RECEIVED
May 19 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

Heath P. Taylor, Circuit Court Judge

Case No. 2022-CP-18-01775
Appellate Case No. 2024-000914

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

Respondent,

v.

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

Appellants.

RECORD ON APPEAL

PARKER LAW GROUP, LLP
Lee D. Cope (SC Bar No. 14361)
John E. Parker, Jr. (SC Bar No. 104225)
P.O. Box 487
Hampton, South Carolina 29924
(803) 903-1781

-and-

BRIGHT MATTHEWS LAW FIRM, LLC
Margie Bright Matthews (SC Bar No. 13200)
P.O. Box 499
Walterboro, South Carolina 29488
(843) 549-6028

Attorneys for Respondent

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Matthew O. Riddle (SC Bar No. 76650)
T. Ashton Phillips III (SC Bar No. 104227)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
P.O. Box 993 (29402)
Charleston, South Carolina 29401
(843) 720-5488

Attorneys for Appellants

INDEX

Orders

Pleadings

Transcript

Other Material

---

[1] "Defendants" refers to Defendants/Appellants, St. George Health Care, LLC, d/b/a St. George Healthcare Center (the "Facility") and Vicki Sides ("Sides"), collectively.

[2] "Plaintiff" refers to Plaintiff/Respondent, Kevin White, as Personal Representative of the Estate of Mary Brisbon.

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP1801775

Kevin White et al
PLAINTIFF(S)

St George Health Care Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

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

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

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

Based upon the Court of Appeals decision in Estate of Solesbee by Bayne v. Fundamental and Operational Services, LLC, 438 S.C. 638, 885 S.E. 2d 144 (Ct. App. 2023), the Court finds and concludes that the Arbitration Agreement and Admission Agreement did not merge and Defendant Sides' and Defendant St. George Healthcare, LLC's motions to compel arbitration based on equitable estoppel are denied.

ORDER INFORMATION

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

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 11/02/2023 .

Kevin White Personal Representative
Mary Brisbon Estate

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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

Dorchester Common Pleas

Case Caption:	Kevin White , plaintiff, et al VS St George Health Care Llc , defendant, et al
Case Number:	2022CP1801775
Type:	Order/Electronic Form 4

IT IS SO ORDERED.

Heath P. Taylor

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP1801775

Kevin White et al
PLAINTIFF(S)

St George Health Care 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:

The Defendant's motion to alter, amend and/or reconsider is hereby denied. Counsel for Appellant is reminded of the requirement to provide a copy of the motion to alter or amend to the undersigned pursuant to Rule 59(g) to ensure timely and efficient disposition of the motion.

ORDER INFORMATION

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

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 05/02/2024 .

Kevin White Personal Representative
Mary Brisbon Estate

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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

Dorchester Common Pleas

Case Caption:	Kevin White , plaintiff, et al VS St George Health Care Llc , defendant, et al
Case Number:	2022CP1801775
Type:	Order/Electronic Form 4

IT IS SO ORDERED.

Heath P. Taylor

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CIVIL ACTION NO.: 2022-CP-18-
KEVIN WHITE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY BRISBON.,	)	
	)	Summons
	)	***(Jury Trial Requested)***
v.	)	
ST. GEORGE HEALTH CARE, LLC, D/B/A ST. GEORGE HEALTHCARE CENTER and VICKI SIDES	)	

TO THE ABOVE-NAMED:

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

-Signature Page to Follow-

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

BY: s/Lee D. Cope

Lee D. Cope
SC Bar # 14361
P.O. Box 457
Hampton, SC 29924
(803) 943-2111

AND

Bright Matthews Law Firm, LLC
Margie Bright Matthews, Esquire
SC Bar # 13200
P.O. Box 499
Walterboro, SC 29488

ATTORNEYS FOR THE PLAINTIFF

November 18, 2022.
Hampton, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CIVIL ACTION NO.: 2022-CP-18-
KEVIN WHITE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY BRISBON.,	)	
	)	Complaint
	)	***(Jury Trial Requested)***
v.	)	
ST. GEORGE HEALTH CARE, LLC, D/B/A ST. GEORGE HEALTHCARE CENTER and VICKI SIDES	)	

COMES NOW the Plaintiff above named complaining of the Defendants alleges and says as follows:

1. The Plaintiff, Kevin White, as Personal Representatives of the Estate of Mary Brisbon, seek a jury trial pursuant S.C. Code Ann. §*15-51-10*, the Wrongful Death Act, and other applicable statutory and/or common law other applicable statutory and/or common law and seek a jury trial pursuant to the Survival Action of South Carolina, S.C. Code Ann. §*15-5-90 et seq.* on behalf of the Estate for conscious pain and suffering of the deceased for all damages authorized by said statute.

