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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Vernon F. Dunbar, Circuit Court Judge

Appellate Case No.: 2025-001290

Marvin Barborek,……...Respondent,

v.

Cascades Nursing, LLC and Cascades Retirement, LLC,……Appellants.

RECORD ON APPEAL

Joe A. Mooneyham (SC Bar #4041) Mitch Appleby (SC Bar #103600 Mooneyham Berry, LLC PO Box 8359 Greenville, SC 29604 (864) 421-0036 joe@mbllc.com mitch@mbllc.com Attorneys for Respondent	R. Hawthorne Barrett (SC Bar #16973) R. Gerald Chambers, Jr. (SC Bar #12065) Turner Padget Graham & Laney P.A. P.O. Box 1473 Columbia, SC 29202 (803) 254-2200 TBarrett@TurnerPadget.com GChambers@TurnerPadget.com Attorneys for Appellants

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2025CP2300434

Marvin Barborek
PLAINTIFF(S)

Cascades Nursing 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 order arises as a result of a hearing before the undersigned held on May 20, 2025 to decide Defendant's Motion to Dismiss and Compel Arbitration. Both parties appeared represented by counsel. Based on a review of the evidence, briefs submitted by parties, and oral arguments, this Court makes the following findings of fact and conclusions of law.

1) Defendant seeks to establish that there exists a contractual waiver of a jury trial in favor of arbitration. Thus, Defendant has the burden of proof to establish that the waive was signed knowingly, voluntarily, and intentionally. A jury trial right is fundamental and cannot be waived absent clear evidence.

2) This Court is mindful that arbitration agreements enjoy a strong presumption of validity in federal and state courts. See Simpson v. MSA of Myrtle Beach, Inc, 373 SC 19, 24, 644 S.E. 2d 663, 558 (2007).

[Continued on Page 2]

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 05/30/2025 .

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.

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3) Sufficient genuine issues giving rise to the waiver of a jury trial and the applicability of the arbitration agreement cannot be adjudicated by this Court at this particular point in the proceedings absent sufficient discovery.

Therefore, Defendant's motion to Dismiss is hereby DENIED. Plaintiff has pled facts sufficient to constitute a cause of action.

Greenville Common Pleas

Case Caption: Marvin Barborek vs. Cascades Nursing Llc , defendant, et al

Case Number: 2025CP2300434

Type: Order/Electronic Form 4

So Ordered

Vernon F. Dunbar

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	
Marvin Barborek,	)	C.A. No.: 2025-CP-23-
	)	
Plaintiff,	)	
	)	
vs.	)	**SUMMONS**
	)	**(Jury Trial Demanded)**
Cascades Nursing, LLC, and Cascades Retirement, LLC,	)	
	)	
Defendants.	)	
	)	

TO: THE DEFENDANTS ABOVE-NAMED

YOU ARE HEREBY SUMMONED and required to answer the complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your answer to the said complaint on the subscribers to their office, 1225 South Church Street, Greenville, South Carolina, 29605 within thirty (30) days after service thereof exclusive of the day of such service, and if you fail to answer the complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the complaint.

Mooneyham Berry, LLC

s/Mitch Appleby
Joe Mooneyham, SC Bar No. 4041
Mitch Appleby, SC Bar No. 103600
P.O. Box 8359
Greenville, SC 29604
P: 864.421.0036 | F: 864.421.9060
joe@mbllc.com
mitch@mbllc.com

Attorneys for the plaintiff

January 24, 2025

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	
Marvin Barborek,	)	C.A. No.: 2025-CP-23-
	)	
Plaintiff,	)	
	)	
vs.	)	**COMPLAINT**
	)	**(Jury Trial Demanded)**
Cascades Nursing, LLC, and Cascades Retirement, LLC,	)	
	)	
	)	
Defendants.	)	
	)	

The plaintiff complaining of the above-named defendants would respectfully show unto the Court as follows:

Parties and Jurisdiction

1. The plaintiff is domiciled in Marion County, Florida.

2. Defendant Cascades Nursing, LLC ("Cascades Nursing"), is a corporation organized and existing under the laws of the State of South Carolina and conducting business in Greenville County, South Carolina. Upon information and belief, Cascades Nursing is a skilled nursing facility located at 10 Fountainview Terrace, Greenville, South Carolina 29607.

3. Defendant Cascades Retirement, LLC ("Cascades Retirement"), is a corporation organized and existing under the laws of the State of South Carolina and conducting business in Greenville County, South Carolina. Upon information and belief, Cascades Retirement is an administrative company located at 10 Fountainview Terrace, Greenville, South Carolina 29607.

4. At all relevant times, the plaintiff was a patient of Cascades Nursing and/or Cascades Retirement.

5. The plaintiff alleges, upon information and belief, that the healthcare complained of herein was provided by agents, servants, or employees of the defendants, while in the course and scope of their employment.

6. The corporate defendants named herein are therefore vicariously responsible for the acts of their employees, agents, servants, and/or surrogates, as identified in the factual allegations below.

7. The events giving rise to the plaintiff's causes of action occurred in Greenville County, and as the defendants operate and/or do business in Greenville County, this Court has jurisdiction of them, and of the subject matter of this action, and venue is proper in Greenville County pursuant to South Carolina Code Ann. § 15-7-30.

8. Because this matter is a complaint for medical malpractice, in part, the plaintiff was required to file a Notice of Intent to File Suit, which he did, with civil action number 2024-NI-23-00055. He accompanied that filing with the requisite expert affidavit identifying one or more negligent and grossly negligent acts or omissions in the care provided by Cascades Nursing and/or Cascades Retirement, as required by S.C. Code Ann. § 15-36-100. That affidavit is likewise filed herewith as an exhibit.

9. In addition, as required by S.C. Code Ann. § 15-79-125, the plaintiff, through counsel, participated in pre-suit mediation of the Notice of Intent to File Suit on December 23, 2024. That mediation resulted in an impasse.

10. Having met the statutory requirements, the plaintiff is now permitted to file this action, and this Court has jurisdiction of the subject matter and of the parties.

Joint and Several Liability

11. The above-named defendants are jointly and severally liable for all damages alleged herein because their negligent, negligent per se, careless, grossly negligent, and reckless acts and omissions singularly or in combination, were the proximate cause of the plaintiff's damages and losses.

Facts

12. In February of 2024, the plaintiff came to the defendants' facility to visit friends.

13. On February 29, 2024, the plaintiff fell on his right side while getting off the toilet at the defendants' facility.

14. The plaintiff was taken to Prisma Health Greenville Memorial Hospital where he was diagnosed with a fractured right femoral neck.

15. On March 2, 2024, the plaintiff had a right hip hemiarthroplasty.

16. Following his surgery, the plaintiff worked with physical therapy who recommended he have a post-acute stay.

17. On March 6, 2024, the plaintiff was transferred back to the defendants' facility for skilled nursing care.

18. In the morning of March 16, 2024, the defendants' staff found the plaintiff on the floor after he suffered a fall.

19. The plaintiff was taken back to Prisma Health Greenville Memorial Hospital where he was diagnosed with periprosthetic femur fracture.

20. Following surgical repair, the plaintiff was discharged on March 22, 2024, to Rolling Green Village for post-acute care.

21. The plaintiff alleges that, at the time and place in question, he, as a patient of Cascades Nursing and/or Cascades Retirement was entitled to health, physician, and nursing care

that was reasonable given his symptoms and the circumstances, and that the failure to provide reasonable care would constitute negligence and gross negligence.

22. The defendants were negligent, careless, reckless, grossly negligent, willful, and wanton in the following particulars:

a. In failing to conduct an appropriate fall assessment;

b. In failing to implement appropriate fall precautions; and

c. In further particulars to be made more definite as discovery progresses and may be shown at the trial of this case.

23. The plaintiff alleges that, at the time and place in question, Cascades Retirement, as the administrative company for Cascades Nursing, owed a duty of reasonable care to the plaintiff.

24. At the time and place described above, Cascades Retirement, acting through its agents, servants, and/or employees breached its duty of care owed to the plaintiff and were thereby negligent and grossly negligent. Specifically, Cascades Retirement's conduct was careless, negligent, grossly negligent, willful, wanton, and reckless in the following particulars:

a. In failing to hire healthcare providers who could provide reasonable care to the plaintiff;

b. In failing to properly train the healthcare providers;

c. In failing to properly monitor the healthcare providers;

d. In failing to properly supervise the healthcare providers; and

e. In further particulars to be made more definite as discovery progresses and may be shown at the trial of this case.

25. As a direct and proximate result of the defendants' aforementioned negligence, carelessness, recklessness, willfulness, gross negligence, and wantonness, the plaintiff suffered the following injuries and damages:

a. Severe pain, mental anguish, and discomfort;

b. Emotional trauma;

c. Permanent impairment of physical function and disability;

d. Permanent scarring and disfigurement;

e. Money spent for medical care and treatment; and

f. Loss of enjoyment of life.

26. The plaintiff is therefore informed and believes he is entitled to judgment against the defendants for actual, consequential, and punitive damages.

WHEREFORE, the plaintiff prays judgment against the defendants for actual, consequential, and punitive damages, for the costs of this action, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

Mooneyham Berry, LLC

s/Mitch Appleby
Joe Mooneyham, SC Bar No. 4041
Mitch Appleby, SC Bar No. 103600
P.O. Box 8359
Greenville, SC 29604
P: 864.421.0036 | F: 864.421.9060
joe@mbllc.com
mitch@mbllc.com

Attorneys for the plaintiff

January 24, 2025

AFFIDAVIT of BARBARA DARLINGTON, RN, BSN, MS, LNHA

PERSONALLY, APPEARED BEFORE ME, THE UNDERSIGNED, WHO BEING DULY SWORN, STATES AS FOLLOWS UNDER OATH:

1. I am a registered nurse. My education, training, and experience are set forth in the attached CV (Exhibit A). It is my belief that my education, training, and experience qualify me to render expert opinions regarding the care rendered to Marvin Barborek in this case.

2. My practice is primarily in New Jersey where I consult with nursing homes and own and operate a medical adult daycare center. I have been in practice since 1965 as a registered nurse and 1985 as a licensed nurse administrator in New Jersey. I am also a licensed registered nurse in North Carolina since 2019. I practiced as a nurse practitioner 2000-2020. I also teach courses online for individuals desirous of becoming licensed nursing home administrators and assisted living administrators. I am also certified as an infection control preventionist.

3. I am familiar with the standard of care of what a reasonably prudent healthcare provider would do or not do in providing care to patients, including the type of care rendered to Mr. Barborek. I am familiar with the breaches of the standard of care that can occur, and result in harm, to a patient like the situation involving Mr. Barborek.

4. Mr. Barborek fell on his right side on February 29, 2024. He was sent to Prisma Health Greenville Memorial Hospital and was diagnosed with a right femoral neck fracture. He underwent right hip hemiarthroplasty before being discharged to Cascades Verdae for postacute skilled nursing care. While still at Cascades Verdae, Mr. Barborek fell again on his right side on March 16, 2024, and was taken back to Prisma Health Greenville Memorial Hospital where he was diagnosed with a periprosthetic fracture of the shaft of his right femur. Mr. Barborek underwent, among other things, surgical fixation of his right periprosthetic femur fracture with plate fixation of his right femur. He was discharged to another rehab facility on March 22, 2024.

5. I reviewed Mr. Barborek's medical records, including records from Cascades Verdae and Prisma Health Greenville Memorial Hospital. The records I reviewed are the type of documents I would consider in rendering an expert opinion in this case.

6. It is my professional opinion that the defendant(s), by and through their employed healthcare providers and/or healthcare provider agents, committed negligent, grossly negligent, or reckless acts or omissions in their care and treatment of Mr. Barborek. Without intending to limit the scope of my opinions, some of the specific breaches of the standard of care I identified by the defendants and/or their employees and/or agents are as follows:

- In failing to conduct an appropriate fall assessment;
- In failing to implement appropriate fall precautions; and
- In further particulars to be made more definite as discovery progresses and may be shown at the trial of this case.

7. Further, it is my opinion to a reasonable degree of medical certainty that the actions or inactions listed above contributed to Mr. Barborek's injuries, pain, suffering, and damages.

8. The factual basis for my opinion about the breaches of the standard of care by the defendants at this time are Mr. Barborek's medical records. The factual basis of my opinions may be supplemented later, should additional medical records be provided to me.

9. This affidavit is given in compliance with S.C. Code Ann. §§ 15-36-100, 15-79-125, which does not require me to state all negligent acts or omissions by any defendant.

BARBARA DARLINGTON, RN, BSN, MS, LNHA

Sworn to me the 1st day of ~~September~~ October 2024

Notary public for the state of North Carolina

My commission expires: 1/18/26

ROBERT R HARRIS NOTARY PUBLIC DARE COUNTY, NC My Commission Expires 1-18-2026

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	CASE NO.: 2025-CP-23-00434
	)	
Marvin Barborek,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**DEFENDANTS' MOTION TO DISMISS AND COMPEL ARBITRATION**
	)	
Cascades Nursing, LLC and Cascades Retirement, LLC,	)	
	)	
Defendants.	)	
	)	

TO: JOE MOONEYHAM, ESQUIRE AND MITCH APPLEBY, ESQUIRE, ATTORNEYS FOR PLAINTIFF:

The Defendants, Cascades Nursing, LLC and Cascades Retirement, LLC ("Defendants"), respectfully move this honorable Court for an Order compelling arbitration, staying all activities and discovery, and requiring that all claims or causes of action between Plaintiff and Defendants be submitted to binding arbitration in accordance with the terms of the Admission Agreements and Arbitration Agreement mutually entered into between the parties on or around March 6, 2024 (attached hereto as **Exhibit A**).

As grounds for this Motion, Defendants assert the following:

1. Plaintiff initiated the present action by filing his Summons and Complaint in the Court of Common Pleas for Greenville County on or about January 24, 2025.

2. The action filed by Plaintiff arises out of Marvin Barborek's (Resident) visiting and residency at Cascades Nursing, LLC (Facility) (Plaintiff's Complaint). Plaintiff asserts that on February 29, 2024 while he was visiting friends at the facility, he fell on his right side while getting off the toilet (*Id* at ¶ 12-13). On March 2, 2024 Plaintiff then asserts he had a right hip

hemiarthroplasty at Prisma Health Greenville Memorial Hospital (*Id* at ¶ 15). On March 6, 2024, Plaintiff was transferred to Defendants' facility for skilled nursing care (*Id* at ¶ 17). Plaintiff asserts he suffered a fall on March 16, 2024 in the facility (*Id* at ¶ 18). He was then discharged on March 22, 2024 (*Id* at ¶ 20).

3. On March 6, 2024, in congruence to the Resident's admission, Plaintiff signed an Admission Agreement that contained an Arbitration Agreement. By signing it, Plaintiff agreed that any claim or dispute between the parties or against any employee, agent, successor, or assign arising out the Admission Agreement—including the validity of the Arbitration Clause itself—must be resolved by binding arbitration.

4. "The policy of the United States and South Carolina is to favor arbitration of disputes." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). The Federal Arbitration Act requires courts to resolve "any doubts concerning the scope of arbitrable issues ... 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." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 387, 759 S.E.2d 727, 736 (2014).

5. Here, the parties to the Admission Agreement and Arbitration Agreement agreed and stipulated that all disputes arising from the Agreement would be resolved by binding arbitration. As such, the matters brought forth by Plaintiff are governed by the Arbitration Agreement and should be resolved accordingly, not through this litigation.

For these reasons, Defendants move to dismiss Plaintiff's Complaint and compel arbitration in accordance with the Arbitration Agreement contained within the Admission Agreement. This Motion is based upon the pleadings, relevant statutes and authorities, oral

argument of counsel, any memorandum in support of this Motion that may be hereafter submitted, and/or any other material the Court may require or receive.

