

BY: *s/ Lee D. Cope*

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ATTORNEYS FOR THE PLAINTIFF

January 21, 2025.
Hampton, South Carolina

PHYSICIAN CERTIFICATION
REGARDING ABILITY TO CONSENT

6/18/2018

A patient's inability to consent must be certified by two licenses physicians (Code of Laws of South Carolina, Title 44 Chapter 66 – Adult Health Care Consent Act - §44-66-20). "Unable to consent" means unable to appreciate the nature and implications of the patient's condition and proposed health care, to make a reasoned decision concerning the proposed health care, or to communicate that decision in an unambiguous manner. "Health care" means a procedure to diagnose or treat a human disease, ailment, defect, abnormality, or complaint, whether of physical or mental origin. Health care also includes the provision of intermediate or skilled nursing care; services for the rehabilitation of injured, disabled, or sick persons; and the placement in or removal from a facility that provides these forms of care.

PHYSICIAN STATEMENT

I, Randi Popp (attending physician), do hereby certify that Steve L. Rickenbaker (Resident) is unable to provide consent regarding health care decisions as defined by South Carolina Adult Health Care Consent Act.

My decision is based upon the following cause and nature: (*condition that is responsible for inability to consent & degree of intellectual or related disability; i.e. non-verbal, unable to follow commands*)

dementia

I believe the extent of this inability is: (*specific areas where resident cannot make informed decisions*)

global

I believe that the probably duration of this inability is:

✓ Permanent _____Temporary

This declaration is made following examination of this resident and review of the medical record.

RPopp 7/2/18

Attending Physician Date

CONSULTING PHYSICIAN STATEMENT

I, Stela susac-Pavic (attending physician), do hereby certify that _____ (Resident) is unable to provide consent regarding health care decisions as defined by South Carolina Adult Health Care Consent Act.

My decision is based upon the following cause and nature: (*condition that is responsible for inability to consent & degree of intellectual or related disability; i.e. non-verbal, unable to follow commands*)

Dementia

I believe the extent of this inability is: (*specific areas where resident cannot make informed decisions*)

Global

I believe that the probable duration of this inability is:

X Permanent _____Temporary

This declaration is made following examination of this resident and review of the medical record.

Consulting Physician 07/02/18 Date

EXHIBIT B

SOUTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES

PASARR-Level 1
SCREENING FORM

Name:	STEVE L RICKENBAKER	Date of Review:	06/18/2018
SSN:		Location at Assessment:	TRIDENT
Medicaid:	Non-Medicaid X	CLTC#:	
Date of Birth:		Referral Source	MSW CASE MANAGER

All Diagnosis (If dementia diagnosed or suspected, complete and attach the Mini-Mental Form):
CERVICAL FXS, RIGHT FIBULA FX, T1 LAMINAR FX, AMS, DIABETES, GOUT, LOWER GI BLEED,

I. SCREENING FOR MENTAL RETARDATION INDICATORS:

	YES	NO
1. Diagnosis of mental retardation or related disability made prior to age 22?		X
2. IQ tested below 70?		X
3. Was time of test prior to age 22?		X
4. Does client have 3rd grade education? In not, state reason in Comments Section.	X	
5. Adaptive behavior: Could client ever perform self care activities?	X	
- Did he/she help care for spouse/parents/children?	X	
- Was client ever able to cook and perform household duties?	X	
- Was client gainfully employed? If not, explain in Comments Section.	X	
- Did client have a driver's license?	X	
6. Cognitive functioning:		
- Memory: Does client remember what he/she had for breakfast or lunch?	X	
- Simple math: Can client add 12 + 8?		X
- Concept formation: Can client describe the difference between a fish and dog?		X

7. Comments:

II. SCREENING FOR MENTAL ILLNES INDICATORS:

1. Diagnosis of mental illness: No ___ Yes X Diagnosis: HALLUCINATIONS
2. History of psychiatric hospitalization within previous two years. (Give dates of treatment) If no hospitalization, indicate here: none
   ___ to ___ ___ to ___ ___ to ___
3. Current behavioral indicators

Attempted suicide		Unrealistic fear of strangers	
Assaultive		Self-mutilation	
Incessant loud talking		Combative	
Uncooperative		Social Isolation	
Hostile		Destruction of property	
		None of these indicators	X

4. Comments: (Include explanation of major symptoms)

EXHIBIT C

DHHS form 234 (1/96) Previous Editions are Obsolete.

2018 WL 6831844 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina.
Horry County

Orveletta ALSTON, et al.,
v.
CONWAY MANOR, LLC, et al.

No. 2017CP261351.
January 17, 2018.

Order

Larry B. Hyman, Jr., Judge.

***1** This matter comes before the Court on Defendants Conway Manor, LLC, Raymond Tiller, and John and Jane Does 1-10's Motion to Stay Action and Compel Arbitration and for Protective Order. Based on the Court's review of the parties' written submissions and oral arguments during a hearing on November 1, 2017, the Court **DENIES** the Defendants' motion.

BACKGROUND

The Defendants operate a nursing home, licensed by the South Carolina Department of Health and Environmental Control, R.61-17, *Standards for Licensing Nursing Homes*. Willie Earl Alston, Sr. was admitted to the Defendant' nursing home facility on or about December 17, 2015. Upon admission, Mr. Alston was documented to return home with his wife after short-term rehabilitation. At all relevant times, it was documented that Mr. Alston suffered from dementia. Plaintiff alleges that while Mr. Alston was a resident, he developed pressure ulcers. Willie Earl Alston, Sr. died on April 22, 2016.

When Mr. Alston arrived at the Defendants' nursing home, Defendant's staff approached Mr. Alston's daughter, Kimberly Alston-Wood. Ms. Alston-Wood was not Mr. Alston's guardian, conservator, or attorney in fact. The documents included an Admission Agreement which included a clause with an **Arbitration Agreement**. Mr. Alston's wife, Orveletta Alston, was appointed as Personal Representative of the Estate of Willie Earl Alston, Sr. on May 27, 2016 and filed this action on his behalf, alleging that the Defendants breached their duty in caring for Mr. Alston. On June 21, 2017, Defendants' filed a Motion to Stay Action and Compel Arbitration and for Protective Order. Oral arguments were heard on November 1, 2017.

ANALYSIS

Arbitration is a matter of contract and South Carolina Courts must determine the enforceability of an **arbitration agreement** based on principles of contract law. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). The policy of this State is to favor arbitration of disputes. *Toler Cove Homeowner's Ass'n v. Trident Constr. Co., Inc.*, 355 S.C. 605, 612,581 (2003). However, an **arbitration agreement** is not enforceable when a party to the contract lacks the capacity to contract.

1. The Arbitration Agreement is not enforceable because Kimberly Alston-Wood lacked the capacity to contract on behalf of her father.

EXHIBIT
D

In South Carolina, actual authority is expressly conferred upon the agent by the principal, but apparent authority exists where the principal knowingly permits the agent to exercise authority or when the principal holds the agent out as possessing such authority. *Roberson v. S. Fin. Of South Carolina, Inc.*, 365 S.C. 6,9, 615 S.E.2d 112, 115 (S.C. 2005). It is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority. *Frasier v. Palmetto Homes of Florence*, 473 S.E.2d 865 (S.C. App. 1996). While the Plaintiffs did not expressly argue apparent authority, Ms. Alston-Woods authority status was raised by both parties, therefore the Court shall analyze both actual and apparent authority.

***2** Here, Defendants argue in their motion that because Mr. Alston suffered dementia prior to and at the time of his admission, he did not have capacity to enter into a binding contract. Therefore by Defendants' own admission, Mr. Alston could not explicitly authorize, hold out, or knowingly permit Ms. Alston-Wood to sign the **Arbitration Agreement**, in satisfaction of the elements of the doctrine of apparent authority. Additionally, a review of the admissions and arbitration documents by Defendants would have informed them that Ms. Alston-Wood did not have authority by way of a Power of Attorney to bind her father. Ms. Alston-Woods, did not indicate at any time on the Admission Agreement that she had any authority to enter the contract on behalf of her father.

Additionally, Ms. Alston-Wood possessed no statutory, legal authority to bind Mr. Alston into a contract. The Adult Health Care Consent Act ("AHCCA") does not confer legal authority to Ms. Alston-Wood to enter into a contract on behalf of her father. S.C. Code Ann. § 44-66-30 notes that "(A) where a patient is unable to consent, decisions concerning his health care may be made by the following persons in order of priority:.....(4) a spouse of the patient… (5) an adult child of the patient…" The statute specifically provides for a surrogate to make decisions regarding procedures and treatment of human disease and ailments. However, the statute does not authorize surrogates to enter into legal contracts waiving a person's right to a jury trial. Even if it did, Ms. Alston-Wood lacked priority under the statute because Mr. Alston's wife was alive and making his health care decisions. The purpose of the AHCCA is to enable contracting parties in a healthcare situation to enter into a binding agreement when express authority has not been conferred upon an agent for that purpose. "However the [AHCCA] does not confer such authority with respect to an **Arbitration Agreement**...." *Thomspon*, at 52. Additionally, neither party argued under S.C. Code Ann. § 44-66-30(D) that Mr. Alston's wife, who had top priority, was not reasonably available, unwilling to make decisions, or unable to make healthcare decisions for Mr. Alston.

Furthermore, the S.C. Bill of Rights for Resident of Long-Term Care Facilities does not confer legal authority to Ms. Alston-Wood to enter into a contract on behalf of her father. Under the Bill of Rights, a "representative" is defined as a "resident's legal guardian, committee, or next of kin or other person acting as agent of a resident who does not have a legally appointed guardian." S.C. Code Ann. §44-81-30(3). Mr. Alston did not have a legally appointed guardian or attorney in fact at the time of his admission. Therefore, the Bill of Rights would grant Mr. Alston's wife, as next of kin, as his representative, not Ms. Alston-Wood.

This Court finds the Supreme Court of South Carolina's decision in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2 450 (2014) is very similar to the facts of the case at hand. In *Coleman*, the Circuit Court denied the nursing home defendants" motion to stay the action and compel arbitration because the sister of the resident who signed the **arbitration** and admission **agreements** lacked capacity to bind her sister to the **arbitration agreement**. In affirming the Circuit Court's Order in *Coleman*, the Supreme Court found that although the AHCCA did give the resident's sister "authority to make 'healthcare decision' on behalf of her sister, consent for medical treatment for someone unable to consent is not the same as binding an incompetent person to a legally binding contract such as an **arbitration agreement** without authority to do so." Id. The Court reasoned that the Act only extends authority to surrogates to make traditional health care decisions and financial decisions that arise out of those decisions. The Court further addressed this in *Thompson v. Pruitt Corp.*, 416 S.C. 43, holding that an **arbitration agreement** was separate from the admission agreement. In *Thompson*, the Court found that while the resident's son was authorized to execute an admission agreement under the AHCCA, the Act did not convey any authority for the son to sign an **arbitration agreement** on behalf of his father. The Court specifically addressed the fact that the terms of the Admission Agreement indicate that it either incorporated, or merged with, the **Arbitration Agreement**, but declined to merge the two. *Id*. at 52. Simply stated, an **Arbitration Agreement** is a legal document which does not concern health care related decisions.

Likewise, an Admission agreement is a medical document which does not concern legal related decisions. One cannot simply be contained in the other and its health care or legal distinction is masked by the other.

***3** In accordance with the foregoing, Ms. Alston-Wood lacked the actual or apparent authority, pursuant to statute, to make health care decisions on behalf of Mr. Alston as his agent. She furthermore lacked the actual or apparent authority to make legal decisions on behalf of Mr. Alston, which includes the **agreement** to **arbitrate** disputes by arbitration. Ms. Alston-Wood had no legal authority whatsoever to sign the **Arbitration Agreement**. Absent legal authority or at least some measure of apparent authority, the **Arbitration Agreement** is void and unenforceable.

2. *Willie Alston, Sr. was not a third-party beneficiary to the Arbitration Agreement because Kimberly Alston-Wood did not have capacity to bind him to the contract.*

Defendants' argument that Willie Alston, Sr. is bound by the **Arbitration Agreement** executed by his daughter as a third-party beneficiary is without merit. Mr. Alston did benefit from the Admissions Agreement to the facility, however Ms. Alston-Wood lacked authority under the AHCCA and the S.C. Bill of Rights to execute on his behalf. Along the same lines, Ms. Alston-Wood did not have authority to legally bind her father to the **Arbitration Agreement** contract for the reasons set forth above in *Coleman* and *Thompson*, because the **Arbitration Agreement** and Admission Agreement did not merge together. As such, this Court finds Willie Alston, Sr. was not a third-party beneficiary to the **Arbitration Agreement** because the contract was never valid.

3. *Plaintiff is not equitably estopped from denying the Arbitration Agreement.*

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

Defendant has not met its burden to establish these elements. There is no evidence Ms. Alston-Wood acted in a way amounting to a false representation to Defendants regarding Mr. Alston's status or that Ms. Alston-Wood intended for Defendant to act in reliance on her conduct. Mr. Alston's diminished capacity prevented him from forming the required intent for Defendants to rely on his conduct. Additionally, the evidence shows Defendants cannot meet its burden to show they lacked knowledge or the means of knowledge of the truth of the facts in question. This element requires Defendants to show it did not know Mr. Alston lacked authority to sign the **arbitration agreement** on her father's behalf and Defendant lacked the ability to make this determination. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on **equitable estoppel** if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

***4** Defendants had the capacity to determine whether Ms. Alston-Wood had authority to sign an **arbitration agreement** on Mr. Alston's behalf. Defendants are a sophisticated business entity frequently interacting with residents and their families during the nursing home admission process. Defendants are familiar with the legal concepts of guardianship and powers-of-attorney. Defendants had the ability to ask Ms. Alston-Wood whether she was Mr. Alston's guardian or attorney-in-fact and had the

ability to request supporting documentation. Since Defendants have not cited or provided evidence on all required elements of **equitable estoppel**, Plaintiff is not equitably estopped from denying the **arbitration agreement**.

Furthermore, while typically the Defendants argument that **equitable estoppel** would prevent a party from cherry picking certain previsions to rely upon while disavowing other, there is an exception in cases such as these circumstances. As stated above, Mr. Alston was suffering from dementia prior to being admitted to Conway Manor, thus he was prevented from having the requisite intent and knowledge to assent to the **Arbitration Agreement**. Therefore, there must be some legal authority for Ms. Alston-Woods to sign on behalf of her father. The Admissions **Agreement** and the **Arbitration Agreement** were signed at the same time, in the course of the same transaction. The Agreements, however, do not merge. The two agreements are independent of one another, as reflected in the language of the Admission Agreement, indicating the execution of the Admission agreement was not contingent upon an Optional Arbitration Clause. The Optional Arbitration Clause stated:

> "Any action, dispute, claim, or controversy, of any kind (tort, contract, equitable or statutory, including but not limited to claims of violation of resident's rights(now existing or hereafter arising between the parties, in anyway arising form or relating to this Agreement governing the Resident's stay a[t] the Facility, shall be resolved by binding arbitration.... ***OPTIONAL*: if the parties do not agree to this Arbitration Clause, please mark with an X to void this clause only."**

As previously stated the AHCCA provides for the health and wellbeing of an incapacitated adult, an **Arbitration agreement** is a legal document not for the care of an incapacitated adult, and is outside of the scope of the AHCCA. Therefore, because the Court finds that the two documents did not merge and there was no legal authority for Ms. Alston-Woods to sign on Mr. Alston's behalf, **equitable estoppel** does not apply to the **Arbitration agreement**.

4. ***The FAA does not mandate the enforcement of the Arbitration Agreement***

Under the Federal **Arbitration Agreement** ("FAA"), **arbitration** is required when there is a valid **arbitration agreement** and a dispute exists which is within the scope of the agreement. Under the arbitration clause, neither prong is satisfied. As discussed in the sections above, there is no valid **arbitration agreement** because Ms. Alston-Wood did not have the legal authority to execute a valid **arbitration agreement** or health care admission agreement. Accordingly, the FAA does not apply.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the **Arbitration Agreement** in question is unenforceable and Defendants' Motion to Dismiss is DENIED.

<<signature>>

The Honorable Larry B. Hyman, Jr.

1 - 11, 2018

Conway, South Carolina

End of Document

2020 WL 12904662 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina.
Sumter County

Andrietta ATKINSON and Debra Clyburn-Wilson, individually and as Personal Representatives of the Estate of Willie Mae Clyburn, Plaintiffs,
v.
SSC SUMTER EAST OPERATING COMPANY, LLC d/b/a Sumter East Health and Rehabilitation Center and Paul Granger, Defendants.

No. 2017-CP-43-1740.
June 25, 2020.

Order Denying Motion to Compel Arbitration

Kristi F. Curtis, Judge.

***1** This matter was before the Court in Sumter County, South Carolina, upon Defendant SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehabilitation Center's [Sumter East] Motion to Dismiss and Compel Arbitration. Defendant's Motion to Dismiss and Compel Arbitration is DENIED.

BACKGROUND

Willie Mae Clyburn [Clyburn] was admitted to the Sumter East on October 13, 2016. Sumter East is a skilled nursing facility licensed by the South Carolina Department of Health and Environmental Control. While a resident at Sumter East, Plaintiff contends Clyburn developed pressure sores, resulting in her decline and eventual death. Clyburn died on February 5, 2018. Andrietta Atkinson filed the original action as Power of Attorney for Clyburn on September 20, 2017. After Clyburn's death, Clyburn's daughters, Andrietta Atkinson and Debra Clyburn-Wilson, were appointed as Personal Representatives of her estate, and were substituted as Plaintiffs in this action. Plaintiffs thereafter filed an amended complaint which included causes of action for Wrongful Death and Survivorship. The parties agreed to conduct limited discovery and mediate this matter without waiver of Sumter East's arbitration rights. Following the parties' inability to resolve this matter at mediation, Sumter East filed this Motion to Dismiss and Compel Arbitration. Plaintiffs contend that the **Arbitration Agreement** is unenforceable under state law.

STANDARD OF REVIEW

A parties' right to a jury trial in South Carolina is governed by state law. Pelfrey v. Bank of Greer, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978). The party seeking to enforce an **agreement** to **arbitrate** has the burden of establishing the existence of a valid **arbitration agreement**. Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). It is well established that "where one party denies the existence of an **arbitration agreement** raised by an opposing party, a court must immediately determine whether the **agreement** to **arbitrate** exists in the first place...If no agreement is found to exist, the court must deny any application to arbitrate." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (citing S.C. Code Ann. § 15-48-20(a)). Whether a valid **arbitration agreement** exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

In determining whether an **agreement** to **arbitrate** exists, "the court should apply 'ordinary state-law principles that govern the formation of contracts.'" Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). Arbitration is available only when the parties contractually agree to arbitrate. Id. South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989).

***2** The present case is very similar to three cases where the South Carolina Court of Appeals and Supreme Court addressed the issue of **arbitration agreements** in skilled nursing facilities: Coleman v. Mariner Health Care, Inc, 407 S.C. 346, 755 S.E.2d 450 (2014); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292, 304 (Ct. App. 2018); and Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d, 679 (Ct. App. 2016). In all three of these cases, our Courts have found **Arbitration Agreements** to be unenforceable where a family member signed an **Arbitration Agreement** near the time of admission to a skilled nursing facility for the Decedent and did not have authority to do the same. In all three cases, the Courts found that neither implied authority nor estoppel applied.

ANALYSIS

THE ARBITRATION AGREEMENT IS NOT ENFORCEABLE BECAUSE WILSON WAS NEVER CLYBURN'S LEGAL GUARDIAN OR ATTORNEY IN FACT AND LACKED ACTUAL OR APPARENT AUTHORITY TO SIGN THE ARBITRATION AGREEMENT FOR CLYBURN.

Wilson executed documents on behalf of Clyburn upon her entry to Sumter East on October 13, 2016, including an **Arbitration Agreement** titled "Dispute Resolution Program" [hereinafter referred to as "**Arbitration Agreement**"]. The **Arbitration Agreement** states:

YOUR PARTICIPATION IN DRP IS VOLUNTARY. BY SIGNING THIS AGREEMENT, YOU AGREE TO PARTICIPATE IN THE DISPUTE RESOLUTION PROGRAM. THIS AGREEMENT MAY BE REVOKED BY SENDING A WRITTEN NOTICE OF REVOCATION WITHIN THIRTY (30) DAYS FROM THE DATE OF ADMISSION OR THE DATE ON WHICH THIS AGREEMENT IS SIGNED, WHICHEVER OCCURS LATER. A DECISION TO REVOKE THIS AGREEMENT WILL IN NO WAY ADVERSELY AFFECT THE RESIDENT'S STATUS AT THE FACILITY. WE WILL NOT REFUSE TO ADMIT, ATTEMPT TO DISCHARGE THE RESIDENT OR TAKE ANY OTHER ADVERSE ACTION AGAINST THE RESIDENT BASED ON A REVOCATION OF THE OPPORTUNITY TO PARTICIPATE IN A DRP.

The **Arbitration Agreement** is separately paginated from the Admissions Agreement, and each document contains its own signature lines. At the bottom of the **Arbitration Agreement** there is a signature line for the resident, another line for the signature of a Representative to sign when a "mentally competent resident is unable to physically execute the Agreeement and authorizes a Representative to sign Agreement on the Resident's behalf." Both of these lines were left blank. The next signature line states, "If resident is judged incompetent, complete this section ... I am the spouse, responsible party, legal guardian or power of attorney of the resident and have the authority to sign the agreement on his/her behalf. In signing this Agreement, the Legal Representative or Family Member binds both the Resident and themselves Individually." Wilson signed the Agreement under this section.

A. Wilson lacked the actual authority to bind Clyburn's estate to an Arbitration Agreement.

Sumter East argues that Wilson's signature on the **Arbitration Agreement** binds Clyburn' estate. The court disagrees. The mere fact that an **arbitration agreement** exists does not automatically refer any dispute to **arbitration**. The **agreement** must be valid, enforceable, and signed by the parties who had the express and legal authority to do so. The legal consequences of an agent's actions can only be attributed to the principal when the agent has actual or apparent authority. Charleston Registry v. Young Clement, 359 S.C. 635, 598 S.E.2d 717 (Ct. App. 2004). Moreover, it is the duty of one dealing with an agent to use due

care to ascertain the scope of the agent's authority. Frasier v. Palmetto Homes of Florence, 323 S.C. 240, 473 S.E.2d 865 (Ct. App. 1996). The evidence shows Wilson was not the legal guardian of Clyburn, nor was she the attorney in fact.

***3** Wilson also lacked the capacity to bind Clyburn under the South Carolina Adult Health Care Consent Act ("AHCCA"). The AHCCA governs the placement or removal of an individual from a facility that provides intermediate or skilled nursing care. S.C. Code Ann. § 44-66-20(1). Under the AHCCA, a party may consent to health care on behalf of a patient if the patient is deemed unable to consent to treatment after two licensed physicians have examined the patient and certify an inability to consent. S.C. Code Ann. § 44-66-20(8)(emphasis added). S.C. Code Ann. § 44-66-30 lists the appropriate persons who may make health care decisions for a patient who is unable to consent and provides an order of priority for who may make those decisions. It reads:

> (A) Where a patient is unable to consent, decisions concerning his health care may be made by the following persons in the following order of priority:
>
> (1) a guardian appointed by the court pursuant to Article 5, Part 3 of the South Carolina Probate Code, if the decision is within the scope of the guardianship;
>
> (2) an attorney-in-fact appointed by the patient in a durable power of attorney executed pursuant Section 62-5-501, if the decision is within the scope of his authority;
>
> (3) a person given priority to make health care decision by another statutory provision;
>
> (4) a spouse of the patient unless the spouse and the patient are separated pursuant to one of the following:
>
> a. entry of a pendent lite order in a divorce of separate maintenance action;
>
> b. formal signing of a written property or marital settlement agreement; or
>
> c. entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;
>
> (5) an adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;
>
> (6) a parent of the patient;
>
> (7) an adult sibling of the patient; or if the patient has more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation;
>
> (8) a grandparent of the patient; or if the patient has more than one grandparent, a majority of the grandparents who are reasonably available for consultation;
>
> (9) any other adult relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient, or if the patient has more than one other adult relative, a majority of those adult relatives who are reasonably available for consultation.