2. That upon information and belief, Defendant St. George Health Care, LLC d/b/a St. George Healthcare Center is a Delaware corporation with its principal place of business in the County of Dorchester, South Carolina. At the time of the acts complained of, St. George Healthcare Center was a skilled nursing home facility.

3. That upon information and belief, Defendant Vicki Sides is a resident of Dorchester County State of South Carolina. Upon information and belief, she was the administrator of the Defendant St. George Healthcare.

4. On April 24, 2019, Mrs. Brisbon was admitted to St. George Healthcare Center. On admission the skin assessment noted a deep tissue injury to her left heel and left lower buttock.

5. On June 4, 2019, Mrs. Brisbon had 3 small open area to her sacrum.

6. On July 3, 2019, Mrs. Brisbon was noted to have a left knee "growth" and a Stage III sacral wound.

7. On July 22, 2019, the sacral wound was a Stage IV.

8. On August 7, 2019, an assessment showed a wound on her left ischium measuring 4cm x 4cm x 1 cm.

9. On August 14, 2019, Mrs. Brisbon was sent emergently to Colleton Medical Center due to hypotension and severe hyperthermia.

10. Mrs. Brisbon was diagnosed with severe sepsis due to infected sacral wound, dehydration, severe calorie-protein malnutrition and acute kidney injury due to the sepsis. She was treated aggressively with IV antibiotics and readmitted to St. George Healthcare.

11. On September 6, 2019, Mrs. Brisbon was readmitted to Colleton Medical Center for severe sepsis. The admission assessment showed she had a right hip unstageable pressure injury, right ischium Stage IV pressure injury, left ischium unstageable pressure injury and multiple wounds to her right and left leg and feet were covered in eschar.

12. On September 17, 2019, Mrs. Brisbon was readmitted to St. George Healthcare Center. On admission, she was noted to have pressure injures to 13 areas.

13. On September 20, 2019, Mrs. Brisbon was transferred to Trident Medical Center and diagnosed with pneumonia.

14. On September 26, 2019, Mrs. Brisbon was admitted to Vibra Hospital for further treatment of pneumonia.

15. On November 6, 2019, Mrs. Brisbon was admitted to Riverside Health & Rehab.

16. On November 14, 2019, Mrs. Brisbon passed away.

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence)

17. While in the Defendants care, custody and control, Mrs. Brisbon did suffer grave and severe injuries and humiliation at the facility as a direct and proximate result of the following negligent, reckless, willful, careless, negligent per se and grossly negligent acts of the Defendants, combining and concurring:

a. In failing to provide oversight of Mrs. Brisbon's safety and dignity;

b. In failing to exercise due care, including without limitation, failing to care for Mrs. Brisbon;

c. In failing to provide appropriate administrative oversight and management to assure Mrs. Brisbon was appropriately cared for;

d. In failing to realize Mrs. Brisbon needed a higher level of medical care;

e. In failing to conduct an assessment of Mrs. Brisbon's change in condition;

f. In failing to communicate with appropriate staff to advise of a potential need of a higher level of care;

g. In failing to exercise reasonable care for the safety and well-being of Mrs. Brisbon under the circumstances;

h. In failing to monitor for and prevent infection;

i. In failing to implement appropriate dehydration and malnutrition preventions;

j. In failing to implement appropriate pressure sore preventions;

k. In failing to have sufficient and properly trained staff to care for its residents;

l. In failing to have sufficient nursing and nursing assist time to provide the care that was needed for Mrs. Brisbon;

m. In failing to manage its revenue and income such that appropriate care may be rendered to Mrs. Brisbon;

n. In failing to implement an appropriate care plan;

o. In failing to implement appropriate measures to prevent Mrs. Brisbon from aspirating;

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

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

18. That as a direct and proximate result of the aforesaid negligent, reckless, willful, careless, negligent per se and grossly negligent acts of the Defendants, the deceased Plaintiff's beneficiaries have suffered grief, sorrow, mental anguish and all of the damages which accompany the loss of a loved one; the beneficiaries have suffered pecuniary loss, all to the Plaintiff's actual and punitive damages.

19. That as a direct and proximate result of the aforesaid negligent, reckless, willful, careless, negligent per se and grossly negligent acts of the Defendants, the deceased Plaintiff suffered grave and severe injuries prior to her death; she was hospitalized; she incurred medical expenses; she suffered conscious pain and suffering and mental anguish prior to her death; she suffered a loss of her dignity and individuality; she suffered a diminished quality of life prior to her death; her estate has incurred funeral expenses.

20. That by reason of the foregoing, the Plaintiff is informed and believes that he is entitled to judgment against the Defendants on behalf of the Estate of the deceased Plaintiff, for both actual and punitive damages; all of which damages were proximately caused by the Defendants' acts and/or omissions as are more fully set forth above, in an amount as may be set and determined by the trier of fact in this matter.