TURNER PADGET GRAHAM & LANEY P.A.

By: s/R. Gerald Chambers, Jr.

R. Gerald Chambers, Jr. (SC Bar #12065)
Email: GChambers@turnpadget.com
P. O. Box 1473
Columbia, SC 29202
Telephone: (803) 227-4201
Fax: (803) 400-1511

ATTORNEYS FOR DEFENDANTS CASCADES NURSING, LLC AND CASCADES RETIREMENT, LLC

Dear Resident/Resident Representative,

We thank you for trusting in us as your choice of residence and care. Our dedicated team will treat you or your loved ones in a healing atmosphere of dignity and respect. Our Admissions Department strives to make the agreement and admission process as clear and concise as possible, however we understand this process may be new to you.

In addition to in-person assistance, remember that we are also available via phone and video conference to walk you through the entire process at your convenience. Please do not hesitate to contact us at any time to arrange a date and time that is convenient for you.

Below are several key inputs that are referenced throughout your agreement with us:

Community Name: Cascades Verdae

Community Address: 10 Fountainview Terrace, Greenville, SC 29607

Main Number: 864-528-5501

Agreement Date: 03/06/2024

Admission Date: 03/06/2024

Resident Name: Marvin Barborek

Resident Representative: Marvin Barborek **Relationship:** Self

Physician: Dr. Win

Private Pay Daily Rate: $495.00

Care Services Suite Type: ___ Semi-Private _X_ Private Suite ___ Private Deluxe

Care Services Suite: # 302

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SKILLED CARE
RESIDENCY AGREEMENT

ATTACHMENTS

SKILLED CARE RESIDENCY AGREEMENT

INTRODUCTION

THIS RESIDENT AGREEMENT (the "Agreement"), is made this 03/06/2024 , by and between Cascades Verdae , with its principal place of business at 10 Fountainview Terrace, Greenville, SC 29607 , as Community, and Marvin Barborek , as Resident.

TERM OF THIS AGREEMENT

The term of this Agreement shall begin on the date of admission of Resident to Community (the "Admission Date"). Resident's Admission Date to Community is 03/06/2024 . Community may refuse to admit or retain as a resident any person who (a) poses a threat to his or her own health or safety, or the health and safety of others at Community, including staff, (b) who requires greater care than Community is safely able to provide or is licensed to provide, or (c) if Community is unable to meet Resident's needs. (d) or for any other reason determined by Community.

The private pay daily rate at the time of admission is $495.00 . For the daily rate, the Resident day is midnight to midnight; the Healthcare Center shall apply the daily charge for the day of admission, but not the day of discharge.

THE PRIVATE PAY DAILY RATE MAY BE REVISED BASED ON THE EXPERIENCE OF THE COMMUNITY AND ESTIMATES OF ITS FUTURE COSTS, AS DETERMINED BY Community, IN ITS SOLE DISCRETION. Factors to be considered in reviewing Monthly Service Fees include, but are not limited to, the consumer price index, government regulations, and reserve fund maintenance and occupancy levels. Community will make adjustments not more often than once a year and will provide you with thirty - (30) day's prior written notice of any such adjustments.

Payment is due the first day of each month. If the Monthly Service Fee is not received by the 5th day of the month for which such services will be provided, a late payment fee of $50 will apply. Past due amounts will bear interest at the rate of 1.5 % per month until paid in full. If you fail to pay any amounts overdue under this Agreement, you agree to pay any costs of collection incurred by Community, including but not limited to reasonable attorney's fees, expenses, costs, and disbursements.

RESIDENT FINANCIAL AGREEMENT

STATEMENT OF FEES. I do hereby acknowledge that my daily service charge *addressed in the Resident agreement is:

$495.00 per day:

___ **Semi-Private Suite**

_X_ **Private Suite**

___ **Private Deluxe Suite**

*The daily service charge may be increased, within the sole discretion of the Company, no more often than semi-annually, after providing the Resident with at least thirty (30) days of written notice before the increase becomes effective.

REFUND POLICY. Resident or Responsible Party is entitled to a prorated refund of the Daily Rate after all charges, including the cost of documented damages to the room caused by Resident and resulting from circumstances other than normal use, have been paid to Community, for any unused portion of payment beyond the latter of the termination date or the date the room is vacated, and cleared of all of Resident's personal possessions. All documented damages shall be identified, and a list given to Resident or Responsible Party. The refund shall occur within sixty (60) days of receipt of a written notice of termination after the suite is vacated and residents' personal belongings are removed.

i. Except in the case of death or discharge due to medical reasons, including mental health, the refund shall be computed in accordance with the Termination of Agreement, Discharge and Transfer requirements specified in this Agreement.

ii. In case of death or discharge due to medical reasons, including mental health, the notice of termination requirement in this Agreement is waived, and all refunds shall be computed in accordance with the Termination of Agreement, Discharge and Transfer requirements specified in this Agreement. Notwithstanding the foregoing provisions, refunds may be withheld until all outstanding bills have been paid.

PHYSICIAN FEES AND MEDICATIONS. Resident and Responsible Party shall pay for the services of any physician that are billed by the physician directly to Resident or Responsible Party and for medications ordered by the physician and billed by the dispensing pharmacist when not eligible for payment by Medicare Part A.

OUR RESPONSIBILITES TO YOU AS A RESIDENT

HEALTHCARE SUITE. Resident has the right to occupy and use the care services suite known as # 302 ,

which includes a bed, armoire, chair, bedside table, and a private bathroom offered by us subject to certain qualifications as hereinafter provided. No more than one (1) person will occupy the Healthcare Suite unless authorized by the Administrator. Community reserves the right to determine Resident's room assignments, and to move Resident from one room to another within, subject to applicable laws and regulations, as may be necessary. Community will give thirty (30) days' notice of a room change. Thirty days written notice may be waived if both Community, and Resident agree in writing. Community shall endeavor to honor reasonable room requests of Resident when practicable.

HOUSEKEEPING. Community will provide routine Housekeeping services in your Healthcare Suite. These include general dusting of horizontal surfaces, cleaning of floors, mirror cleaning, and bathroom cleaning and small trash removal.

TELEPHONE. The Resident Healthcare Suite is provided a telephone with a direct dial phone number.

CABLE T.V. Residents Healthcare Suites are equipped with cable/satellite (standard package) television.

MAINTENANCE AND REPAIR. Subject to damages clause as previously mentioned, Community will be responsible for all necessary repairs, maintenance and replacement of property and equipment owned by Community.

TRANSPORTATION. Community will schedule and provide regular transportation, at no extra charge to Residents, to certain event, shopping, and medical destinations. Individualized transportation for appointments may be provided on a fee for service basis.

INSURANCE. Community will carry casualty and liability insurance on Community.

YOUR RESPONSIBILITIES AS A RESIDENT

DESIGNATED PHYSICIAN. Resident shall be under the care of a physician at the time of admission and shall remain under the care of a physician for the duration of Resident's stay at Community. In the event the Resident does not have a physician, Resident may elect to be under the care of Community Medical Director and will be responsible for payment to the Medical Director for services rendered as the Resident's Primary Care physician.

RECORDS. All records supplied by residents will be held in strict confidence. Resident may approve or refuse the release of information or records to any individual outside the Community, except and otherwise provided for in law and in the case of transfer to another health facility. Should an emergency arise, Resident and his/her Responsible Party authorize Community to make the appropriate records available.

POLICIES, RULES, AND REGULATIONS. Resident agrees to abide by the policies, rules and regulations of Community including such changes as may be adopted at a later time.

RESPONSIBILITY FOR DAMAGES. Residents will be responsible for any costs incurred in replacing, maintaining, or repairing any loss or damage to the real or personal property of Community caused by negligence or willful misconduct of the resident, guests, agents, and/or employees.

PERSONAL LAUNDRY. Community will provide you with sheets and towels, which will be laundered on a routine basis to ensure that bed linens are clean and dry. Personal clothing laundering is also available.

PROTECTION OF PERSONAL PROPERTY. Community is not responsible for the loss of any personal property belonging to residents due to theft, fire, or any other cause, unless said property is specifically entrusted in writing to the care and control of Community and then only for Community gross negligence in failing to safeguard and account for such property. Resident and Responsible Party shall clearly mark all personal items of resident with Resident's name.

ARBITRATION. See full "**ARIBITRATION AGREEMENT**" attached separately.

NON-TRANSFERABLE. Resident's rights and privileges under this Agreement with respect to the Healthcare Center, facilities, services, and medical care are personal to residents and cannot be transferred or assigned by resident, or by any proceeding at law, or otherwise. If any person, other than the person(s) who signs this Agreement establishes residency in resident's suite without following the proper procedures established by Community, Community shall have the right to terminate this Agreement.

TERMINATION OF AGREEMENT, DISCHARGE AND TRANSFER BY RESIDENT

AFTER ADMISSION DATE. Resident may terminate this Agreement after the Admission Date by giving Community at least thirty (30) day's written notice to that effect. In such event, this Agreement will terminate at the end of such notice period, and resident will vacate the Healthcare Suite no later than such termination date. After the Admission Date, this Agreement shall terminate at your demise. All other charges will be prorated to the date of termination and any excess payments will be refunded.

TERMINATION OF AGREEMENT, DISCHARGE AND TRANSFER BY COMMUNITY

PRIOR TO ADMISSION. Community may terminate this Agreement before the Admission Date for any of the following reasons: (i) Resident does not meet the conditions of admission under this Agreement; or (ii) Resident breach or default of any of the terms of this Agreement: (iii) Community decides at its sole discretion to terminate this agreement.

AFTER ADMISSION DATE. Community may terminate this Agreement and transfer, discharge or refuse to readmit Resident in accordance with applicable South Carolina Department of Environmental Control regulations regarding termination, transfer, discharge, and notice requirements. Grounds for termination include, without limitation, the following: (i) Community determines a resident is inappropriately placed or Community cannot properly provide for a Resident who poses a risk to the health and safety of other residents or employees of Community, (ii) for non-payment of fees, charges or costs, or (iii) Residents at Community would cause a violation of any rules and/or regulations imposed by an agency or authority or other entity having jurisdiction over Community.

TEMPORARY TRANSFER. If Community, in its sole discretion, determines that a condition exists which requires residents to transfer to a hospital, nursing home or other related Community and has the potential to be resolved In a manner that may allow residents to return to your suite, the suite will be held for residents return. Resident and his/her Responsible Party agree to pay any costs associated with this holding of the suite.

INVOLUNTARY TRANSFER OR DISCHARGE. Community will give a minimum of thirty (30) days written notice to resident in the case of an involuntary discharge or transfer, except when (i) an emergency transfer is mandated by Resident's health care needs and is in accordance with a written order and medical justification of the attending physician or Community Medical Director when attending physician is unavailable; or (ii) when the transfer or discharge is necessary for the physical safety of other residents as documented in the clinical chart.

Community has the right to remove and store all property from the Residence which has been released for occupancy, or on which the Agreement has been terminated. The resident or the resident's estate shall be liable for the costs of such storage and/or moving. Storage for such property shall be for a period of no more than 10 days from the time the suite is vacated, after such time the property will be deemed to be abandoned and Community shall have the right to dispose of it as they see fit.

COMPLAINT AND GRIEVANCE PROCEDURES

RESIDENTS RIGHTS. A copy of the resident's rights is attached and incorporated by reference in this agreement.) Community will honor and respect your rights.

GRIEVANCES AND COMPLAINTS. Any grievances/complaints shall be shared immediately with the Administrator of Community. You have the right to make suggestions, register complaints or present grievances about your care or service you or another resident receives here. See the attached Policy and Procedure on Resident Grievance/Complaint

MISCELLANEOUS

COMPLIANCE WITH LAW. The parties to this Agreement agree to comply with the applicable laws of South Carolina and the United States of America that are presently in effect and that may be enacted during the term of this Agreement. Resident and Responsible Party, if any, further agree to execute, when requested by Community, any and all amendments or modifications to this Agreement if required by law.

NON-DISCRIMINATION. Community promotes equal housing opportunities and shall not discriminate against applicants or residents based on race, color, religion, sex, handicap, familial status, or national origin.

ACKNOWLEDGEMENT OF CERTAIN DELIVERIES

Resident and Responsible Party acknowledge that they have read and understand this Agreement, and that Community has answered any questions relative to this Agreement. Each party acknowledges receipt of a duplicate original of the Agreement.

INTERPRETATION

This Agreement shall inure to the benefit of, and be binding upon, the heirs, successors, permitted assigns, and legal and personal representatives of the parties. Resident and Responsible Party shall not assign any of their rights or delegate any of their obligations under this Agreement without Community's prior, written consent.

IN WITNESS WHEREOF, Community has caused this Agreement to be executed through its duly authorized representative, and Resident and Responsible Party have executed this Agreement, as of the day and year first written above.

X _____
Resident or Resident Representative

3-6-24
Date

_____
Community Administrator or Designee

3/6/24
Date

ARBITRATION AGREEMENT

PLEASE READ THIS ARBITRATION AGREEMENT CAREFULLY. IT WAIVES CERTAIN RIGHTS THAT YOU MAY HAVE, INCLUDING YOUR RIGHT TO HAVE A JURY TRIAL ON ANY CLAIMS THAT YOU MAY HAVE AGAINST THE COMMUNITY OR ITS AFFILIATES.

(a) Any and all controversies, claims, disputes, disagreements or demands of any kind that Resident may have against Community, its employees or agents, or Community's affiliates (including, but not limited to, Maxwell Group, Inc. or Senior Living Communities) or their employees or agents that cannot be resolved informally by the grievance procedure set forth in this Residency Agreement and that arise out of or relate in any way to (a) this Residency Agreement, (b) any service, care or treatment provided to you, as Resident, in the Community, or (c) Resident's stay in the Community shall be settled exclusively by binding arbitration conducted in accordance with the Consumer Rules of the American Health Law Association, which provide for selection of a neutral arbitrator and allow for the convenient location of any arbitration hearing.

(b) Any disputes concerning the scope, validity or enforceability of this Arbitration Agreement shall be decided by an arbitrator, not a court. Any award of the arbitrator may be entered as a judgment in any court having jurisdiction.

(c) Resident and Community acknowledge and agree that the relationship between Resident and Community involves interstate commerce; therefore, the Federal Arbitration Act is applicable to this Arbitration Agreement.

(d) This Arbitration Agreement is an integral and essential part of the Residency Agreement between Resident and Community.

(e) You, the Resident (or Resident's representative), are not required to sign this Arbitration Agreement as a condition of Resident's admission to, or as a requirement for Resident to continue to receive care at, this facility.

(f) By signing below, you, the Resident (or Resident's representative) acknowledge that this Agreement has been explained to you in a form and manner that you understand, and that you understand this Agreement. You have the right to rescind this Agreement within thirty (30) days after you sign it.

(g) Nothing in this Agreement is intended to prohibit or discourage you or anyone else from communicating with federal, state or local officials, including federal or state surveyors, other federal or state health department employees, or representatives of the State Long-Term Care Ombudsman concerning the facility or your care at the facility.

ARBITRATION AGREEMENT

Please select one of the following:

Yes, I agree to the terms of this Arbitration Agreement.

No, I do not agree to the arbitration of disputes.

This Arbitration Agreement is being competed by:

Resident

Resident Representative

The following provision is to be signed only if the Residency Agreement is being executed on Resident's behalf by another person.