Defendant has put forth insufficient evidence to demonstrate that Clyburn herself was unable to consent or that two licensed physicians certified her inability to consent, as required by the statute, which would trigger the AHCCA and allow a family member to make health care decisions for her.

Additionally, even if Wilson had actual authority under the AHCCA, her authority under the Act would extend only to health care decisions and would not give her the authority to sign an **Arbitration Agreement**. The AHCCA only deals with health care related decisions, not legal decisions. Nowhere in the entire AHCCA is the word "legal" or "arbitration" used. Clearly the legislature intended this Act to govern only those decisions related to health care. The South Carolina Supreme Court addressed this issue squarely in Coleman v. Mariner Heath Care 407 S.C. 346, 755 S.E.2d 450 (2014). In Coleman, a nursing home resident's sister was authorized to make health care decisions under the AHCCA because her sister was unable to consent within the meaning of the Act and she was an individual with statutory priority to represent her sister. The court held that her authority under the AHCCA did not give her the capacity to bind her sister to a voluntary **arbitration agreement**. According to the Court, the AHCCA specifically limited the representative's authority to making health care decisions and associated financial arrangements. The Court held arbitration is not a health care or related financial decision, and thus the decision to engage in arbitration exceeds the authority granted by the AHCCA. Id. at 351-52, 755, S.E. 2d at 453.

***4** Sumter East argues that the Admissions **Agreement** and **Arbitration Agreement** signed by Wilson should be merged into one document, which Wilson had authority to sign. This court disagrees and finds the Admissions **Agreement** and **Arbitration Agreement** were not merged and should be treated as two separate documents.

Our South Carolina Supreme Court has ruled that there is a difference between a residency contract and an **arbitration agreement**, and that just because the two agreements are executed contemporaneously does not make them one and the same. The Supreme Court has ruled:

> Assent to this contract [the admission agreement] was a condition for Decedent's admission to Facility. On the other hand, the AA was not required for Decedent's admission, contained no provision for medical, nursing, or health care services to be provided for Decedent, and did not require any financial commitment to pay for such services. The separate **arbitration agreement** concerned neither health care nor payment, but instead provided an optional method for dispute resolution.

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 354, 755 S.E.2d 450, 454 (2014).

The Court reached similar holdings in Thompson v. Pruitt Corp., 416 S.C. 43,50, 784 S.E.2d 679, 683 (Ct. App. 2016) and Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) ("The Act confers authority on a health care surrogate to consent on the patient's behalf 'to the provision or withholding of health care' and to make financial decisions obligating the patient to pay for the medical care provided." (quoting Coleman, 407 S.C. at 351-52, 755 S.E.2d at 453)).

In this case, as in Coleman, the Admission **Agreement** and **Arbitration Agreement** were separate documents, each with its own separate pagination and signature lines. Furthermore, in this case the Admissions Agreement contains language indicating that the Admissions Agreement is the "entire agreement and understanding between the parties." In addition, the **Arbitration Agreement** could be revoked within thirty days, whereas the Admissions Agreement contained no revocation provision. The **Arbitration Agreement** states that a resident's decision to revoke the document has no bearing on whether or not the resident would be admitted to the facility. The language of Sumter East's own document suggests that even Sumter East treated these as entirely separate agreements.

Sumter East cannot meet its burden to prove **merger**. The Admission **Agreement** and **Arbitration Agreement** are distinct and should not be construed as a unit. Therefore, even if Wilson had the actual authority to sign the Admissions Agreement, that authority did not extend to the **Arbitration Agreement**.

B. Wilson did not have the apparent authority to bind Clyburn's Estate.

South Carolina law requires that to prove apparent authority, the Defendant must show "(1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but the relationship between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412, S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists. Id.

***5** Sumter East places much emphasis on the behavior and deposition testimony of Wilson as to her apparent authority to act for Clyburn. The case law, however, suggests that it is Clyburn's actions which dictate whether she held Wilson out as her agent. This Court finds that the present case is nearly identical to Hodge and Thompson. In Hodge, the South Carolina Court of Appeals discussed a Maryland case, Dickerson v. Longoria, 414 Md. 419, 995, A.2d 721, 743 (2010). The Court specifically stated, "'This limited range of acts performed on the [decedent]'s behalf suggest, at most [he] may have conferred on [the personal representative] the authority to make health care and financial decisions on his behalf, but no more than that."' Hodge at 567. Further, in Thompson, the Court determined that "'The authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial."' Thompson at 686.

The only evidence that suggests Clyburn held Wilson out as having authority to sign an **Arbitration Agreement** on Clyburn's behalf is the fact that she remained at the facility for some five months and never repudiated the **Arbitration Agreement**. However, by its very terms her residence at Sumter East was not effected by the **Arbitration Agreement**. Clyburn's silence on the issue is not a sufficient basis from which to infer apparent authority.

PLAINTIFFS ARE NOT EQUITABLY ESTOPPED FROM DENYING THE ARBITRATION AGREEMENT

Sumter East argues that Plaintiffs should be equitably estopped from denying enforcement of the **Arbitration Agreement**. **Equitable estoppel** is a contract defense and the party asserting this defense bears the burden of proving all of its elements. Kelly v. Logan, Tolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). **Equitable estoppel** requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conduct be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting the estoppel must (1) lack knowledge and the means of attaining the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on the conduct of the party to be estopped. Id.

Defendant has not met its burden to establish these elements. There is insufficient evidence Wilson acted in a way amounting to a false representation to Sumter East regarding her authority to act for Clyburn. Additionally, Sumter East cannot meet its burden to show they lacked knowledge or the means of attaining the truth of the facts in question. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on **equitable estoppel** if the party, by the exercise of reasonable diligence, could have determined the truth of the facts in question. Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

In this case, Sumter East had the capacity to determine whether Wilson had authority to sign the **Arbitration Agreement** on Clyburn's behalf. Sumter East is - or should be - familiar with the legal concepts of guardianship and powers-of-attorney. Sumter East had the ability to simply ask Wilson whether she was Clyburn's guardian or attorney-in-fact and to request supporting documentation.

Sumter East also fails to show any direct benefit Clyburn received by virtue of the **Arbitration Agreement**. As stated above, the Admissions **Agreement** and **Arbitration Agreement** were separate documents, and Clyburn's admission to Sumter East was never conditioned upon her signing the **Arbitration Agreements**. Sumter East cannot point to any other "direct benefit" Clyburn received from entering into the **Arbitration Agreement** which would support its claim that she be equitably estopped from denying the Agreement. See Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (noting nursing home's "**equitable estoppel** argument is premised on [the home's] contention that, under state law, the admission **agreements** and the [**arbitration agreements**] merged"); Thompson, 416 S.C. at 59-60, 784 S.E.2d at 688 (any benefit of admission "is of no moment" for the application of **equitable estoppel** to a separate arbitration contract).

***6** Further, so long as the admission and arbitration contracts are separate documents, any alleged misrepresentations made by a resident's family member when signing the contracts would not equitably estop the resident's attorney-in-fact from challenging the family member's authority to bind the resident to arbitration. A family member who signs an arbitration contract without legal authority to bind the resident acts in their individual capacity and their misrepresentations, if any, would have no bearing on claims against the nursing home by the resident even if the misrepresenting family member is also the attorney in-fact for the resident. Thompson, 416 S.C. 43, 62, 784 S.E.2d 679 (Ct. App. 2016) (finding nursing home "may not hold [resident's] estate responsible for any possible misrepresentations Son or Daughter may have made in their individual capacities"). Since the agreements were not merged, Defendant's **equitable estoppel** argument must be denied. See Coleman 407 S.C. at 355-56, 755 S.E.2d at 455 (rejecting estoppel argument by finding no **merger**).

THE ARBITRATION AGREEMENT WAS NOT RATIFIED BY WILLIE MAE CLYBURN.

Clyburn's continued residency Sumter East did not act as a ratification of the **Arbitration Agreement**. To establish a ratification of the **Arbitration Agreement** Sumter East must show (1) acceptance by the principal of the benefits of the agent's acts, (2) the principal's full knowledge of the facts, and (3) circumstances or an affirmative election demonstrating the principal's intent to accept the unauthorized arrangement. Lincoln v. Aetna Gas. & Sur. Co., 300 S.C 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989).

Clyburn's presence at the facility alone cannot constitute an affirmative representation. See Hodge (rejecting the notion that a nursing home resident represents his/her family member has authority to enter an **arbitration agreement** on the resident's behalf simply by failing to object to the family member's signature).

Sumter East argues Clyburn accepted the benefits of the **Arbitration Agreement** and relies on this as proof of ratification. However, the only alleged benefit Sumter East can cite is admission to the facility, which the terms of the Aribtration Ageement show were not impacted by the signing or refusing of the Agreement. The Court of Appeals' ruling in Thompson speaks directly on this point, stating, "any possible benefit emanating from the [**arbitration agreement**] alone is offset by the [**arbitration agreement's**] requirement that [resident] waive her right to access the courts and her right to a jury trial." 416 S.C. at 60, 784 S.E.2d at 688. As there is no clear benefit that Willie Mae Clyburn derived from the **Arbitration Agreement**, and her presence alone does not constitute an affirmative representation to accept the **Arbitration Agreement**, this Court finds that the **Arbitration Agreement** was not ratified.

CONCLUSION

For the foregoing reasons the Defendant's Motion to Dismiss and Compel Arbitration is DENIED.

IT IS SO ORDERED.

Kristi Curtis, Circuit Court Judge

June _____, 2020

Sumter, South Carolina

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

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2020 WL 12919118 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina.
Richland County

Vermeil DANIELS as Personal Representative of The Estate of Annie Porter, Plaintiff,

v.

THI OF SOUTH CAROLINA AT COLUMBIA, LLC d/b/a Midlands Health & Rehabilitation Center, Defendant.

No. 2019-CP-40-02295.
February 21, 2020.

Order

L. Casey Manning, Judge.

***1** This matter was before the Court on Thursday, February 13, 2020, at 2:00 p.m., in Richland County, South Carolina, upon Defendant THI of South Carolina at Columbia, LLC d/b/a Midlands Health & Rehabilitation Center's Motion to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration. Attorney Bradley H. Banyas of Hughey Law Firm, LLC was present representing the interests of the Plaintiff. Attorney Russell G. Hines of Young Clement Rivers, LLP was present representing the interests of the Defendant.

PROCEDURAL HISTORY

Annie Porter was admitted to the Defendant's skilled nursing facility in December of 2017. The Defendant operates a skilled nursing facility, licensed by the South Carolina Department of Health and Environmental Control, R.61-17, *Standards for Skilled Nursing Facilities*. Plaintiff alleges that while a resident in the Defendant's facility, Ms. Porter was allowed to develop pressure sores, which resulted in her decline and eventual death. Annie Porter died on March 28, 2018. Vermeil Daniels, Annie Porter's daughter and Plaintiff in this matter was appointed as Personal Representative of the Estate of Annie Porter on August 18, 2018 by the Kershaw County Probate Court, and filed this action on her behalf, including causes of action for Wrongful Death and Survivorship. Plaintiff filed the Notice of Intent to file suit on October 23, 2018. The parties participated in pre-suit mediation, which resulted in an impasse. Plaintiff filed her Summons and Complaint on April 25, 2019. Defendant THI of South Carolina at Columbia, LLC d/b/a Midlands Health & Rehabilitation Center filed its Motion to Dismiss and Compel Arbitration on June 5, 2019. This Court reviewed submissions and heard oral arguments by counsel at a hearing on August 26, 2019. This Court entered an Order Denying the Defendant's Motion to Dismiss and Compel Arbitration on November 6, 2019. Defendant filed a Motion to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration on November 18, 2019. Oral arguments were held at a hearing February 13, 2020.

FACTUAL BACKGROUND

This matter arises out of a nursing home negligence case where Plaintiff alleges Ms. Porter was injured as a result of the Defendants' negligence allowing her to develop pressure ulcers. Ms. Porter was admitted to the Defendants' facility on or about January 5, 2018. Defendant has represented that agreeing to arbitrate was not a prerequisite to admission to the facility or a condition for admission. It is undisputed that Annie Porter did not sign the **Arbitration Agreement**. No power of attorney existed at the time of the admission into the nursing home on January 5, 2018. Vermeil Daniels is Annie Porter's daughter. Vermeil Daniels signed the **Arbitration Agreement**. At no point in time did Vermeil Daniels have Power of Attorney or any other legal authority that would have given Ms. Daniels the legal authority to bind Ms. Porter to arbitration. Plaintiff provided

an affidavit from Daniels that stated: " I was never asked by any Midlands Health and Rehabilitation employee if I was Annie Porter's legal guardian, nor if I had legal authority to bind her to arbitration, which I did not." Defendants have never offered any evidence to contradict the affidavit, nor provide any affidavits to the contrary.

STANDARD OF REVIEW

***2** A parties' right to a jury trial in South Carolina is governed by state law. Pelfrey v. Bank of Greer, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978). The party seeking to enforce an **agreement** to **arbitrate** has the burden of establishing the existence of a valid **arbitration agreement**. Aiken v. World Finance Corp. of S.C., 373 S.C. 144,149,644 S.E.2d 705,708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). It is well established that "where one party denies the existence of an **arbitration agreement** raised by an opposing party, a court must immediately determine whether the **agreement** to **arbitrate** exists in the first place...If no agreement is found to exist, the court must deny any application to arbitrate." Simpson v. MSA of Myrtle Beach. Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) citing S.C. Code Ann. § 15-48-20(a) (2005). Whether a valid **arbitration agreement** exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

In determining whether an **agreement** to **arbitrate** exists, "the court should apply 'ordinary state-law principles that govern the formation of contracts."' Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E. 2d 839, 844 (Ct. App., 1999). Arbitration is available only when the parties involved contractually agree to arbitrate.]d. South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Player v. Chandler, 299 S.C. 101, 105, (1989). Arbitration will be denied if a court determines no **agreement** to **arbitrate** existed. S.C. Code Ann. § 15-48-20(a).

ANALYSIS

1. The Arbitration Agreement is not enforceable because Vermeil Daniels lacked actual or apparent authority to sign the Arbitration Agreement for Annie Porter.

The legal consequences of an agent's actions can only be attributed to the principle when the agent as actual or apparent authority. Charleston Registry v. Young Clement, 359 S.C. 635, 598 S.E.2d 717 (Ct. App. 2004). It is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority. Frasier v. Palmetto Homes of Florence, 473 S.E.2d 865 (Ct. App. 1996). South Carolina law requires that to prove apparent authority, the Defendant must show"... (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488,491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412, S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists, id.

Defendants have produced no evidence indicating that Vermeil Daniels had authority to enter a contract on Ms. Porter's behalf or waive Ms. Porter's right to a jury trial. The issue of **arbitration agreements** in skilled nursing facilities has been addressed at the Court of Appeals and Supreme Court, and the case is very similar to Coleman v. Mariner Health Care. Inc, 407 S.C. 346, 755 S.E.2d 450 (2014); Hodae v. UniHealth Post-Acute Care of Bamberg. LLC, 422 S.C. 544, 813 S.E.2d 292, 304 (Ct. App. 2018); and Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d, 679 (Ct. App. 2016). In all three of these cases, our Courts have found **Arbitration Agreements** to be unenforceable where a family member signed an **Arbitration Agreement** near the time of admission to a skilled nursing facility for the Decedent and did not have any actual authority to do the same. In all three cases, the Courts found that no implied authority nor estoppel applied. Presently, a review of the admissions and arbitration documents by the Defendant would have informed them that Vermeil Daniels did not have actual authority by way of a Power

of Attorney, nor Court Appointed Guardianship to bind her mother, nor did she ever indicate that she had any apparent authority to enter in to contracts on behalf of her mother. The Adult Health Care Consent Act ("AHCCA") does not confer legal authority to Ms. Daniels to enter into contracts on behalf of her mother, nor does the South Carolina Bill of Rights for Residents of Long-Term care Facilities.

***3** This Court finds that the present case is nearly identical to Hodge and Thompson, In Hodge, the South Carolina Court of Appeals discussed a Maryland case, Dickerson v. Longoria, 414 Md. 419, 995, A.2d 721, 743 (2010). The Court specifically stated, "This limited range of acts performed on the [decedent]'s behalf suggest, at most [he] may have conferred on [the personal representative] the authority to make health care and financial decisions on his behalf, but no more than that."' Hodge at 567. Further, in Thompson, the Court determined that" The authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial."' Thompson at 686. Thus, the **arbitration agreement** and admissions documents do not merge in to one. Based upon the above, Ms. Daniels did not have the actual or apparent authority to sign the **Arbitration Agreement** on behalf of Ms. Porter.

For agency situations, the legal burden is on the party asserting that an agency exists. Frasier v. Palmetto Homes of Florence. Inc., 323 S.C 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). In this case, Defendant must show all necessary elements of an agency relationship are "clearly established" by the facts.]d. A party dealing with an agent has a duty to use due care to ascertain the scope of the agent's authority to act. Jd. An agency may not, however, be established solely by the declarations and conduct of an alleged agent. Muller v. Myrtle Beach Golf & Yacht Club, 303 S.C. 137, 142-143,399 S.B.2d at 433 (Ct. App. 1990) overruled on other grounds bv Mvrtle Beach Hosp., Inc. v. City of Mvrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000)). South Carolina law requires that to prove apparent authority the Defendants must show: 1) that the purported principal consciously or impliedly represented to another to be his agent, 2) that there was reliance upon the representation, and 3) that there was a change of position to the relying party's detriment. Cownburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412, S.E.2d 425 (Ct. App. 1991). Defendant has failed to provide any evidence beyond Vermeil Daniells' signature to suggest she was Ms. Porter's agent. The fact that Daniels signed documents so that Ms. Porter could be admitted to the facility and receive medical care in no way indicates a manifestation of authority by Ms. Porter to waive her right to a jury trial or agree to arbitration. There has been no evidence that Ms. Porter ever manifested any form of assent establishing Daniels as her agent.

Vermeil Daniels was one of Ms. Porter's children. She was not Ms. Porter's attorney-in-fact or court appointed guardian. She had no legal authority to enter contracts on Ms. Porter's behalf. The Supreme Court of South Carolina has held that a surrogate without proper legal authority cannot bind a person to arbitration.

> The scope of Sister's authority to consent to "decisions concerning Decedent's health care" extended to the admission agreement, which was the basis upon which Facility agreed to provide health care and Sister agreed to pay for it. The separate **arbitration agreement** concerned neither health care nor payment, but instead provided an optional method for dispute resolution between Facility and Decedent or Sister should issues arise in the future. Under the Act, Sister did not have the capacity to bind Decedent to this voluntary **arbitration agreement**. We therefore affirm the circuit court's holding that the Act did not confer authority on Sister to execute a document which involved neither health care nor financial terms for payment of such care.

***4** Coleman v. Mariner Health Care. Inc., 407 S.C. 346 S.C. 353-54, 755 S.E.2d 450, 454 (2014).

In Coleman, the circuit court refused to compel arbitration because the sister of a nursing home resident who signed the **arbitration** and admission **agreements** lacked authority to bind her sister to the **arbitration agreement**. In affirming the circuit

court's order, the Supreme Court found that, although the South Carolina Adult Healthcare Consent Act gave the sister authority to make 'healthcare decisions' on behalf of her sister, consent for medical treatment is not the same as binding an incompetent person to a legally binding contract such as an **arbitration agreement**. Coleman, 407 S.C. at 352, 755 S.E.2d at 453-54. The court reasoned that the Act extends authority to surrogates to make traditional healthcare decisions and financial decisions that arise out of those decisions, Id. Daniels had no legal authority to sign the **Arbitration Agreement**, and Defendant knew or should have known this fact. Since Daniels lacked legal authority to enter into a contract; the **arbitration agreement** is void and unenforceable.

2. Plaintiff is not equitably estopped from denying the Arbitration Agreement

Defendants also argue that Plaintiff should be equitably estopped from denying enforcement of the **Arbitration Agreement**. **Equitable estoppel** is a contract defense and the party asserting this defense bears the burden of proving all of its elements." Kelly v. Logan, Jollev & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). **Equitable estoppel** requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conduct be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting the estoppel must lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on the conduct of the party to be estopped. Id.

Defendant has not met its burden to establish these elements. There is no evidence Ms. Daniels acted in a way amounting to a false representation to Defendant regarding Ms. Porter's status or that Ms. Daniels intended for Defendant to act in reliance on her conduct. Additionally, the evidence shows Defendant cannot meet its burden to show they lacked knowledge or the means of knowledge of the truth of the facts in question. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on **equitable estoppel** if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct.App. 2001).

In this case, Defendant had the capacity to determine whether Ms. Daniels had authority to sign an **arbitration agreement** on Ms. Porter's behalf. The Defendant is a sophisticated business entity frequently interacting with residents and their families during the nursing home admission process. Defendant are or should be familiar with the legal concepts of guardianship and powers-of-attorney. Defendants had the ability to ask Ms. Daniels whether she was Ms. Porter's guardian or attorney-in-fact and had the ability to request supporting documentation. Since the Defendant has not cited or provided evidence on all required elements of **equitable estoppel**, Plaintiff is not equitably estopped from denying the **arbitration agreement**.

***5** The Admission **Agreement** and **Arbitration Agreement** are separate contracts that do not merge. See Hodae v. UniHealth Post-Acute Care of Bamberg. LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert, denied Aug. 21, 2018); Thompson v. Pruitt Corp, 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014) (Coleman refused to apply the doctrine of **merger** because language in the contracts "recognize[d] the 'separateness' of the admission and **arbitration agreements**." 407 S.C. at 355, 755 S.E.2d at 455. Thompson and Hodge applied Coleman and provided further examples of factors demonstrating "separateness and preventing **merger**. 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.

As discussed above briefly, there were two separate agreements signed on the day of the admission, and they were not merged. By their own terms, the Admission Agreement indicated an intent that the common law doctrine of **merger** not apply. The Admission Agreement's "Entire Agreement" provision shows that one contract constituted "the entire agreement and understanding between the parties" concerning admission to the Facility and prohibits merging the two separate agreements. An admission contract with an "Entirety of Agreement" provision is separate "on its face" from an arbitration contract where the provision identifies the two contracts distinctly--i.e. "this [Admission] Agreement *or* in the **Arbitration Agreement**." Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). Even if the "Entire Agreement" clause creates an ambiguity as to **merger**,

the law is clear that any ambiguity must be construed against the drafter, in this case, Defendants. 11 Since there was no **merger** here, Defendants' **equitable estoppel** argument must be denied. See Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455 (rejecting estoppel argument by finding no **merger**).

As in Hodge, the separate contracts here have separate signature pages and separate patination--i.e. the Admission Agreement ends with "Page 12 of 12" while the **Arbitration Agreement** is a separate document. As in Thompson, the **arbitration agreement** announces its independence with its "**Arbitration Agreement**" title.

The arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has "**Arbitration Agreement**" at the top of its first page, these factors further indicate the parties' intent for in to stand by itself as an independent contract." Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n.1; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302. Separateness is further demonstrated within the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home. Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

The Facility cannot meet its burden to prove **merger**. The Admission **Agreement** and **Arbitration Agreement** are distinct and should not be construed as a unit. So long as the admission and arbitration contracts are separate documents, any alleged misrepresentations made by a resident's family member when signing the contracts would not equitably estop the resident's attorney-in-fact from challenging the family member's authority to bind the resident to arbitration. A family member who signs an arbitration contract without legal authority to bind the resident acts in her individual capacity and his misrepresentations, if any, would have no bearing on claims against the home by the resident even if the misrepresenting family member is also the attorney-in-fact for the resident. Thompson, 416 S.C. 43, 62, 784 S.E.2d 679 (Ct. App. 2016) (finding nursing home "may not hold [resident's] estate responsible for any possible misrepresentations Son or Daughter may have made in their individual capacities").

***6** Therefore, Defendants cannot prove **merger** of the Admission **Agreement** and **Arbitration Agreement**. Defendants can also not claim to have been misled and cannot rely on **equitable estoppel** if they, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in questions. Furthermore, Defendants had the capacity to determine whether Daniels had authority to sign the **Arbitration Agreement** on Ms. Porter's behalf. Again, Defendants are a sophisticated business entity frequently interacting with residents and their families during the nursing home admission. Defendants are familiar with the legal concepts of guardianship and powers-of-attorney and had the ability to ask Daniels for any power of attorney or court appointed guardianship documentation.