WHEREFORE, Plaintiff prays this Honorable Court for a Judgment against the Defendant for actual and punitive damages in an amount to be determined by a trier of fact, and any other and further relief as this Honorable Court deems just, proper, and equitable.

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

BY: s/Lee D. Cope

Lee D. Cope
SC Bar # 14361
P.O. Box 457
Hampton, SC 29924
(803) 943-2111

AND

Bright Matthews Law Firm, LLC
Margie Bright Matthews, Esquire
SC Bar # 13200
P.O. Box 499
Walterboro, SC 29488

ATTORNEYS FOR THE PLAINTIFF

November 18, 2022.
Hampton, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CIVIL ACTION NO.: 2022-NI-18-
KEVIN WHITE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY BRISBON.,	)	
v.	)	**Affidavit of Merit of Luanne Trahant, MSN, APRN, FNP-BC, LNCC**
ST. GEORGE HEALTH CARE, LLC, D/B/A ST. GEORGE HEALTHCARE CENTER and VICKI SIDES	)	

The Affiant, Luanne Trahant, MSN, APRN, FNP-BC, LNCC, having been duly sworn testifies as follows:

---

1) I am over 18, legally competent, and I make this affidavit based upon medical records provided to me as well as my background, education, training, and experience.

2) I am a registered nurse in Louisiana. I received my Bachelor of Science in Nursing from Northwestern State University in 1992 and a Master of Science in Nursing in 2005. I am a Board Certified Family Nurse Practitioner. I have practiced in the field of which I give this opinion for at least three out of the last five years.

3) I have been provided with the medical records from St. George Healthcare, Franklin Fetter-Walterboro, Riverside Health & Rehab, Vibra Hospital, Colleton Medical Center and Hallmark Skilled Nursing Facility pertaining to Mary Brisbon.

4) On April 24, 2019, Mrs. Brisbon was admitted to St. George for rehabilitation. On admission to St. George, Mrs. Brisbon was assessed as alert and oriented to self and place. The assessment revealed contractures to her bilateral upper and lower extremities and the skin assessment noted a deep tissue injury to her left heel and left lower buttock. There was also a description of a “discoloration” to her sacrum, but no further assessment of this area was found on admission.

EXHIBIT D

5) On June 4, 2019, the nurses document that Ms. Brisbon has 3 small open areas to her sacrum, that were light red with small amounts of drainage. The wounds measured: 1) 2cm x 1.5cm x 0.2cm, 2) 1.6cm x 1.0cm x <0.2cm and 3) 0.6cm x 0.6cm x <0.2cm

6) Ms. Brisbon was finally referred to a wound care consultant and her first visit was on July 3, 2019. Her skin was assessed and noted to have a left knee "growth" and the wound doctor suggested biopsy, and she was noted to have a Stage III sacral wound measuring 9cm x 5cm x 0.1cm.

7) By July 22nd, her sacral wound was described as measuring 4cm x 3cm x 0.5cm, with tunneling and undermining, indicating a Stage IV wound at this time.

8) On August 13, 2019, the dietician noted a "new" unstageable wound to Ms. Brisbon's left ischium.

9) August 14, 2019, she was sent emergently to Colleton Medical Center due to hypotension and severe hyperthermia . Ms. Brisbon was diagnosed with severe sepsis due to infected sacral wound, dehydration, severe calorie-protein malnutrition, and acute kidney injury due to the sepsis.

10) She was admitted with a left hip pressure injury that had purulent drainage and was cultured on admission. It measured 3.5cm x 4cm and was unstageable. The sacral wound measured 1.5cm x 2cm.

11) On August 26, 2019 Mrs. Brisbon was readmitted to St. George.

12) Ms. Brisbon was readmitted to Colleton on September 6, 2019 for severe sepsis. Her wounds were described as a right hip unstageable pressure injury, right ischium Stage IV pressure injury, left ischium unstageable pressure injury and multiple wounds to her right and left leg and feet that were covered in eschar.

13) She returned to St. George on September 17th. On readmission the nursing staff noted that Mary Brisbon had skin injuries and pressure injuries to 13 areas which included: 1) left lateral foot, 2) left heel, 3) left medial ankle, 4) left hip, 5) left buttock, t6) right buttock, 7) sacrum, 8) right heel, 9) right lateral foot, 10) right lateral foot, 11) left knee, 12) left lower leg, and 13) left great toe. At this point, Mary Brisbon was suffering from skin failure more likely than not due to her two episodes of severe sepsis and multi organ failure.

14) Mary Brisbon required transfer to Trident Medical Center on September 26, 2019 for pneumonia and from trident was transferred to Vibra Hospital on September 26, 2019 for further treatment of her pneumonia and severe skin issues.