I hereby acknowledge that I have the power and authority, as Resident's agent and representative, to sign this Residency Agreement (including this arbitration agreement) on behalf of Resident. My power and authority to act on Resident's behalf arises from (check all that apply):

I have an applicable court order or procedure (for example, a conservatorship): ___Yes ✓No

I have Durable Power of Attorney for Resident: ___Yes ✓No

Attach Court Order document using the link here:

I have Express Authority granted to me by Resident: ___Yes ✓No

Name: Marvin Barborek

X _____
Resident or Resident Representative

X 3-6-24
Date

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	CASE NO.: 2025-CP-23-00434
	)	
Marvin Barborek,	)	
	)	
Plaintiff,	)	**DEFENDANTS CASCADES NURSING, LLC AND CASCADES RETIREMENT, LLC'S ANSWER TO PLAINTIFF'S COMPLAINT**
	)	
v.	)	
	)	
Cascades Nursing, LLC and Cascades Retirement, LLC,	)	
	)	
Defendants.	)	
	)	

TO: JOE MOONEYHAM, ESQUIRE AND MITCH APPLEBY, ESQUIRE, ATTORNEYS FOR PLAINTIFF:

Defendants Cascades Nursing, LLC and Cascades Retirement, LLC by and through their undersigned attorneys, subject to and without waiving their defense answer the Complaint of the Plaintiff as follows:

1. The Defendants deny each and every allegation that is not specifically admitted herein.

2. The Defendants lack sufficient information to form a belief regarding the allegations set forth in Paragraph 1 of the Plaintiff's Complaint and therefore deny the same and demand strict proof thereof.

3. The Defendants admit only so much of the allegations contained in Paragraph 2 of Plaintiff's Complaint as alleges that the Defendant Cascades Nursing, LLC is a business corporation organized and existing pursuant to the laws of the State of South Carolina. The Defendants deny the remaining allegations and demand strict proof thereof.

4. The Defendants admit only so much of the allegations contained in Paragraph 3 of Plaintiff's Complaint as alleges that Cascades Retirement, LLC is a business corporation organized and existing pursuant to the laws of the State of South Carolina. The Defendants deny the remaining allegations and demand strict proof thereof.

5. As to the allegations contained in Paragraph 4, the Defendants crave reference to the applicable medical records and deny any allegations that are inconsistent therewith.

6. The Defendants deny the allegations contained in Paragraphs 5, 6 and 7 of Plaintiff's Complaint.

7. The allegations contained in Paragraph 8 contain statements or conclusions of law to which no response is required. To the extent a response is required, the allegations contained in the Notice of Intent to File Suit as well as the expert affidavit are specifically denied.

8. The allegations contained in Paragraph 9 state a legal conclusion to which no response is necessary. To the extent a response is necessary, pre-suit mediation was completed and resulted in an impasse.

9. The allegations contained in Paragraph 10 contain statements or conclusions of law to which no response is necessary.

10. The Defendants deny the allegations contained in Paragraph 11 of Plaintiff's Complaint.

11. The Defendants lack sufficient information to form a belief regarding the allegations set forth in Paragraphs 12, 13, 14, 15 and 16 of the Plaintiff's Complaint and therefore deny the same and demand strict proof thereof.

12. As to the allegations contained in Paragraphs 17 and 18, the Defendants crave reference to the applicable medical records and deny any allegations that are inconsistent therewith.

13. The Defendants lack sufficient information to form a belief regarding the allegations set forth in Paragraphs 19 and 20 of the Plaintiff's Complaint and therefore deny the same and demand strict proof thereof.

14. The Defendants deny the allegations contained in Paragraphs 21, 22, 23, 24, 25, and 26 of Plaintiff's Complaint.

FOR A SECOND DEFENSE

15. **FURTHER ANSWERING THE COMPLAINT AND AS A SECOND DEFENSE**, these Defendants allege the Complaint fails in whole or in part to state facts sufficient to constitute a cause of action and, therefore, this action should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

16. **FURTHER ANSWERING THE COMPLAINT AND AS A THIRD DEFENSE**, these Defendants would show that the care and treatment of Plaintiff was within the standard of care required of community residential care facilities and providers in the field, for which reason these Defendants are not liable to Plaintiff in any sum whatsoever.

FOR A FOURTH DEFENSE

17. **FURTHER ANSWERING THE COMPLAINT AND AS A FOURTH DEFENSE**, any injury or damage sustained by the Plaintiff as a result of the matters alleged in the Complaint were due to and caused by the Plaintiff's physical and medical health infirmities and

disease process, and these Defendants plead such physical and medical health infirmities and disease process as a complete bar to this action.

FOR A FIFTH DEFENSE

18. **FURTHER ANSWERING THE COMPLAINT AND AS A FIFTH DEFENSE**, these Defendants submit the injuries and damages for which Plaintiff seeks recovery were due to and proximately caused by the intervening negligence, recklessness, willfulness, wantonness, and fault of a party or parties other than these Defendants. Such intervening negligence, recklessness, willfulness, wantonness, and fault were the sole cause of the injuries and damages for which Plaintiff seeks recovery and, therefore, Plaintiff may not recover against these Defendants.

FOR A SIXTH DEFENSE

19. **FURTHER ANSWERING THE COMPLAINT AND AS A SIXTH DEFENSE**, these Defendants allege the injuries and damages for which Plaintiff seeks recovery were due to and proximately caused by the sole negligence, recklessness, willfulness, wantonness, and fault of third parties for whom these Defendants are not liable. Therefore, the acts or fault of third parties are the real, efficient and proximate cause of the injuries for which Plaintiff seeks recovery, and, therefore, Plaintiff cannot recover against these Defendants.

FOR A SEVENTH DEFENSE

20. **FURTHER ANSWERING THE COMPLAINT AND AS A SEVENTH DEFENSE,** these Defendants allege any injuries or damages sustained by the Plaintiff were due to and caused by the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness ("negligence") of the Plaintiff, combining, concurring and contributing with the negligence of these Defendants, if any, without which contributory negligence, the Plaintiff's

alleged injuries and damages would not have been incurred or sustained. Should the negligence of the Plaintiff be determined to be greater than that of these Defendants if any, the Plaintiff is entitled to no recovery. If the negligence of the Plaintiff be determined to be not greater than that of these Defendants, if any, the Plaintiff's recovery is to be reduced by the percentage of Plaintiff's fault.

FOR AN EIGHTH DEFENSE

21. **FURTHER ANSWERING THE COMPLAINT AND AS AN EIGHTH DEFENSE**, these Defendants plead the applicable provisions of the South Carolina Non Economic Damage Awards Act of 2005 (§15 32 200, et seq.) and §15 38 15, as such provisions may be applicable in this case.

FOR A NINTH DEFENSE

22. **FURTHER ANSWERING THE COMPLAINT AND AS A NINTH DEFENSE**, these Defendants allege that any award of punitive damages to Plaintiff would violate the constitutional safeguards provided to these Defendants by the Due Process Clause of the Fourteenth Amendment of the United States Constitution and under the Due Process Clause of Article I, Section 3 of the South Carolina Constitution because the determination of punitive damages does not bear any reasonable relationship to the amount of actual damages, if any, suffered by or awarded to Plaintiff.

FOR A TENTH DEFENSE

23. **FURTHER ANSWERING THE COMPLAINT AND AS A TENTH DEFENSE**, any injury or damage sustained by the Plaintiff as a result of the matters alleged in the Complaint could not be avoided, and these Defendants plead an unavoidable accident as a complete bar to this action.

FOR AN ELEVENTH DEFENSE

24. **FURTHER ANSWERING THE COMPLAINT AND AS AN ELEVENTH DEFENSE**, these Defendants reserve any additional and further defenses as may be revealed by additional information during the course of discovery and investigation, and as is consistent with the South Carolina Rules of Civil Procedure.

FOR A TWELFTH DEFENSE

25. **FURTHER ANSWERING THE COMPLAINT AND AS A TWELFTH DEFENSE**, these Defendants plead the procedures and limitations of punitive damages as provided in S.C. Code Ann. § 15-32-520.

FOR A THIRTEENTH DEFENSE

26. **FURTHER ANSWERING THE COMPLAINT AND AS A THIRTEENTH DEFENSE**, these Defendants allege that this matter is subject to binding arbitration.

WHEREFORE, having fully answered Plaintiff's Complaint, these Defendants pray that the same be dismissed with costs and for such other and further relief as this Court may deem to be just and proper.

TURNER PADGET GRAHAM & LANEY P.A.

By: s/R. Gerald Chambers, Jr.

R. Gerald Chambers, Jr. (SC Bar #12065)
Email: GChambers@turnpadget.com
P. O. Box 1473
Columbia, SC 29202
Telephone: (803) 227-4201
Fax: (803) 400-1511

ATTORNEYS FOR DEFENDANTS CASCADES NURSING, LLC AND CASCADES RETIREMENT, LLC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	
Marvin Barborek,	)	C.A. No.: 2025-CP-23-00434
	)	
Plaintiff,	)	
	)	
vs.	)	**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND COMPEL ARBITRATION**
	)	
Cascades Nursing, LLC, and Cascades Retirement, LLC,	)	
	)	
Defendants.	)	
	)	

The plaintiff submits this memorandum in opposition to the defendants' Motion to Dismiss and Compel Arbitration.

Facts

Mr. Barborek came to Greenville, SC, in February 2024 to visit friends. (**Exhibit 1 – Complaint**). On February 29, 2024, he fell on his right side while getting off the toilet. (**Ex. 1, ¶ 13**). He was taken to Prisma Health Greenville Memorial Hospital where he was diagnosed with a fractured right femoral neck. (**Ex. 1, ¶ 14**). On March 2, 2024, Mr. Barborek received a right hip hemiarthroplasty. (**Ex. 1, ¶ 15**). He subsequently worked with physical therapy who recommended he have a post-acute stay. (**Ex. 1, ¶ 16**). Therefore, on March 6, 2024, he was discharged from Greenville Memorial with numerous medications, including oxycodone, and sent to a skilled nursing facility identified in the medical records as "P/302/CV SNF Asher/Harper House/Verdae SNF/Cascades Verdae/South Carolina/CCRC/Corp" (hereinafter "Facility").

Upon Mr. Barborek's arrival at the Facility, he was presented with nearly thirty pages of intake documents to complete. Included in those intake documents were an Admission Agreement and an Arbitration Agreement. (**Exhibit 2 – Admission Agreement; Exhibit 3 – Arbitration**

Agreement). The Admission Agreement governed the care Mr. Barborek would receive at the Facility and his financial obligations for those services. The final page of the Admission Agreement stated, "[t]his Agreement shall inure to the benefit of, and be binding upon, the heirs, successors, permitted assigns, and legal and personal representatives of the parties" and was allegedly signed by Mr. Barborek and an unidentified "community administrator or designee," presumably for the Facility. The defendants were not mentioned in the Admission Agreement.

The separate Arbitration Agreement, purportedly a contract between the Facility and Mr. Barborek, provided for alternative dispute resolution for any claim Mr. Barborek, and only Mr. Barborek, may have against "Community," Maxwell Group, Inc., or Senior Living Communities. The Arbitration Agreement was not signed by the Facility and neither included nor referenced the defendants.

In the morning of March 16, 2024, Mr. Barborek was discovered on the floor after suffering a fall. He was taken back to Prisma Health Greenville Memorial Hospital where he was diagnosed with a periprosthetic femur fracture. Following surgical repair, Mr. Barborek was discharged on March 22, 2024, to Rolling Green Village for post-acute care. He filed a Notice of Intent in this matter on October 21, 2024. A pre-suit mediation was held on December 20, 2024, that resulted in impasse. Mr. Barborek filed this action against Defendants on January 24, 2025. Defendants filed a motion to dismiss and compel arbitration on February 19, 2025, followed by an answer on February 20, 2025.

Burden of Proof

The defendants seek to compel arbitration. Defendants carry the burden of proving that a valid and enforceable arbitration agreement exists. The party seeking to establish contractual waiver of a jury trial bears the burden of proof to establish that the waiver was signed in a

"knowing, voluntary and intentional" capacity. Of those courts that have decided this question, most have held that it is the proponent of the waiver who bears the burden, reasoning that the jury trial right is fundamental, and should not be waived absent clear evidence.[1]

General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 668 (S.C. 2007). The drafter of a contract is in the best position to prevent confusion in the contract's construction and should be the party to suffer from its shortcomings. WDI Meredith & Co. v. American Telesis, 359 S.C. 474, 480, 597 S.E.2d 885 (Ct. App. 2004) citing Williams v. Teran, Inc., 266 S.C. 55, 60, 221 S.E.2d 526, 529 (1976) (noting an ambiguity in an agreement must be resolved against its drafter).

When considered in the proper context, our statements that the law "favors" arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021). There is, however, no public policy – federal or state – "favoring" arbitration. Id.

Argument

I. The defendants cannot enforce the arbitration agreement because they are not parties to it.

[1] See e.g., Leasing Serv. Corp. v. Crane, 804 F.2d 828, 833 (4th Cir. 1986) ("Where waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed."); Luis Acosta, Inc. v. Citibank, N.A., 920 F.Supp. 15, 18 (D.P.R. 1996) (rejecting a waiver, after concluding that "the burden of proving the waiver of such a fundamental right properly rests upon the party seeking to enforce such a waiver"); Phoenix Leasing, Inc. v. Sure Broadcasting, Inc., 843 F.Supp. 1379, 1384 (D. Nev. 1994) ("An informal survey indicates the majority of courts having considered this question followed the approach in Leasing Service [and placed burden of proof on proponent of waiver]."); Smyly v. Hyundai Motor Am., 762 F.Supp. 428, 429 (D. Mass. 1991) (concluding that "since it is a waiver of a constitutional right," proponent of waiver bears burden of showing agreement was made knowingly and intentionally).

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 (Ct. App. 1999). In Defendants' Motion to Compel Arbitration, they ask the Court to compel arbitration "between Plaintiff and Defendants…in accordance with the terms of the Admission Agreements and Arbitration Agreement mutually entered into between the parties on or around March 6, 2024." Defendants attached the Admission Agreement and the Arbitration Agreement to their Motion to Compel Arbitration. The Admission Agreement and the Arbitration Agreement appear to have been drafted and controlled by three companies – Senior Living Communities, Maxwell Group, Inc., and Wellmore as those three companies appear at the top of each page of the Admission Agreement and are at the top of the Arbitration Agreement and, as for Senior Living Communities and Maxwell Group, Inc., are mentioned in paragraph (a) of the Arbitration Agreement.. There is also an address at the bottom of page one of the Admission Agreement – 3530 Toringdon Way, Suite 204, Charlotte, NC 28277, which appears to be the address for Maxwell Group, Inc. While Senior Living Communities, Maxwell Group, Inc., and Wellmore are referenced throughout the Admission Agreement and the Arbitration Agreement, the defendants in this case are not listed even once in either agreement.

The Admission Agreement references a "Cascades Verdae," a supposed entity with its principal place of business at 10 Fountainview Terrace, Greenville, SC 29607, as party to the agreement. However, "Cascades Verdae" is not party to this action and does not exist as a business entity in South Carolina. In Mr. Barborek's Complaint, he alleged that Defendant Cascades Nursing, LLC, is a South Carolina corporation doing business in Greenville County and is a skilled nursing facility located at 10 Fountainview Terrace, Greenville, South Carolina 29607, the supposed address of "Cascades Verdae." (**Ex. 1, ¶ 2**). In Defendants' Answer to the Complaint, in

response to the aforementioned allegations, Defendants admitted only that Defendant Cascades Nursing, LLC, is a corporation existing in South Carolina. (**Exhibit 4 – Answer, ¶ 3**). Defendants specifically denied that Cascades Nursing, LLC, is a skilled nursing facility located at 10 Fountainview Terrace, Greenville, South Carolina 29607 and demanded strict proof thereof. (**Ex. 4, ¶ 3**). Similarly, in Mr. Barborek's Complaint, he alleged Defendant Cascades Retirement, LLC, is a South Carolina corporation doing business in Greenville County and is an administrative company located at 10 Fountainview Terrace, Greenville, South Carolina 29607. (**Ex. 1, ¶ 3**). In Defendants' Answer, Defendants admitted only that Defendant Cascades Retirement, LLC, is a corporation existing in South Carolina. (**Ex. 4, ¶ 4**). Defendants specifically denied that Cascades Retirement, LLC, is an administrative company located at 10 Fountainview Terrace, Greenville, South Carolina 29607 and demanded strict proof thereof. (**Ex. 4, ¶ 4**).