Defendants then argued Ms. Porter's admission to the Facility was the required "direct benefit." In doing so, Defendant tied its estoppel argument to the **merger** argument. See Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (noting nursing home's "**equitable estoppel** argument is premised on [the home's] contention that, under state law, the admission **agreements** and the [**arbitration agreements**] merged"). Admission can be the "direct benefit" that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same contract. For the reasons outlined above, the two contracts are separate, they do not merge, and Ms. Porter's admission does not support **equitable estoppel**.

Precedent is decisive on this point. Citing International Paper, the Court of Appeals held in Thompson that any benefit of admission "is of no moment" for the application of **equitable estoppel** to a separate arbitration contract. 416 S.C. at 59-60, 784 S.E.2d at 688; see also Coleman. 407 S.C. at 558-59, 813 S.E.2d at 300. Since admission is unavailable as a "direct benefit" to support estoppel, Defendants would be required to point to some benefit Ms. Porter received from the **Arbitration Agreement** alone. However, Ms. Porter derived no benefit from the **Arbitration Agreement**. Hodae, 422 S.C. at 563, 813 S.E.2d at 302 (finding family members, resident, and resident's estate "received no benefit from the **Arbitration Agreement**"). In sum, Defendants cannot meet their burden to prove **merger**. The Admission **Agreement** and **Arbitration Agreement** are distinct and should not be construed as a unit.

Defendants then argued ratification of her continued residency in Defendants' facility. To establish a ratification of the **Arbitration Agreement** Defendants must show (1) acceptance by the principal of the benefits of the agent's acts, (2) the principal's full knowledge of the facts, and (3) circumstances or an affirmative election demonstrating the principal's intent to accept the unauthorized arrangement. Lincoln v. Aetna Gas. & Sur. Co., 300 S.C 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989).

This argument fails for several reasons. First, Ms. Porter's presence alone cannot constitute an affirmative representation. See Hodae where the court rejected the notion that a nursing home resident represents her/her family member has authority to enter an **arbitration agreement** on the resident's behalf simply by failing to object to the family member's signature.

Defendants argued Ms. Porter accepted the benefits of the contracts. It is doubtful that the resident received a benefit from the **Arbitration Agreement**. Hodge was skeptical of the notion that admission was a benefit to the resident considering Complaint allegations that the nursing home's acts during the admission caused the resident's death. 422 S.C. at 563, 813 S.E.2d at 303 ("we find it difficult to find [resident] benefitted even from being admitted").

However, the only alleged benefit Defendants cited is admission itself, a benefit Defendants have admitted being separate from arbitration. Defendants never attempt to explain what supposed benefit of the independent **Arbitration Agreement** Ms. Porter derived during her time as a resident in Defendants' facility. The Court of Appeals' ruling in Thompson speaks directly on this point, i.e., "any possible benefit emanating from the [**arbitration agreement**] alone is offset by the [**arbitration agreement's**] requirement that [resident] waive her right to access the courts and her right to a jury trial." 416 S.C. at 60, 784 S.E.2d at 688.

***7** Defendants then made a broader argument that it would be manifestly inequitable for Plaintiff to pursue a tort claim based on the Admission Agreement while denying Daniel's authority to sign the **Arbitration Agreement**. The Adult Health Care Consent Act does provide statutory authority for family members to make an incapacitated loved one's health care decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code. Coleman, 407 S.C. at 353, 755 S.E.2d at 454 (finding statutory power to make "health care" decisions limited to nursing home admission and related financial decisions).

Lastly, Defendants claimed that the agreement is enforceable under a theory of third-party beneficiary. See Thompson, 416 S.C. at 57, 784 S.E.2d at 687 (holding as to the **arbitration agreement** between the appellants and Son in his individual capacity, a third-party beneficiary to an **arbitration agreement** cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the **arbitration agreement**.) With no valid underlying contract, there could be no third-party beneficiary. First, Plaintiff's action sounds solely in tort. There is no breach of contract claim asserted. Plaintiffs pleading does not specifically refer to any written contract or necessarily rely upon the language of any written contract. Plaintiffs tort claims presumably are based on common law and statutory or regulatory duties imposed by law. Second, as discussed above, the **Arbitration Agreement** is a separate and distinct agreement from the Admission Agreement. Plaintiff does not rely upon the terms of the **Arbitration Agreement** to establish her tort claims.

CONCLUSION

After consideration of the pleadings, motions and arguments of counsel, I find that there is no valid **Arbitration Agreement**. In order to prevail in its motion, the Defendant facility must show a valid and enforceable **arbitration agreement** between Ms. Porter and the facility to prevail on its motion. Defendants have not met this burden. As such, the Court finds no valid arbitration contract existed between Ms. Porter and the facility because: (1) Vermeil Daniels did not have legal authority to bind Annie Porter to the **arbitration agreement**; (2) there is a lack of consideration and mutuality under the circumstances; and (3) the affirmative defenses of **equitable estoppel**, ratification, and third-party beneficiary do not apply under the circumstances. Accordingly, for the foregoing reasons the Defendant's Motion to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration is DENIED.

IT IS SO ORDERED.

<<signature>>

Honorable L. Casey Manning

February ~~18,~~ 21 2020

Columbia, South Carolina

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2019 WL 10783906 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina,
Seventh Judicial Circuit.
Spartanburg County

The ESTATE OF Mary SOLESBEE, by her Personal Representative Connie Bayne, Plaintiff,

v.

FUNDAMENTAL CLINICAL & OPERATIONAL SERVICES, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina At Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman; Impatient Consultants of North Carolina, P.C.; and Angela Brown, ACNP, Defendant/s.

No. 2018-CP-42-04405.
September 11, 2019.

***1** Hearing Date: August 16th, 2019, at 9:30 a.m.
Court Reporter: Michael R. Watts

Order

Matthew W. Christian, for plaintiff.

Russell G. Hines, for defendant/s.

Grace Gilchrist Knie, Judge.

This matter was before the Court on Friday, August 16th, 2019, at 9:30 a.m., in Spartanburg County, SC, the Seventh Judicial Circuit upon Defendant's Motions to Dismiss and Compel Arbitration. Attorney Matthew W. Christian of Christian and Davis, LLC was present representing the interests of Plaintiff. Attorney Russell G. Hines of Young Clement Rivers, LLP was present representing the interests of Defendant THI of South Carolina at Magnolia Manor. Michael R. Watts was the Court Reporter.

PROCEDURAL BACKGROUND:

This action was commenced by the filing of a Summons and Complaint dated December 27th, 2018, for wrongful death and survival actions. An Amended Summons and Complaint was filed January 3rd, 2019. Service on the Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman was made personally on the registered agent on January 23rd, 2019, and filed on January 29th, 2019. Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman filed an Answer and a Motion to Dismiss on February 22nd, 2019. A Second Amended Summons and Complaint was filed by Plaintiff on February 27th, 2019. Defendant THI of South Carolina at Ma gnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman filed an Answer to the Second Amended Complaint on March 14th, 2019. Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman filed a Memorandum in Support of Motion to Compel Arbitration and Stay Court Proceeding on August 14th, 2019. The parties appeared in front of this Court on this Motion on August 16th, 2019.

FACTUAL BACKGROUND:

This matter arises out of two civil actions: a survival action and a wrongful death action. Both actions involve allegations of nursing home negligence and corporate negligence resulting in the death of Mary Solesbee (hereinafter "Decedent"). Connie Bayne (hereinafter "Daughter") was Decedent's daughter and serves as Personal Representative of Decedent's Estate.

Decedent was admitted to this Defendant's (THI of South Carolina at Magnolia Manor-Inman, LLC) Facility on June 27th, 2016, for skilled nursing care following her transfer from Pelham Regional Medical Center. Decedent was admitted with the assistance and aid of her son, Alan Dover (hereinafter "Son"). Decedent was admitted to Magnolia Manor for short-term rehabilitation after undergoing treatment for sepsis, resulting from a spider bite. Decedent was 71 years old. At the time of admission, Decedent's Son, signed an Admission **Agreement** and an **Arbitration Agreement** presented to him by an agent of Magnolia Manor. The **Arbitration Agreement** was signed by Son as "resident/representative," and by Libby Byars of the facility as "authorized agent of facility."

Plaintiff alleges that as a result of the Defendant's negligence, Decedent's wounds deteriorated, became infected, and she became septic, resulting in her emergency transport to the hospital and ultimately in her death.

***2** Plaintiff filed the Notice of Intent to file suit on July 12th, 2018. The parties engaged in the mandatory pre-suit mediation, which was unsuccessful. Daughter as Personal Representative then filed the Complaints for wrongful death and survival action and timely served the Defendants. Defendant THI of South Carolina at Magnolia Manor-Inman, LLC filed its Motion to Compel Arbitration and Stay State Court Proceedings on August 14th, 2019. Defendants Fundamental Administrative Services, LLC and Fundamental Clinical and Operational Services, LLC filed their Motions to Stay on August 9th, 2019. Plaintiff contends that the **Arbitration Agreement** is unenforceable under state contract law.

LAW & ANALYSIS:

The party seeking to enforce an **agreement** to **arbitrate** has the burden of establishing the existence of a valid **arbitration agreement**. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). It is well established that "where one party denies the existence of an **arbitration agreement** raised by an opposing party, a court must immediately determine whether the agreement exists in the first place…If no agreement is found to exist, the court must deny any application to arbitrate." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) citing S.C. Code Ann. § 15-48-20(a) (2005). Whether a valid **arbitration agreement** exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach. Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 668 (2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause"). The courts, not arbitrators, are charged with deciding certain "gateway matters," including "whether the parties have a valid **arbitration agreement** or whether the arbitration clause applies to a certain type of controversy." Simpson, 373 S.C. at 23, 644 S.E.2d at 668; See also New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008).

I. The first issue presented to the Court was whether the Son had actual or apparent and inherit authority to sign the Arbitration Agreement for Decedent.

The legal consequences of an agent's actions can only be attributed to the principle when the agent has actual or apparent authority. Charleston Registry v. Young Clement, 359 S.C. 635, 642, 598 S.E.2d 717 (Ct. App. 2004). Apparent authority is based on "representations made by the principal to the third party and reliance by the third party on those representations." Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). Apparent authority

exists when the principal is bound by the acts of its agent after the principal has placed the agent in such a position that "a person of ordinary prudence, reasonably familiar with business usages and custom is led to believe the agent has certain authority and in turn, deals with the agent based on the assumption." Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. 137, 142, 399 S.E.2d 430, 433 (Ct. App. 1990), *rev'd on other grounds,* citing Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d 424 (1982); Watkins v. Mobil Oil Corp., 291 S.C. 62, 352 S.E.2d 284 (Ct. App. 1986).

South Carolina law requires that to prove apparent authority, the Defendant must show "… (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists. Id.

***3** The present case is very similar to Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 567, 813 S.E.2d 292, 304 (Ct. App. 2018); and Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d, 679 (Ct. App. 2016). In all three of these cases, either the South Carolina Supreme Court or the South Carolina Court of Appeals found **Arbitration Agreements** to be unenforceable where a family member signed an **Arbitration Agreement** near the time of admission to a skilled nursing facility for the Decedent and did not have any actual authority to do such. In all three cases, the Courts found that no implied authority and that no estoppel applied. As the Court noted in Thompson and in Hodge, there was no evidence that the resident being admitted to the nursing home took any action to create an agency relationship for Son. *See* Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d, 679 (Ct. App. 2016); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 567, 813 S.E.2d 292, 304 (Ct. App. 2018). The present case is nearly identical to Hodge and Thompson.

In Hodge, the Court discussed a Maryland case, Dickerson v. Longoria, 414 Md. 419, 995 A.2d 721, 743 (2010). The Court specifically stated, "'This limited range of acts performed on the [decedent]'s behalf suggest, at most, [he] may have conferred on [the personal representative] the authority to make health care and financial decisions on his behalf, but no more than that.'" Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 567, 813 S.E.2d 292, 304 (Ct. App. 2018). As further noted by the South Carolina Court of Appeals in Hodge, the Dickerson Court, and The Supreme Court of Nebraska quoted in Hodge, "…a son who had authority to sign health care documents on behalf of his mother did not have authority to sign an **arbitration agreement** on her behalf." Hodge, 813 S.E.2d at 305, citing Dickerson, 995 A.2d at 738, also citing Koricic v. Beverly Enterprises-Nebraska, Inc., 773 N.W.2d 145, 149-52 (2009). The Hodge court also relied upon the Court of Appeals' decision in Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d, 679, 686 (Ct. App. 2016), *cert. denied,* S.C. Sup. Ct. Order dated Dec. 2, 2016. The Thompson Court determined, "'The authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial.'" Hodge, 813 S.E.2d at 307, quoting Thompson at 784 S.E.2d at 686.

Furthermore, as the Hodge Court noted, the Plaintiff is not suing under the **Arbitration Agreement** or attempting to invoke the **Arbitration Agreement** itself. In fact, Plaintiff has filed no action alleging a breach of contract under the Admissions Agreement. Therefore, Plaintiff is not seeking to invoke benefit of either of the contracts executed by Son. *See* Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167 (2019). As the Wilson Court noted, a non-signatory should be compelled to arbitrate a claim, only if, it seeks through the claim to derive a direct benefit from the contract containing the arbitration provision. Wilson, 426 S.C. at 344. Additionally, the Wilson Court noted, it is important to distinguish direct benefits from indirect benefits because when the benefits to a signatory are merely indirect, an **Arbitration Agreement** cannot be compelled. Wilson, 426 S.C. at 343. The Wilson Court explicitly found that the mere fact that the claim would not exist "but for" the contract, does not invoke the theory of estoppel. Wilson, 426 S.C. at 343. Further, as the Wilson Court noted, "**Equitable estoppel** is, ultimately, a theory designed to prevent injustice, and it should be used sparingly. See Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 71 A.3d 849, 852 (N.J.

2013) (Observing **equitable estoppel** should be used sparingly to compel arbitration and noting it 'is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration'); 28 Am. Jur. 2d Estoppel and Waiver §29 (2011) (stating **equitable estoppel** should be used with restraint and only in exceptional circumstance)." Wilson, 426 S.C. at 345.

***4** Based on the above cited law, the Son did not have the actual or apparent authority to sign the **Arbitration Agreement** on behalf of the Decedent.

II. The second issue presented to the Court was whether the Wrongful Death claims brought by the Decedent's Beneficiaries are excluded under a valid Arbitration Agreement.

First, it should be noted that the Court has found no valid **Arbitration Agreement** in this case. However, even if the **Arbitration Agreement** was valid, the Wrongful Death claims of the Decedent's Beneficiaries would not be excluded, as they are separate causes of action.

South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. Bennett v.-Spartanburg Railway Gas and Electric Co., 97 S.C. 27. 81 S.E. 189 (1914). While dealing with a separate arbitration issue in a nursing home case and finding the **arbitration agreement** to be unenforceable, the Court of Appeals in Hodge recognized the separateness of the statutory beneficiaries/estate's claims from those of the patient/resident. Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 567, 813 S.E.2d 292 (Ct. App. 2018). In Dickerson. the Maryland Court of Appeals noted that the nursing home was attempting:

> "[T]o use **equitable estoppel** against [the patient's] estate based on actions that [daughter] took in her individual capacity. The fact that [daughter] is now the Personal Representative for [the patient's] [e]state is of no moment; we will not hold this circumstance against [the patient's] [e]state. Simply put, [the patient's] [e]state is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] [e]state, or by [the patient's companion] in her capacity as Personal Representative of [the patient's] [e]state...." Hodge, 422 S.C. at 559-560, 813 S.E.2d at 300; quoting Dickerson v. Longoria, 414 Md. 419, 995 A.2d. 721, 743 (2010).

Other states have come to the same conclusion: Daniels v. Sunrise Senior Living, Inc., 212 Cal.App 4th 674, 151 Cal.Rptr.3d 273 (Cal.App.4 Dist, 2 Div., 2013) (Wrongful Death claims not bound to arbitration); Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (Wrongful Death claimants not bound by **arbitration agreement**).

The Defendant, however, argues that by including the clause, "successors, assigns, heirs, personal representatives, guardians or any other persons deriving their claims through or on behalf of Resident," within the **Arbitration Agreement** therefore binds the parties wrongful death claim. The Supreme Court of Kentucky answered such argument regarding the binding of non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises, Inc.:

> "[A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third party are appropriately subjected to the contract's arbitration provisions, at least where the tort and the contract are significantly intertwined. See, *In re Weekley Homes, L.P.*, 180 S.W.3d 127 (Tex.2005) (negligent repair claim by homeowner's daughter against contractor was subject to repair contract's arbitration clause because daughter, although a non-party, was a direct and principal beneficiary under the contract). It is something else entirely, however, to say that incidental beneficiaries of a contract— individuals or entities with no substantive rights under the contract and no

> direct benefits— may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants. This is what Beverly purports to do. Arbitration is a matter of contract, however; it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Citation and internal quotation marks omitted). Since Beverly's theory would allow just that, i.e., would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a "third party beneficiary" of the **arbitration agreement**, we reject it out of hand." Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 599-600 (K.Y. 2012).

***5** The wrongful death claims are separate claims apart from the Decedent's claims.

According to South Carolina's Wrongful Death Act:

> "Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued shall be liable to an action for damages…" S.C. Code Ann. §15-51-10 (1977).

The wrongful death beneficiaries are as follows:

> "Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs of the person whose death shall have been so caused. Every such action shall be brought by or in the name of the executor or administrator of such person." S.C. Code Ann. §15-51-20 (Supp. 2001).

The general element of damages recoverable are "pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, arid deprivation of the use and comfort of the Decedent's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries." Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d. 713, 714 (Ct. App. 1989) citing Smith v. Wells, 258 S.C. 316, 188 S.E.2d 470 (1972); Mishoe v. Atlantic Coast Line R.R. Co., 186 S.C. 402, 197 S.E. 97 (1938).

The wrongful death claim is a separate claim than the claims a decedent might bring on his own behalf under the survival statute. Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914). The South Carolina Supreme Court held that wrongful death and survival actions are different claims for different injuries. Id. The Court stated, "necessarily, therefore, there must be separate verdicts and separate judgments…there should be separate actions." Bennett, 97 S.C. at 31, 81 S.E. at 190; See also Strickland v. Southern Ry Co., 111 S.C. 248, 97 S.E. 695 (1918) (Supreme Court affirmed appeal from Circuit Court's ruling noting that survival claims are independent of wrongful death claims); Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539 (1928) (discussing the difference between survival and wrongful death claims as being independent of each other).

If the defendant has a defense that would completely bar the decedent's claim had the decedent survived, then the wrongful death beneficiaries may not bring a claim under the statute. Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 699 S.E.2d 143 (2010). For instance, in Stokes, the statute of limitations had run on the decedent's claim, and the wrongful death beneficiaries were accordingly barred from pursuing their claims under the statute. Id. The Supreme Court cited the following from United States District Court case of Ouattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. 1988): "anything that would have defeated the decedent's recovery had he survived the accident, 'such as contributory negligence, a

valid release, or similar acts on his part,' would defeat the right of recovery on behalf of his family in case of his death." The Court held, "Ouattlebaum was correctly decided and adheres to the principle that a decedent's estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived." Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010). Here, however, the claim would not have failed had Decedent survived; therefore, it does not fail for the Decedent's beneficiaries.

***6** The Defendants rely on cases where statutory beneficiaries are bound as third party beneficiaries. The Defendants cite Pearson v. Hilton Head Hosp.. 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012). In Pearson, the Plaintiff who sought to avoid the **arbitration agreement** had filed suit for a breach of the contract that contained the arbitration clause. In the present case, there has been no claim for breach of contract. Further, the Plaintiff in Pearson personally received direct benefits from the contract. Here, the statutory beneficiaries personally received no benefit from any contract.

Here, the statutory beneficiaries' claims align with the claims of the non-signatory Plaintiffs in Wilson, where the South Carolina Supreme Court held the non-signatories could not be bound by the **arbitration agreement**. Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167 (2019). The statutory beneficiaries in this case are not attempting to exploit or receive a direct benefit from the agreement and were not aware of the existence of the arbitration provision. As further stated in Wilson, direct benefits estoppel does not apply simply because the claim relates to or arose because of the existence of the contract. Id.

Because the statutory beneficiaries have separate and independent claims and were not covered by the scope of this agreement or parties to this **agreement**, the **Arbitration Agreement** drafted by Defendant cannot reach the claims of the wrongful death statutory beneficiaries. Therefore, had the **Arbitration Agreement** been found to be valid, the Wrongful Death claims by the Decedent's Beneficiaries would not have been excluded. However, the **Arbitration Agreement** is invalid; therefore, the second argument is moot.

III. The third issue presented to the Court was whether the Defendants are entitled to conduct discovery as to the Arbitration Agreement.

The Defendants had the burden to prove that there was an enforceable **Arbitration Agreement**. Defendants had the opportunity to use the South Carolina Rules of Civil Procedure to conduct discovery related to arbitration. As argued by Plaintiff's counsel, Plaintiff's counsel sent discovery to the Defendants and the Defendants objected to produce any information related to the arbitration matter due to their pending Motion.

The Court noted in Hodge, discovery issues are within the discretion of the trial court. Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 576, 813 S.E.2d 292, 309 (Ct. App. 2018). Further, as noted in Hodge, additional discovery would likely not change the outcome of the Court's decision as issues related to Son and Daughter's actions are not relevant to any implied or apparent authority. Id. It is the actions of the Decedent that would be relevant; therefore, discovery is not necessary as the discoverable information would not change the outcome of the Court's decision as the discovery issues would not be dispositive of the matter.

ARGUMENTS OF COUNSEL:

Defendant argued the **Arbitration Agreement** was valid, as the Decedent's Son had the actual and apparent authority to bind the Decedent. Therefore, Defendant also argued the **Arbitration Agreement** is enforceable. Specifically, the Defendant argued that the Admission **Agreement** and **Arbitration Agreement** constituted validly executed contracts. The Defendant explained that the contracts were each signed by the Son, as representative of Decedent, and by Libby Byers, as a representative for the Facility on June 27th, 2016. Defendant argued Son explicitly represented that he was authorized to admit Decedent to the Facility and execute necessary documents on her behalf, including an **Arbitration Agreement**. The Defendant argued that because the acts complained of by the Plaintiff fall within the scope of the **Arbitration Agreement**, the Court should dismiss

the Plaintiff's action, or stay these proceedings, and compel this matter to arbitration. In the alternative, Defendant requests the ability to conduct additional discovery regarding the **Arbitration Agreement**.

***7** Plaintiff first argued that the **Arbitration Agreement** is unenforceable under state contract law. Specifically, the Plaintiff stated that the Son lacked both actual and apparent authority to act as the Decedent's agent in signing the **Arbitration Agreement**. The Plaintiff's alternative argument, if the Court found a valid **Arbitration Agreement**, is that the Wrongful Death cause of action on behalf of the Decedent's Beneficiaries is separate from the Survival Action and not subjected to the **Arbitration Agreement**. Finally, the Plaintiff argued that Defendant had the opportunity to conduct discovery over the **Arbitration Agreement** issues, and failed to do so at the appropriate time.

CONCLUSION:

The Court acknowledges and appreciates the amount of research and preparation for the hearing by counsel, as well as, the professionalism of counsel in their presentations to the Court.

After consideration of the pleadings, motions, and arguments of counsel, 1 find that there is no valid **Arbitration Agreement**.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendants' Motions to Dismiss and Compel Arbitration are denied; and further

Defendants' Motion to conduct additional discovery as to **Arbitration Agreement** issues is denied.

IT IS SO ORDERED.

/s/ Grace Gilchrist Knie

Honorable Grace Gilchrist Knie

Resident Judge, Seventh Judicial Circuit

September 9, 2019

Spartanburg, South Carolina

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760

End of Document

2018 WL 7892466 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina.
Lexington County

Jewel Susan HANNA as Personal Representative of the Estate of Jewel Rawls Dawson, Plaintiff,
v.
EMERITUS CORPORATION d/b/a Brookdale Lexington, Emeritus, LLC, Brookdale Senior Living Communities, Inc., Brookdale Senior Living, Inc., Brookdale Senior Housing, LLC, West Columbia BG OPCO, LLC d/b/a Lexington Place, Assisted Living Concepts, LLC, and Gary Tyson, Defendants.