15) Mary Brisbon remained at Vibra Hospital until November 6, 2019 when she was admitted to Riverside Health and Rehab. The admission records indicate that Ms. Brisbon continued to suffer from 25 different wounds.

16) Mrs. Brisbon passed away on November 14, 2019.

17) The Defendants' employees failed to provide adequate assessments and monitoring of Mrs. Brisbon's condition which led to multiple wounds and deterioration of those wounds.

18) I reserve the right to alter, amend, add, or delete opinions as new information becomes available.

Luanne Trahant, MSN, APRN, FNP-BC

Sworn to and subscribed before me:

Notary Public
Date: 03/14/2022

ALISON BLAIR NOTARY PUBLIC RAPIDES PARISH, LA 147296

STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER KEVIN WHITE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY BRISBON, PLAINTIFF, vs. ST. GEORGE HEALTH CARE, LLC, D/B/A ST. GEORGE HEALTHCARE CENTER AND VICKI SIDES , DEFENDANTS.	)	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT CASE NO. 2022-CP-18-01775 **DEFENDANT ST. GEORGE HEALTH CARE, LLC D/B/A ST. GEORGE HEALTHCARE CENTER'S ANSWER TO PLAINTIFF'S COMPLAINT**

TO: LEE COPE AND MARGIE MATTHEWS, ATTORNEYS FOR THE PLAINTIFF:

The Defendant St. George Health Care, LLC d/b/a St. George Healthcare Center (hereinafter "this Defendant" or "Facility"), by and through its undersigned counsel, *and subject to and without waiving its right to compel this matter to arbitration*, hereby answers the Plaintiff's Complaint and alleges and states as follows:

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

2. This Defendant is without knowledge or information sufficient to respond to the allegations set forth in Paragraph 1 of Plaintiff's Complaint regarding Mr. White's status as personal representative of the estate of Mr. Brisbon, and therefore denies the same and demands strict proof thereof. The remaining allegations in Paragraph 1 call for legal conclusions and require

no response. To the extent those allegations intend to allege liability against this Defendant, they are denied and strict proof is demanded thereof.

3. Responding to the allegations set forth in Paragraph 2 of Plaintiff's Complaint, this Defendant admits those allegations insofar as they allege that this Defendant operates the skilled nursing facility at issue in Plaintiff's Complaint located in Dorchester County, South Carolina.

4. The allegations set forth in Paragraph 3 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required.

5. Responding to the allegations set forth in Paragraph 4 of Plaintiff's Complaint, this Defendant admits Ms. Brisbon was a resident of the Facility but would crave reference to her medical records for their contents, including Ms. Brisbon's admission date. This Defendant denies any and all allegations inconsistent with those contents including those intended to allege liability or damages against this Defendant.

6. In responding to the allegations set forth in Paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 of Plaintiff's Complaint, this Defendant would crave reference to Ms. Brisbon's medical records for their contents. Any allegations inconsistent with those contents or which assert or imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof.

7. Responding to the allegations set forth in Paragraph 13 of Plaintiff's Complaint, this Defendant admits that Ms. Brisbon was discharged to Trident Medical Center on September 20, 2019, upon information and belief. This Defendant is without sufficient knowledge or information to respond to the remaining allegations set forth in Paragraph 13 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

8. This Defendant is without sufficient knowledge or information to respond to the allegations set forth in Paragraphs 14, 15 and 16 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

9. This Defendant denies the allegations set forth in Paragraphs 17, 18, 19 and 20 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

10. This Defendant denies in full the Plaintiff's "WHEREFORE" Paragraph and demands strict proof thereof.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

11. This Court lacks jurisdiction over this matter because Plaintiff's claims as to this Defendant should be submitted to arbitration pursuant to a valid arbitration agreement entered into between the parties to this litigation, and therefore this matter should be dismissed pursuant to Rule 12(b)(1) and Rule 12(b)(2) of the South Carolina Rules of Civil Procedure and compelled to arbitration.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

12. This action must be stayed until the validity of the Plaintiff's arbitration agreement is determined by the appropriate court.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

14. This Defendant reserves and does not waive its right to contest this Court's jurisdiction over this matter and assert that Plaintiff's claims as to this Defendant should be submitted to arbitration pursuant to any valid arbitration agreement entered into between the parties to this litigation, and assert that this matter should be dismissed pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure and compelled to arbitration.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

24. This Defendant would affirmatively state that Plaintiff lacks standing to pursue some or all of the claims they allege.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

26. This Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and thus reserves the right to amend its Answer to assert any such defenses. Furthermore, this Defendant hereby incorporates all defenses asserted by its Codefendants in this matter to the extent they are applicable.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

27. This Defendant pleads the doctrine of election of remedies as a defense to the Plaintiff's claims.

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

[SIGNATURE BLOCK ON THE FOLLOWING PAGE]