Because the defendants are separate legal entities from "Cascades Verdae," and because neither of the defendants are parties to the Admission Agreement or the Arbitration Agreement, the defendants cannot enforce the Arbitration Agreement.

II. The Arbitration Agreement is not enforceable because it was not signed by those seeking its enforcement and because it did not merge with the Admission Agreement.

South Carolina 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. Grant v. Magnolia Manor – Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009) citing Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989). Additionally, our Courts have stated, "[v]agueness of expression, indefiniteness, and uncertainty as to any of the essential terms of an agreement have often been held to prevent the creation of an enforceable contract." Reed v. Boykin, 282 S.C. 614, 320 S.E.2d 68 (Ct. App. 1984).

The Admission Agreement and Arbitration Agreement are two separate documents. The Admission Agreement had a table of contents for the Admission Agreement itself and for the attachments to it. The separate Arbitration Agreement is not referenced in the table of contents, including the attachments. The final page of the Admission Agreement was allegedly signed by Mr. Barborek and an unidentified "community administrator or designee," presumably for the Facility.

In order to distinguish it from the Admission Agreement, the drafters of the Arbitration Agreement provided for its own separate signature line reserved for "Resident or Resident Representative" signature, which Mr. Barborek allegedly signed. While Mr. Barborek allegedly signed the Arbitration Agreement, the Arbitration Agreement was clearly never signed or executed by a representative of the Facility or of the defendants. As previously noted, the defendants bear the burden of proving that a valid arbitration agreement exists and was created. Because the Arbitration Agreement was not signed by a Facility representative or a representative of the defendants, there is no indicia of mutual assent as required for a valid enforceable arbitration agreement. Parties cannot be said to have had a meeting of the minds on matters which are indefinite, vague, uncertain, and even incomprehensible. By failing to sign the Arbitration Agreement, the defendants never indicated assent to the terms of the agreement, and therefore, the Arbitration Agreement is unenforceable.

Hodge v. Unihealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018) examined the issue of merger in admission agreements and arbitration agreements when a patient entered a rehabilitation facility subsequent to a hospitalization. The Court looked to Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014) for guidance on the issue. Quoting the Court in Coleman, the Court in Hodge noted, "[t]he 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." Hodge at 561. Ambiguities as to merger are construed against the drafter. Id. at 562. The Court in Hodge noted that the admission agreement and arbitration agreement at issue had their own signature pages and that the arbitration agreement stated signing it was not a precondition to admission. Id. at 562-563. Based in part on the separate signature pages and that signing the arbitration agreement was not a precondition to admission, the Court held that the admission agreement and arbitration agreement did not merge. Id.

In Mr. Barborek's case, the Admission Agreement and Arbitration Agreement are separate and do not merge. As in Hodge, the Arbitration Agreement provides for a separate signature and states that signing the Arbitration Agreement is not a requirement as a condition of admission. Any ambiguity as to those provisions in the Arbitration Agreement, or any other provisions contained therein, are held against the drafter and, therefore, against merger. Because the Admission Agreement and Arbitration Agreement are separate and do not merge, the Arbitration Agreement has to be evaluated independently. The Arbitration Agreement is not independently enforceable because the Arbitration Agreement was not signed by a representative of the Facility or the defendants. Therefore, there was no meeting of the minds, and the Arbitration Agreement did not merge with the Admission Agreement.

III. The Arbitration Agreement is not enforceable because there is no consideration for Mr. Barborek's signature.

The necessary elements of a contract are an offer, acceptance, and valuable consideration. Roberts v. Gaskins, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997). Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or

some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. Prestwick Golf Club v. Prestwick Ltd., 331 S.C. 385, 503 S.E.2d 184 (Ct. App. 1998) (quoting J.C. White Lumber Co. v. Allen, 306 S.C. 183, 410 S.E.2d 588 (Ct. App. 1991). A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement. O'Neil v. Hilton Head Hosp., 115 F.3d 272 (4th Cir. 1997) citing Rickborn v. Liberty Life Insurance Co., 321 S.C. 291, 468 S.E.2d 292, 300 (1996). In determining the effect of a written contract, the intention of the parties and the meaning are gathered from the four corners of the instrument. McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 33 S.E.2d 501 (1945). A meaning cannot be given a contract other than that expressed; that is, words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed. Id. Where a contract lacks valuable consideration, the contract will be deemed unenforceable.

The Court must assess whether the Arbitration Agreement itself contains sufficient consideration. There is no direct benefit to nursing home residents from a pre-admission arbitration contract separate from the admission agreement. Admission can be the benefit that forces a plaintiff to arbitrate if admission and arbitration are governed by the same contract. However, Defendants cannot meet their burden to prove merger.

The Arbitration Agreement at issue in this case provided that, "[i]t waives certain rights that *you* may have, including *your* right to have a jury trial on any claims that *you* may have against the community or its affiliates." Unlike O'Neil, the Arbitration Agreement in this case is not a mutual promise to arbitrate, but rather only provides for the residents to give up their rights to a jury trial.

In a case evaluating admission agreements and arbitration agreements, the Honorable Judge Perry Buckner held in Holmes v. Bayview Manor that the arbitration agreement was not enforceable. See Judge Buckner's Order (**Exhibit 5 – Judge Buckner's Order**) which states:

> Alternatively, if the jury waiver was not a precondition to admission, then it fails for lack of consideration. As noted, the waiver, as written, works only in one direction. When asked during arguments what the consideration for the waiver might be, counsel for Defendants argued only that the admission was the consideration for the waiver. When pushed on whether any additional consideration was present (separate and apart from the admission and care) counsel agreed there was none. Here, Defendants cannot have it both ways. They cannot, on the one hand, argue that the waiver was not consideration for the admission but, on the other, argue that the admission was valuable consideration for the waiver. For the waiver to be enforceable as a non-pre-condition to admission, it must be supported by some other valuable consideration, which it is not.

The Honorable Judge Diane Goodstein found similarly in Rawl v. West Ashley Rehabilitation and Nursing Center (**Exhibit 6 – Judge Goodstein's Order**):

> The Arbitration Agreement was not necessary for admission. Additionally, there was no bargain for exchange nor consideration in Ms. Brown's agreement to the Arbitration Agreement.
>
> Upon admission Ms. Brown was asked to sign the admission paperwork. Ms. Brown then signed the Arbitration Agreement separate from the admission paperwork. Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement. In fact, the Arbitration Agreement states "[t]he patient will receive services in this center whether or not this agreement is signed." Neither party gained a right, interest, profit or benefit by agreeing to the Arbitration Agreement. Plantation, 386 S.C. at 206, 687 S.E.2d at 718. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered or undertaken by the other the party, when agreeing to the Arbitration Agreement. Id. Finally, viewing the Arbitration Agreement itself there is no mention of consideration. The court is required to make its assessment by viewing only the four-corners of the Arbitration Agreement, and cannot go beyond the confines of the Arbitration Agreement itself. Consequently, where the Arbitration Agreement is guided by the FAA and principles of contract law – the Arbitration Agreement is unenforceable where the Arbitration Agreement lacks valuable consideration.

As noted previously, the agreement to arbitrate by Mr. Barborek was not a requirement for admission. If the Arbitration Agreement was not a requirement of admission, then what is the

consideration for the Arbitration Agreement? What benefit did Mr. Barborek receive from signing the Arbitration Agreement? Because the Arbitration Agreement was not a requirement, there was no bargain and, therefore, no consideration.

Further, there exists a lack of mutuality that makes the Arbitration Agreement unconscionable. An agreement may lack mutuality where it permits one party to seek relief through the courts but does not allow the same relief for the other party. In this case, there is a lack of mutuality because the Arbitration Agreement, on its face, only waives Mr. Barborek's right to a jury trial. Because there was not a mutual promise to arbitrate, there was no consideration. There is no consideration for the Arbitration Agreement in this case.

IV. The Arbitration Agreement is not enforceable because the plaintiff did not have the mental capacity to enter into a contract.

South Carolina has defined contractual capacity as a person's ability to understand, at the time the contract is executed, the nature of the contract and its effect. In re Thames, 344 S.C. 564, 544 S.E.2d 854 (Ct. App. 2001). A mere infirmity of mind, if it does not amount to an incapacity to understand, at the time of the execution of a contract, the nature of the act done and the effect thereof…does not render a person incapable of executing a valid and binding contract. Id. The test for lack of contractual capacity is generally said to be whether an individual lacks sufficient mental capacity to understand in a reasonable manner the nature of the transaction in which he or she is engaging, and to understand its consequences and effect upon his or her rights and interests. Id.

Mr. Barborek, who was 79 years old at the time, presented to the Facility on March 6, 2024, to recover from a fractured right femoral neck and subsequent right hip hemiarthroplasty. To make Mr. Barborek's pain as tolerable as possible, he was prescribed and administered oxycodone narcotic pain medication on March 6, 2024, prior to allegedly signing the Admission Agreement and the Arbitration Agreement later that same day. Mr. Barborek lacked contractual capacity on

March 6, 2024, because of the physical and mental anguish he was enduring and because he had been given oxycodone.

V. The Arbitration Agreement is not enforceable because it is unconscionable.

"In South Carolina, unconscionability is defined as the absence of 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." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007). The "[a]bsence of meaningful choice" requirement "speaks to the fundamental fairness of the bargaining process in the contract at issue." Id. at 25, 644 S.E.2d at 669. Even if an arbitration clause is technically conspicuous, it may be improper if it is "sprung on [a consumer] along with a flurry of other" documents during a hasty transaction. Doe v. TCSC, LLC, 430 S.C. 602, 613-614, 846 S.E.2d 874, 879-880 (Ct. App. 2020). "Unconscionability is gauged at the time the contract was made." Id. at 612, 846 S.E.2d at 879. The following should be taken into account by courts in determining unconscionability: "the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." Id. (quoting Simpson, 373 S.C. at 25, 644 S.E.2d at 669).

The Honorable Judge Diane Goodstein found an arbitration agreement in Rawl v. West Ashley Rehabilitation and Nursing Center, a nursing home and rehabilitation center case, unconscionable for several reasons, including but not limited to, a lack of meaningful choice, the terms of the arbitration agreement were oppressive and one-sided, the patient was ill, the arbitration agreement was on a take it or leave it basis, the patient did not contribute to the drafting of the

arbitration agreement, and the patient did not possess the bargaining power to negotiate the terms of the arbitration agreement (**Exhibit 6**).

Mr. Barborek's need for post-acute nursing care was brought on by a precipitous deterioration in health status. The need to find placement arose quickly and was unplanned. There was little time to investigate options. The pressure of time, along with physical and mental pain, and narcotic pain medication, significantly impaired Mr. Barborek's ability to seek and consider alternatives. Mr. Barborek did not have time to read and deliberate on the terms of the arbitration agreement. He was focused on trying to recover from his significant injury. Further, Mr. Barborek was only in town visiting friends. He had no family in the area to assist him and had no familiarity with the area at all.

The defendants are the superior, experienced party. In a time of crisis, Mr. Barborek was presented with nearly thirty pages of intake documents to review and sign. The Arbitration Agreement was buried amongst those nearly thirty pages and would function to contract away one of Mr. Barborek's most significant rights, the right to a jury trial, while requiring the defendants to give up nothing. The Arbitration Agreement is unconscionable.

Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss and Compel Arbitration must be denied.

Respectfully submitted,

Mooneyham Berry, LLC

s/Mitch Appleby
Joe Mooneyham, SC Bar No. 4041
Mitch Appleby, SC Bar No. 103600
P.O. Box 8359
Greenville, SC 29604
P: 864.421.0036 | F: 864.421.9060
joe@mbllc.com
mitch@mbllc.com

Attorneys for the plaintiff

May 16, 2025

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	
Marvin Barborek,	)	C.A. No.: 2025-CP-23-
	)	
Plaintiff,	)	
	)	
vs.	)	**SUMMONS**
	)	**(Jury Trial Demanded)**
Cascades Nursing, LLC, and Cascades Retirement, LLC,	)	
	)	
Defendants.	)	
	)	

TO: THE DEFENDANTS ABOVE-NAMED

YOU ARE HEREBY SUMMONED and required to answer the complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your answer to the said complaint on the subscribers to their office, 1225 South Church Street, Greenville, South Carolina, 29605 within thirty (30) days after service thereof exclusive of the day of such service, and if you fail to answer the complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the complaint.

Mooneyham Berry, LLC

s/Mitch Appleby
Joe Mooneyham, SC Bar No. 4041
Mitch Appleby, SC Bar No. 103600
P.O. Box 8359
Greenville, SC 29604
P: 864.421.0036 | F: 864.421.9060
joe@mbllc.com
mitch@mbllc.com

Attorneys for the plaintiff

January 24, 2025

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	
Marvin Barborek,	)	C.A. No.: 2025-CP-23-
	)	
Plaintiff,	)	
	)	
vs.	)	**COMPLAINT**
	)	**(Jury Trial Demanded)**
Cascades Nursing, LLC, and Cascades Retirement, LLC,	)	
	)	
	)	
Defendants.	)	
	)	

The plaintiff complaining of the above-named defendants would respectfully show unto the Court as follows:

Parties and Jurisdiction

1. The plaintiff is domiciled in Marion County, Florida.

2. Defendant Cascades Nursing, LLC ("Cascades Nursing"), is a corporation organized and existing under the laws of the State of South Carolina and conducting business in Greenville County, South Carolina. Upon information and belief, Cascades Nursing is a skilled nursing facility located at 10 Fountainview Terrace, Greenville, South Carolina 29607.

3. Defendant Cascades Retirement, LLC ("Cascades Retirement"), is a corporation organized and existing under the laws of the State of South Carolina and conducting business in Greenville County, South Carolina. Upon information and belief, Cascades Retirement is an administrative company located at 10 Fountainview Terrace, Greenville, South Carolina 29607.

4. At all relevant times, the plaintiff was a patient of Cascades Nursing and/or Cascades Retirement.

5. The plaintiff alleges, upon information and belief, that the healthcare complained of herein was provided by agents, servants, or employees of the defendants, while in the course and scope of their employment.

6. The corporate defendants named herein are therefore vicariously responsible for the acts of their employees, agents, servants, and/or surrogates, as identified in the factual allegations below.

7. The events giving rise to the plaintiff's causes of action occurred in Greenville County, and as the defendants operate and/or do business in Greenville County, this Court has jurisdiction of them, and of the subject matter of this action, and venue is proper in Greenville County pursuant to South Carolina Code Ann. § 15-7-30.

8. Because this matter is a complaint for medical malpractice, in part, the plaintiff was required to file a Notice of Intent to File Suit, which he did, with civil action number 2024-NI-23-00055. He accompanied that filing with the requisite expert affidavit identifying one or more negligent and grossly negligent acts or omissions in the care provided by Cascades Nursing and/or Cascades Retirement, as required by S.C. Code Ann. § 15-36-100. That affidavit is likewise filed herewith as an exhibit.

9. In addition, as required by S.C. Code Ann. § 15-79-125, the plaintiff, through counsel, participated in pre-suit mediation of the Notice of Intent to File Suit on December 23, 2024. That mediation resulted in an impasse.

10. Having met the statutory requirements, the plaintiff is now permitted to file this action, and this Court has jurisdiction of the subject matter and of the parties.