No. 2018-CP-32-01644.
October 19, 2018.

Order denying defendants' Motion to Dismiss and/or Compel Arbitration

Walton J. McLeod, Judge.

***1** This matter comes before the Court on Defendants Emeritus Corporation d/b/a Brookdale Lexington, Emeritus, LLC, Brookdale Senior Living Communities, Inc., Brookdale Senior Living, Inc., Brookdale Senior Housing, LLC, and Gary Tyson's Motion to Dismiss and/or Compel Arbitration ("Motion"). Based on the Court's review of the parties' written submissions and oral arguments during a hearing on October 10, 2018, the Court **DENIES** the Defendants' Motion.

BACKGROUND

At all times relevant to the Plaintiff's Complaint, the Defendants operated an assisted living facility licensed by the South Carolina Department of Health and Environmental Control pursuant to S.C. Code Reg.61-84, *Standards for Licensing Community Residential Care Facilities.* The State of South Carolina required Defendants to ensure that individuals seeking admission shall be identified as appropriate for the level of care, services, or assistance offered. Defendants' facility ("Brookdale" or "Brookdale Lexington") was required to establish admission criteria that were consistently applied and complied with local, state, and federal laws and regulations. State law dictates that persons not eligible for admission/retention to an assisted living facility include any person who is likely to endanger him/herself or others as determined by a physician or other authorized healthcare provider; any person needing hospitalization or nursing home care; or treatment of stage 2, 3, or 4 decubitus ulcers, or multiple pressure sores. S.C. Code Reg. 61-84.801. Although a prospective resident must be certified as appropriate for admission by his or her physician, each prospective resident must additionally be assessed by the facility to determine whether any additional services are necessary and to determine the prospective resident's suitability for admission. *Id*. Plaintiff does not challenge Ms. Dawson's appropriateness for admission. Jewel Dawson was admitted to the Defendants' nursing facility on or about April 1, 2015. At the time of her admission, Ms. Dawson was eighty-eight (88) years old.

While Ms. Dawson was a resident, she allegedly suffered multiple falls and developed ulcers. Ms. Dawson was ultimately transferred to a skilled nursing facility when her physician determined that the level of care she needed exceeded that which Defendants could provide. Ms. Dawson later died on January 5, 2018. Ms. Dawson's daughter, Jewel Susan Hanna, was appointed Personal Representative of the Estate of Jewel Rawls Dawson on February 1, 2018, and filed this action on her behalf, including causes of action for wrongful death and survivorship.

During the admission of Ms. Dawson, Brookdale Lexington staff and Ms. Dawson's adult daughters, Ms. Hanna and Ansley Roberts, purportedly completed all necessary intake paperwork prior to Ms. Dawson's acceptance to the facility. Defendants'

Exhibit submitted during hearing with leave of Court (hereinafter "Defs. Hearing Ex.") at 1-2. At all relevant times, neither Ms. Hanna nor Ms. Roberts were Ms. Dawson's guardian, conservator, or attorney in fact. Execution of the Residency Agreement, which contained an arbitration provision, was required for admission to the facility. Plaintiff's Exhibit A of Motion to Dismiss/ Compel **Arbitration** (hereinafter "Residency **Agreement**"). The Residency Agreement set forth services and accommodations, the resident's responsibilities and representations, rates, the term of the agreement, and included an arbitration clause and specifically provided for the provision of goods and services in interstate commerce. Section V. of the Residency Agreement set forth an arbitration provision (hereinafter "Arbitration Provision" or "**arbitration agreement**"), which in pertinent part stated:

V. AGREEMENT TO ARBITRATE

A. *ARBITRATION PROCEEDINGS*

***2** 1. Any and all claims or controversies arising out of, or in any way related to, this Agreement or any of your stays at the Community, excluding any action for involuntary transfer or discharge or eviction, and including disputes regarding interpretation, scope, enforceability, unconscionability, waiver, preemption, and/or violability of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law. The parties to this Agreement further understand that a judge and/or jury will not decide their case.

2. The parties hereby expressly agree that this Arbitration Provision, the Residency Agreement and the Resident's stay at the Community substantially involve interstate commerce, and stipulate that the Federal Arbitration Act ("FAA") shall exclusively apply to the interpretation and enforcement of this Agreement ....

4. The arbitration proceedings shall take place in the county in which the Community is located, unless agreed to otherwise by mutual consent of the parties.

7. Discovery in the arbitration proceeding shall be governed by the South Carolina Rules of Civil Procedure. However discovery may be modified by agreement of the parties ....

9. The arbitrator shall apply the South Carolina Rules of Evidence and South Carolina Rules of Civil Procedure in the arbitration proceeding except where otherwise stated in this Agreement. Also, the arbitrator shall apply, and the arbitration decision shall be consistent with, South Carolina law ....

14. This Arbitration provision binds third parties not signatories to this Arbitration Provision, including any spouse, children, heir, representatives, agents, executors, administrators, successors, family members, or other persons claiming through the Resident, or persons claiming through the Resident's estate, whether such third parties make a claim in a representative capacity or a personal capacity.

…

B. BENEFITS OF ARBITRATION

You and/or your legal representative understand that other long term care companies' Agreements may not contain an arbitration provision.... The undersigned acknowledges that he or she has been encouraged to discuss this Agreement with an attorney. The parties to this Agreement further understand that a judge and/or a jury will not decide their case.

The Residency Agreement concluded with the following:

We believe it is important to disclose all services and fees to the best of our ability and in accordance with the law. We recommend that you consult with legal counsel to ensure understanding of this [Residency] Agreement before signing.

During the Defendants' assessment process, Defendants apparently relied upon information provided by Ms. Hanna, who purportedly represented her authority as legally responsible for all healthcare decisions. Ms. Dawson's Resident Information/ Emergency Contact Sheet dated March 28, 2016, expressly listed Ms. Hanna as the party legally responsible for Ms. Dawson's healthcare decisions. Defs. Hearing Ex. at 1-2. The Residency Agreement was presented and required to be executed in return for admission to the facility. The Residency Agreement was signed by Ms. Hanna, dated March 30, 2016, so that Ms. Dawson could be admitted to Brookdale Lexington.

On April 1, 2016, Senior Health Associates physician, Dr. Floyd Ashton Cribbs, evaluated Ms. Dawson. Dr. Cribbs diagnosed Ms. Dawson with unspecified dementia without behavioral disturbance likely from Parkinson's, noting it to be progressive. Defs. Hearing Ex. at 10-12. Approximately one (one) year later, on or about April 5 and 12, 2017, Ms. Dawson was evaluated by David Miller, GNP. Defs. Hearing Ex. at 3-9. Mr. Miller noted altered mental status, unspecified and vascular dementia with behavioral disturbance. Defs. Hearing Ex. at 4-5. Approximately six (6) weeks later, on or about May 30, 2017, Ms. Dawson executed a durable power of attorney designating her adult daughters, Ms. Roberts and Ms. Hanna as agent and alternate agent, respectively. Plaintiff's Exhibit A. of Memorandum in Opposition at 1-14.

ANALYSIS

***3** Arbitration is a matter of contract, and South Carolina courts must determine the enforceability of an **arbitration agreement** based on principles of contract law. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). The policy of this State is to favor arbitration of disputes. *Toler Cove Homeowner's Ass'n v. Trident Constr. Co., Inc.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003). However, an **arbitration agreement** is not enforceable when a party to the contract lacks the capacity to contract. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Aiken v. World Fin. Corp.*, 373 S.C. 144, 149, 644 S.E.2d 702, 708 (2007) (internal citation omitted). Arbitration will be denied if a court determines no **agreement** to **arbitrate** existed. S.C. Code Ann. § 15-48-20(a).

1. *The Arbitration Provision is not enforceable because Jewel Susan Hanna lacked the capacity to contract on behalf of her mother.*

Whether Ms. Hanna possessed the requisite authority to enter into **arbitration agreement** was raised by both parties, leading this Court to analyze whether Ms. Hanna possessed the authority to bind Ms. Dawson to the Residency **Agreement** containing the **Arbitration** Provision. In South Carolina, it is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority. *Frasier v. Palmetto Homes of Florence*, 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). Actual authority is expressly conferred upon the agent by the principal. *Roberson v. S. Fin. Of South Carolina, Inc.*, 365 S.C. 6, 9, 615 S.E.2d 112, 115 (2005). "The doctrine of apparent authority focuses on the principal's manifestation to a third party that the agent has certain authority." *R & G Const., Inc. v. Lowcountry Regional Transp. Authority*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000) (internal citation omitted). Further the Court of Appeals of South Carolina provided the following:

> [a]pparent authority occurs when the principal by written or spoken words or any other conduct, when reasonably interpreted, causes a third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him. Apparent authority must be established based upon manifestations by the principal, **not the agent**. The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but on that between the principal and the third party. Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such belief. To establish apparent agency, a party must prove the purported principal has represented another to be his agent by

> either affirmative conduct or conscious and voluntary inaction. The crux of apparent agency is that the principal holds out to a third party the agent is acting on his or her behalf.

Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 577, 813 S.E.2d 292, 310 (Ct. App. 2018), rearing denied, May 2, 2018, cert. denied, August 21, 2018 (internal citations and quotations omitted) (emphasis added).

In the present case, the Residency **Agreement** containing the **Arbitration** Provision was signed only by Ms. Hanna. It was not signed by Ms. Dawson. According to the Resident Information/Emergency Contact Sheet dated March 28, 2016, Ms. Dawson was previously diagnosed with "Parkinson's", and according to a Clinical Summary on file and dated April 1, 2016, Dr. Cribbs diagnosed Ms. Dawson with unspecified dementia. Defs. Hearing Ex. at 2, 3-9. This may explain why Ms. Dawson did not sign the Residency Agreement herself. However, a review of the documents signed by Ms. Hanna would have informed the Defendants that Ms. Hanna did not have authority by way of a power of attorney or a court-appointed guardianship or conservatorship to bind Ms. Dawson to arbitration. Further, Defendants' intake sheet notes to "obtain [a] copy" of the documentation evidencing a guardianship or a power of attorney. Defs. Hearing Ex. at 1. No such document is in the record, further showing no manifestation by Ms. Dawson of any authority delegated to either Ms. Roberts or Ms. Hanna. As such, there is no evidence that Ms. Dawson manifested to Defendants that Ms. Hanna had the authority to enter into the Residency **Agreement** or the **arbitration agreement** contained therein. Therefore, this Court concludes that Ms. Hanna did not have the actual or apparent authority to enter into the Residency **Agreement** or the **arbitration agreement** contained therein.

***4** Next, the Court determined whether the Adult Health Care Consent Act ("AHCCA") provided Ms. Hanna the authority enter into the Residency Agreement. This Court finds the Supreme Court of South Carolina's decision in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 353-54, 755 S.E.2 450, 454 (2014) is similar and applicable to the facts of the case at hand. In *Coleman*, the Circuit Court denied the nursing home defendants' motion to stay the action and compel arbitration because the sister of the resident who signed the **arbitration** and admission **agreements** lacked capacity to bind her sister to the **arbitration agreement**. In affirming the Circuit Court's Order in *Coleman*, the Supreme Court found that although the AHCCA did give the resident's sister "authority to make 'healthcare decision' on behalf of her sister, consent for medical treatment for someone unable to consent is not the same as binding an incompetent person to a legally binding contract such as an **arbitration agreement** without authority to do so." *Id*. The Court reasoned that the AHCCA only extends authority to surrogates to make traditional health care decisions and financial decisions that arise out of those decisions.

> Assent to this contract [the admission agreement] was a condition for Decedent's admission to Facility. On the other hand, the AA was not required for Decedent's admission, contained no provision for medical, nursing, or health care services to be provided for Decedent, and did not require any financial commitment to pay for such services. The separate **arbitration agreement** concerned neither health care nor payment, but instead provided an optional method for dispute resolution.

Id. at 353, 755 S.E.2 at 454.

The Court of Appeals of South Carolina further addressed this in *Thompson v. Pruitt Corp.*, 416 S.C. 43, 52-53, 784 S.E.2d 679, 685-85 (Ct. App. 2016) holding that an **arbitration agreement** was separate from the admission agreement. In *Thompson*, the Court of Appeals found that while the resident's son was authorized to execute an admission agreement under the AHCCA, the AHCCA did not convey any authority for the son to sign an **arbitration agreement** on behalf of his father. The Court specifically addressed the fact that the terms of the admission agreement indicate that it either incorporated, or merged with, the **arbitration agreement**, but declined to merge the two. *Id*. at 52, 784 S.E.2d at 684.

The AHCCA confers legal authority to Ms. Hanna to enter into a contract concerning health care on behalf of her mother. S.C. Code Ann. § 44-66-30(A) (providing that "where a patient is unable to consent, decisions concerning health care may be made by the following persons in order of priority … (5) an adult child of the patient"). The statute provides for a surrogate

to make decisions regarding procedures and treatment of human disease and ailments. However, the statute does not authorize surrogates to enter into legal contracts waiving a person's right to a jury trial. Although the AHCCA granted Ms. Hanna the authority to execute the Residency Agreement, the AHCCA did not grant Ms. Hanna to enter into the **arbitration agreement** found within the Residency Agreement. Absent legal authority or at least some measure of apparent authority, the Arbitration Provision is void and unenforceable.

2. ***The FAA does not mandate the enforcement of the Arbitration Agreement.***

Under the Federal **Arbitration Agreement** ("FAA"), **arbitration** is required where there is a valid **arbitration agreement** and a dispute exists which is within the scope of the agreement. Under the arbitration clause, neither prong is satisfied. As discussed in the paragraphs above, there is no valid **arbitration agreement** because Ms. Hanna did not have the legal authority to execute a valid **arbitration agreement**. Accordingly, the FAA does not apply.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Arbitration Provision in question is unenforceable and Defendants' Motion to Dismiss and/or Compel is **DENIED.**

So Ordered

<<signature>>

s/Walton J. McLeod, 2765

End of Document

2018 WL 11033620 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina,
Sixteenth Judicial Circuit.
York County

Teresa MURPHY, as Personal Representative for the Estate of Isaac Strong, Plaintiff,

v.

HUNT VALLEY HOLDINGS, LLC f/k/a Fundamental Long Term Care Holdings, LLC; Fundamental Clinical and Operational Services, LLC; Fundamental Consulting, LLC; Fundamental Administrative Services, LLC; THI of Baltimore, Inc.; THI of South Carolina, LLC; THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill; and Amisub of S.C., Inc. d/b/a Piedmont Medical Center, Defendants.

No. 2018-CP-46-01459.
December 17, 2018.

Order

William A. McKinnon, Circuit Judge.

***1** This matter came before the Court on Defendant THI of South Carolina, LLC d/b/a Magnolia Manor Rock Hill's ("THI") Motion to Dismiss and Compel Arbitration or, Alternatively, to Compel Arbitration and Stay Proceedings. A hearing was held on August 30, 2018. After considering the parties' written submissions and oral arguments and for the reasons stated below, THI's motion is **DENIED**. [1]

FACTS

Plaintiff's Complaint alleges Isaac Strong was admitted to Magnolia Manor of Rock Hill ("Facility") on December 22, 2014, following a multi-week hospitalization in Piedmont Medical Center related to a stroke that caused persistent weakness along his right side. (Compl. ¶¶ 25, 28). Four days before Mr. Strong was transferred to the Facility, his daughter Teresa Murphy was presented with two contracts. The first was an "Admission Agreement" that governed the type of care Mr. Strong would receive at the Facility and Mr. Strong's financial obligation to pay for those services. On the Admission Agreement's final page, labeled as "Page 12 of 12," there was an "Entire Agreement" provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Mr. Strong's admission to the Facility. Ms. Murphy signed the Admission Agreement on the "Signature of Representative" line. Ms. Murphy was not Mr. Strong's conservator, guardian, or attorney-in-fact.

On the same day, Ms. Murphy signed a contract called "**Arbitration Agreement**." This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate entity (labeled "Page 1 of 1") with its own signature blocks. The **Arbitration Agreement**, purportedly a contract between the Facility and Mr. Strong, provides for alternative dispute resolution for any claim a party may bring against another arising out of Mr. Strong's admission in the Facility. Ms. Murphy signed the **Arbitration Agreement** on the line labeled "Resident/Representative Signature." THI informed the Court that Mr. Strong agreeing to arbitrate was not a prerequisite to his admission at the Facility.

When Mr. Strong arrived in the Facility on December 22, 2014, he had a pressure ulcer and was at an elevated risk of developing new ulcers. (Compl. ¶ 28). Orders were entered requiring that Mr. Strong be turned or repositioned ever two hours. (Compl. ¶ 26). However, over the next couple weeks, Mr. Strong's pressure ulcer worsened, becoming infected and then septic. (Compl.

¶¶ 31-33). Mr. Strong's condition grew increasingly severe over the following months requiring hospitalizations and procedures before his passing away on September 5, 2015. (Compl. ¶¶ 34-46). On May 14, 2018, Ms. Murphy initiated this action as the personal representative for Mr. Strong's estate. The Complaint alleges wrongful death and survival claims arising from Defendants' failure to properly treat Mr. Strong's skin condition while at PMC and the Facility. On July 17, 2018, THI filed a Motion to Compel Arbitration and Petition to Stay State Court Proceedings. Relying on the **Arbitration Agreement** that Mr. Strong did not sign, THI argues Plaintiff must arbitrate rather than litigate her claims.

***2 LEGAL REASONING**

I. There is no valid agreement to arbitrate claims stated in Plaintiff's Complaint.

Plaintiff's Complaint alleges causes of action for negligence (wrongful death and survivor actions). The survival claim relates to duties established and breached during Isaac Strong's life and damages sustained during his life. This claim belongs to Mr. Strong. Plaintiff Teresa Murphy (Mr. Strong's personal representative) presents this claim on Mr. Strong's behalf. See S.C. Code Ann. § 15-5-90 (stating that claims "survive both to and against the personal or real representative…of a deceased person"). Accordingly, THI must show a valid and enforceable **arbitration agreement** between Mr. Strong and THI to prevail on its motion. Defendants' motion, memorandum, and attached documents do not meet this burden.

Basic contract law holds that a contract binds only those parties who show an "objective manifestation of… assent at the time the contract was made." Laser Supply & Services, Inc. v. Orchard Park Assoc., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009). Mr. Strong did not sign the **Arbitration Agreement** or personally give any other objective manifestations of assent to this contract. THI contends Mr. Strong is bound to the agreement through the signature of Teresa Murphy, whom THI asserts was acting as Mr. Strong's agent. Defs.' Mem. at 6-9. For agency situations, the legal burden is on the party asserting that an agency exists. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). In this case, THI 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. Frasier v. Palmetto Homes of Florence. Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996).

A. The Admission Agreement and Arbitration Agreement are Separate Contracts that do not Merge.

As discussed below, THI argues the **Arbitration Agreement** signed by Teresa Murphy is valid because, even though she had no actual authority to sign it on Mr. Strong's behalf, she was Mr. Strong's apparent agent or, in the alternative, Mr. Strong's estate is estopped from contesting her alleged authority. These arguments have a common premise. Defendants stake both arguments to the notion that the **Arbitration Agreement** and Admission Agreement merge into a single contract that must be construed as a unit. For example, THI argues Mr. Strong created an agency relationship to support arbitration because he "accepted" admission. (Defs.' Mem. at 8). THI then argues Plaintiff is estopped from denying authority to bind Mr. Strong to arbitration because she does not deny authority to admit him to the Facility. (Defs.' Mem. at 12). Accepting **merger** is a prerequisite to accepting Defendants' arguments. However, recent case law governing nursing home arbitration contracts reject THI's argument. Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert, denied Aug. 21, 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014).

***3** South Carolina law states that contracts signed at the same time by the same parties and for the same purpose will be construed together "in the absence of anything indicating a contrary intention." Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts Resort Realty, Inc. v. Down'round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (19771). Coleman refused to apply the **merger** doctrine because language in the contracts "recognize[d] the 'separateness' of the admission and **arbitration agreements**." 407 S.C. at 355, 755S.E.2d at 455. Thompson and Hodge applied Coleman and provided further examples of

factors demonstrating "separateness" and preventing **merger**. 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.

An admission contract with an "Entirety of Agreement" provision is separate "on its face" from an arbitration contract especially where the provision identifies the two contracts distinctly— i.e. "this [Admission] Agreement *or* in the **Arbitration Agreement**." Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). In fact, when the arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has "**Arbitration Agreement**" atop its first page, these factors further "indicat[e] the parties' intent for it to stand by itself as an independent contract." Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302. Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home. Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

Many of these same factors are present here. The "Admission Agreement" presented to Ms. Murphy contains an "Entire Agreement" provision stating that "this Agreement represents the entire agreement" related to Mr. Strong's admission to the Facility. Thus, "Agreement" is a defined term in this contract and, as stated in the contract's opening paragraph, is limited to the "Admission Agreement," not the separate **Arbitration Agreement**. Like in Hodge, the separate contracts have separate signature pages and separate pagination—i.e. the Admission Agreement ends with "Page 12 of 12" while the **Arbitration Agreement** is "Page 1 of 1." As in Thompson, the **arbitration agreement** states its independence with its "**Arbitration Agreement**" title. Moreover, THI's counsel argued at the hearing that agreeing to arbitrate was not required for Mr. Strong to be admitted to Defendants' facility. To the extent there are any ambiguities in this contract language, they must be resolved against **merger**. Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455; Thompson. 416 S.C. at 53, 784 S.E.2d at 685 (citing Coleman). THI was in sole control of the language chosen for these form contracts of adhesion and it was their responsibility to make **merger** clear if they so desired.

In sum, THI cannot meet its burden to prove **merger**. The Admission **Agreement** and **Arbitration Agreement** are distinct and should not be construed as a unit.

B. Teresa Murphy was not Mr. Strong's Actual or Apparent Agent.

Agency is a "fiduciary relationship that results from the manifestation of consent by one person to another to be subject to the control of the other and to act on his behalf." Peoples Fed. Savs. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 145, 425 S.E.2d 764, 773 (Ct. App. 1992) (citing Restatement (Second) of Agency § 1 (1958)). An agency relationship may be established with clear evidence of actual or apparent authority conferred by the purported principal on the purported agent. Cowburn v. Leventis, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). Actual authority is "expressly conferred upon the agent by the principal." Richardson v. PV, Inc., 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009). Apparent authority is based on "representations made by the principal to the third party and reliance by the third party on those representations." Young v. S.C. Dep't of Disabilities & Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). To prove apparent authority, a party must show (1) purported principal consciously or impliedly represented another to be his agent; (2) reliance on the representation by a third party; and (3) change in position by third party in reliance on the representation. Cowburn, 366 S.C. at 39-40, 619 S.E.2d at 448.

***4** South Carolina law provides that an agency relationship cannot be established solely by the words and actions of the purported agent, Id. For apparent authority to exist, "[e]ither the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such belief." R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000), THI has not identified any conduct by Mr. Strong showing he intended to cause THI to believe Teresa Murphy was authorized to act for him. In fact, THI argued at the hearing Mr. Strong suffered from serious health issues that may have affected his ability to understand events occurring during his admission.

THI then argues Mr. Strong represented Teresa Murphy had authority to waive his jury trial right simply by his continued residency in the Facility. Defs.' Mem. at 8. The Court rejects this argument for several reasons. First, Defendants conclude Mr. Strong's presence alone can constitute an affirmative representation. Defs.' Mem. at 7-8 (citing Carraway v. Beverly Enters. Ala., Inc., 978 So.2d 27, 30-31 (Ala. 2007)). Carraway is not binding precedent in this Court and its expansive view of apparent agency was rejected in Hodge, where the court rejected the notion that a nursing home resident represents his/her family member has authority to enter an **arbitration agreement** on the resident's behalf simply by failing to object to the family member's signature. 422 S.C. at 573-74, 813 S.E.2d at 308 (noting 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"). THI makes a similar argument to the one Hodge rejected. Defs.' Mem. at 8 (suggesting Mr. Strong created apparent agency relationship "by allowing Ms. Murphy to procure Mr. Strong's admission to the Facility").