CLEMENT RIVERS, LLP

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

D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
T. Ashton Phillips, III
SC State Bar ID No.: 104227
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com,
mriddle@ycrlaw.com, aphillips@ycrlaw.com
Attorneys for the Defendant St. George Health Care, LLC d/b/a St. George Healthcare Center

Charleston, South Carolina

Dated: March 20, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
KEVIN WHITE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY BRISBON, PLAINTIFF, vs. ST. GEORGE HEALTH CARE, LLC, D/B/A ST. GEORGE HEALTHCARE CENTER AND VICKI SIDES , DEFENDANTS.	)	CASE NO. 2022-CP-18-01775 **DEFENDANT VICKI SIDES' ANSWER TO PLAINTIFF'S COMPLAINT**

TO: LEE COPE AND MARGIE MATTHEWS, ATTORNEYS FOR THE PLAINTIFF:

The Defendant Vicki Sides (hereinafter "this Defendant"), by and through her undersigned counsel, *and subject to and without waiving its right to compel this matter to arbitration*, hereby answers the Plaintiff's Complaint and alleges and states as follows:

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

2. This Defendant is without knowledge or information sufficient to respond to the allegations set forth in Paragraph 1 of Plaintiff's Complaint regarding Mr. White's status as personal representative of the estate of Ms. Brisbon, and therefore denies the same and demands strict proof thereof. The remaining allegations in Paragraph 1 call for legal conclusions and require no response. To the extent those allegations intend to allege liability against this Defendant, they are denied and strict proof is demanded thereof.

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

4. This Defendant denies the initial allegations set forth in Paragraph 3 of Plaintiff's Complaint regarding this Defendant's residency and demands strict proof thereof. Responding to the remaining allegations, this Defendant admits that she was the administrator at St. George Healthcare Center during part of Ms. Brisbon's residency there.

5. Responding to the allegations set forth in Paragraph 4 of Plaintiff's Complaint, this Defendant admits Ms. Brisbon was a resident of the Facility but would crave reference to her medical records for their contents, including Ms. Brisbon's admission date. This Defendant denies any and all allegations inconsistent with those contents including those intended to allege liability or damages against this Defendant.

6. In responding to the allegations set forth in Paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 of Plaintiff's Complaint, this Defendant would crave reference to Ms. Brisbon's medical records for their contents. Any allegations inconsistent with those contents or which assert or imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof.

7. Responding to the allegations set forth in Paragraph 13 of Plaintiff's Complaint, this Defendant admits that Ms. Brisbon was discharged to Trident Medical Center on September 20, 2019, upon information and belief. This Defendant is without sufficient knowledge or information to respond to the remaining allegations set forth in Paragraph 13 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

8. This Defendant is without sufficient knowledge or information to respond to the allegations set forth in Paragraphs 14, 15 and 16 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

9. This Defendant denies the allegations set forth in Paragraphs 17, 18, 19 and 20 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

10. This Defendant denies in full the Plaintiff's "WHEREFORE" Paragraph and demands strict proof thereof.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

11. This Court lacks jurisdiction over this matter because Plaintiff's claims as to this Defendant should be submitted to arbitration pursuant to a valid arbitration agreement entered into between the parties to this litigation, and therefore this matter should be dismissed pursuant to Rule 12(b)(1) and Rule 12(b)(2) of the South Carolina Rules of Civil Procedure and compelled to arbitration.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

12. This action must be stayed until the validity of the Plaintiff's arbitration agreement is determined by the appropriate court.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

14. This Defendant reserves and does not waive its right to contest this Court's jurisdiction over this matter and assert that Plaintiff's claims as to this Defendant should be submitted to arbitration pursuant to any valid arbitration agreement entered into between the

parties to this litigation, and assert that this matter should be dismissed pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure and compelled to arbitration.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

19. This Defendant would affirmatively assert that, to the extent it is liable to Plaintiff, which is vehemently denied, she would be entitled to any and all benefits, joint and several liability

protections, emergency situations limitations on liability, any and all monetary limitations or caps of liability and/or damages under the Uniform Contributions Among Tortfeasors Act, Noneconomic Damages Award Act, and Medical Malpractice Reform Bill, including but not limited to §15-38-15; §15-32-200 *et. seq.*; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

22. This Defendant asserts that she complied with the applicable standard of care at all times during the timeframe alleged in the Complaint and did not proximately cause damage to the Plaintiff.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

24. This Defendant would affirmatively state that Plaintiff lacks standing to pursue some or all of the claims they allege.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

26. This Defendant hereby gives notice that she intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and thus reserves the right to amend its Answer to assert any such defenses. Furthermore, this Defendant hereby incorporates all defenses asserted by its Codefendants in this matter to the extent they are applicable.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