Joint and Several Liability

11. The above-named defendants are jointly and severally liable for all damages alleged herein because their negligent, negligent per se, careless, grossly negligent, and reckless acts and omissions singularly or in combination, were the proximate cause of the plaintiff's damages and losses.

Facts

12. In February of 2024, the plaintiff came to the defendants' facility to visit friends.

13. On February 29, 2024, the plaintiff fell on his right side while getting off the toilet at the defendants' facility.

14. The plaintiff was taken to Prisma Health Greenville Memorial Hospital where he was diagnosed with a fractured right femoral neck.

15. On March 2, 2024, the plaintiff had a right hip hemiarthroplasty.

16. Following his surgery, the plaintiff worked with physical therapy who recommended he have a post-acute stay.

17. On March 6, 2024, the plaintiff was transferred back to the defendants' facility for skilled nursing care.

18. In the morning of March 16, 2024, the defendants' staff found the plaintiff on the floor after he suffered a fall.

19. The plaintiff was taken back to Prisma Health Greenville Memorial Hospital where he was diagnosed with periprosthetic femur fracture.

20. Following surgical repair, the plaintiff was discharged on March 22, 2024, to Rolling Green Village for post-acute care.

21. The plaintiff alleges that, at the time and place in question, he, as a patient of Cascades Nursing and/or Cascades Retirement was entitled to health, physician, and nursing care

that was reasonable given his symptoms and the circumstances, and that the failure to provide reasonable care would constitute negligence and gross negligence.

22. The defendants were negligent, careless, reckless, grossly negligent, willful, and wanton in the following particulars:

a. In failing to conduct an appropriate fall assessment;

b. In failing to implement appropriate fall precautions; and

c. In further particulars to be made more definite as discovery progresses and may be shown at the trial of this case.

23. The plaintiff alleges that, at the time and place in question, Cascades Retirement, as the administrative company for Cascades Nursing, owed a duty of reasonable care to the plaintiff.

24. At the time and place described above, Cascades Retirement, acting through its agents, servants, and/or employees breached its duty of care owed to the plaintiff and were thereby negligent and grossly negligent. Specifically, Cascades Retirement's conduct was careless, negligent, grossly negligent, willful, wanton, and reckless in the following particulars:

a. In failing to hire healthcare providers who could provide reasonable care to the plaintiff;

b. In failing to properly train the healthcare providers;

c. In failing to properly monitor the healthcare providers;

d. In failing to properly supervise the healthcare providers; and

e. In further particulars to be made more definite as discovery progresses and may be shown at the trial of this case.

25. As a direct and proximate result of the defendants' aforementioned negligence, carelessness, recklessness, willfulness, gross negligence, and wantonness, the plaintiff suffered the following injuries and damages:

a. Severe pain, mental anguish, and discomfort;

b. Emotional trauma;

c. Permanent impairment of physical function and disability;

d. Permanent scarring and disfigurement;

e. Money spent for medical care and treatment; and

f. Loss of enjoyment of life.

26. The plaintiff is therefore informed and believes he is entitled to judgment against the defendants for actual, consequential, and punitive damages.

WHEREFORE, the plaintiff prays judgment against the defendants for actual, consequential, and punitive damages, for the costs of this action, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

Mooneyham Berry, LLC

s/Mitch Appleby
Joe Mooneyham, SC Bar No. 4041
Mitch Appleby, SC Bar No. 103600
P.O. Box 8359
Greenville, SC 29604
P: 864.421.0036 | F: 864.421.9060
joe@mbllc.com
mitch@mbllc.com

Attorneys for the plaintiff

January 24, 2025

Dear Resident/Resident Representative,

We thank you for trusting in us as your choice of residence and care. Our dedicated team will treat you or your loved ones in a healing atmosphere of dignity and respect. Our Admissions Department strives to make the agreement and admission process as clear and concise as possible, however we understand this process may be new to you.

In addition to in-person assistance, remember that we are also available via phone and video conference to walk you through the entire process at your convenience. Please do not hesitate to contact us at any time to arrange a date and time that is convenient for you.

Below are several key inputs that are referenced throughout your agreement with us:

Community Name: Cascades Verdae

Community Address: 10 Fountainview Terrace, Greenville, SC 29607

Main Number: 864-528-5501

Agreement Date: 03/06/2024

Admission Date: 03/06/2024

Resident Name: Marvin Barborek

Resident Representative: Marvin Barborek **Relationship:** Self

Physician: Dr. Win

Private Pay Daily Rate: $495.00

Care Services Suite Type: ___ Semi-Private _X_ Private Suite ___ Private Deluxe

Care Services Suite: # 302

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SKILLED CARE RESIDENCY AGREEMENT

INTRODUCTION

THIS RESIDENT AGREEMENT (the "Agreement"), is made this 03/06/2024 , by and between Cascades Verdae , with its principal place of business at 10 Fountainview Terrace, Greenville, SC 29607 , as Community, and Marvin Barborek , as Resident.

TERM OF THIS AGREEMENT

The term of this Agreement shall begin on the date of admission of Resident to Community (the "Admission Date"). Resident's Admission Date to Community is 03/06/2024 . Community may refuse to admit or retain as a resident any person who (a) poses a threat to his or her own health or safety, or the health and safety of others at Community, including staff, (b) who requires greater care than Community is safely able to provide or is licensed to provide, or (c) if Community is unable to meet Resident's needs. (d) or for any other reason determined by Community.

The private pay daily rate at the time of admission is $495.00 . For the daily rate, the Resident day is midnight to midnight; the Healthcare Center shall apply the daily charge for the day of admission, but not the day of discharge.

THE PRIVATE PAY DAILY RATE MAY BE REVISED BASED ON THE EXPERIENCE OF THE COMMUNITY AND ESTIMATES OF ITS FUTURE COSTS, AS DETERMINED BY Community, IN ITS SOLE DISCRETION. Factors to be considered in reviewing Monthly Service Fees include, but are not limited to, the consumer price index, government regulations, and reserve fund maintenance and occupancy levels. Community will make adjustments not more often than once a year and will provide you with thirty - (30) day's prior written notice of any such adjustments.

Payment is due the first day of each month. If the Monthly Service Fee is not received by the 5th day of the month for which such services will be provided, a late payment fee of $50 will apply. Past due amounts will bear interest at the rate of 1.5 % per month until paid in full. If you fail to pay any amounts overdue under this Agreement, you agree to pay any costs of collection incurred by Community, including but not limited to reasonable attorney's fees, expenses, costs, and disbursements.

RESIDENT FINANCIAL AGREEMENT

STATEMENT OF FEES. I do hereby acknowledge that my daily service charge *addressed in the Resident agreement is:

$495.00 per day:

___ **Semi-Private Suite**

_X_ **Private Suite**

___ **Private Deluxe Suite**

*The daily service charge may be increased, within the sole discretion of the Company, no more often than semi-annually, after providing the Resident with at least thirty (30) days of written notice before the increase becomes effective.

REFUND POLICY. Resident or Responsible Party is entitled to a prorated refund of the Daily Rate after all charges, including the cost of documented damages to the room caused by Resident and resulting from circumstances other than normal use, have been paid to Community, for any unused portion of payment beyond the latter of the termination date or the date the room is vacated, and cleared of all of Resident's personal possessions. All documented damages shall be identified, and a list given to Resident or Responsible Party. The refund shall occur within sixty (60) days of receipt of a written notice of termination after the suite is vacated and residents' personal belongings are removed.

i. Except in the case of death or discharge due to medical reasons, including mental health, the refund shall be computed in accordance with the Termination of Agreement, Discharge and Transfer requirements specified in this Agreement.

ii. In case of death or discharge due to medical reasons, including mental health, the notice of termination requirement in this Agreement is waived, and all refunds shall be computed in accordance with the Termination of Agreement, Discharge and Transfer requirements specified in this Agreement. Notwithstanding the foregoing provisions, refunds may be withheld until all outstanding bills have been paid.

PHYSICIAN FEES AND MEDICATIONS. Resident and Responsible Party shall pay for the services of any physician that are billed by the physician directly to Resident or Responsible Party and for medications ordered by the physician and billed by the dispensing pharmacist when not eligible for payment by Medicare Part A.

OUR RESPONSIBILITES TO YOU AS A RESIDENT

HEALTHCARE SUITE. Resident has the right to occupy and use the care services suite known as # 302 ,

which includes a bed, armoire, chair, bedside table, and a private bathroom offered by us subject to certain qualifications as hereinafter provided. No more than one (1) person will occupy the Healthcare Suite unless authorized by the Administrator. Community reserves the right to determine Resident's room assignments, and to move Resident from one room to another within, subject to applicable laws and regulations, as may be necessary. Community will give thirty (30) days' notice of a room change. Thirty days written notice may be waived if both Community, and Resident agree in writing. Community shall endeavor to honor reasonable room requests of Resident when practicable.

HOUSEKEEPING. Community will provide routine Housekeeping services in your Healthcare Suite. These include general dusting of horizontal surfaces, cleaning of floors, mirror cleaning, and bathroom cleaning and small trash removal.

TELEPHONE. The Resident Healthcare Suite is provided a telephone with a direct dial phone number.

CABLE T.V. Residents Healthcare Suites are equipped with cable/satellite (standard package) television.

MAINTENANCE AND REPAIR. Subject to damages clause as previously mentioned, Community will be responsible for all necessary repairs, maintenance and replacement of property and equipment owned by Community.

TRANSPORTATION. Community will schedule and provide regular transportation, at no extra charge to Residents, to certain event, shopping, and medical destinations. Individualized transportation for appointments may be provided on a fee for service basis.

INSURANCE. Community will carry casualty and liability insurance on Community.

YOUR RESPONSIBILITIES AS A RESIDENT

DESIGNATED PHYSICIAN. Resident shall be under the care of a physician at the time of admission and shall remain under the care of a physician for the duration of Resident's stay at Community. In the event the Resident does not have a physician, Resident may elect to be under the care of Community Medical Director and will be responsible for payment to the Medical Director for services rendered as the Resident's Primary Care physician.

RECORDS. All records supplied by residents will be held in strict confidence. Resident may approve or refuse the release of information or records to any individual outside the Community, except and otherwise provided for in law and in the case of transfer to another health facility. Should an emergency arise, Resident and his/her Responsible Party authorize Community to make the appropriate records available.

POLICIES, RULES, AND REGULATIONS. Resident agrees to abide by the policies, rules and regulations of Community including such changes as may be adopted at a later time.

RESPONSIBILITY FOR DAMAGES. Residents will be responsible for any costs incurred in replacing, maintaining, or repairing any loss or damage to the real or personal property of Community caused by negligence or willful misconduct of the resident, guests, agents, and/or employees.

PERSONAL LAUNDRY. Community will provide you with sheets and towels, which will be laundered on a routine basis to ensure that bed linens are clean and dry. Personal clothing laundering is also available.

PROTECTION OF PERSONAL PROPERTY. Community is not responsible for the loss of any personal property belonging to residents due to theft, fire, or any other cause, unless said property is specifically entrusted in writing to the care and control of Community and then only for Community gross negligence in failing to safeguard and account for such property. Resident and Responsible Party shall clearly mark all personal items of resident with Resident's name.

ARBITRATION. See full "**ARIBITRATION AGREEMENT**" attached separately.

NON-TRANSFERABLE. Resident's rights and privileges under this Agreement with respect to the Healthcare Center, facilities, services, and medical care are personal to residents and cannot be transferred or assigned by resident, or by any proceeding at law, or otherwise. If any person, other than the person(s) who signs this Agreement establishes residency in resident's suite without following the proper procedures established by Community, Community shall have the right to terminate this Agreement.

TERMINATION OF AGREEMENT, DISCHARGE AND TRANSFER BY RESIDENT

AFTER ADMISSION DATE. Resident may terminate this Agreement after the Admission Date by giving Community at least thirty (30) day's written notice to that effect. In such event, this Agreement will terminate at the end of such notice period, and resident will vacate the Healthcare Suite no later than such termination date. After the Admission Date, this Agreement shall terminate at your demise. All other charges will be prorated to the date of termination and any excess payments will be refunded.

TERMINATION OF AGREEMENT, DISCHARGE AND TRANSFER BY COMMUNITY

PRIOR TO ADMISSION. Community may terminate this Agreement before the Admission Date for any of the following reasons: (i) Resident does not meet the conditions of admission under this Agreement; or (ii) Resident breach or default of any of the terms of this Agreement: (iii) Community decides at its sole discretion to terminate this agreement.

AFTER ADMISSION DATE. Community may terminate this Agreement and transfer, discharge or refuse to readmit Resident in accordance with applicable South Carolina Department of Environmental Control regulations regarding termination, transfer, discharge, and notice requirements. Grounds for termination include, without limitation, the following: (i) Community determines a resident is inappropriately placed or Community cannot properly provide for a Resident who poses a risk to the health and safety of other residents or employees of Community, (ii) for non-payment of fees, charges or costs, or (iii) Residents at Community would cause a violation of any rules and/or regulations imposed by an agency or authority or other entity having jurisdiction over Community.

TEMPORARY TRANSFER. If Community, in its sole discretion, determines that a condition exists which requires residents to transfer to a hospital, nursing home or other related Community and has the potential to be resolved in a manner that may allow residents to return to your suite, the suite will be held for residents return. Resident and his/her Responsible Party agree to pay any costs associated with this holding of the suite.

INVOLUNTARY TRANSFER OR DISCHARGE. Community will give a minimum of thirty (30) days written notice to resident in the case of an involuntary discharge or transfer, except when (i) an emergency transfer is mandated by Resident's health care needs and is in accordance with a written order and medical justification of the attending physician or Community Medical Director when attending physician is unavailable; or (ii) when the transfer or discharge is necessary for the physical safety of other residents as documented in the clinical chart.

Community has the right to remove and store all property from the Residence which has been released for occupancy, or on which the Agreement has been terminated. The resident or the resident's estate shall be liable for the costs of such storage and/or moving. Storage for such property shall be for a period of no more than 10 days from the time the suite is vacated, after such time the property will be deemed to be abandoned and Community shall have the right to dispose of it as they see fit.

COMPLAINT AND GRIEVANCE PROCEDURES

RESIDENTS RIGHTS. A copy of the resident's rights is attached and incorporated by reference in this agreement.) Community will honor and respect your rights.

GRIEVANCES AND COMPLAINTS. Any grievances/complaints shall be shared immediately with the Administrator of Community. You have the right to make suggestions, register complaints or present grievances about your care or service you or another resident receives here. See the attached Policy and Procedure on Resident Grievance/Complaint

MISCELLANEOUS

COMPLIANCE WITH LAW. The parties to this Agreement agree to comply with the applicable laws of South Carolina and the United States of America that are presently in effect and that may be enacted during the term of this Agreement. Resident and Responsible Party, if any, further agree to execute, when requested by Community, any and all amendments or modifications to this Agreement if required by law.

NON-DISCRIMINATION. Community promotes equal housing opportunities and shall not discriminate against applicants or residents based on race, color, religion, sex, handicap, familial status, or national origin.

ACKNOWLEDGEMENT OF CERTAIN DELIVERIES

Resident and Responsible Party acknowledge that they have read and understand this Agreement, and that Community has answered any questions relative to this Agreement. Each party acknowledges receipt of a duplicate original of the Agreement.

INTERPRETATION

This Agreement shall inure to the benefit of, and be binding upon, the heirs, successors, permitted assigns, and legal and personal representatives of the parties. Resident and Responsible Party shall not assign any of their rights or delegate any of their obligations under this Agreement without Community's prior, written consent.

IN WITNESS WHEREOF, Community has caused this Agreement to be executed through its duly authorized representative, and Resident and Responsible Party have executed this Agreement, as of the day and year first written above.