Second, even accepting THI's recently rejected premise, any representation Mr. Strong's presence conveyed could only cover admission and not arbitration. As THI argued during the hearing, Mr. Strong's admission was in no way contingent on agreeing to arbitrate disputes. Third, THI's argument conflates the Admission **Agreement** and **Arbitration Agreement** in another important way. THI argues Mr. Strong "accept[ed] the benefits of the contracts." Def's. Mem. at 8. However, the only "benefit" THI cites is admission itself, a benefit THI has admitted to be separate from arbitration. THI never attempts to explain what supposed "benefit" of the independent **Arbitration Agreement** Mr. Strong derived during his time as a resident in Defendants' facility. Any such attempt would have been futile given the Court of Appeals' unambiguous ruling in Thompson which held that "any possible benefit emanating from the [**arbitration agreement**] alone is offset by the [**arbitration agreement's**] requirement that [resident] waive her right to access the courts and her right to a jury trial." 416 S.C. at 60, 784 S.E.2d at 688. Since Mr. Strong made no affirmative representations that Ms. Murphy had authority to sign the **Arbitration Agreement** on his behalf, the Court rejects THI's actual and apparent agency arguments.

C. Plaintiff is not Estopped from Challenging the Arbitration Agreement's Validity.

THI argues Plaintiff is equitably estopped from opposing enforcement of the **Arbitration Agreement**. **Equitable estoppel** is a contract defense for which the asserting party "bears the burden of establishing all the elements." Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). **Equitable estoppel** requires proof that the party to be estopped (I) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id.

***5** THI briefly mentions some of these elements but make no effort to apply them. Def's. Mem. at 10 (citing Boyd v. BellSouth Tele. Tele. Co., Inc., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006)). Instead, THI suggests an alternative **equitable estoppel** standard and rely on federal cases. Defs.' Mem. at 17-18. THI contend their contract-based argument is subject to federal law rather than the law of South Carolina, the state where the alleged contract was signed and its alleged parties resided. The Court rejects this argument as at odds with U.S. Supreme Court precedent. An arbitration contract concerning interstate commerce are governed by the FAA but its provisions apply state law to enforceability questions such as the application of **equitable estoppel**. 9 U.S.C. § 2 (requiring enforcement of arbitration contract "save upon such grounds as exist at law or in equity for the revocation of any contract"). The FAA does not "alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." Arthur Anderson LLP v. Carlisle, 556 U.S. 624, 630 (2009). Arthur Andersen specifically applied this principle to **equitable estoppel** arguments. Id. at 632 (noting question on remand was "whether the relevant state contract law recognizes **equitable.estoppel**"). At least eight federal circuits [2] along with multiple district [3] and state courts [4] have cited Arthur Andersen with multiple courts modifying or overruling precedent to comply with the Supreme Court's ruling.

Moreover, the Court finds THI could not prevail even if its **equitable estoppel** argument was governed by federal law. THI relies primarily on International Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH, 206 F.3d 411, 417-18 (4th Cir. 2000) which held that a party may be estopped from denying arbitration when he has received a "direct benefit" from a contract containing an arbitration clause. THI then argues Mr. Strong's admission to the Facility was the required "direct benefit." In doing so, THI tie their estoppel argument inextricably to their flawed **merger** argument. See Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (noting nursing home's "**equitable estoppel** argument is premised on [the home's] contention that, under state law, the admission **agreements** and the [**arbitration agreements**] merged"). Admission can be the "direct benefit" that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same contract. For the reasons outlined above, the two contracts are.separate, they do not merge, and Mr. Strong's admission does not support **equitable estoppel**.

***6** Again, precedent is decisive on this point. Citing International Paper, the Court of Appeals recently held in Thompson that any benefit of admission "is of no moment" for the application of **equitable estoppel** to a separate arbitration contract. 416 S.C. at 59-60, 784 S.E.2d at 688; see also Coleman, 407 S.C. at 354-55, 755 S.E.2d at 455. Hodge cited and reaffirmed Thompson's estoppel analysis. 422 S.C. at 558-59, 813 S.E.2d at 300. [5] Since admission is unavailable as a "direct benefit" to support estoppel, THI would be required to point to some benefit Mr. Strong received from the **Arbitration Agreement** alone. However, Mr. Strong and his estate derived no benefit from the **Arbitration Agreement**. Hodge, 422 S.C. at 563, 813 S.E.2d at 302 (finding family members, resident, and resident's estate "received no benefit from the **Arbitration Agreement**"). Even if they had, "any possible benefit emanating from the [**Arbitration Agreement**] alone is offset by the [**Arbitration Agreement's**] requirement that [Mr. Strong] waive [his] right to access the courts and [his] right to a jury trial." Thompson, 416 S.C. at 60, 784 S.E.2d at 688.

THI then makes a broader argument that it would be "manifestly inequitable" for Plaintiff to pursue a tort claim based on the Admission Agreement while denying Ms. Murphy's authority to sign the **Arbitration Agreement**. Defs.' Mem. at 18. Defendants misunderstand the legal distinction between health care and dispute resolution decisions. It is not unusual for a family member to have authority to admit a loved one to a nursing home while lacking authority to waive the loved one's jury trial right. That is what the Adult Health Care Consent Act permits. It provides statutory authority for family members to make an incapacitated loved one's "health care" decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code. Coleman. 407 S.C. at 353, 755 S.E.2d at 454 (finding statutory power to make "health care" decisions limited to nursing home admission and related financial decisions). Plus, Plaintiff is not asserting any claim based on the Admission Agreement; she alleges only common-law negligence claims. See Hodge, 422 S.C. at 563, 813 S.E.2d at 302 ("because [resident and estate] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement" and are not estopped from challenging the **Arbitration Agreement**).

In sum, THI's **equitable estoppel** argument is rejected under South Carolina and federal law as interpreted in Thompson and Hodge. [6]

D. Ms. Murphy did not have Inherent Agency Power to Bind Mr. Strong or his Estate to Arbitration.

***7** THI next ask the Court to find a binding agency relationship even if Ms. Murphy lacked actual or apparent authority to admit Mr. Strong to the Facility. Def s. Mem. at 12-13. THI cites just one South Carolina case in support of this proposition. Smith v. Fitton & Pittman, Inc., 264 S.C. 129, 212 S.E.2d 925 (1975). Smith was later overruled but, even on its own, Smith does not support THI's theory because the only reference to agency in the whole opinion was the court rejecting the inherent agency theory. Id. at 134, 212 S.E.2d at 927 ("appellant has offered no authority, and we have found none, that [individual] would have inherent agency power …"). There is no basis for inherent agency in South Carolina law for nursing home arbitration contracts.

E. The South Carolina Bill of Rights for Residents of Long-Term Care Facilities did not Authorize Ms. Murphy to Bind Mr. Strong to Arbitration.

Finally, the Court rejects Defendants' argument that a statute designed to protect nursing home residents' dignity and personal integrity actually paves the way for a resident to lose his right to litigate claims for nursing home neglect. (Defs.' Mem. at 13-14). The "Bill of Rights" for nursing home residents is intended to help residents "retain their individuality and personal freedom" and to support residents' "need for self-determination." S.C. Code Ann. § 44-81-20. To make these rights meaningful, the statute requires nursing homes to provide a written explanation of each right to the resident or his representative and provides a grievance procedure to address alleged violations. S.C. Code Ann. §§ 41-81-40, -60. Defendants cite this statute to suggest that, because Ms. Murphy may have been the "representative" who received a copy of Mr. Strong's explanation of the Bill of Rights, she then gained legal authority to "bind him to arbitration. However, the Bill of Rights makes no mention of arbitration, and the Court finds neither the statute's language nor its legislative purpose support arbitration in this case.

F. THI is not Entitled to Depose Ms. Murphy or to Conduct Other Discovery before the Court Rules on its Motion.

Finally, THI argued at the hearing that it should be allowed to depose Ms. Murphy or conduct additional discovery to support its agency and estoppel arguments before the Court rules on arbitration. Hodge recently rejected a similar argument. 422 S.C. at 575, 813 S.E.2d at 309. As discussed above, agency depends on the representations of the purported principal (i.e. Mr. Strong) and cannot be formed based on the representations of the purported agent (i.e. Ms. Murphy). Accordingly, Ms. Murphy's deposition "would not add anything to [the agency] determination." Id. at 578, 813 S.E.2d at 310. Moreover, while THI argues on reply that it needs additional discovery on Mr. Strong's mental capabilities when the arbitration contract was signed, records documenting Mr. Strong's mental faculties at admission lie within THI's own medical records. The Court finds no need for additional discovery to rule on the issues raised in THI's motion.

CONCLUSION

For all these reasons, THI's motion to dismiss/compel arbitration is **DENIED**. In light of this ruling, the motions to stay filed by Defendants Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, and THI of South Carolina, LLC are **DISMISSED AS MOOT**.

IT IS SO ORDERED

_____

William A. McKinnon

Circuit Court Judge, 16th Judicial Circuit

October _____,2018

So Ordered

/s William A. McKinnon, #2761, Circuit Judge

Footnotes

1 Defendants Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, and THI of South Carolina, LLC also filed motions to stay Plaintiff's claims against them pending resolution of THI's motion to compel arbitration. In light of the Court's ruling denying to compel arbitration, the motions to stay are dismissed as moot.

2 Richmond Health Facilities v. Nichols, 811 F.3d 192, 195 (6th Cir. 2016) (citing Arthur Anderson) ("in determining the enforceability of an **arbitration agreement**, we apply state law of contract formation"); Crawford Prof 1 Drugs, Inc. v. CVS Caremark Corp., 748 F.3d 249, 255 (5th Cir. 2014) (holding "state contract law" applied to **equitable estoppel** issue and noting prior decisions "based on federal common law, rather than state contract law … have be modified to conform with Arthur Andersen"); Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1128 (9th Cir. 2013) (citing Arthur Andersen and applying California law to the **equitable estoppel** analysis); Awuah v. Coverall N. Am., Inc., 703 F.3d 36, 41-42 (1st Cir. 2012) (same for Massachusetts law); The Republic of Iraq v. BNP Paribas USA, 472 Fed. Appx. 11, 13-14 (2d Cir. 2012) (same for New York law); Lenox MacLaren Surgical Corp. v. Medtronic, Inc. 449 Fed. Appx. 704, 708 n. 2 (10th Cir. 2011) (finding Arthur Andersen "made it clear that state law governs who maybe bound to an arbitration clause"); Lawson v. Life of the S. Ins. Co., 648 F.3d 1166, 1172 (11th Cir. 2011) (holding that "to the extent any of our earlier decisions indicate to the contrary, those indications are overruled or at least undermined to the point of abrogation by [Arthur Andersen]"); Donaldson Co. v. Burroughs Diesel, Inc., 581 F.3d 726, 732 (8th Cir. 2009) ("The Supreme Court has ruled that state contract law governs the ability of nonsignatories to enforce arbitration provisions").

3 MacDonald v. Unisys Corp., 951 F. Supp. 2d 729, 736-38 (E.D. Pa. 2013) ("Post-Arthur Anderson, it is incontrovertible that state law governs the **equitable estoppel** and third-party beneficiary determinations"); Hospira, Inc. v. Therabel Pharma N.V., Case No. 12-C-8544, 2013 WL 3811488 * 11-14 (N.D. Ill. July 19, 2013) (citing Arthur Andersen and applying state law to **equitable estoppel** analysis); FR 8 Singapore Pte. Ltd. v. Albacore Maritime Inc., 794 F. Supp. 2d 449, 455 (S.D.N.Y. 2011) ("the question of who was bound by [**arbitration**] **agreement** was treated as a question of state law").

4 See e.g., Carter v. TD Ameritrade Holding Corp., 721 S.E.2d 256, 261-62 (N.C. Ct. App. 2012) (citing Arthur Andersen and considering ratification argument under state law).

5 Hodge was also skeptical of the notion that admission was a benefit to the resident considering Complaint allegations that the nursing home's acts during the admission caused the resident's death. 422 S.C. at 563, 813 S.E.2d at 303 ("we find it difficult to find [resident] benefitted even from being admitted").

6 THI assert "agency by estoppel" as a separate basis for compelling arbitration (Def s. Mem. at 10-12) but the arguments in that section are subsumed by THI's other arguments. THI cites a sentence from R & G Construction holding that a principal is estopped from denying the existence of an agency relationship. However, that same sentence makes clear that estoppel only applies if the principal has acted in a way to create an agency relationship. For the reasons stated in Section 2(B), there is no agency relationship here. THI then cite Boyd v. BellSouth Tele. Tele. Co., Inc., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006), but the elements cited there are for **equitable estoppel**. Finally, THI relies heavily on McCutcheon v. THI of S.C. at Charleston, LLC, an unreported federal district court. No. 2:1 l-cv-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011). Any value McCutcheon may have held is significantly undercut by the facts that the McCutcheon reviewed merged contracts and that this (at best) persuasive authority preceded the binding rulings in Coleman, Thompson, and Hodge.

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2015 WL 12567394 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina.
Greenville County

Ashley S. SMITH as Guardian ad Litem for Jaywayne L. Henderson, Plaintiff,

v.

GLORIFIED HEALTH & REHAB OF GREENVILLE, LLC, New Glorified Health and Rehab of Greenville, LLC, New Ark Investment, Inc., f/k/a Ark Holding Company, Inc., Covenant Dove, LLC, Covenant Dove Holding Company, LLC, Ark South Carolina Holding Company, LLC, Olive Leaf, LLC, Greenville RE II, LLC, a/k/a Glorified RE, LLC, Ark III Real Estate, LLC, Ark Real Estate, LLC, New Ark SC Operator Holdings, Inc., New Ark Operator Holding, LLC, New Ark Master Tenant, LLC, New Ark Investment, Inc., DES New Ark TR, 4 West Holding, LLC, 4 West Investors, JS New Ark TR, HS New Ark TR and Heather Burton, Defendant(s).

No. 2014-CP-23-06975.
December 11, 2015.

Order Denying Defendants' Motion to Compel Arbitration and Motion for Protective Order and Granting Plaintiff's Motion to Compel Discovery

Edward W. Miller, Judge.

PROCEDURAL HISTORY

***1** This matter came before the Court on November 3, 2015, in Greenville, South Carolina. All parties were represented by counsel.

This matter rises out of certain claims set forth in complaints against Glorified Health & Rehab of Greenville, LLC (hereinafter "Facility"), New Glorified Health and Rehab of Greenville, LLC, New Ark Investment, Inc., f/k/a Ark Holding Company, Inc., Covenant Dove, LLC, Covenant Dove Holding Company, LLC, Ark South Carolina Holding Company, LLC, Olive Leaf, LLC, Greenville RE II, LLC, a/k/a Glorified RE, LLC, Ark III Real Estate, LLC, Ark Real Estate, LLC, New Ark SC Operator Holdings, Inc., New Ark Operator Holding, LLC, New Ark Master Tenant, LLC, New Ark Investment, Inc., DES New Ark TR, 4 West Holding, LLC, JS New Ark TR, HS New Ark TR and Heather Burton (hereinafter collectively referred to as "Defendants") for allegations of nursing home neglect and negligence involving the care and treatment of Jaywayne Henderson (hereinafter "Resident").

This matter was before the Court on Plaintiffs Motion to Compel Discovery and Defendants' Motion to Compel Arbitration and Motion for Protective Order. Having listened to oral arguments from counsel and having reviewed the parties' legal memoranda and attachments to same, for the reasons more fully set forth below, the Court hereby denies Defendants' Motion to Compel Arbitration and Motion for Protective Order and grants Plaintiff's Motion to Compel Discovery in the above-captioned matter.

This action is brought by Resident's daughter Ashley Smith (hereinafter "Daughter") as Guardian *ad Litem* for Resident. Plaintiff has specifically alleged that Resident developed skin breakdown and bedsores as a result of chemical burns from being left in and exposed for extended periods of time to feces and urine, that this required his emergent transfer to St. Francis Hospital and then emergent transfer to the Georgia Burn Center. Plaintiff has also alleged claims against Defendants other than the licensed facility alleging direct negligence for corporate negligence, underfunding the facility, understaffing the facility and negligently managing and operating the facility. The Defendants vigorously deny all of the allegations.

At the time of admission, Resident's brother, Michael Henderson (hereinafter "Brother"), entered into an Admission Agreement for the provision of healthcare services. Further, subsequent to entering into the Admission Agreement, Brother signed an **Arbitration Agreement** regarding claims which might arise during the admission. In the **Arbitration Agreement**, under Brother's signature, it is checked that Brother signed as "General Power of Attorney" and as "Family". No Power of Attorney or authority for Brother to act on behalf of Resident has been introduced, submitted or discovered. In fact, Facility admits that Daughter was Resident's Power of Attorney during his residency at Facility.

If enforceable, the **Arbitration Agreement** would purport to, among other things, require that the claims alleged in Plaintiff's Complaint be subject to binding arbitration instead of Plaintiff having a right to a trial in court before a judge and/or jury.

***2** Plaintiff filed the Notice of Intent on July 8, 2014. The parties engaged in the required pre-suit mediation on November 21, 2014. Thereafter, Plaintiff filed the Summons and Complaint and Defendants were served no later than January 20, 2015. Plaintiff served her First Interrogatories and First Requests for Production with the Summons and Complaint. The Defendants answered the Complaint on February 19, 2015, and served their first set of Interrogatories and Requests for Production with the Answer. An Amended Complaint was filed shortly thereafter with consent regarding name changes of some of the Defendants, for which the Defendants timely answered.

Plaintiff requested responses to discovery from the Defendants on multiple occasions between January and July. When Plaintiff did not receive any responses to her First Interrogatories and First Requests for Production, a Motion to Compel was filed in July, 2015. Shortly before the hearing on the Motion to Compel was to be heard, Defendants provided limited answers (according to Plaintiff's Motion to Compel Discovery) on August 23, 2015. Plaintiff subsequently wrote to the Defendants seeking full and complete responses to discovery requests which were in issue. Defendants did not supplement these discovery requests and filed a Motion to Compel Arbitration on the day before the hearing on Plaintiff's Motion to Compel Discovery. At the first hearing, the trial court instructed the parties to try to resolve the discovery disputes and continued the Motion to Compel Discovery until the Motion to Compel Arbitration and Motion for Protective Order could be heard at the same time. The parties engaged in discovery limited to the arbitration issues after the filing of Defendants' Motion to Compel Arbitration.

LEGAL ANALYSIS AND CONCLUSIONS

Whether the parties agreed to arbitrate is a question of substantive state law. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007). The courts, not arbitrators, are charged with deciding certain "gateway matters" including whether the parties have a valid **arbitration agreement** or whether the arbitration clause applies to a certain type of controversy. *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 629, 667 S.E. 2d 1, 5 (Ct. App. 2008). In making a determination as to whether a valid **arbitration agreement** exists, courts must consider "general contract defenses" to ensure a meeting of the minds existed. *Zabinski v. Bright Acres Assocs*., 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001). Further, §2 of the F.A.A provides that state law contract defenses apply to the enforceability of an **arbitration agreement**. 9 U.S.C. §2. For the reasons set forth below, the **Arbitration Agreement** is not enforceable, and the Defendants' Motion to Compel Arbitration and Motion for Protective Order is denied.

I. *THE ARBITRATION AGREEMENT IS UNENFORCEABLE AGAINST RESIDENT BECAUSE BROTHER HAD NO AUTHORITY TO EXECUTE THE ARBITRATION AGREEMENT*

a. Third Party Beneficiary is Not Applicable

The Defendants rely upon two Federal District Court cases for their contention that the **Arbitration Agreement** is enforceable. Specifically Defendants rely upon *McCutcheon v. THI* (2011, U.S. Dist. Lexis 144288 D.S.C. 2011) and *THI v. Wiggins* (2011, U.S. Dist. Lexis 103638 D.S.C. 2011).

In light of this State's third party beneficiary law, and in light of *Coleman v. Mariner, et al.*, 755 S.E.2d 450; 755 S.E.2d 450 (2014), this Court rejects Defendants' arguments. In *Coleman*, the South Carolina Supreme Court affirmed the trial court's refusal to enforce an **arbitration agreement** that was signed and executed by the resident's sister, who had no power of attorney, guardianship or other authority to act on her behalf. In addition to other contentions, the Defendants in *Coleman* argued that the Plaintiff was a third party beneficiary to the **arbitration agreement**, and therefore, the **arbitration agreement** should be enforced. The South Carolina Supreme Court rejected the nursing home Defendants' arguments in *Coleman*.

***3** Furthermore, as argued by Plaintiff's counsel, the nursing nome Defendants in Coleman argued the *McCutcheon* and *Wiggins* cases to the South Carolina Supreme Court. *McCutcheon* and *Wiggins* are both 2011 cases, which existed three (3) years prior to *Coleman*. As such, the South Carolina Supreme Court did not follow *McCutcheon* and *Wiggins*, and *Coleman* is controlling on these issues. See also *Malloy v. Thompson*, 409 S.C. 557, 762 S.E.2d 690 (2014), (discussing third party beneficiary and estoppel but not enforcing arbitration.)

Furthermore, for a third party beneficiary argument to be successful, the court must find that the underlying agreement is a valid contract. As the Arkansas Court of Appeals recently noted in *Progressive Elder Care Services-Chicot Inc., et al. v. Sue Long, as the Administrator for the Estate of Marion L. "Sugar" Long*, 449 SW 3d 324, 2014 Ark. App. 661, there must be a valid contract underlying the premise of the third party beneficiary argument. In *Progressive Elder Care Services-Chicot, Inc., et al.*, the nursing home sought to compel arbitration where the signatory to the **arbitration agreement** (not the resident) did not have authority to contract or enter into the **arbitration agreement** on behalf of the resident. Rather, the nursing home, as the Defendants do here, argue that the resident was a third party beneficiary. The trial court denied the nursing home's motion and the Arkansas Court of Appeals agreed. The court ruled that there was not a valid underlying agreement between the signatories to the contract/agreement because the signatory was not authorized to sign the documents. With no valid underlying contract, there could be no third party beneficiary. In the present case, there is no evidence that Brother had any authority to sign the **Arbitration Agreement** on behalf of Resident.

Plaintiff submitted the transcript of the 30(b)(6) deposition of Nursing Home Defendants. The 30(b)(6) designee (hereinafter "Wright") was the admission's director for Facility and presented the Admission **Agreement** and **Arbitration Agreement** to Brother. Wright's testimony reveals that Defendants' policies and procedures required them to: 1) obtain a copy of Brother's Power of Attorney (if it existed); 2) explain Brother's relationship to Resident in the relevant signatory portions of the **Arbitration Agreement** (Defendants did not provide any explanation); and 3) obtain Daughter's signature to the **Arbitration Agreement** and Admission Agreement when they learned Daughter had Power of Attorney for Resident during his admission (which they never did). Wright's testimony reflects that it was unclear who checked the line indicating that Brother had General Power of Attorney for Resident under the **Arbitration Agreement** signature.

Because the evidence shows that Brother had no authority to sign the **Arbitration Agreement** on behalf of Resident, there can be no third party beneficiary argument because there is no valid underlying agreement. Furthermore, as noted hereinabove, *Coleman* is controlling and the third party beneficiary argument fails when there is no authority for the signatory to the **Arbitration Agreement** to sign on behalf of the resident.

Finally, it is clear that the Admission **Agreement** and the **Arbitration Agreement** were two separate contracts (which is addressed more fully herein below), and as such, Resident is not a beneficiary under the unenforceable **Arbitration Agreement**.

a. Estoppel Does Not Apply

***4** The Defendants also rely upon the *McCutcheon* case to argue that the resident is equitably estopped from denying the validity of the **Arbitration Agreement**. *McCutcheon v. THI* (2011, U.S. Dist. Lexis 144288 D.S.C. 2011). The Court rejects this argument for multiple reasons.

First, as noted hereinabove, this argument was made before the court in *Coleman* and rejected under the facts of the *Coleman* case, which are very similar and analogous to the case at hand. Second, **equitable estoppel** applies only to prevent a party from relying on one part of a contract while seeking to deny another part of the same contract.

The testimony of the Wright explicitly states that these were two separate contracts. Wright's testimony reflects: 1) the **Arbitration Agreement** was not a requirement to be signed before admission; 2) the **Arbitration Agreement** is entered into separately from the Admission **Agreement**; 3)the **Arbitration Agreement** is signed after the Admission Agreement; and 4) facility policies and procedures require that the Admission Agreement be signed, but not the **Arbitration Agreement**.