27. This Defendant pleads the doctrine of election of remedies as a defense to the Plaintiff's claims.

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

[SIGNATURE BLOCK ON THE FOLLOWING PAGE]

CLEMENT RIVERS, LLP

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

D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
T. Ashton Phillips, III
SC State Bar ID No.: 104227
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com,
mriddle@ycrlaw.com, aphillips@ycrlaw.com
Attorneys for the Defendant Vicki Sides

Charleston, South Carolina

Dated: March 20, 2023

STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER	) IN THE COURT OF COMMON PLEAS) FIRST JUDICIAL CIRCUIT
KEVIN WHITE, as personal representative of the ESTATE OF MARY BRISBON VS. ST. GEORGE HEALTHCARE, LLC, et al	) NO. 2022-CP-18-01775)))
and	
BEVERLY CALLOWAY, as personal representative of the ESTATE OF HATTIE ADMORE VS. OAKBROOK HEALTHCARE, LLC, et al	) NO. 2023-CP-18-00722))) TRANSCRIPT OF RECORD) Motions

B E F O R E:

The Honorable Heath P. Taylor, Judge

DATE: Monday, October 23, 2023
10:46 a.m.
Saint George, South Carolina

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

Grahame Ellison Holmes, Esquire

Parker Law Group, LLP
Post Office Box 1164
Walterboro, South Carolina 29488
gholmes@parkerlawgroupsc.com
Attorney for the Plaintiff

Russell Grainger Hines, Esquire

Clement Rivers, LLP
Post Office Box 993
Charleston, South Carolina 29402-0993
rhines@ycrlaw.com's
Attorney for the Defendant

Reported by: Cathy J. Provost, RMR, Official Court Reporter

INDEXES

INDEX TO WITNESSES

(No witnesses called.)

INDEX TO EXHIBITS

(No exhibits marked.)

- - - - - - - - - - -

COURT REPORTER LEGEND:

dash -- intentional/purposeful interruption; change in thought
ellipses ... trailing off
[ph] phonetically written
[sic] written as said
[indiscernible] unable to be understood due to low volume or quality of audio

-- P R O C E E D I N G S --

CLERK OF COURT: The first motion up is going to be on case No. 2022-CP-18-01775, Kevin White versus St. George Healthcare, LLC. And we have two motions on this case.

THE COURT: All right. What are we hearing first?

ATTORNEY HINES: Your Honor, may it please the Court.

THE COURT: Yes, sir.

ATTORNEY HINES: Russ Hines on behalf of Defendants St. George Healthcare, LLC, d/b/a St. George Healthcare Center, and Vicki Sides. I believe both motions are our motions. We filed them separately but what they are, both of them are substantively identical motions to compel arbitration, is what they are.

And, Your Honor, also out there is another case on your roster this morning, a case called Calloway. And I spoke briefly about this with opposing counsel before, I spoke with him. When that case gets called, what we might do is ask Your Honor to simply incorporate the arguments from this motion into that one just to save the Court time, because they are essentially, in both cases, although they're separate cases, the same arguments will be presented to the Court.

THE COURT: All right. And that's No. 12?

ATTORNEY HINES: I believe that's right, Your Honor.

THE COURT: Okay.

ATTORNEY HINES: But if it pleases the Court, I'll go ahead

with the motions in this case, which again is the White case, and they are both motions to compel arbitration.

Your Honor, this is a nursing-home malpractice case, and the motions today are made on behalf of both the facility, the nursing-home facility, skilled-nursing facility and its individual defendant, Ms. Sides.

Just as a housekeeping-type matter, the arguments that go for the facility also cover Ms. Sides. The basis for that is that the arbitration agreement involved in the case is signed on behalf of the facility and its employees, agents, servants. Ms. Sides is the administrator of the facility, so I say that just to say that I'll be referring to the facility primarily as opposed to Ms. Sides but the arguments go for one and all.

THE COURT: I understand.

ATTORNEY HINES: Now, Your Honor, we filed a rather extensive memo in support, and there's a lot in there, but what I'd like to focus on in the relatively brief amount of time that we have today is our argument for merger and equitable estoppel. And I want to -- there's plenty an arm on that, but I want to try to hit the main points and then also be available to answer any questions the Court might have, and also, of course, to reply, if I might, briefly to opposing counsel's argument.

But, Your Honor, the way to look at this is sort of a one-two punch, if you will, and it's merger and equitable estoppel. And I'll admit to the Court, to prevail I've got to

land both punches.

And let me explain what I'm talking about in merger. Merger has to do with when this resident was admitted into our facility, Ms. Brisbon, her son, Mr. White, he signed the admissions documents on his mother's behalf. Those documents included both the arbitration agreement and an admission agreement, and so merger is the idea that the arbitration agreement and admission agreement merge under our law and they are to be considered and construed as a single instrument.