X _____ 3-6-24
Resident or Resident Representative — Date

_____ 3/6/24
Community Administrator or Designee — Date

ARBITRATION AGREEMENT

PLEASE READ THIS ARBITRATION AGREEMENT CAREFULLY. IT WAIVES CERTAIN RIGHTS THAT YOU MAY HAVE, INCLUDING YOUR RIGHT TO HAVE A JURY TRIAL ON ANY CLAIMS THAT YOU MAY HAVE AGAINST THE COMMUNITY OR ITS AFFILIATES.

(a) Any and all controversies, claims, disputes, disagreements or demands of any kind that Resident may have against Community, its employees or agents, or Community's affiliates (including, but not limited to, Maxwell Group, Inc. or Senior Living Communities) or their employees or agents that cannot be resolved informally by the grievance procedure set forth in this Residency Agreement and that arise out of or relate in any way to (a) this Residency Agreement, (b) any service, care or treatment provided to you, as Resident, in the Community, or (c) Resident's stay in the Community shall be settled exclusively by binding arbitration conducted in accordance with the Consumer Rules of the American Health Law Association, which provide for selection of a neutral arbitrator and allow for the convenient location of any arbitration hearing.

(b) Any disputes concerning the scope, validity or enforceability of this Arbitration Agreement shall be decided by an arbitrator, not a court. Any award of the arbitrator may be entered as a judgment in any court having jurisdiction.

(c) Resident and Community acknowledge and agree that the relationship between Resident and Community involves interstate commerce; therefore, the Federal Arbitration Act is applicable to this Arbitration Agreement.

(d) This Arbitration Agreement is an integral and essential part of the Residency Agreement between Resident and Community.

(e) You, the Resident (or Resident's representative), are not required to sign this Arbitration Agreement as a condition of Resident's admission to, or as a requirement for Resident to continue to receive care at, this facility.

(f) By signing below, you, the Resident (or Resident's representative) acknowledge that this Agreement has been explained to you in a form and manner that you understand, and that you understand this Agreement. You have the right to rescind this Agreement within thirty (30) days after you sign it.

(g) Nothing in this Agreement is intended to prohibit or discourage you or anyone else from communicating with federal, state or local officials, including federal or state surveyors, other federal or state health department employees, or representatives of the State Long-Term Care Ombudsman concerning the facility or your care at the facility.

ARBITRATION AGREEMENT

Please select one of the following:

Yes, I agree to the terms of this Arbitration Agreement.

No, I do not agree to the arbitration of disputes.

This Arbitration Agreement is being competed by:

Resident

Resident Representative

The following provision is to be signed only if the Residency Agreement is being executed on Resident's behalf by another person.

I hereby acknowledge that I have the power and authority, as Resident's agent and representative, to sign this Residency Agreement (including this arbitration agreement) on behalf of Resident. My power and authority to act on Resident's behalf arises from (check all that apply):

I have an applicable court order or procedure (for example, a conservatorship): ___Yes ✓No

I have Durable Power of Attorney for Resident: ___Yes ✓No

Attach Court Order document using the link here:

I have Express Authority granted to me by Resident: ___Yes ✓No

Name: Marvin Barborek

X _____

Resident or Resident Representative

X 3-16-24

Date

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	CASE NO.: 2025-CP-23-00434
	)	
Marvin Barborek,	)	
	)	
Plaintiff,	)	**DEFENDANTS CASCADES NURSING, LLC AND CASCADES RETIREMENT, LLC'S ANSWER TO PLAINTIFF'S COMPLAINT**
	)	
v.	)	
	)	
Cascades Nursing, LLC and Cascades Retirement, LLC,	)	
	)	
Defendants.	)	
	)	

TO: JOE MOONEYHAM, ESQUIRE AND MITCH APPLEBY, ESQUIRE, ATTORNEYS FOR PLAINTIFF:

Defendants Cascades Nursing, LLC and Cascades Retirement, LLC by and through their undersigned attorneys, subject to and without waiving their defense answer the Complaint of the Plaintiff as follows:

1. The Defendants deny each and every allegation that is not specifically admitted herein.

2. The Defendants lack sufficient information to form a belief regarding the allegations set forth in Paragraph 1 of the Plaintiff's Complaint and therefore deny the same and demand strict proof thereof.

3. The Defendants admit only so much of the allegations contained in Paragraph 2 of Plaintiff's Complaint as alleges that the Defendant Cascades Nursing, LLC is a business corporation organized and existing pursuant to the laws of the State of South Carolina. The Defendants deny the remaining allegations and demand strict proof thereof.

4. The Defendants admit only so much of the allegations contained in Paragraph 3 of Plaintiff's Complaint as alleges that Cascades Retirement, LLC is a business corporation organized and existing pursuant to the laws of the State of South Carolina. The Defendants deny the remaining allegations and demand strict proof thereof.

5. As to the allegations contained in Paragraph 4, the Defendants crave reference to the applicable medical records and deny any allegations that are inconsistent therewith.

6. The Defendants deny the allegations contained in Paragraphs 5, 6 and 7 of Plaintiff's Complaint.

7. The allegations contained in Paragraph 8 contain statements or conclusions of law to which no response is required. To the extent a response is required, the allegations contained in the Notice of Intent to File Suit as well as the expert affidavit are specifically denied.

8. The allegations contained in Paragraph 9 state a legal conclusion to which no response is necessary. To the extent a response is necessary, pre-suit mediation was completed and resulted in an impasse.

9. The allegations contained in Paragraph 10 contain statements or conclusions of law to which no response is necessary.

10. The Defendants deny the allegations contained in Paragraph 11 of Plaintiff's Complaint.

11. The Defendants lack sufficient information to form a belief regarding the allegations set forth in Paragraphs 12, 13, 14, 15 and 16 of the Plaintiff's Complaint and therefore deny the same and demand strict proof thereof.

12. As to the allegations contained in Paragraphs 17 and 18, the Defendants crave reference to the applicable medical records and deny any allegations that are inconsistent therewith.

13. The Defendants lack sufficient information to form a belief regarding the allegations set forth in Paragraphs 19 and 20 of the Plaintiff's Complaint and therefore deny the same and demand strict proof thereof.

14. The Defendants deny the allegations contained in Paragraphs 21, 22, 23, 24, 25, and 26 of Plaintiff's Complaint.

FOR A SECOND DEFENSE

15. **FURTHER ANSWERING THE COMPLAINT AND AS A SECOND DEFENSE**, these Defendants allege the Complaint fails in whole or in part to state facts sufficient to constitute a cause of action and, therefore, this action should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

16. **FURTHER ANSWERING THE COMPLAINT AND AS A THIRD DEFENSE**, these Defendants would show that the care and treatment of Plaintiff was within the standard of care required of community residential care facilities and providers in the field, for which reason these Defendants are not liable to Plaintiff in any sum whatsoever.

FOR A FOURTH DEFENSE

17. **FURTHER ANSWERING THE COMPLAINT AND AS A FOURTH DEFENSE**, any injury or damage sustained by the Plaintiff as a result of the matters alleged in the Complaint were due to and caused by the Plaintiff's physical and medical health infirmities and

disease process, and these Defendants plead such physical and medical health infirmities and disease process as a complete bar to this action.

FOR A FIFTH DEFENSE

18. **FURTHER ANSWERING THE COMPLAINT AND AS A FIFTH DEFENSE**, these Defendants submit the injuries and damages for which Plaintiff seeks recovery were due to and proximately caused by the intervening negligence, recklessness, willfulness, wantonness, and fault of a party or parties other than these Defendants. Such intervening negligence, recklessness, willfulness, wantonness, and fault were the sole cause of the injuries and damages for which Plaintiff seeks recovery and, therefore, Plaintiff may not recover against these Defendants.

FOR A SIXTH DEFENSE

19. **FURTHER ANSWERING THE COMPLAINT AND AS A SIXTH DEFENSE**, these Defendants allege the injuries and damages for which Plaintiff seeks recovery were due to and proximately caused by the sole negligence, recklessness, willfulness, wantonness, and fault of third parties for whom these Defendants are not liable. Therefore, the acts or fault of third parties are the real, efficient and proximate cause of the injuries for which Plaintiff seeks recovery, and, therefore, Plaintiff cannot recover against these Defendants.

FOR A SEVENTH DEFENSE

20. **FURTHER ANSWERING THE COMPLAINT AND AS A SEVENTH DEFENSE,** these Defendants allege any injuries or damages sustained by the Plaintiff were due to and caused by the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness ("negligence") of the Plaintiff, combining, concurring and contributing with the negligence of these Defendants, if any, without which contributory negligence, the Plaintiff's

alleged injuries and damages would not have been incurred or sustained. Should the negligence of the Plaintiff be determined to be greater than that of these Defendants if any, the Plaintiff is entitled to no recovery. If the negligence of the Plaintiff be determined to be not greater than that of these Defendants, if any, the Plaintiff's recovery is to be reduced by the percentage of Plaintiff's fault.

FOR AN EIGHTH DEFENSE

21. **FURTHER ANSWERING THE COMPLAINT AND AS AN EIGHTH DEFENSE**, these Defendants plead the applicable provisions of the South Carolina Non Economic Damage Awards Act of 2005 (§15 32 200, et seq.) and §15 38 15, as such provisions may be applicable in this case.

FOR A NINTH DEFENSE

22. **FURTHER ANSWERING THE COMPLAINT AND AS A NINTH DEFENSE**, these Defendants allege that any award of punitive damages to Plaintiff would violate the constitutional safeguards provided to these Defendants by the Due Process Clause of the Fourteenth Amendment of the United States Constitution and under the Due Process Clause of Article I, Section 3 of the South Carolina Constitution because the determination of punitive damages does not bear any reasonable relationship to the amount of actual damages, if any, suffered by or awarded to Plaintiff.

FOR A TENTH DEFENSE

23. **FURTHER ANSWERING THE COMPLAINT AND AS A TENTH DEFENSE**, any injury or damage sustained by the Plaintiff as a result of the matters alleged in the Complaint could not be avoided, and these Defendants plead an unavoidable accident as a complete bar to this action.

FOR AN ELEVENTH DEFENSE

24. **FURTHER ANSWERING THE COMPLAINT AND AS AN ELEVENTH DEFENSE**, these Defendants reserve any additional and further defenses as may be revealed by additional information during the course of discovery and investigation, and as is consistent with the South Carolina Rules of Civil Procedure.

FOR A TWELFTH DEFENSE

25. **FURTHER ANSWERING THE COMPLAINT AND AS A TWELFTH DEFENSE**, these Defendants plead the procedures and limitations of punitive damages as provided in S.C. Code Ann. § 15-32-520.

FOR A THIRTEENTH DEFENSE

26. **FURTHER ANSWERING THE COMPLAINT AND AS A THIRTEENTH DEFENSE**, these Defendants allege that this matter is subject to binding arbitration.

WHEREFORE, having fully answered Plaintiff's Complaint, these Defendants pray that the same be dismissed with costs and for such other and further relief as this Court may deem to be just and proper.

TURNER PADGET GRAHAM & LANEY P.A.

By: s/R. Gerald Chambers, Jr.

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ATTORNEYS FOR DEFENDANTS CASCADES NURSING, LLC AND CASCADES RETIREMENT, LLC

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017-CP-07-02636

JOSEPH HOLMES, as Personal Representative of the ESTATE OF DAVID HOLMES
PLAINTIFF(S)

BAYVIEW MANOR, LLC, d/b/a BAYVIEW MANOR; EPIC GROUP, LP; and EPIC GENERAL, LLC
DEFENDANT(S)

Submitted by: Eric M. Poulin	**Attorney for :** ☒ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

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

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

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: Defendants' Motion for Non-Jury Trial is DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

Eric M. Poulin / Stefan B. Feidler	W. McElhaney White
32 Ann Street	101 West St. John Street, Suite 200
Charleston, SC 29403	Spartanburg, SC 29306
ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**

CLERK OF COURT

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOR THE 14TH JUDICIAL CIRCUIT CASE NO: 2017-CP-07-02636
JOSEPH HOLMES, as Personal Representative of the ESTATE OF DAVID HOLMES, Plaintiff(s), v. BAYVIEW MANOR, LLC, d/b/a BAYVIEW MANOR; EPIC GROUP, LP; and EPIC GENERAL, LLC, Defendant(s).		ORDER DENYING DEFENDANTS' MOTION FOR NON JURY TRIAL

THIS MATTER is before the Court on Defendants' Motion for Non-Jury Trial. Arguments were held on April 25, 2018 in the Beaufort County Courthouse. Present at the call of the case was attorney Eric M. Poulin, representing the Plaintiff, and attorney W. McElhaney White, representing the Defendants. For the following reasons, Defendants' Motion is respectfully **DENIED.**

BACKGROUND

The Decedent, David Holmes, was a resident of Defendants' long term care facility. Decedent was first admitted on December 2, 2014, and re-admitted on February 17, 2015. Decedent was incompetent during both admissions. At each admission, Decedent's family signed an Admission Agreement.[1] The Admission Agreements contained the following provision:

[1] Plaintiff argues that the family members lacked authority to sign these Admission Agreements to the extent they contain jury waiver clauses. However, because the Court finds this waiver was invalid and unenforceable in the first instance, it is not necessary to discuss the issues of authority or agency.

> **Waiver of Jury Trial: (Please read carefully)**
> Resident hereby knowingly, voluntarily, and intentionally waives the right to trial by jury with respect to any litigation, including any counterclaim which Resident may assert, arising from or relating to this Agreement or any other document connected with this Agreement, or arising out of or relating to any of the said documents or any relationship between the Facility and Resident, including the Resident's admission itself, or any other course of conduct, course of dealing statements (whether verbal or written) or actions of the facility or Resident.
>
> Resident represents and warrants that the waiver contained in this Paragraph has been freely and voluntarily made after reviewing the same, or having had an opportunity to review the same, with counsel of Resident's choice.

The Admission Agreements also contained an Arbitration Clause which states that arbitration is "Optional" and allows the person signing to decline by marking an "X." At each admission, the family declined arbitration by marking an "X." Upon Decedent's death, his Estate brought this medical negligence action against the Defendants and requested a jury trial. Defendants now seek to invoke the jury waiver clause of the Admission Agreements, and seek an order setting this case for non-jury disposition.

LAW

An illegal contract is unenforceable. Berkebile v. Outen, 311 S.C. 50, 53 n. 2, 426 S.E.2d 760, 762 n. 2 (1993). "The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Id. Federal regulations require Medicare and Medicaid certified facilities to accept Medicare/Medicaid reimbursement rates as payment in full. See 42 C.F.R. § 489.30; 42 C.F.R. § 447.15. Moreover, such facilities, in the case of an individual who is entitled to medical assistance, must "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under

the state plan…any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay at the facility." 42 U.S.C. § 1396r(c)(5)(A)(iii).

Finally, it is well settled that to be valid and enforceable, a contract must be supported by valuable consideration. Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct.App.1984)("[a] contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act."). Consideration may consist of "some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998).

ANALYSIS

In the instant case, it is undisputed that Decedent was a Medicare and Medicaid beneficiary while residing at Defendants' facility and that the facility was billing and accepting payment from Medicare and Medicaid for Decedent's care.[2] Therefore, the question of enforceability turns, in part, on whether the jury waiver provision was a mandatory part of the Admission Agreement and a required pre-condition to admission. During arguments, counsel for Defendants was unable or unwilling to take a position on this issue. However, in light of the following analysis, the Court finds that this provision is unenforceable in either case.