Additionally, the **Arbitration Agreement** attempts to include as parties the Facility's "parent, affiliates, any subsidiary companies, owners, officers, shareholders, directors, medical directors, employees, administrators, rehabilitation company, successors, assigns, agents, attorneys and insurers," while, the Admission Agreement purports to only include the Facility and the resident. Therefore, different entities are parties to the **Arbitration Agreement** and the Admission Agreement.

Furthermore, as the *Coleman* court noted, and as exists in this case, the **Arbitration Agreement** may be revoked within thirty (30) days of admission, and the revocation of the **Arbitration Agreement** does not affect the Admission Agreement. Also, the Admission Agreement states clearly that it is governed by South Carolina law and the **Arbitration Agreement** states clearly that it is governed by Federal law (Federal Arbitration Act). As in *Coleman*, the **Arbitration Agreement** here is not a pre-condition to admission and is not a requirement for the Admission Agreement, but the Admission Agreement must be signed and entered into before admission according to the Wright's testimony.

The Admission Agreement also has portions and sections of the agreement that state that it shall withstand all other agreements, even if they are revoked. The Admission Agreement also states that it is the "entire agreement among the parties pertaining to the subject matter contained in it and supersedes all prior arrangements, representations, and all understandings of the parties." Therefore, in light of these facts, it is the Court's determination that the **Arbitration Agreement** and the Admission Agreement are two separate agreements and that is was the Defendants' intent to make these two separate agreements and therefore, there is no **merger** with the **Arbitration Agreement** and the separate Admission Agreement. As the court noted in *Pearson v. Hilton Head Hospital* 400 S.C., 281, 290, 733 S.E.2d 597, 601 (2012), the South Carolina Court of Appeals has ruled "in the arbitration context, the doctrine [of **equitable estoppel** applies]…when [one party] has consistently maintained that other provisions of the **same contract** should be enforced to benefit him". *Id. emphasis added.* In the present case, Plaintiff is not relying upon the **Arbitration Agreement** for any of the claims or causes of action Plaintiff is pursuing. Because there are two separate contracts with no **merger** of the documents, **equitable estoppel** cannot apply.

***5** Further, for **equitable estoppel** to apply there must be a misrepresentation by the party. Underneath the signature on the **Arbitration Agreement** where it requests the "title or relationship to resident", it was written "brother". Brother did not write that he was Power of Attorney. Wright testified that she did not know who checked the lines indicating that Brother was general power of attorney. Wright also agreed the Facility failed to indicate the relation to the resident as required by Facility's policies and procedures. Wright also agreed that "responsible party" as indicated in the Admission Agreement does not define the relationship to Resident or indicate that Brother had any authority to sign for Resident. Further, Wright testified that there was no specific recollection of conversations with Brother during the admission process where Brother represented that he had authority for Resident, but only that she had the "impression" that he was power of attorney. Wright also acknowledged that many times family members believe that just because they are a family member of the resident that they have a power of attorney. Based upon the evidence submitted, there is no evidence that Brother misrepresented his position and relationship with Resident and that Resident made a misrepresentation.

Equitable estoppel also requires that there is reasonable reliance by the party claiming estoppel and a lack of knowledge and means of knowledge of the truth as to the facts in question. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E.2d 110, 116 (2001). Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E.2d 110, 116(2001).

The evidence points to the fact that Facility knew or should have known that Brother had no power of attorney. The Defendants never obtained a power of attorney from Brother as required by Facility's policies, there was no power of attorney on record for Brother as required by the policies and procedures, and Facility actually became aware that Daughter had the Power of Attorney during Resident's admission and obtained a copy of Daughter's Power of Attorney, yet never had her sign the Admission **Agreement** and **Arbitration Agreement** as required by their policies and procedures. Therefore, Defendants cannot contend that they should not have known that Brother had no power of attorney or that they were misled by Brother or Resident.

Finally, estoppel cannot apply because the Defendants must prove that the party to be estopped (Resident) acted in a way amounting to a false representation, intended such conduct to be acted on by the Defendants, and had actual or constructive knowledge of the facts. *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). Defendants present no evidence that Resident allowed Brother to falsely represent himself or that Resident had any knowledge of the facts or intended that Facility act upon Brother's representations. In fact, Wright testified that Resident likely was not present at the facility when Brother signed the **Arbitration Agreement**. Further, it is Nursing Home Defendants' contention that Resident was incompetent. There is no evidence that Resident acted in any way to amount to a false representation.

II. Defendants Other than Glorified Rehab are not Parties to the Arbitration Agreement

The **Arbitration Agreement** alleges to be between the Facility to include the "particular facility where the resident resides, its parents, affiliates, and any subsidiary companies, owners, officers, shareholders, directors, medical directors, employees, administrators, rehabilitation company, successors, assigns, agents, attorneys and insurers." However, these entities are not signatories to the **Arbitration Agreement**, nor did anyone sign on their behalf. The only entity that had a signatory on its behalf was Facility.

Wright testified that the only parties to the **Arbitration Agreement** were Facility and the Resident. Wright testified that she signed on behalf of Facility-Glorified Health & Rehab. Wright, who signed on behalf of the Facility also testified that she was employed by Facility (not other Defendants), received her paychecks from Facility, and had **no** authority to act on behalf of any other company other than Facility. She also testified that when she signed, she signed on behalf of Facility. Because Defendants other than Facility are not parties to the **Arbitration Agreement**, they cannot move to compel arbitration on the claims against them. The South Carolina Court of Appeals held in *Pearson v. Hilton Head Hospital et al*, 400 S.C. 281, 733 S.E.2d 597 (S.C. Ct. App. 2012), that "generally arbitration is a matter of contract and a party cannot be required to submit to arbitration in a dispute which he has not agreed so to submit. *Id*. at 288 citing *International Paper Company v. Schwabedissen Maschinen and Anlagen GMBH 206 F.3d 411 416 (4th Cir. 2000)*.[1] As the *Pearson* court noted, courts must not "ignore the corporate form of a non-signatory based solely on the interrelatedness of the claims alleged." *Id.* at 294.

III. Nursing Home Defendants Waive Their Right to Compel Arbitration

***6** The right to enforce an arbitration clause may be waived. *Rhodes v. Benson Chrysler-Plymouth, Inc*., 374 S.C. 122, 647 S.E.2d 249, 251 (Ct. App. 2007); *Davis v. KB Home of South Carolina, Inc.*, 394 S.C. 116, 713 S.Edd. 799, (Ct. App. 2011). Courts generally consider the following factors when determining whether a party has waived his rights to compel arbitration:

> (1) Whether a substantial length of time transpired between commencement of the action and the commencement of a motion to compel arbitration;
>
> (2) Whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and
>
> (3) Whether the non-moving party was prejudiced by the delay in seeking arbitration. Id,

Furthermore, the South Carolina Supreme Court recognized nursing homes can waive arbitration rights in *Dean v. Heritage Healthcare of Ridgeway, LLC* 401 S.C. 371, 759 (2014). In this case, Plaintiff filed a Notice of Intent to File Suit under S.C. Code §15-79-125 on July 8, 2014. The parties participated in an unsuccessful mediation on November 21, 2014. Plaintiff then timely filed her Summons and Complaint on December 18, 2014, and served the Defendants in January 2015. The Defendants filed an Answer in February, 2015.

The Defendants then served discovery upon the Plaintiff. Defendants, while belated, served responses to Plaintiff's discovery on August 23, 2015. When Plaintiff's Motion to Compel Discovery was scheduled to be heard, Defendants filed this Motion to Compel Arbitration and Motion for Protective Order on September 8, 2015, the day before Plaintiff's Motion to Compel Discovery hearing.

Unlike the nursing home defendants in *Dean*, the Defendants in this case failed to move "to compel arbitration at their first opportunity." *Dean* at 388. Defendants could have sought to compel arbitration after the Notice of Intent was filed and after the Complaint was filed but delayed in both instances. The Motion to Compel Arbitration was filed fourteen (14) months after Plaintiff first filed the Notice of Intent to File Suit and over eight (8) months after the Plaintiff filed the Summons and Complaint.

Plaintiff further argues that Plaintiff has been prejudiced by the additional accrual of expenses in the litigation, which would not have been necessary if the parties were engaged in arbitration, and that Plaintiff has lost the ability to obtain witnesses or evidence through the Defendants' delay.

Given the substantial delay and participation in discovery and litigation process, the Defendants waived and abandoned their rights to compel arbitration.

IV. *PLAINTIFF'S MOTION TO COMPEL DISCOVERY IS GRANTED*

Plaintiff filed a Motion to Compel Discovery on July 10, 2015. According to Plaintiff's Motion, Memoranda, and exhibits attached thereto, Defendants have refused to answer numerous discovery requests and objected to significant discovery requests. When these matters were before the Court and these motions were heard, the Defendants contended that their objections to Plaintiff's discovery were based upon their Motion for a Protective Order which resulted from the underlying Motion to Compel Arbitration. Defendants were explicitly given the opportunity to place any further objections to discovery on the record and no objections were so placed.

***7** Therefore, all Defendants are ordered to provide full and complete responses to Plaintiff's First Interrogatories and First Requests for Production within forty-five (45) days of the date of this Order.

WHEREFORE, for the reasons stated herein, the Court denies the Defendants' Motion to Compel Arbitration and Motion for Protective Order and grants Plaintiff's Motion to Compel Discovery.

IT IS SO ORDERED.

<<signature>>

The Honorable Edward W. Miller

Presiding Judge Thirteenth Judicial Circuit

Greenville, South Carolina

Date: *12/9*, 2015

Footnotes

1 *Pearson's* holding regarding third party beneficiary for the non-signatory defendants is distinguishable from the present case because Plaintiff is not relying upon the **Arbitration Agreement** for any claim, and there is no evidence that there is **arbitration agreements** controlling the relationship between the Defendants, and there is no **merger**.

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2017 WL 11543658 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina,
Ninth Judicial Circuit.
Charleston County

Mary Frances SMITH, as Personal Representative of the Estate of Cecil Smith, Sr., Plaintiff,
v.
SANDPIPER REHAB & NURSING-DELAWARE, LLC, Sandpiper Rehab & Nursing, LLC, Premier Senior Living, LLC and Premier Senior Living-Delaware, LLC, Defendants.

No. 2017-CP-10-0470.
July 7, 2017.

Order

Honorable J.C. Nicholson, Jr., Judge.

***1** This matter came before the Court on Defendants' Motion to Stay and Compel Arbitration.

This is a nursing home negligence action. The essence of Plaintiff's claim is that Defendants, nursing home owners/operators, failed to provide adequate care to Cecil Smith, Sr., deceased, ("decedent") resulting in his developing a deep sacral pressure ulcer and complications related thereto. Subsequent to the filing of this action, Defendants' filed this motion to stay and to compel arbitration.

Decedent was admitted to Defendants' nursing home ("the nursing home") on July 30, 2015. At that time Plaintiff, decedent's surviving spouse, purportedly signed on decedent's behalf an admission agreement and a separate **agreement** to **arbitrate** any disputes that may arise from decedent's residency at the nursing home. The agreements made clear that the signing of the **arbitration agreement** was not a pre- condition to decedent's admission to the nursing home. Decedent was discharged from the nursing home to Roper Hospital from August 23, 2015 to August 27, 2015. Decedent was re-admitted to the nursing home on August 27, 2015. At that time, Plaintiff was presented the same admission and **arbitration agreements** that Plaintiff previously signed and was asked to initial and date the agreements. Plaintiff did so.

The record reflects, and Defendants did not dispute, that decedent was mentally competent at the time of both his initial admission to the nursing home on July 27, 2015 and upon decedent's re-admission to the nursing home on August 30, 2015. There is no evidence in the record that Decedent verbalized to anyone that Plaintiff had authority to sign either the admission **agreement** or the **arbitration agreement** on his behalf. There is no evidence in the record that decedent was present when Plaintiff signed the agreements nor that he did anything to indicate his assent to the agreements. Decedent did not execute a General Power of Attorney document in which he gave anyone permission to sign the documents on his behalf. There is no evidence in the record that decedent did anything by his actions to lead Defendants to believe Plaintiff had authority to execute the agreements on his behalf, thus there can be no apparent agency. *Fronenberger v. Smith,* 406 S.C. 37, 47, 784 S.E.2d 625, 630 (Ct. App. 2013).

Decedent did sign a Health Care Power of Attorney ("Health Care POA") document during his hospitalization at Roper Hospital on August 26, 2015, apparently authorizing his wife to make "health care decisions" on his behalf during any period of his incompetence. Because the Court finds that decedent was competent at the times the agreements were initially signed and subsequently initialed by Plaintiff, Plaintiff would have had no authority pursuant to the Health Care POA to sign the agreements on decedent's behalf. Likewise, Plaintiff would have had no authority to act on decedent's behalf pursuant to the Adult Health

Care Consent Act ("Act"), S.C. Code of Laws 44-66-10 et seq., as the authority granted to a patient's "surrogate" under the Act to make decisions concerning the patient's medical care and financial decisions concerning payment for such medical care is triggered only when the patient is incapacitated. *See Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014) *cert. denied 2014 U.S. Lexis 7615* (U.S. Supreme Ct. 2014). Defendants, in any event, did not dispute that the Health Care POA was ineffective nor the inapplicability of the Act to the facts of this case. Accordingly, the Court concludes, as Plaintiff contends, that Plaintiff did not have authority to sign and bind the decedent to the agreements.

***2** Defendants did argue at the hearing of this matter that the doctrines of third-party beneficiary and **equitable estoppel** apply here and that those doctrines require that the Court enforce the purported **arbitration agreement**. Both doctrines were considered and rejected in the nursing home negligence case context in *Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App.* 2016) *rehearing denied 2016 Lexis S.C. 85 (Ct. App. 2016).* As to the third-party beneficiary doctrine, it has no application here, as the *Thompson* court noted, because "there can be no third-party beneficiary unless a valid contract exists." *Id.* Because the Court finds no valid contract exists here, Defendants' third-party beneficiary argument must fail. As to the **equitable estoppel** argument, that doctrine also does not apply because there is no evidence in the record to indicate that decedent intended to mislead Defendants nor is there any evidence that Defendants relied on any representation made by decedent that resulted in Defendants changing their position to their detriment. *See id.* (discussing elements of **equitable estoppel**). Accordingly, the doctrines of third-party beneficiary and **equitable estoppel** are of no avail to Defendants.

For the reasons set forth above, Defendants' motion is denied.

AND IT IS SO ORDERED.

<<signature>>

The Honorable J.C. Nicholson, Jr.

Circuit Court Judge

July 5, 2017

Charleston, South Carolina

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2018 WL 9991009 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina.
Greenville County

Marlene WILSON, et al.,
v.
NHC HEALTHCARE/MAULDIN, LLC, et al.

Nos. 2018-CP-23-00119, 2018-CP-23-00120.
June 21, 2018.

Order

Michael Nettles, Judge.

***1** This matter came before the Court on Defendants National Healthcare Corporation' and NHC/OP, LP's (hereinafter "Nursing Home Defendants") Motion to Dismiss and to Compel Arbitration. Having listened to oral arguments from counsel and having reviewed the parties' legal memoranda for the reasons more fully set forth below, the Court hereby denies the Defendants' Motion to Dismiss and to Compel Arbitration.

BACKGROUND

This matter arises out of two civil actions – a survival action and a wrongful death action. Both actions involve allegations of nursing home negligence and corporate negligence resulting in the death of Kenneth Wilson (hereinafter "Decedent"). Marlene Wilson (hereinafter "Daughter") was Decedent's daughter and serves as Personal Representative of Decedent's estate. On April 6, 2015, Decedent was admitted to NHC Mauldin for short-term rehabilitation after undergoing a hip arthroplasty at St. Francis Hospital. Plaintiff alleges that as a result of Nursing Home Defendants' negligence, Decedent developed necrotic and infected bedsores, became dehydrated, suffered from nutritional compromise, and developed multiple infections which went untreated, all of which Plaintiff alleges caused Decedent's injuries and death.

At the time of admission, Daughter signed an **Agreement** to **Arbitrate** and Waive Jury Trial ("**Arbitration Agreement**"). The **Arbitration Agreement** was signed by Jennifer Balon for "The Center" and by Daughter for "The Patient". The **Arbitration Agreement** provides that the parties agree to follow the dispute resolution procedures set forth in the **Arbitration Agreement** which include the waiver of a jury trial and the requirement that the parties submit to binding arbitration all disputes against each other which exceed an amount in controversy over $7,500.00.

Plaintiff filed the Notice of Intent to File Suit on September 14, 2017. The parties engaged in the mandatory pre-suit mediation on December 28, 2017. Plaintiff then filed the Summons and Complaint on January 5, 2018 and served same. Nursing Home Defendants filed this Motion to Dismiss and to Compel Arbitration on February 28, 2018. Nursing Home Defendants contend that this **Arbitration Agreement** requires that this Court order that this case be dismissed and that the claims be submitted to binding arbitration in accordance with the **Arbitration Agreement**. Plaintiff contends that the **Arbitration Agreement** is unenforceable under state contract law and this Court agrees for the various reasons set forth hereinbelow.

LEGAL ANALYSIS AND CONCLUSIONS

The party seeking to enforce an **agreement** to **arbitrate** has the burden of establishing the existence of a valid **arbitration agreement**. See *Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). It is well established that "where one party denies the existence of an **arbitration agreement** raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application to arbitrate. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663, 667 (S.C. 2007) (internal citation omitted). Whether a valid **arbitration agreement** exists is a matter for judicial determination. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67,78,749 S.E.2d 139, 144 (Ct. App. 2013). Whether the parties agreed to arbitration is a question of substantive state law. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

I. Daughter had No Authority to Sign the Arbitration Agreement for Decedent

***2** Because Decedent did not sign the **Arbitration Agreement**, Daughter was required to have authority to execute the **Arbitration Agreement** for the **Arbitration Agreement** to be enforceable. Daughter had no such authority. The legal consequences of an agent's actions can only be attributed to the principal when the agent has actual or apparent authority. *Charleston Registry v. Young Clement*, 598 S.E.2d 717, 359 S.C. 635, 642 (Ct. App. 2004). In the present case, neither actual or apparent authority exists for Daughter.

A. No Actual Agency/Authority

While it is true that Daughter held a "Power of Attorney" on behalf of Decedent, this Power of Attorney did not confer the necessary authority to execute an **arbitration agreement** on Decedent's behalf. This document is titled "Power of Attorney" and is not identified a "General Durable Power of Attorney." More importantly, the document does not confer sufficient authority to enter into contracts generally, to enter into releases on behalf of Decedent, to waive the constitutional right to a jury trial, nor does it include the "catch all provision giving the attorney-in-fact the authority 'to sign any and all releases or consent required."' *Sovereign Healthcare of Tampa v. Schmitt*, 195 So. 3d, 1175 (Fla. Dist. Ct. App. 2016).

The powers and authorities which Daughter held were specifically delineated in the Power of Attorney. These powers granted to Daughter the authority to make decisions regarding financial matters and decisions regarding healthcare.

This analysis is akin to that in *Hodge v. UniHealth Post-Acute Care of Bamberg*, 2018 S.C. App. LEXIS 13. As noted in *Hodge*, "'This limited range of acts performed on the [decedent]'s behalf suggest, at most, [he] may have conferred on [the personal representative] the authority to make health care and financial decisions on his behalf, but no more than that."' *Id* at 29 quoting *Dickerson v. Longoria*, 95 A.2d 721, 743, 414 Md. 419 (2010). The *Hodge* court further noted that the authority to sign healthcare documents does not include the authority to sign an **arbitration agreement**. *Hodge* at 40. Our courts have held a healthcare power of attorney does not provide authority to sign an **arbitration agreement**. *Hodge v. UniHealth Post-Acute Care of Bamberg*, 2018 S.C. App. LEXIS 13; *Thompson v. Pruitt Corp.*, 784 S.E.2d, 679, 416 S.C. 43, 55 (Ct. App. 2016), *cert. denied*, S.C. Sup. Ct. Order dated Dec. 2, 2016.

Furthermore, the South Carolina Supreme Court has held that "The authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial." *Hodge* at 37 quoting *Thompson* at 55, 784 S.E.2d at 686. As previously indicated, this Power of Attorney did not have the "catch all" language of many general powers of attorney and does not encompass the executing of an agreement to resolve legal claims by arbitration and waiving a jury trial, but rather, deals with the limited circumstances enumerated therein of making financial or healthcare decisions for Decedent. Therefore, no actual authority existed for Daughter to sign the **Arbitration Agreement**.

B. No Apparent Agency/Authority NAAA

Daughter did not have apparent authority/agency to execute the **Arbitration Agreement** on behalf of the Decedent. Apparent authority is based on "representations made by the principal to the third party and reliance by the third party on those representations". *Young v. S.C. Department of Disabilities and Special Needs*, 374 S.C. 360, 367, 649, S.E.2d 488, 491 (2007). Apparent authority exists when the principal is bound by the acts of its agent after the principal has placed the agent in such a position that a person of ordinary prudence, reasonably familiar with business usages and custom is led to believe the agent has certain authority and in turn, deals with the agent based on the assumption. *Muller v. Myrtle Beach Golf and Yacht Club*, 303 S.C. 137, 399 S.E.2d 430 (Ct. App. 1990), *rev'd on other grounds*.

***3** South Carolina law requires that to prove apparent authority, the Defendants must show "… (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." *Cowburn v. Leventis*, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. *Young v. S.C. Department of Disabilities and Special Needs*, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. *Vereen v. Liberty Life Insurance, Company*, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists.

Nursing Home Defendants have presented no evidence that Decedent represented, implicitly or explicitly, to the Nursing Home Defendants that Daughter had the authority to enter into the **Arbitration Agreement** on his behalf. The Affidavit presented by Plaintiff reflects that Decedent was not present when Daughter signed the **Arbitration Agreement** as he was still in the hospital. The Affidavit further reflects that Decedent was never aware that Daughter had signed the **Arbitration Agreement** and never authorized Daughter to sign such contracts or agreements. Further, based upon the Affidavit of Daughter and the records submitted as exhibits at the hearing, Decedent was confused from the effects of the anesthesia and had "moderate" mental impairment.

It should further be noted that despite the fact that Decedent's mental impairment improved to "cognitively intact", according to Nursing Home Defendants' own records during his admission, Defendants never requested that Decedent sign the **Arbitration Agreement** personally. Further, the **Arbitration Agreement** does not reflect any authority which Daughter had to execute such **agreement** despite the **Arbitration Agreement's** own requirement that any such authority be delineated.

Nursing Home Defendants must also show a detrimental change of position. It should also be noted that the **Arbitration Agreement** is separate from the Admissions Agreement. The facility cannot show that it changed its position for the worse as required to prove any apparent authority/agency as reflected in *Hodge*.

Because Decedent did not consciously or impliedly represent that Daughter was his agent and because there was no change of position by the Nursing Home Defendants, Nursing Home Defendants cannot show that Daughter had apparent authority/agency to execute the **Arbitration Agreement** on behalf of Decedent.

II. The Arbitration Agreement is Unenforceable Against the Decedent's Wrongful Death Statutory Beneficiaries

It is the conclusion and order of this Court that the **Arbitration Agreement** is unenforceable for the above-stated reasons. However, even if Daughter had actual or apparent authority/agency to sign the **Arbitration Agreement** on behalf of Decedent, the **Arbitration Agreement** is unenforceable against the Decedent's wrongful death statutory beneficiaries under South Carolina contract law defenses. The **Arbitration Agreement** neither covers the wrongful death statutory beneficiaries' claims within the scope of the agreement nor was the **Arbitration Agreement** signed by an individual who had authority to bind the statutory beneficiaries.

South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. *Bennett v. Spartanburg Railway Gas and Electric Co.*, 97 S.C. 27, 81 S.E. 189 (1914). The alleged **Arbitration Agreement** by its own terms is an agreement between "Kenneth Wilson ('patient')" and "NHC Healthcare/Mauldin, LLC ('center')". While at some point during Decedent's admission to the facility, he might have had the authority to bind himself and his claims to arbitration but was never given the chance. However, even if Decedent had agreed to arbitration, he did not have the legal authority to bind his statutory beneficiaries who are not parties to the **Arbitration Agreement**. The signatories to the agreement are Daughter on behalf of Decedent and NHC Healthcare/Mauldin, LLC. No other persons are parties to this agreement. The scope of the agreement does not include the statutory beneficiaries' claims.