And the basis for that argument, Your Honor, is a case called *Coleman v. Mariner Healthcare*. There's other authority, too. In fact, *Coleman* cites a case called *Klutts v. Down'Round.* This is cited in our brief, but the point of law in the matters is that when you have multiple instruments that are signed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, our law deems them to merge unless there is evidence indicating a contrary intention; that is, an intention contrary to merger.

Now, that is the first punch that I have to land to win my argument, Your Honor. Admittedly, I've got to win both of them. Then you turn to equitable estoppel, and I just want to give you a fairly brief overview before I come back and explain a little bit more about both.

Equitable estoppel, Your Honor, there's a principle that's called "direct-benefits estoppel." The best case that, I think,

gets into this in our law is a case called *Wilson v. Willis.* It's a fairly recent Supreme Court case. I think it dates back maybe four years now. The bottom line on "direct-benefits estoppel" is you can't have your cake and eat it, too; you cannot enjoy the benefits under a contract that includes an arbitration clause and then deny the enforceability of the arbitration clause.

So that's the roadmap, Your Honor: Merger of the arbitration agreement and admission agreement; "direct-benefits estoppel" of the merged agreement.

So going back to get a little more meat on the bone of my merger argument, again, Your Honor, the law is multiple instruments signed at the same time, by the same parties, for the same purpose, in the course of the same transaction deem to merge, be considered and construed as a single contract, unless there's evidence of intention contrary to merger.

Now, Your Honor, some of the times it's argued against me that you don't have those four boxes checked - time, parties, purpose, transaction. We absolutely do. The admission agreement and the arbitration agreement were both signed in conjunction with the admission of this resident, Ms. Brisbon, at the same time.

The case of *Coleman v. Mariner Healthcare* is particularly instructive because in that case there was also a case -- in that case it was the sister of the resident admitting her sister to a

skilled nursing facility -- and in *Coleman* the Court found that, yes, indeed, the admission agreement signed, an arbitration agreement signed at the same time when you're admitting someone to a skilled nursing facility -- check all those boxes -- same persons or parties, time, purpose, and transaction.

Now, *Coleman* came down against the proponent of arbitration in that case, and it did so on the basis of what I mentioned is the doctrine of merger applies unless there is evidence of an intention contrary to merger. And in the *Coleman* case they looked at the facts of that case, which are materially different than the facts of our case, and said, Well, we don't think there is evidence of an intention contrary to merger and, therefore, the merger rule doesn't apply.

And the evidence in *Coleman* was the fact that the arbitration agreement included within it a provision that allowed it to be revoked within 30 days, and also the Court found that there was language in the admission agreement, in the entire provision of that agreement that, on its face recognized a textual -- the *Coleman* court, I think, might have made up a word in this case but it makes sense -- a separatedness, an attempt to keep these documents separate and not merge them, and that was what the *Coleman* court found.

In our case we like *Coleman* for the fact that it gives us the law that allows me to argue merger; that is, same parties, same time, purpose, and transaction. We like *Coleman* in that

Coleman says that, yes, you have all those boxes checked, those four boxes, in the context of a nursing-home admission like this, and the arbitration and admission agreement signed at the same time.

Where we part company from *Coleman* is on these factual distinctions that were present in *Coleman* but are not present in this case. Now, in *Coleman*, as I mentioned, there was the ability to revoke the arbitration agreement in 30 days. We don't have that, we don't have the ability for the arbitration agreement to just simply just disappear as though it's not there. It doesn't have a -- there's no revocation clause.

Also, on this issue of the entire agreement provision and what *Coleman* found in that case to be a textual -- the basis for finding a separateness between admission agreement and arbitration agreement, well, in our case the admission agreement does have an entire agreement provision, but what it says is very much different than what you had in the *Coleman*, but ours specifically recognizes what I would call a connectedness to the other documents. And here's the language: "The undersigned forever acknowledges that he/she has received and read the admission handbook and other admissions materials, and understands these documents are made part of this agreement by reference herein."

That language here, referring in particular to other admissions materials, we submit, reaches out and grabs the

arbitration agreement and makes this case different than the *Coleman* case because, yes, while we have an entire agreement clause, this entire agreement clause is more expansive, it looks outward beyond the four corners of this document, it specifically refers to other admissions materials, and those materials would include the arbitration agreement which was signed, again, in conjunction with admission.

We cite a couple cases in our memo. There's a case called *Stott v. White Oak Manor*; another case called *Hodge* -- I forgot the defendant in the case right now. But both of them in just plain or ordinarily language would reflect the fact that an arbitration agreement that is signed in conjunction with the admission is among the admissions paperwork which, again, we believe it goes, it jives, with this other admissions-materials language.