If the jury waiver provision was a required pre-condition to admission, then this requirement was a clear violation of Federal Law. 42 U.S.C. § 1396r(c)(5)(A)(iii) prohibits a

[2] During the hearing, counsel for Defendants stated his belief that Decedent was Medicare eligible but only "Medicaid pending" during his stay. However, Mr. White has since confirmed that Decedent was, in fact, Medicaid eligible during his stay.

facility such as Defendants' from soliciting or accepting "any other consideration" as a condition to admission outside of the Medicaid payments when admitting a patient in Decedent's position. By requiring Decedent's family to waive his right to a jury trial as a condition of admission, Defendants' were requiring and accepting consideration in addition to Medicaid payments. Therefore, the jury waiver clause would be unenforceable due to its illegality.

Alternatively, if the jury waiver was not a precondition to admission, then it fails for lack of consideration. As noted, the waiver, as written, works only in one direction. When asked during arguments what the consideration for the waiver might be, counsel for Defendants argued only that the admission was the consideration for the waiver. When pushed on whether any additional consideration was present (separate and apart from the admission and care) counsel agreed there was none. Here, Defendants cannot have it both ways. They cannot, on the one hand, argue that the waiver was not consideration for the admission but, on the other, argue that the admission was valuable consideration for the waiver. For the waiver to be enforceable as a non-pre-condition to admission, it must be supported by some other valuable consideration, which it is not.

CONCLUSION

Therefore, we are left with a clause that, if a pre-condition to admission, is unenforceable under the doctrines of illegality; if not a precondition to admission, void for lack of consideration. For these reasons, Defendants' Motion for Non-Jury trial is respectfully **DENIED.**

IT IS SO ORDERED!

Dated this ____ day of May, 2018
Walterboro, S.C.

The Honorable Perry M. Buckner, III
Presiding Judge, 14th Judicial Circuit

Beaufort Common Pleas

Case Caption: David Holmes Estate Of , plaintiff, et al VS Bayview Manor Llc , defendant, et al

Case Number: 2017CP0702636

Type: Order/Jury Trial

It is so Ordered

s/ Perry M Buckner III 2122

IN THE STATE OF SOUTH CAROLINA) COUNTY OF CHARLESTON)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO: 2017-CP-10-5984
VICTOR RAWL as Personal Representative of the ESTATE OF VERA BROWN, Plaintiff, v. WEST ASHLEY REHABILITATION AND NURSING CENTER-CHARLESTON, SC, LLC d/b/a HEARTLAND OF WEST ASHLEY REHAB AND NURSING CENTER, Defendant.	ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND COMPEL ARBITRATION

This matter came before the court on March 21, 2018 on Defendant's Motion to Dismiss and Compel Arbitration. For the reasons set forth below, Defendant's Motion to Dismiss and Compel Arbitration is **DENIED**.

BACKGROUND FACTS

Vera Brown was admitted to Defendant's facility on August 25, 2014. Upon admission, Ms. Brown was asked to sign admission paperwork as well as the Arbitration Agreement, which was separate from the admission paperwork. The Arbitration Agreement was not necessary for admission. Additionally, there was no bargain for exchange nor consideration in Ms. Brown's agreement to the Arbitration Agreement. Ms. Brown passed away approximately four (4) days after her admission into Defendant's facility, while under Defendant's care.

LEGAL ANALYSIS

While there is a presumption in favor of arbitration agreements, this presumption only applies where there is a valid arbitration agreement. EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler's Cove Homeowners Ass'n v.

Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 D.E.2d 581 (2003). However, not all arbitration clauses are enforceable. Unless the parties have contracted otherwise, the FAA applies in federal and state courts to any arbitration agreement. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007). While federal law preempts state laws that would invalidate arbitration agreements on most public policy grounds, the FAA looks to state law to decide the threshold questions of contract formation. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'"). Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts. Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

A. The Arbitration Agreement lacks valuable consideration and is unenforceable where there was no additional consideration in Plaintiff's agreement to the Arbitration Agreement and future promises are not valuable consideration.

The necessary elements of a contract are an offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 581 S.E.2d 161, 166 (S.C. 2003) "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)). Where a contract lacks valuable consideration, the contract will be deemed unenforceable.

Our courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. See Riedman Corp. v. Jarosh, 290 S.C. 252, 253, 349 S.E.2d 404, 405 (1986); see also O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274-5 (4th Cir. 1997). However, in determining whether adequate consideration exists in a contract, or arbitration agreement under the FAA guided by principles of contract law, our courts must examine and stay within the confides of the four corners of the instrument. State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)). Therefore, our courts must assess whether the arbitration agreement itself contains sufficient consideration in the form of a mutual exchange of promises to arbitrate.

In the case at hand, it is clear that the Arbitration Agreement lacks valuable consideration. Paragraph 3 of the Arbitration Agreement states that the FAA applies to the Agreement. Therefore, we must look at state law to decide the threshold question of contract formation and whether consideration exists. Munoz, 343 S.C. at 542 S.E.2d 360, 364; Towles, 338 S.C. at 37, 524 S.E.2d at 844; Rent-A-Center, West, Inc, 561 U.S. at 130 S. Ct. at 2776, 177 L.Ed.2d 403; Simpson, 373 S.C at 14, 644 S.E.2d at 663. Upon admission Ms. Brown was asked to sign the admission paperwork. Ms. Brown then signed the Arbitration Agreement separate from the admission paperwork. Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement. In fact, the Arbitration Agreement states "[t]he patient will receive services in this center whether or not this agreement is signed." Neither party gained a right, interest, profit or benefit by agreeing to the Arbitration Agreement. Plantation, 386 S.C. at 206, 687 S.E.2d at 718. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered or undertaken by the other the party,

when agreeing to the Arbitration Agreement. Id. Finally, viewing the Arbitration Agreement itself there is no mention of consideration. The court is required to make its assessment by viewing only the four-corners of the Arbitration Agreement, and cannot go beyond the confines of the Arbitration Agreement itself. Consequently, where the Arbitration Agreement is guided by the FAA and principles of contract law - the Arbitration Agreement is unenforceable where the Arbitration Agreement lacks valuable consideration.

B. Plaintiff's agreement to the Arbitration Agreement was unconscionable in the absence of meaningful choice on part of Plaintiff due to the one-sided contract provisions, the relative disparity in the parties' bargaining power, and the Defendants relative sophistication over Plaintiff's decedent.

In South Carolina, unconscionability is defined as the absence of 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. Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the agreement. S.C. Code Ann. § 36–2–302(1) (2003).

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. See Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir.1999). It is under this general rubric that courts must determine whether a contract is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms.

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. See Carlson v. General

Motors Corp., 883 F.2d 287, 295 (4th Cir.1989). In determining whether a contract was "tainted by an absence of meaningful choice," id. at 295, 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. Id. at 293. See also Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17A Am.Jur.2d Contracts § 279 (2004))).

In the case at hand, it is clear that the Arbitration Agreement is unconscionable because Vera Brown lacked absence of meaningful choice and the terms in the Arbitration Agreement are oppressive, one-sided terms. Vera Brown was admitted into Defendants' facility on August 25, 2014. She passed away at Defendants' facility four (4) days later on August 29, 2014. Upon admission the standard Arbitration Agreement form was presented to an ill Vera Brown on a take-it-or leave it basis. Ms. Brown did not contribute to the drafting of the Arbitration Agreement or possess the bargaining power to negotiate the terms of the Arbitration Agreement. See Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (recognizing a contract of adhesion is generally thought of as a standard form contract, offered on a take-it-or-leave-it basis, containing non-negotiable terms). Nevertheless, finding a contract to be one of adhesion is merely the beginning point in the analysis of whether the contract is unconscionable. Lackey, 330 S.C. at 395, 498 S.E.2d at 902.

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 v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). In determining whether there

is an absence of a meaningful choice, courts consider the relative disparity in the parties' bargaining power; the parties' relative sophistication; the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id.

In the case at hand, there was an inherent disparity in bargaining power between the parties as this was a transaction between an ill patient who died four (4) days after executing the Arbitration Agreement and a commercial entity. Vera Brown was transferred from the hospital via ambulance to Defendants' facility with diagnosis that included chronic kidney disease, Anemia, dementia, urinary tract infection, upper respiratory disease, acute kidney failure, congestive heart failure, hypertension, weakness, and difficulty in walking. She was also marked as a fall risk.

Furthermore, the arbitration agreement was inconspicuously buried in the admission paperwork and "hastily" presented to Ms. Brown for her signature. This is evident by the "x's" where Ms. Brown was asked to print and sign her name, and date. Moreover, Vera Brown's injuries include death as this is a wrongful death claim.

Moreover, we must also consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences. The loss of the right to a jury trial is an obvious result of arbitration. However, this particular arbitration clause also required Vera Brown to forego certain remedies that were otherwise required by statute. While certain phrases are in bold, the arbitration clauses in their entirety are written in the standard small print, and embedded in paragraphs one (1) through fourteen (14). The Court cannot ignore the inconspicuous nature of these provisions, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Ms. Brown by law.

Therefore, this Court denies Defendant's Motion to Dismiss and Compel Arbitration where the Arbitration Agreement is guided under the FAA and principles of contract law because the Arbitration Agreement lacks valuable consideration and was unconscionable.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss and Compel Arbitration is **DENIED.**

IT IS SO ORDERED!

Dated this 27 day of April 2018

The Honorable Dianne Goodstein
Presiding Judge, Ninth Judicial Circuit

STATE OF SOUTH CAROLINA) IN THE CIRCUIT COURT NO. 13

COUNTY OF GREENVILLE) DOCKET NO.: 2025-CP-23-00434

MARVIN BARBOREK)
)
Plaintiff,)
)
versus)
)
CASCADES NURSING, LLC, et al,)
)
Defendants.)

M O T I O N H E A R I N G

DATE: May 20, 2025
TIME: 04:41 to 05:12
LOCATION: South Carolina Circuit Court No. 13
JUDGE: Vernon F. Dunbar
TRANSCRIBED BY: Sandra J. Early

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A P P E A R A N C E S

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FOR THE DEFENDANTS, CASCADES NURSING, LLC, ET AL:

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I N D E X

E X H I B I T S

(None offered or admitted.)

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

P R O C E E D I N G S

THE COURT: Just come on up, and just tell us the name of the case or the number on the docket so we can announce it properly.

MR. APPLEBY: Judge, I believe we're first on the docket. This is Barborek versus Cascades Nursing, LLC, et al.

THE COURT: Okay. You may call the case. You maybe seated.

THE CLERK: Yes, sir. This is Case No. 2025-CP-23-00434, Marvin Barborek versus Cascades Nursing, LLC, et al. It's defendant's motion to dismiss and compel arbitration.

THE COURT: Okay. I'm going to ask you to speak very loudly into the microphone since we're doing this by WebEx. You don't have to stand up, but just make certain the microphone is positioned in front of you. Okay? I'll hear from the defendant, the moving party.

MS. BRAY: Yes, Your Honor. Are you sure I don't need to stand up?

THE COURT: If you wish to stand up, that's fine. It's up to.

MS. BRAY: Okay. Just let me know if I'm speaking loud enough.

THE COURT: You're speaking fine.

MS. BRAY: Great. May it please the Court, Your Honor, my name is Abigail Bray, and along with my clerk, William Hammontree, we represent the defendants in this matter. We filed a motion to dismiss and a motion to compel arbitration.

Your Honor, plaintiff was admitted to Cascades Nursing, LLC on March 6th, and included with his admission paperwork was a standard arbitration agreement that plaintiff signed. And the arbitration agreement was not a precondition of admission, but plaintiff did sign it upon admission to the facility. Plaintiff has now presented an action in circuit court, and so we are asking that the arbitration agreement that was voluntarily signed be compelled and ordered, and that this case be resolved through arbitration. The arbitration agreement itself is governed by the Federal Arbitration Act, or the FAA, and that requires that arbitration agreements be placed on equal footing as to all contracts in the State of South Carolina. And, in fact, the FAA favors an arbitration agreement when it's signed.

In our case, the arbitration agreement that was included in the admissions paperwork is valid on its face. It's supported by consideration, and it's a valid contract in all aspects. It's not unconscionable because

to be unconscionable, you have to have both an absence of meaningful choice as well as terms that are so oppressive that a reasonable person could not be held to them and accept them. We don't have that here, Your Honor. As I said, it was not a precondition to his admission. It was voluntarily signed. And these are industry-standard, I would say. The agreement is reasonable and clearly states at the top that it would waive certain rights you'd have. And it clearly -- it's a two page agreement, Your Honor -- we included it with our motion -- and it's very clear what it's meant to do.

So, without question, the claims that plaintiffs present in their complaint to this Circuit Court falls within the arbitration agreement itself. We -- plaintiff's counsel filed a response this weekend we've reviewed. Some of the things that were brought up in the response in opposition to arbitration agreement were that it's unenforceable because the admission agreement itself refers to Cascades Verdae instead of the two entities, Cascades Retirement, LLC and Cascades Nursing, LLC that are included on the complaint.

Your Honor, the Cascades Retirement, LLC and Cascades Nursing, LLC are both single-member LLCs, and their sole member is Senior Living Communities, LLC, which is comprised of Cascades Verdae and nine other communities.

So we do have the proper defendants listed here on the complaint that encompass Cascades Verdae. Further, that's not necessarily an issue for the Court at this time because that's not a requirement of kind of compelling this type of arbitration. It's clear what facility the plaintiff went to and received care. It's clear the plaintiff has sued for the care that he received. And so, we just ask today that the arbitration agreement that was signed upon admission be enforced.

The -- the plaintiff also stated in their response that because the arbitration agreement itself -- which is this two-page document, Your Honor, that we had attached -- was separate to the admissions agreement, that the two did not merge. And we just don't find that that's accurate under South Carolina law, Your Honor. It was presented as an admissions packet with several portions of it, and it's clear that all documents have merged together to be admitted into the facility. Again, it was not a precondition of admission, it's not unconscionable. It was voluntary signed by the plaintiff.

The last point I'll reference in the response before plaintiff can get up, Your Honor, is that plaintiff says there was lack of consideration to this agreement itself. Again, I think that goes into the merger argument that we've discussed. It's a merged agreement with all

portions of it together, and consideration was for the entirety of the agreement. So here, we just ask, Your Honor, that you compel arbitration in this case. It is, we believe, industry-standard when it comes to these types of facilities. And I'm happy to answer any questions after plaintiff presents. Thank you, Your Honor.

THE COURT: Thank you very much. I'll hear from you, sir. Good afternoon.

MR. APPLEBY: Yes, sir. Good afternoon, Judge. My name is Mitch Appleby. I represent the plaintiff. Can you hear me okay?

THE COURT: I can hear you fine.

MR. APPLEBY: Would you prefer I stand?

THE COURT: No, no, you can sit.

MR. APPLEBY: Okay. I just want to make sure that the microphone can pick me up. So if this works for you, then it works for me.

THE COURT: It works fine.

MR. APPLEBY: Thank you, Judge, and thank you for -- for the argument from defendant's counsel there. I submitted a memorandum in opposition on Friday. In addition to that memorandum, I submitted I believe six exhibits attached to it. I have all of that printed out. If the Court wants me to hand anything up, I'm happy to do

it.

THE COURT: If you've already printed it out, that would be great.

MR. APPLEBY: Sure. A copy of everything?

THE COURT: Yes. Whatever you've printed out and you'd like to hand to the Court would be fine. It would save my eyes from this computer. I did give it a cursory review, I'm going to be quite candid. But to get into the details, based upon your argument, it will be best that I have a copy.

MR. APPLEBY: Give me one second.

THE COURT: Take your time.

MR. APPLEBY: Do you all need a copy? I printed out three if you need any.

MS. BRAY: I think we're okay. Thank you, though.

MR. APPLEBY: Okay.

THE COURT: I mean, I have it up here on display.

MR. APPLEBY: Well, if that would be easier for you, I'll hand it up.

THE COURT: Yeah.