***4** However, even if the **Arbitration Agreement** did contemplate the wrongful death statutory beneficiaries' claims, Decedent and/or Daughter had no authority to waive the statutory beneficiaries' claims. Daughter signed the **Arbitration Agreement** in her *individual capacity*. However, as the *Hodge* court noted, actions taken by Daughter in her *individual capacity* will not be held against the estate as the estate has other beneficiaries and may have other creditors. Daughter's Affidavit reflects that other statutory beneficiaries exist in this case.

Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, a Federal District Court in South Carolina has analyzed this issue under the South Carolina Non-Economic Awards Act of 2005. *Diane Boyle as Personal Representative of the Estate of John Francis Boyle v. United States of America*, 944 F.Supp.2d 577 (D.S.C. 2012). In *Boyle*, the Court concluded that the wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. This analysis supports the contention that the wrongful death claimants have separate and distinct claims apart from that of the survival action.

Many other states have come to this same conclusion, *Daniels v. Sunrise Senior Living, Inc.*, 212 Cal.App 4th 674, 151 Cal.Rptr.3d 273 (Cal.App.4 Dist, 2013) (Wrongful Death claims not bound to arbitration), *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009) (Wrongful Death claimants not bound by **arbitration agreement**.) As previously discussed, the only parties executing this Agreement were Daughter purportedly on behalf of Decedent and employee as an Agent for NHC Mauldin. NHC Mauldin would contend that this agreement is binding on the non-signatory statutory beneficiaries simply because it contends the **Arbitration Agreement** says so.

However, as the Supreme Court of Kentucky said regarding binding non-signatory wrongful death beneficiaries in *Ping v. Beverly Enterprises. Inc.*:

> [A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third-party are appropriately subjected the contract's arbitration provisions, at least where the tort and contract are significantly intertwined. See, *In re Weekley Homes, L.P.*, 180 S.W. 3d 127 (Tex. 2005) (negligent repair claim by homeowner's daughter against contractor was subject to repair contract's arbitration clause because daughter, although a non-party, was direct and principal beneficiary under the contract). It is something else entirely, however, to say that incidental beneficiaries of a contact-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely be being mentioned in the contract as potential claimants. This is what Beverly purports to do. Arbitration is a matter of contract, however, it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79,83, 123 S. Ct. 588, l54 L. Ed.2d 491 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit", Citation and internal quotation marks omitted.) Since Beverly's theory would allow just

that, i.e., would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a "third party beneficiary" of the **arbitration agreement**, we reject it out of hand.

***5** *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 599-600 (KY 2012).

Likewise, NHC-Mauldin's mentioning of "employees, agents, representatives, affiliates, fiduciaries, medical directors, officers, directors, governing bodies, management companies, insurers, attorneys, predecessors, successors, assigns, third party beneficiaries, heirs, executors, administrators, or any of them, and all persons, entities or corporations with whom any of the former have been, are now, or may be affiliated, arising out of or in any way related or connected to the patient's stay and the care provided at the Center", as being bound by the **Arbitration Agreement** does not make it so. It is no more than an *ipse elixir* which Defendants expect this Court to embrace. The law simply does not permit a party to cut off the rights of a non-signatory to an agreement who receives no benefit thereunder.

The wrongful death claims are separate claims apart from the Decedent's claims. According to South Carolina's Wrongful Death Act:

"Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued shall be liable to an action for damages."

South Carolina Code Annotated §15-51-10 (1977)

The wrongful death beneficiaries are as follows:

"Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs or the person whose death shall have been so caused."

South Carolina Code Annotated §15-51-20 (Supp. 2001)

The general element of damages recoverable are pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of the Decedent, society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries. *Self v. Goodrich*, 300 S.C. 349, 351, 387 S.E.2d. 713, 714 S.C. (Ct. App. 1989).

The wrongful death claim is a separate claim from the claims a decedent might bring on his own behalf under the survival statute. In *Bennett v. Spartanburg Railway Gas and Electric Company*, 97 S.C. 27, 81 S.E. 189 (1914), the Supreme Court held that wrongful death and survival actions are different claims for different injuries. The Court stated "necessarily, therefore, there must be separate verdicts and separate judgments, there should be separate actions." *Id*. at 31. See also *Strickland v. Southern Ry Co.*, 111 S.C. 248, 97 S.E. 695 (1918) (Supreme Court Affirmed Appeal from Circuit Court's ruling noting that survival claims are independent of wrongful death claims), *Claussen v. Brothers*, 148 S.C. 1, 145 S.E. 539 (1928) (discussing the difference between survival and wrongful death claims as being independent of each other).

***6** The Pennsylvania Superior Court in *Pisano v. Extended Homes, Inc., operating under the fictitious name Belaire Health 84 Rehabilitation Center*, 2013 PA Super 232, 77 A.3d 651, 662 (PA 2013) affirmed the trial court decision that the nursing home **arbitration agreement** did not apply to the statutory beneficiaries' wrongful death claim. The Court noted the wrongful death and survival actions are not derivative of each other but are flowing from the same underlining tortious conduct. Like the

South Carolina statute, Pennsylvania's wrongful death statute provides that the right of action exists only for the benefit of the spouse, children, parents, or parents of the deceased. *Id*. at 656. The Pennsylvania Court further held that since the wrongful death claim is independent of the survival action and because the wrongful death statute does not characterize the wrongful death claim as that of a third-party beneficiary, that the trial court properly refused to compel arbitration to the non-signatory wrongful death beneficiaries who were not parties to the **arbitration agreement**.

Likewise, in *Bybee v. Abdulla, M.D.*, 189. P.3d 40, 2008 UT 35 (Utah, 2008), the Supreme Court of Utah held that an **agreement** to **arbitrate** that was signed by the decedent cannot extend to the statutory beneficiaries of a wrongful death claim. The Utah Supreme Court noted that certain defenses from the decedent's personal injury action may be raised against the heirs of a wrongful death action such as comparative negligence and statutes of limitations as key common characteristics. However, as the Supreme Court of Utah noted, both of these defenses go to the viability of the underlying personal injury action. The Court further stated that "by contract, an agreement to bind heirs to arbitrate disputes does not implicate the viability of underlying claims." *Id.* at 47, citing *Horwich v. Superior Court*, 21 Cal. 4th 272, 87 Cal. Rptr. 2d 222, 980 P. 2d 927, 935 (1999). The Utah Supreme Court went on to note that "we have never intended to suggest, however, that because Decedent is the master of his claim he may by contract expose his unwilling heirs to any imaginable defense." *Bybee v. Abdulla, M.D.* at 46. The Utah Supreme Court further held that the defenses against the decedent's claim which are less likely to be found enforceable against the heirs' claims in a wrongful death action "are contract provisions that purport to affect the rights of heirs that do not affect the existence of the decedent's personal injury claim during his lifetime. The **arbitration agreement**…falls squarely within this category and is, therefore, unenforceable against the heir." *Id.* at 47.

The Court of Appeals in Washington in *Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wn. App. 919, 231 P. 3d 1252 (Wash. App. Div. 1 2010) held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit." *Id*. quoting *Satomi Owners Association v. Satomi. LLC*, 167 Wash. 2d 781, 225 P.3d 213 (2009). The Washington Court of Appeals further noted that the wrongful death claims asserted in that case were not on behalf of the estate just as South Carolina's wrongful death claims are not on behalf of the estate. The Washington Court of Appeals further discussed the Supreme Court of Ohio's ruling in *Peters v. Columbus Steel Casting Co.*, 115 Ohio St.3d 134, 873 N.E.2d 1258 (2007), wherein the Supreme Court of Ohio held that the wrongful death claim of a spouse who was Administrator of her husband's estate was not subject to the Decedent's **arbitration agreement**. The Washington Court of Appeals in discussing *Peters*, stated "In sum, the decedent's agreement was an **agreement** 'to **arbitrate** his claims against the company,' and thus the provision in the agreement binding the decedent's heirs applied to a survival action. But the decedent could not 'restrict his beneficiaries to arbitration of their wrongful death claims because he held no right to those claims." *Woodall v. Avalon Care Center - Federal Way, LLC* at 929. In the Washington Court of Appeals' analysis, the Court concluded that the wrongful death beneficiaries could not be bound to the **arbitration agreement** which they did not sign.

***7** Therefore, even if Daughter had actual or apparent authority/agency to execute the **Arbitration Agreement**, the **Arbitration Agreement** did not include the wrongful death statutory beneficiaries' claims within the scope of the **Arbitration Agreement**, nor did Decedent and/or Daughter have authority to bind the wrongful death statutory beneficiaries' claims to the **Arbitration Agreement**. As a result, the **Arbitration Agreement** cannot reach the claims of the wrongful death statutory beneficiaries.

WHEREFORE, for the reasons stated herein, the Court denies Defendants' Motion to Dismiss and Motion to Compel Arbitration.

IT IS SO ORDERED.

_____

The Honorable Michael G. Nettles

Presiding Judge

Greenville, South Carolina

Date: _____

So Ordered

s/ Michael Nettles

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STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER	)	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT CASE NO. 2023-CP-18-02145
STEVE RICKENBAKER, Plaintiff, vs. OAKBROOK HEALTHCARE, LLC d/b/a Oakbrook Health and Rehabilitation Center, Defendant.	)	**DEFENDANT OAKBROOK HEALTHCARE, LLC D/B/A OAKBROOK HEALTH AND REHABILITATION CENTER'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ARBITRATION**

Defendant, Oakbrook Healthcare, LLC d/b/a Oakbrook Health and Rehabilitation Center ("Defendant" or the "Facility"), submits is Memorandum in Support of its Motion to Compel Arbitration pursuant to the Federal Arbitration Act (the "FAA") 9 U.S.C. §§ 1, et seq.

Plaintiff, Steve Rickenbacker, has sued Defendant in negligence based on an occipital scalp ulcer he developed from a neck brace. Plaintiff's allegations against Defendant concern his residency the Facility. On admission to the, Mr. Rickenbacker, through his wife, Mrs. Faye Rickenbacker, entered into an arbitration agreement with the Facility that covers all allegations raised in the Complaint.

For the reasons set forth herein, Defendant respectfully requests that the action be stayed and that this matter be compelled to arbitration.

BACKGROUND

With the help of Mrs. Rickenbaker, Mr. Rickenbaker, age 71, was admitted to the Facility on June 18, 2018, for skilled nursing care. Mrs. Rickenbaker handled the paperwork in conjunction with Mr. Rickenbaker's admission, and in so doing, Mrs. Rickenbaker executed an Admission Agreement and an Arbitration Agreement on Mr. Rickenbaker's behalf, both of which

were duly countersigned by the Facility's representative Dan Owens. (See **Exhibits 1** and **2**, respectively, attached hereto). Mrs. Rickenbaker also signed certain consents, authorizations, and acknowledgements directly related to Mr. Rickenbaker's residency and care. (See **Exhibit 3**).

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

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

The Arbitration Agreement provides:

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

The Arbitration Agreement further provides:

> The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform

> Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law. (See **Ex. 2**).

Regarding Mrs. Rickenbaker's authority to sign on behalf of her husband, the Arbitration Agreement states:

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

(See **Ex. 2**).

ARGUMENT

I. The FAA applies to the Arbitration Agreement.

Without question, the FAA applies to the Arbitration Agreement. The FAA applies "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress's power under the Commerce Clause); *id.* at 273–77 (1995) (explaining that unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce). Here, the Arbitration Agreement expressly states that the FAA applies,[1] and in any event, our Supreme Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

[1] (**Ex. 2** ("[T]he enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Act (Title 9 of the United States Code) . . . .").)

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

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

[2] *Allied-Bruce*, 513 U.S. at 270.

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).

III. 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 Mrs. Rickenbaker's signature on behalf of Mr. Rickenbaker, along with Mrs. Rickenbaker's express representation that she is authorized to sign for Mr. Rickenbaker.[3] It is countersigned by Mr. Owens 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 defined scope of disputes to binding arbitration[4] 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. To require more just because an

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[3] By virtue of her signature, Mrs. Rickenbaker 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 Mr. Rickenbaker'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 Mrs. Rickenbaker is no less bound by this covenant than the Facility.

[4] 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.").

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 party alleging that the enforcement of a contract would be unconscionable bears the burden of proving both prongs of the definition. *Green Tree Fin. Corp.-Ala. v. Randolph*, 53 l U.S. 79, 92 (2000); *accord Marzulli v. Tenet S.C.*, Inc., No. 2015-002363, 2018 WL 1531507, at *3 (S.C. Ct. App. Mar. 28, 2018). In this case, Plaintiff bears that burden. "Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Simpson*, 373 S.C. 14, 25, 644 S.E.2d 663, 669. "Meaningful choice" refers specifically to the bargaining process involved in entering into the Arbitration Agreement. The Arbitration Agreement clearly articulates that the resident entering into the Agreement is fully aware of his or her healthcare options and other potential providers of nursing home facilities. The Agreement states:

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

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

By signing the Arbitration Agreement and Admission Agreement, Mrs. Rickenbaker, acting on behalf of Mr. Rickenbaker, represented that she understood and assented to their terms. Indeed, she was given the option of entering into the Arbitration Agreement – *or not* – and she freely and voluntarily made the decision to proceed. The Arbitration Agreement by its plain language was not a precondition of admission to the Facility and simply could not have been an adhesion or "take it or leave it" contract. Mrs. Rickenbaker had the option not to enter into the Arbitration Agreement on behalf of her husband, yet she voluntarily did so, voluntarily did not retract her agreement thereto, and her mother stayed at the Facility and received skilled nursing care after admission.

The Declaration of the Facility's representative, Dan Owens, attached hereto as **Exhibit 4**, further confirms that the Facility gave Mrs. Rickenbaker a meaningful choice whether to enter into the Arbitration Agreement. With regard to the Admissions Agreement, Mr. Owens stated that the resident has the option to enter the agreement, but that it is "not a condition for admission to the facility." *See* **Ex. 4** ¶ 7, 10. Mr. Owens confirmed that he "personally reviewed and explained each of the admissions documents" to Mrs. Rickenbaker and "she made Mrs. Rickenbaker aware that completion of the Arbitration Agreement was not a condition of her husband's admission to the Facility. *See id.* at ¶ 10. Mrs. Rickenbaker indicated that she understood Mr. Owens as he explained each of the admissions documents, including the Arbitration Agreement. *See id.* at ¶ 11. This Declaration and the surrounding circumstances set forth above establish that Mrs. Rickenbaker was coherent and understood the admissions materials at the time of her husband's admission to the Facility. *See id.* at ¶ 9-14. Mrs. Rickenbaker understood the terms of the Arbitration Agreement, understood that she was not required to enter into the Agreement, and voluntarily chose to consent to its terms on behalf of her husband.

The fact that this Defendant is a commercial entity is also not sufficient grounds, standing alone, to prove the absence of a "meaningful choice." While disparity in bargaining power and relative sophistication are factors to be considered under *Simpson*, the fact that the Facility unilaterally drafted this agreement and presented it to Mr. Rickenbaker's representative for consideration cannot justify a finding of unconscionability. *See Munoz v. Green Tree Financial Corp.,* 343 S.C. 531, 542 S.E.2d 360, 365 n. 5 (2001) ("[I]nequality of bargaining power alone will not invalidate an arbitration agreement.").

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

When determining this aspect of unconscionability, this Court must focus on "whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision maker." *Id.* at 25, 644 S.E.2d at 668. Under the terms of the Arbitration Agreement, the parties are to select a third party arbitrator *jointly* "from a panel having experience and knowledge of the health care industry." *See* **Ex. 2.** If the parties are unable to agree upon such an arbitrator, the agreement vests the Court with authority to make a selection. The selected neutral arbitrator is vested with authority to hear the case and make a decision which is "binding on all parties." As a result, it can only be said that the Arbitration Agreement allows for complete mutuality of remedies. Neither party is

given an advantage by its terms. The Arbitration Agreement simply binds the parties (both sides) to resolve disputes via arbitration, something that, again, is expressly favored as a matter of both state and federal policy. 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. 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."

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

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

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

> It is . . . understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission

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

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

V. The Arbitration Agreement and the Admission Agreement merged (i.e., should be construed together as a single contract), and, because Plaintiff effectively embraced and directly benefitted from the Admission Agreement, Plaintiff should be estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.

"South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including . . . estoppel." *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–55, 755 S.E.2d 450, 455 (2014) (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel); *id.* (explaining that "Appellants' equitable estoppel argument," which "[wa]s premised on [Appellants'] contention that, under state law, the admission agreements and the [arbitration agreements] merged," as follows: "Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] . . . , she is nevertheless *equitably estopped to*

deny the [arbitration agreement's] enforceability.") (emphasis added). Conceptually, the merger/equitable estoppel argument is not an argument for the *enforceability* of the Arbitration Agreement per se but rather for Plaintiff to be *estopped to deny the enforceability* of the Arbitration Agreement.

A. Merger

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

> Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] under the [Adult Health Care Consent] Act, she is nevertheless equitably estopped to deny the [arbitration agreement's] enforceability. The circuit court held there was no estoppel here, and we agree.
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> Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. In South Carolina,
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> > The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
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> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction*. *Unless there is a contrary intention, appellants are correct that there was a merger*.

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

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

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,"[5] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[6] there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the instruments were intended to be construed together as effectively one contract. This is a question of intention. *Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a contrary *intention* . . .") (emphasis added). And "in attempting to ascertain th[e] [parties'] intention," our courts "endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into." *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

It must be remembered that, where, as here, the instruments in question were executed at the same time, by the same parties, for the same purpose, and in the course of the same

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[5] *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

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

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

Unlike the arbitration agreement at issue in *Coleman*—and, for that matter, the arbitration agreements at issue in *Coleman's* progeny *Thompson* and *Hodge*, all of which cases involved arbitration agreements that contained a provision allowing them to be disclaimed or revoked within 30 days of signing while the corresponding admission agreements did not—the instant Arbitration Agreement has no disclaimer/revocation provision. (**Ex. 2**.) Moreover, while the instant Admission Agreement does contain an "Entire Agreement" clause, it does not reference the Arbitration Agreement as a separate contract. (**Ex. 1** p. 12.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[7]), the "Entire Agreement" clause in the instant Admission Agreement expressly states that "other Admissions materials" are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed "separatedness." (**Ex. 1** p. 12.) Without question, the Arbitration Agreement is among these other materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84

[7] 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).

(Ct. App. 2019) ("The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's *admission documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 ("Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement*.") (emphasis added)).[8]

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

Moreover, while it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e.,

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

without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement's) sole reason for being. (**Ex. 2** (providing for arbitration of "any controversy or dispute between the parties arising out of or relating to [the] Facility's Admission Agreement, or breach thereof, or relating in any way to [Plaintiff's] stay at [the] Facility, or to the provisions of care or services to [Plaintiff] . . . ."); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at [the] Facility . . . .").)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Plaintiff's relationship with the Facility, the Admission Agreement setting forth the terms of his admission, the Arbitration Agreement providing for arbitration of disputes arising out of his admission. (*Compare* **Ex. 1** (setting forth the terms of Plaintiff's admission to the Facility) *with* **Ex. 2** (providing for arbitration of disputes arising out of Plaintiff's admission in the Facility).)

Also absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* **Ex. 1** p. 10 ("This Agreement

will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located.") *with* **Ex. 2** (providing that, "because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Act . . . ," but also providing that arbitration shall be "as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules").) Essentially, both instruments provide that South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, the survival of the Arbitration Agreement is no evidence of "separatedness." Again, the only reason for the Arbitration Agreement is the Admission Agreement, as the point of the Arbitration Agreement is to cover disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intention contrary to merger. To point to such things, is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact

which does not actually suggest anything probative about whether they are intended to be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. The very nature of *merger* is to *merge* separate documents.

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

The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." 407 S.C. at 355, 755 S.E.2d at 455. While it is true that the *Coleman* Court also cited the rule that ambiguity is construed against the drafter, (a) it did so in dicta[9] and (b) it never

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

addressed the logical inconsistency—which thus remains fair game as an argument in this case[10]—in recognizing a rule of law creating a presumption in favor of merger (i.e., in recognizing the occurrence of a set of circumstances (same time, parties, purpose, and transaction) as sufficiently probative to affirmatively tip the scales in favor of merger) while at the same time allowing that presumption to be completely overturned by evidence that is merely ambiguous, i.e., evidence that does not even go so far as to clearly indicate a contrary intention and, indeed, is actually still susceptible to a reasonable conclusion in favor of merger. *See S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are *reasonably* susceptible of more than one interpretation.") (emphasis added).

To find against merger here would be to rely on improper speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding intent. The presumption of merger arises from the concurrence of the four elements of time, parties, purpose, and transaction. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. This is why for the merger presumption to mean anything in practice it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). The merger presumption is "earned," so to speak, by the fact that for it even to arise in the first place there

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matter not necessarily involved in the case, and is not binding as authority.") (internal citations and quotations marks omitted).

[10] To be clear, no subsequent case has addressed this either.

must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

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

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

More recently, our Court of Appeals decided *Solesbee*, 438 S.C. 638, 885 S.E.2d 144, wherein it affirmed the circuit court's denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as the present. Indeed, the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*.

In affirming the circuit court's denial of the motion to compel arbitration, the *Solesbee* Court likened that case to *Coleman* and *Hodge* and found that the circuit court had correctly determined that there was no merger of the Admission Agreement and the Arbitration Agreement and, in turn, had properly denied the Facility's equitable estoppel argument. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149 ("Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and [the facility's] equitable estoppel argument was

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

First, the *Solesbee* Court erroneously found against merger on the basis that "the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law." It is not true that "the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law."

Regarding governing law, what the Admission Agreement actually states is this: "This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which the Facility is located." (**Ex. 1** p. 10.) And what the Arbitration Agreement actually states is this:

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

(**Ex. 2**.)

Again, without question, the FAA applies to the Arbitration Agreement. And the rule that the FAA applies whenever an arbitration agreement involves interstate commerce of course applies even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law. *See Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (The FAA "create[d] a body of federal substantive law," which is "applicable in state and federal courts."); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) ("[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the

remainder of the contract."); *see also Allied-Bruce*, 513 U.S. 265, 270–77. For that matter, even where the FAA applies, the general state law of contracts continues to apply. *Allied-Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted). And again, the Arbitration Agreement expressly calls for the arbitration proceedings to be conducted pursuant to the South Carolina ADR Rules. (**Ex. 2**.)

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

Second, the *Solesbee* Court erroneously found against merger on the basis that "[t]he Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement 'shall survive any termination or breach of this Agreement or the Admission Agreement.'" 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger here. Unlike in *Coleman* and *Hodge*, the supposed textual recognition of the Admission Agreement as being separate from the Arbitration Agreement is not included in any "Entire Agreement" provision. Rather, the "Entire Agreement" provision of the Admission Agreement expressly states, "other Admissions materials . . . are made a part of this Agreement by reference." (**Ex. 1** p. 12.) And as in the instant case, the Arbitration Agreement that was signed in conjunction with the admission is clearly among these "other Admissions materials." Moreover, that the Arbitration Agreement "shall survive any termination or breach of this Agreement or the Admission Agreement" just means that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. Again, this is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. 2d at 612–13 ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

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

reasonable inference of an intent contrary to merger. The absence of a "revocation" provision is one way in which the Arbitration Agreement is materially different from those at issue in *Coleman* and *Hodge*, and, for that matter, *Thompson*. Moreover, the *Solesbee* Court drew a false equivalency between the concept of "revocation" and that of "termination." A "revocation" is an annulment (i.e., to make something a nullity),[11] whereas "termination" is to put or bring something to an end. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. at 612–13.

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

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[11] *Black's Law Dictionary* p. 1321 revocation (7th ed. 1999); *id.* at 89 annulment ("The act of nullifying or making void.").

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

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

Arbitrations Agreement's) sole reason for being. (*See* **Ex. 2** (providing for arbitration of "any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident . . . ."); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at Facility . . . .").)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission, whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of the resident's relationship with the Facility: the Admission Agreement setting forth the terms of the admission, the Arbitration Agreement providing for arbitration of disputes arising out of the admission. (*Compare* **Ex. 1** (setting forth the terms of the admission) *with* **Ex. 2** (providing for arbitration of disputes arising out of the admission).)