MR. APPLEBY: I'll make sure I get everything right.

THE COURT: Thank you.

MR. APPLEBY: And I believe that's everything. Judge, I kind of broke the memo in opposition into several different arguments. First, I broke it into the defendants aren't actually parties to the arbitration agreement. Defendants' counsel mentioned that a moment ago, and I handed up the arbitration agreement to the Court. It's only a two-page front and back document. If you review it, it lists Maxwell Group Incorporated, Senior Living Communities, and Wellmore, which are apparently three different corporations. However, it does not list Cascades Nursing, LLC or Cascades Retirement LLC, who are the defendants in this case. They are not listed anywhere in the admission agreement, nor are they mentioned anywhere in the arbitration agreement.

The admission agreement does mention a community name called Cascades Verdae. If you look on the South Carolina Secretary of State business website, Cascades Verdae is not actually a business that comes up. It's not actually an even legally formed entity in the State. In the admission agreement, it lists the address for Cascades Verdae as 10 Fountainview Terrace in Greenville. And one of the exhibits that I handed up to the Court is the defendants' answer that they filed after filing this motion to dismiss. And as you can see in there, I actually allege that Cascades Nursing and Cascades

Retirement were the facility located at 10 Fountainview Terrace in this case. Both of those were denied by -- by the defendants in their answer. So when the argument is made that patient was admitted to Cascades Nursing, the answer that we received in response to the complaint was that Cascades Nursing is not located at 10 Fountainview Terrace, which is the supposed address of Cascades Verdae. So I don't even know actually what the name of the facility is.

I listed in the factual background of my memo that, according to the medical records, the facility is identified as P-302-CVS&F Asher, Harper House Verdae S&F, Cascades Verdae of South Carolina, CCRC/Corp. So it's not exactly clear to me who the facility is. And, regardless of the outcome the -- the defendants that have been named in this case are not listed anywhere the admission agreement. They're not listed anywhere the arbitration agreement.

Secondly, there's this question of merger, whether the admission agreement that I've hand up along with the arbitration agreement, whether they merge into one document. I would argue that they don't. If you look at the arbitration agreement in the case, it has its own signature line. And, in addition to that, it also provides that the arbitration agreement is not a

precondition to admission under the admission agreement. So, if there's a separate signature line, if there's a separate clause in there, basically, that says, hey, you don't have to sign this in order to be admitted, then that's separate -- a separate agreement. And I cited some cases in there. Under that section of argument, the Hodge case, which I believe is a South Carolina Court of Appeals case. It's a similar issue, like nursing home, rehab facility. Admission agreement and arbitration agreement were submitted, and the Court of Appeals, in examining it, held for various reasons that the documents did not merge together. And part of the reason that they held that they didn't merge together was because of the separate area for signature and because arbitration, signing that, was not a precondition to admission. So the South Carolina Court of Appeals looked at that issue in the Hodge case and found that, because of those two separate -- separate signature lines, it's not a precondition. Based in part on those issues, they found that there was no merger.

And the merger issue is important because, if the documents haven't merged, then we have to look at the arbitration agreement solely on its own as its own independent contract separate and apart from the admission agreement. So I believe with -- with the two

things that I've mentioned and the Hodge opinion, I don't think that they merge. And so, looking at the arbitration agreement independently, we just have to look at the four corners of the document and what the document says. The document was allegedly signed by my client called, Mr. Barborek. It was not signed by anybody with the facility or anybody from either defendant named in this case. With it not being signed, that doesn't seem to communicate any mutual assent in order to make a valid contract.

In addition to that, I don't believe that the arbitration agreement standing on its own has any consideration. In review of the arbitration agreement itself, it doesn't seem like there's any mutually agreed promise to arbitrate. The arbitration agreement only mentions that the plaintiff gives up his right to a jury trial, it doesn't say anything about the facility or the defendants named in the case giving up their right to a jury trial. So it's only the plaintiff giving up his right. And if the arbitration agreement being signed is not a precondition to admission, then I don't know what the consideration is for the arbitration agreement. I don't know what benefit my client would get by signing that. He gives up his right to a jury trial in exchange for basically nothing, because he could have not signed

it and still gone into the facility because it's not a precondition to admission. So counsel for the defendants mentioned that there's consideration for it. I'm not sure what that is at this point. It doesn't appear to me that there is any consideration for that independent arbitration agreement. And, obviously, consideration is necessary in order to form a contract.

I would also add, in addition to other issues that I think are important, I believe that the arbitration agreement is unconscionable. And what I should mention on the consideration piece that I was just arguing a minute ago, I attached two exhibits to that memo, and there are two orders, one from Judge Buckner, and one from Judge Goodstein where they examined this issue. And they both, in reviewing this issue in their orders, found that when waiver -- meaning signing an arbitration agreement, waiving a right to a jury trial -- when that's not a precondition for admission, then it fails for lack of consideration. So they addressed those two issues in those orders that I attached as exhibits.

In addition, I also included an argument in there that the arbitration agreement is unconscionable. And the order from Judge Goodstein also addresses this issue that's attached as an exhibit. In her order, in kind of addressing unconscionability for an arbitration

agreement, she looked at lack of meaningful choice, whether the arbitration agreement was one-sided, that the patient was ill, that it's kind of on a take-it-or-leave-it basis, that the patient did not contribute to the drafting of the arbitration agreement, and that the patient had no bargaining power.

In this case, Mr. Barborek is not from Greenville, he's from Florida, and he came up to this area to visit some friends of his. While he was here, he got injured, went to the hospital. He had a broken femur and had to have the hip replacement. He's 79 years old. He goes to this facility, again, not being familiar with the area. He's in a time of crisis. He's on oxycodone. And he's there and he's presented with nearly 30 document -- you know, 30 pages of intake documents to review and sign. Again, he's an elderly man. He's not from the area. He has no family here to assist him. He's on oxycodone. He didn't -- he was ill, like Judge Goodstein referenced in her order. He didn't contribute to the drafting of the arbitration agreement. He had no bargaining power, and he lacked meaningful choice when it comes to what are his options.

He's transferred from the hospital to this facility. I don't believe that he has legitimate options for other places that he could go. And from just a purely

one-sided issue and a one-sided argument, the defendants or the facility in this case are the experienced party. They're the superior party in terms of they've handled this issue many times, they know what the documents are. Mr. Barborek is not that. He's never encountered this issue before. And also from the one-sided nature by agreeing to this unilateral arbitration agreement where only he's waiving his right to a jury trial, it says nothing in the arbitration agreement about the defendants waiving their right to a jury trial. He gives up of one of his most significant rights, the right to a jury trial, in exchange for nothing at all. Because, again, it's not a precondition to admission and so, again, back to I think there's no consideration for it. But from an unconscionability standpoint, he gives up his most significant right and he gets nothing in return for it, because he could have been admitted. The admission was not consideration for it.

And, lastly, I argued that Mr. Barborek was not in a position mentally as far as mental capacity to form that contract at the time. As I mentioned, he was 79 years old, he had just broken his femur, he had had a hip replacement. He had been given oxycodone that morning. He was sent to the facility, you know, in a time of crisis to try and recover from this injury. He's not

from the area, he has no one there to help him. And he's presented with all these documents to sign in order to get admitted to the facility. I would argue that he didn't have the mental capacity or the right state of mind at that time in order to form a contract for -- for an arbitration agreement.

So, just to reiterate, the defendants are not parties to the admission agreement or the arbitration agreement. I believe that the documents do not merge the admission and arbitration agreement because the arbitration agreement has its own separate signature line. It's not a precondition to admission. It's also not listed anywhere in the table of contents or as an attachment in the admission agreement, so I think they're separate and don't merge there. There's a lack of mutual assent because no member of the facility or defendants signed the arbitration agreement. There's no consideration for the arbitration agreement. I believe the arbitration agreement is unconscionable, and I don't believe that Mr. Barborek had the mental capacity to contract away his right to a jury trial at that time.

THE COURT: I understand your position.

MR. APPLEBY: Yes, sir.

THE COURT: Okay. Let me hear from you, ma'am.

MS. BRAY: Yes, Your Honor, briefly. Thank you.

THE COURT: Certainly.

MS. BRAY: So, I'll take some in turn, Your Honor. First, the issue of the defendants as listed on the complaint. So there is South Carolina case law, Cobb & Seal Shoe Store versus Aetna Insurance Company that says "A contract is good between the parties, no matter how incorrect the names used in the paper may be, if it appears they were intended as the names of the parties to be bound by the contract or to receive its benefits." So, Your Honor, that's South Carolina case law that strengthens the position I stated earlier, which is these are the intended parties here. We've talked about kind of how the LLCs are formed. But the plaintiff received care from this facility is now suing this facility due to that care. Those are the intended parties. So, South Carolina law dictates that this type of, you know, LLC naming wouldn't preclude the contract and the arbitration agreement.

Going to the issue of precondition and how it affects merger. So, Your Honor, we argued that precondition of someone having to sign this agreement in order to enter the facility, that is not an issue that goes to merger, it's an issue that goes to unconscionability. And so, as plaintiff stated, to be considered unconscionable there must be, one, an absence of meaningful choice and, two,

that the terms are oppressive. So, we state that this arbitration agreement is not unconscionable because it was not a precondition. There wasn't an absence of meaningful choice. If we look to the arbitration agreement itself, plaintiff has made claims that it only affects one party, and that's simply not true. At the very beginning, the first paragraph A says "Any and all controversies, claims, disputes, disagreements or demands of any kind that a resident has against the community, its agents," all this. It's anything that occurs that the resident is going to bring up, we're going to do in arbitration. And the idea that arbitration gives, quote, "basically nothing" to either party, I think a lot of people would disagree with, Your Honor. Arbitration is an important part of our system. It has a fast track, if you will, a shorter time period to resolve claims. You know, I didn't anticipate standing up here and, you know touting, the -- the good things of arbitration, but I would say that it's not basically nothing, and that both parties have agreed to this arbitration agreement.

Going to the issue of whether the plaintiff kind of understood what he was signing because it was several documents for admission. Your Honor, if you look to the second page of the admission agreement, you'll see that the plaintiff had to do several things beyond just

signing the documents. He has to select one of the following and circle it. Yes, I agree to the terms of this arbitration agreement was circled by the plaintiff. He has to say who he is that's completing the arbitration agreement, and he signs that he's a resident. He has to check certain aspects, whether there's an appellate court order, whether he has a durable POA, whether he has express -- he has to go through each of these, then he signs and dates. So, the idea that this is just yet another paper shoved before him that he signs, Your Honor we think the agreement itself answers that question that that's not the case.

So, we've talked about that precondition is -- and -- and because it's not a precondition, we do go through all of this, right, Your Honor? So he doesn't have to sign this in order to be under the facility, so we do go through all this and have a separate signature that he has agreed to. So that doesn't go to merger, that goes to the unconscionability we've talked about before. The merger goes to the fact that, again, the intended documents at admission are presented to the plaintiff at one time. And those documents then go to his treatment at the facility, which is the consideration.

So we would argue that, again, just like the name, Your Honor, it's the intended facility, it's the intended

admission, it's the intended care that he received, and that's what these documents are. The precondition aspect goes to it's not unconscionable. He didn't have lack of choice. He had every opportunity not to sign it, not to circle it, but he chose to. And then, again, we go to -- well, we do believe that arbitration has a role in society. It has an opportunity, and a lot of people do benefit from it. So the idea that he receives nothing, I wouldn't agree, Your Honor.

The -- the final argument that -- that plaintiff brings out is the lack of a capacity argument. There's -- there's no evidence that plaintiff had lack of capacity. And I would submit that, on its face, just being 79 years old and having pain medication does not completely take away your capacity to sign contracts. I think that's well established, as well as in -- in the type of care that's received. We don't have discovery that says that any nurse said he wasn't able to sign this. We don't have anything from plaintiff that says besides him being 79 years old and on Oxy at the time. And, Your Honor, I don't think that that meets the threshold of incapacity for a contract.

Those are my brief replies, Your Honor. I'm happy to answer any questions in addition. Thank you, Your Honor.

THE COURT: Thank you. You've briefed it very

well, both of you. Anything else, sir?

MR. APPLEBY: I would just add, when it comes to the issue of whether a precondition to admission is concerning unconscionability or concerning the issue of merger, I'll read from my memo in opposition. This is from Judge Buckner's order: "If the jury waiver was not a precondition to admission, then it fails for lack of consideration." Judge Goodstein's order: "The arbitration agreement was not necessary for admission. Additionally, there was no bargain for exchange, nor consideration in Ms. Brown's agreement to the arbitration agreement." It goes into detail where those two judges discuss in their orders about how, if it's not a precondition to admission, then there's no consideration there.

And another case I cited in here that's just, I think, helpful for considering the -- the four corners of the document and what it says. The McPherson case I cited in my memo basically says you take the document, the four corners of it, and that's what you have. I'm not intentionally misleading the Court that the arbitration agreement is only the plaintiff gives that up and the facility doesn't. The important words that defendant's counsel says there were that the resident gives up. It says the resident gives up these rights, it doesn't say the facility gives up these rights. And so,

we just have to look at the four corners and what does that document say. And the four corners says the resident gives them up, it doesn't say the facility gives them up. And it also doesn't have a signature. I know it's, you know, Mr. Barborek signed or checked a box or whatever. It's not signed from anybody with the facility or anybody with the defendants.

So, all that to say I just don't think that there's any consideration for it. I think that a lot of nursing homes have, in handling these cases, have a lot of different LLCs. I don't know if that's for liability reasons or tax reasons, I don't know. But they are the ones that created all of these LLCs, and they're not listed in this arbitration agreement. It seems unfair for them to then come back at the end and say, oh, well, I know we're not listed in this arbitration agreement, but we can still enforce an arbitration when they have all these LLCs. Then put them in the arbitration agreement so that the plaintiff can know who they're dealing with and who they're working with in signing these things.

They're obviously on such an unequal playing field when it comes to who knows what's in the documents, who's coming in in a position of, you know, crisis and injury and just trying to recover versus, you know, who -- who

has all the bargaining power, who wrote the document. And, again, any ambiguities as to merger, as to arbitration versus admission --

THE COURT: Has to be construed against the drafter.

MR. APPLEBY: -- has to be construed against the drafter. You're right, Judge. Thank you.

THE COURT: Yes?

MS. BRAY: Your Honor, just very briefly. The -- the last thing I would add is that section B on the arbitration agreement itself is that any disputes concerning the scope, validity, or enforceability of the arbitration agreement shall be decided by an arbitrator, not a Court. So, defendants would just like to put on the record that if there is an issue as regards to consideration or if something -- or merger or with the other documents, we would say that this document itself is valid on its face and would ask that an arbitrator would review it and look as to its validity and enforceability. Thank you, Your Honor.

THE COURT: All right. Thank you. You've given me a lot to think about and concentrate on, so I'm going to take this matter under advisement and read everything again carefully. As I said, I gave it a cursory review just so I could understand what you were talking about

from an intelligent standpoint, but you are going to make me dive a lot deeper, so I'll take this matter under advisement. Thank you both very much.

MR. APPLEBY: Thank you, Judge.

MS. BRAY: Thank you, Your Honor. I appreciate your time.

THE COURT: I appreciate you.

(The proceeding was concluded.)

CERTIFICATE OF TRANSCRIBER

I, Sandra J. Early, a court-approved transcriber, do hereby certify that I transcribed the electronic recording of the foregoing proceedings in Docket No. 2025-CP-23-00434 held on May 20, 2025, before the Honorable Vernon F. Dunbar, and that said transcript is true and correct, all to the best of my knowledge and ability.

I further certify that I am not related to nor the employee of any of the parties hereto, nor related to or employed by any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

October 5, 2025

Sandra J. Early

Transcriber

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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