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

B. Estoppel.

In *Wilson*, our Supreme Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals' earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which the Facility contends Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where he received direct benefits from the Admission Agreement with which the Arbitration Agreement merged. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340,

827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added).

Wilson supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration case like this, and it instructs that the key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability but whether benefits to the nonsignatory are direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 ("Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause. In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. Stated another way, [u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement . . . .") (internal citations and quotation marks omitted); *id.* at 343, 827 S.E.2d at 176 ("It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual

relationship of the parties, but does not exploit (and thereby assume) the agreement itself.") (internal citations omitted).

Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration clause (which is the case here because the Admission Agreement and the Arbitration Agreement merge) while at the same time denying that the arbitration clause is enforceable. *See Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.") (citation and internal quotation marks omitted).

As set forth in our Supreme Court's controlling decision in *Wilson*, and consistent with the Court of Appeals' decision in *Pearson*, which the *Wilson* Court favorably cites, the essence of the test for direct benefits estoppel is simply whether the non-signatory has exploited other parts of the contract by reaping its benefits. Indeed, to require more than this—or, in other words, to limit the applicability of direct benefits estoppel to only instances where the non-signatory's claim relies solely on the contract terms to impose liability—is to invite the very sort of have-your-cake-and-eat-it-too inequity that the doctrine aims to prevent in the first place. Neither *Wilson* nor *Pearson* nor general notions of equity countenance,[12] much less call for, such a result.

Here, Plaintiff was a direct beneficiary. To deny his receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of his residency: every night's stay, every meal, every amenity/service provided, every instance of

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

care/treatment, essentially every moment at the Facility—even his complaint does not go nearly so far as that. (*See* Compl.)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Plaintiff received the benefit of his admission to the Facility, including, without limitation, the room, board, care/treatment, and other services he received therein. Respectfully, the Court should find that the Arbitration Agreement merged with the Admission Agreement and that Plaintiff is estopped to deny the Admission Agreement/Arbitration Agreement's enforceability, Plaintiff having effectively embraced the contract with the Facility for the purpose of his admission and receipt of the benefits thereof.[13]

CONCLUSION

For the reasons set forth herein, Defendant respectfully requests that this Court enter an Order staying the pending action and compelling arbitration.

<SIGNED ON THE FOLLOWING PAGE>

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

Respectfully submitted,

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Oakbrook Healthcare, LLC d/b/a Oakbrook Health and Rehabilitation Center

Charleston, South Carolina

Dated: January 21, 2025

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	CASE NO. 2023-CP-18-02145
STEVE RICKENBAKER,	)	
	)	
Plaintiff,	)	
	)	**MOTION TO ALTER, AMEND, AND/OR RECONSIDER ORDER DENYING MOTION TO COMPEL ARBITRATION**
vs.	)	
	)	
OAKBROOK HEALTHCARE, LLC d/b/a Oakbrook Health and Rehabilitation Center,	)	
	)	
Defendant.	)	

TO: THE HONORABLE MAITE MURPHY, Presiding Judge, and LEE D. COPE, ESQUIRE, JOHN E. PARKER, JR., ESQUIRE, and NEIL E. ALGER, ESQUIRE, PARKER LAW GROUP, LLP, Attorneys for Plaintiff

NOW COMES Defendant Oakbrook Healthcare, LLC d/b/a Oakbrook Health and Rehabilitation Center (the "Facility"), by and through its undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set forth below, hereby most respectfully moves this Honorable Court to alter, amend, and/or reconsider its Order filed April 3, 2025, denying the Facility's motion to compel arbitration (the "Subject Order").

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

See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes

[1] The "Underlying Motion" refers to the motion that was decided via the Subject Order, i.e., the Facility's Motion to Compel Arbitration.

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 merger/equitable estoppel analysis in the Subject Order is erroneous, to include, without limitation, the Court's citation to irrelevant authority that pertains to the wrong test for equitable estoppel. The Court should have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Rickenbaker effectively embraced and directly benefitted from the Admission Agreement, he is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.

(a) The Subject Order reflects the Court's misapprehension of the Facility's merger/equitable estoppel argument, as evidenced by the following incorrect and/or inapplicable statements therein:

(i) "The basis of [the Facility's] Motion is that a valid and enforceable arbitration agreement exists between the parties."[2]

(ii) "Since Ms. Rickenbaker lacked legal authority, the Arbitration Agreement is void an unenforceable."[3]

(iii) "[T]he Court must determine (1) if the Arbitration Agreement merged with and was a part of the Admission Agreement such that Rickenbaker would be equitably estopped from denying the Arbitration Agreement's validity, ***and* (2) if Ms. Rickenbaker had actual or apparent authority to enter the Arbitration Agreement on behalf of Rickenbaker."**[4]

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

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2 (Subject Order p. 2.)
3 (Subject Order p. 4.)
4 (Subject Order pp. 2–3 (emphasis added).)

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

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

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

Agreement/Arbitration Agreement on behalf of Mr. Rickenbaker under the law of agency[5] and/or under the South Carolina Adult Health Care Consent Act (the "AHCCA"), S.C. Code Ann. §§ 44-66-10 to -80,[6] and/or because Ms. Rickenbaker lacked power of attorney or guardianship over Mr. Rickenbaker[7]—is beside the point and unavailing to refute the Facility's merger/equitable estoppel argument, which, again, turns not on the question of whether the Arbitration Agreement is enforceable but whether Mr. Rickenbaker is estopped to deny its enforceability.

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

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

> Appellants contend that even if Sister lacked capacity to execute the AA under the Act, she is nevertheless equitably estopped to deny the AA's enforceability. The circuit court held there was no estoppel here, and we agree.
>
> Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the AAs merged. In South Carolina,
>
> > The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
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> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).

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5 (*See* Subject Order pp. 6–7 (regarding principles of agency).)

6 (*See* Subject Order pp. 2–4, 6–7 (regarding the AHCCA).)

7 (*See* Subject Order pp. 2, 4 (regarding power of attorney and guardianship).)

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

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

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

The Subject Order wrongfully concludes that the Admission Agreement and the Arbitration Agreement are separate contacts that do not merge. (Subject Order pp. 4–6.) 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,"[8] as indeed the Admission Agreement and the Arbitration Agreement were here,[9] there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the contracting parties intended the

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[8] *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

[9] To be clear, *Coleman* unequivocally answers the question of whether the instant Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly observes 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).

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

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

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

Court[10]), the "Entire Agreement" clause in the instant Admission Agreement expressly states that "other Admissions materials" are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed "separatedness." (Admission Agreement p. 12.) Without question, the Arbitration Agreement is among these other Admissions materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) ("The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's *admission documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 ("Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement*.") (emphasis added)). The Court's conclusory finding that there is ambiguity in this regard[11] is unsupported and erroneous.

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

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[10] 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).

[11] (Subject Order p. 4 ("While the Admission Agreement purports to incorporate admissions materials into itself "by reference herein", when viewed alongside the other details of

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

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

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the agreements, it creates at best an ambiguity as to merger when taken in context of the totality

Arbitration Agreement (providing for arbitration of disputes arising out of Mr. Rickenbaker's admission to the Facility).)

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

Similarly, and contrary to the view expressed in the Subject Order,[12] the survival of the Arbitration Agreement is no evidence of "separatedness." The only reason for the Arbitration Agreement is the Admission Agreement, i.e., the Arbitration Agreement covers disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination

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of the circumstances . . . .").)

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

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things, as the Subject Order does,[13] is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. The very nature of *merger* is to *merge* separate documents.

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

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[12] (Subject Order p. 4 ("Further, the Arbitration Agreement by its very language distinguishes between itself and the Admission Agreement, stating that the Arbitration Agreement will survive any 'breach of this Agreement or the Admission Agreement.'").)

the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention.

The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." 407 S.C. at 355, 755 S.E.2d at 455. While it is true that the *Coleman* Court also cited the rule that ambiguity is construed against the drafter, (a) it did so in dicta[14] and (b) it never addressed the logical inconsistency—which thus remains fair game as an argument in this case[15]—in recognizing a rule of law creating a presumption in favor of merger (i.e., in recognizing the occurrence of a set of circumstances (same time, parties, purpose, and transaction) as sufficiently probative to affirmatively tip the scales in favor of merger) while at the same time allowing that presumption to be completely overturned by evidence that is merely ambiguous, i.e., evidence that does not even go so far as to clearly indicate a contrary intention and, indeed, is actually still susceptible to a reasonable conclusion in favor of merger. *See S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are *reasonably* susceptible of more than one interpretation.") (emphasis added).

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[13] (Subject Order p. 4.)

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

[15] To be clear, none of *Coleman's* progeny has addressed this either.

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

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

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

In *Solesbee*, the Court of Appeals affirmed the denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as here[16]—although, most respectfully, the *Solesbee* Court (a) erred as to those aspects of the argument that it addressed[17] and (b), in any event, did not actually address all material aspects of the argument, leaving gaps in the *Solesbee* decision through which the Facility's position still fits. In affirming the denial of the motion to compel arbitration in *Solesbee*, the *Solesbee* Court likened that case to *Coleman* and *Hodge* and found that the circuit court had correctly determined that there was no merger of the Admission Agreement and the Arbitration Agreement and, in turn, had properly denied the Facility's equitable estoppel argument. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149 ("Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and [the Facility's] equitable estoppel argument was properly denied.").)[18] Most respectfully, *Solesbee* should not control the disposition of the Underlying Motion.

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

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

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

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

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

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

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

(Arbitration Agreement.)

Without question, the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (the "FAA"), applies to the Arbitration Agreement,[19] as it does "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction"[20]—and this is so even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law. *See Southland Corp. v. Keating*,

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[19] The FAA applies "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress's power under the Commerce Clause); *id.* at 273–77 (1995) (explaining that unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce). And our Supreme Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

[20] *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363.

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

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

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

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

reasonable inference of an intent contrary to merger. The absence of a "revocation" provision is one way in which the Arbitration Agreement is materially different from those at issue in *Coleman* and *Hodge*, and, for that matter, *Thompson*. Moreover, the *Solesbee* Court drew a false equivalency between the concept of "revocation" and that of "termination." A "revocation" is an annulment (i.e., to make something a nullity),[21] whereas "termination" is to put or bring something to an end—which is materially different from making something a nullity, i.e., void and never having properly existed in the first place. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. at 612–13.

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

[21] *Black's Law Dictionary* p. 1321 revocation (7th ed. 1999); *id.* at 89 annulment ("The act of nullifying or making void.").

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

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

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

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

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

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

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

(i) Direct benefits estoppel applies.

The view of equitable estoppel reflected in the Subject Order misapprehends our Supreme Court's decision in *Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel). The *Wilson* Court favorably discussed the framework of the

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

Wilson supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration case like this, without any resort to another test for equitable estoppel, such as that addressed in the *Kelly* and *Strickland* cases cited in the Subject Order. (Subject Opinion p. 5 ("Further, Rickenbaker cannot be equitably estopped from denying enforcement of the Arbitration Agreement. 'Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements.' *Kelly v. Logan, Jollev & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped acted in a way amounting to a false representation. *Strickland v. Strickland*, 375

S.C. 76, 84, 650 S.E.2d 465, 470 (2007). [The Facility] cannot meet its burden to establish this element.").)[22]

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

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

(Subject Order p. 6.)

What *Wilson* actually explains is that the key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability but whether benefits to the nonsignatory are direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 ("Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause. In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. Stated another way, [u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement . . . .") (internal citations and quotation

[22] To be clear, neither *Kelly* nor *Strickland* was an arbitration case, and both cases relied on the traditional six-factor test for estoppel, *Kelly*, 383 S.C. at 638, 682 S.E.2d at 7,

marks omitted); *id.* at 343, 827 S.E.2d at 176 ("It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.") (internal citations omitted).

Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration clause (which is the case here because the Admission Agreement and the Arbitration Agreement merge) while at the same time denying that the arbitration clause is enforceable. *See Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.") (citation and internal quotation marks omitted). As set forth in our Supreme Court's controlling decision in *Wilson*, and consistent with this Court's decision in *Pearson*, which the *Wilson* Court favorably cites, the essence of the test for direct benefits estoppel is simply whether the nonsignatory has exploited other parts of the contract by reaping its benefits. Indeed, to require more than this—or, in other words, to limit the applicability of direct benefits estoppel to only instances where the nonsignatory's claim relies solely on the contract terms to impose liability—is to invite the very sort of have-your-cake-and-eat-it-too inequity that the doctrine aims to prevent in the first place. Neither *Wilson*

Strickland, 375 S.C. at 84–85, 650 S.E.2d at 470, not the direct benefits test.

nor this Court's decision in *Pearson* nor general notions of equity countenance,[23] much less call for, such a result.

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

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

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

The Subject Order states, "Ms. Rickenbaker had no legal authority to sign the Arbitration Agreement, and Oakbrook knew or should have known this fact, as she did not present them with documentation demonstrating power of attorney or guardianship." (Subject Order p. 4.) This

[23] *See Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) ("Courts have the inherent power to do all things reasonably necessary to insure that just results

violates the FAA's "equal footing" rule by charging the Facility with a heightened duty to determine the existence Ms. Rickenbaker's authority that does not exist under South Carolina's general contract law. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (Under the FAA, "courts *must* place arbitration agreements on *equal footing with other contracts* . . . ."); *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (While a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not do so based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.") (citing *Concepcion*, 563 U.S. at 339); *Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted)).

At the same time, the Subject Order disregards applicable state law in respect of the legal significance of Ms. Rickenbaker's act of signing the Arbitration Agreement and her duty of good faith and fair dealing. The Arbitration Agreement itself reflects (by virtue of her signature upon it) Ms. Rickenbaker's express representation that she had all due authority to sign it for Mr. Rickenbaker. (Arbitration Agreement ("By . . . her signature below, the executing party [(i.e., Ms. Rickenbaker)] represents that . . . she has the authority to sign on [Mr. Rickenbaker's] behalf

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are reached to the fullest extent possible.").

so as to bind [Mr. Rickenbaker] as well as [herself].").) There is no question raised as to Ms. Rickenbaker's competency. She is thus "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement,[24] including, of course, the terms whereby she represented herself to the Facility as having authority to act on Mr. Rickenbaker's behalf. Moreover, the covenant of good faith and fair dealing implied in every contract[25] is no less binding on Ms. Rickenbaker than the Facility.

3. The Subject Order incorrectly states—in conclusory fashion, without actually citing any legal or factual support—that "the only relevant and necessary evidence for the Court to make its determination is already available for the Court's review. Any further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, waste judicial resources, and increase costs for both parties unnecessarily."[26]

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

[24] *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.").

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

S.E.2d 764, 773 (Ct. App. 1992). The doctrine of apparent authority provides that a principal may be bound by the acts of it agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

"When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances." *R & G Const.*, 343 S.C. at 433, 540 S.E.2d at 118 (Ct. App. 2000).

Moreover, authority can be supplied to an agent retroactively by express or implied ratification. *See Brazell Bros. Contractors v. Hill*, 245 S. C. 69, 74, 138 S.E.2d 835, 837 (1964) ("Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent."). "Ratification, as it relates to the law of agency, may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into on his behalf by another who at the time assumed to act as his agent." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S. C. 75, 89, 124 S.E.2d 602, 608 (1962). It is not necessary for a principal to be present at the time of the commission of his agent's act in order for him to ratify that act. *See State v. Waldrop*, 73 S. C. 60, 52 S.E. 793, 795 (1905) ("The presiding judge ruled that he could ratify the act of the agent, whether he was present or not, and in this we see no error.").

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[26] (Subject Order pp. 7–8.)

These principles relating to the law of agency potentially provide an additional, independent basis on which to grant the Underlying Motion. Their application is fact dependent, and in no reasonable way can it be said "that the only relevant and necessary evidence for the Court to make its determination [thereon] is already available for the Court's review" such that "further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, waste judicial resources, and increase costs for both parties unnecessarily."

WHEREFORE, for the foregoing reasons—and, again, for that matter, for all of the reasons previously advanced to the Court in and in support of the Underlying Motion, both those advanced in writing and those advanced via oral argument, all of which the Facility incorporates by reference herein and asks the Court to (re)consider and expressly rule upon in full—the Facility asks that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Underlying Motion.

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

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines

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Attorneys for Defendant
Oakbrook Healthcare, LLC d/b/a
Oakbrook Health and Rehabilitation Center

Charleston, South Carolina

April 14, 2025

Hines, Russell

From: Murphy, Maite Law Clerk (Ashley Errett) <mmurphylc@sccourts.org>
Sent: Friday, May 23, 2025 9:11 AM
To: Shanna Jarrell; Murphy, Maite Secretary (Robin Dukes)
Cc: Lee Cope; Jay Parker; Hines, Russell; Davis, Jay; Gandy, III, James D. (Tripp); Bell, Pollyana (Polly)
Subject: RE: Rickenbaker v. Oakbrook Healthcare (Case No. 2023-CP-18-02145) -- Motion to Reconsider

Good morning,

Upon review of the relevant law and the arguments presented by both parties, Judge Murphy has decided to DENY Defendant's Motion to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration.

Thank you,
Ashley

Ashley F. Errett
Law Clerk for the Honorable Maité Murphy
Circuit Court Judge At-Large, Seat 15
5200 East Jim Bilton Boulevard
St. George, South Carolina 29477

From: Shanna Jarrell <sjarrell@parkerlawgroupsc.com>
Sent: Thursday, May 15, 2025 3:12 PM
To: Murphy, Maite Law Clerk (Ashley Errett) <mmurphylc@sccourts.org>; Murphy, Maite Secretary (Robin Dukes) <mmurphysc@sccourts.org>
Cc: Lee Cope <LCope@parkerlawgroupsc.com>; Jay Parker <jayparker@parkerlawgroupsc.com>; Hines, Russell <rhines@ycrlaw.com>; D. Jay Davis Jr. <jdavis@ycrlaw.com>; Gandy, III, James D. (Tripp) <tgandy@ycrlaw.com>; pbell@ycrlaw.com
Subject: RE: Rickenbaker v. Oakbrook Healthcare (Case No. 2023-CP-18-02145) -- Motion to Reconsider

Good Afternoon,

Attached please find a filed copy of Plaintiff's Memorandum in Opposition of Defendants' Motion to Reconsider regarding the above referenced case.

Thank you,
Shanna Jarrell

Shanna Jarrell
Office of Lee D. Cope

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101 Mulberry St. E., P.O. Box 487, Hampton, SC 29924

From: Hines, Russell <RHines@ycrlaw.com>
Sent: Thursday, April 24, 2025 12:52 PM
To: mmurphysc@sccourts.org; mmurphylc@sccourts.org
Cc: Lee Cope <LCope@parkerlawgroupsc.com>; Jay Parker <jayparker@parkerlawgroupsc.com>; Neil E. Alger <nalger@parkerlawgroupsc.com>; Davis, Jay <jdavis@ycrlaw.com>; Gandy, III, James D. (Tripp) <tgandy@ycrlaw.com>; Bell, Pollyana (Polly) <pbell@ycrlaw.com>
Subject: Rickenbaker v. Oakbrook Healthcare (Case No. 2023-CP-18-02145) -- Motion to Reconsider

Dear Judge Murphy,

In accordance with Rule 59(g), SCRCP (which provides that "[a] party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion"), attached please find Defendant's **Motion to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration**, which was filed in the above-referenced matter on April 14, 2025.

As always, thank you very much for your attention to this matter.

Russell G. Hines
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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

Maité Murphy, Circuit Court Judge

Case No. 2023-CP-18-02145

Steve Rickenbaker,

Respondent,

v.

Oakbrook Healthcare, LLC
d/b/a Oakbrook Health and Rehabilitation Center,

Appellant.

NOTICE OF APPEAL

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis Jr. (SC Bar No. 12084)
James D. Gandy, III (SC Bar No. 11925)
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Attorneys for Appellant

Other Counsel of Record:

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-and-

Neil E. Alger (SC Bar No. 100530)
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P.O. Box 2530
Ridgeland, South Carolina 29936
(803) 943-2111

Attorneys for Respondent

Defendant/Appellant, Oakbrook Healthcare, LLC d/b/a Oakbrook Health and Rehabilitation Center ("Appellant"), hereby appeals the following order of the Honorable Maité Murphy, Circuit Court Judge:

- **Order filed April 3, 2025, denying Appellant's Motion to Compel Arbitration**.

A copy of the appealed order is attached hereto and incorporated herein by reference. Although Appellant received written notice of entry of the appealed order on April 3, 2025, this appeal is timely under Rule 203(b)(1), SCACR, because, on Monday, April 14, 2025, Appellant made a timely motion under Rule 59(e), SCRCP, thus staying the time for appeal until Appellant's receipt of written notice of entry of an order granting or denying the motion. Although, via an email from her judicial law clerk earlier today (see attached), Judge Murphy has announced her decision to deny the motion, as of the time of this notice of an appeal, a written order to this effect has not yet been entered. Once such an order is entered, Appellant will amend this notice of appeal to include the order—although, out of an abundance of caution, to the extent that Judge Murphy's email ruling is appealable, Appellant hereby includes its appeal of the same in this notice of appeal.

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines

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Attorneys for Appellant

Charleston, South Carolina

May 23, 2025

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

Maité Murphy, Circuit Court Judge

Case No. 2023-CP-18-02145

Steve Rickenbaker,

Respondent,

v.

Oakbrook Healthcare, LLC
d/b/a Oakbrook Health and Rehabilitation Center,

Appellant.

PROOF OF SERVICE

CLEMENT RIVERS, LLP
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Attorneys for Appellant

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellant, hereby certify that, on May 23, 2025, Appellant's **NOTICE OF APPEAL** was served on Respondent by emailing (see attached email) a copy of the same to his counsel of record:

Lee D. Cope, Esquire
lcope@parkerlawgroupsc.com
John E. Parker, Jr., Esquire
jayparker@parkerlawgroupsc.com
Neil E. Alger, Esquire
nalger@parkerlawgroupsc.com
PARKER LAW GROUP, LLP

Attorneys for Respondent

I also certify that a copy of Appellant's **NOTICE OF APPEAL** was today, May 23, 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 all 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 Appellant

Charleston, South Carolina

May 23, 2025

Hines, Russell

From: Hines, Russell
Sent: Friday, May 23, 2025 3:25 PM
To: lcope@parkerlawgroupsc.com; jayparker@parkerlawgroupsc.com; nalger@parkerlawgroupsc.com
Cc: Shanna Jarrell; Brown, Stephen L.; Davis, Jay; Gandy, III, James D. (Tripp); Justman, Aimee; Bell, Pollyana (Polly); Peterson, Susan; Bohannon, Kiara; Eversole, Amy R.
Subject: Rickenbaker v. Oakbrook (2023-CP-18-02145) -- Notice of Appeal
Attachments: Rickenbaker v. Oakbrook (2023-CP-18-02145) -- Notice of Appeal.pdf; 2025 04-03 -- Order Denying MTCA.pdf; 2025 04-14 -- Appellant's Motion to Alter, Amend, and-or Reconsider.pdf; 2025 05-23 -- Email Denying MTR.pdf

Attached for service in the above-referenced matter please find our **Notice of Appeal** and the **attachments thereto**.

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

A filing has been submitted to the court RE: 2023CP1802145

Official File Stamp:	05-23-2025 03:20:01 PM
Court:	CIRCUIT COURT Common Pleas Dorchester
Case Caption:	Steve Rickenbaker VS Oakbrook Healthcare Llc , defendant, et al
Document(s) Submitted:	Appeal/Notice of Appeal to Court of Appeals - Exhibit/Filing of Exhibits - 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:

John Elliott Parker, Jr. for Steve Rickenbaker
Russell Grainger Hines for Oakbrook Healthcare Llc et al
James D. Gandy, III for Oakbrook Healthcare Llc et al
Lee Deer Cope for Steve Rickenbaker
Donald Jay Davis, Jr. for Oakbrook Healthcare Llc et al

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

CERTIFICATE OF COUNSEL

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

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines

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Attorneys for Appellant

Charleston, South Carolina

March 6, 2026