And I don't mean to misrepresent to the Court or run the risk of doing that. I'm not saying that in *Stott* or in the *Hodge* case the Court expressly looked at that language and held as such, but just in stating the facts of those cases -- and we cite the exact quotes, and I won't read them now, but -- the Court is explaining the facts of the case and says so-and-so admitted his relative in the facility and signed an admission agreement and other admissions documents, including an arbitration agreement.

Just in the sort of common parlance, understanding that, as we understand, as the term admission -- other admission materials

is not defined, my point is to say that those decisions recognize that it is plain and ordinary language that what we are describing here falls within what people, in plain language, would consider to be part of the admissions materials, it's documents signed in conjunction with the admission.

So that's the major point there on, what I'll call, the *Coleman* and related case law. There are a couple cases -- I mentioned *Hodge*. *Hodge* is another case that comes down against the proponent of arbitration. There's another one called *Thompson*. We explained some differences between those cases in our brief. And I realize this is -- every time I've made this argument I have pity for the Court and for certainly the court reporter because it requires me to go through quite a lot of by way of, I guess, explanation, but we do get into more granular detail in the memo.

But the bottom line is that in *Coleman* and *Thompson* and *Hodge*, in all those cases we were dealing with different language in the arbitration agreement and the admission agreement than we're dealing with in this case, or this type of case, because I've argued this motion a number of times based upon these admissions material documents, these particular arbitration agreement and particular admission agreement.

One thing I have to acknowledge is that more recently there's a case called *Solesbee* that's a Court of Appeals case. I think it came down just in January of this year and, in fact, we

have a pending petition for a writ of certiorari before the Supreme Court now. Now, in *Solesbee*, I have to acknowledge that the *Solesbee* case dealt with identical arbitration agreement and admission agreement to what I'm arguing to Your Honor today, and it ruled against me and said that, no, there's no merger. The *Solesbee* case did not go so far -- because the Court found against us on merger, it didn't go so far as to consider the equitable estoppel argument.

And as I mentioned at the outset, I've got to go to land both punches, because if you don't go with me on merger I don't have anything to argue on equitable estoppel because my argument relies upon a merged admission and arbitration agreement and, therefore, the resident in this case, Ms. Brisbon, receives benefits, room, board, various services, various treatments about which are not complained about in the case, so there's certainly benefits that were received, but to get those benefits I need to merge the admission agreement and the arbitration agreement.

But, and even in *Solesbee*, we explained our qualms with *Solesbee* respectfully and how the Court of Appeals, when pursuing this on a writ of cert, where we're asking for the court to grant a writ of cert, about how the basis on which the Court of Appeals found against us on merger in *Solesbee* respectfully are -- well, they are not -- they're erroneous. And so we're having to acknowledge that there is *Solesbee* out there, Your Honor, and then also we think that the grounds upon which the *Solesbee* court

found against us on merger are mistaken, but also the *Solesbee* court never fully addressed our reasoning.

THE COURT: So if I'm hearing you correctly, there's a Court of Appeals opinion directly on point contrary to your position?

ATTORNEY HINES: Your Honor, the only caveat -- and I'll get to that -- is this.

THE COURT: With the same document?

ATTORNEY HINES: The same documents. As far as to say -- and that's why obviously we need to bring this case to your attention.

THE COURT: I mean, I understand you need to make your record, but I certainly don't get to overrule the Court of Appeals.

ATTORNEY HINES: That's certainly true, Your Honor, and I wouldn't suggest that you do and have the ability to do that. And the reason why, what our point is, my only hesitation is for the idea directly on point, meaning that in a way that's true in that it was the same documents, we're arguing merger, we're arguing estoppel, the court in *Solesbee* didn't get to equitable estoppel.

The only, I guess, caveat I need to bring is that we don't feel, respectfully, that the Court of Appeals actually dealt with every one of the distinguishing features that we would argue. The Court of Appeals ruled against us, but we feel like when you make a petition for re-hearing and then a petition for certiorari

you argue that the Court of Appeals misapprehended, or overlooked, certain of your arguments, and we do feel that the court did that, most respectfully.

And so there's perhaps a gray area in there where we're talking about the Court of Appeals' misapprehension of what we consider that to be where you could distinguish this case from the *Solesbee* case on the basis of your consideration of differences that the Court of Appeals, we would argue, didn't appreciate.

But, yes, Your Honor, I -- well, I'm just trying to leave a little room for nuance there, but we have to acknowledge that *Solesbee* is a significant headwind that's blowing against us, going against our position. And I probably would say that I could leave it at our briefing, which begins on page 34 of our brief and runs through, oh, page 39. It would save time to simply say we explain why *Solesbee* should not control the disposition of this current case, Your Honor, and I think probably do it better there in writing than I can do it now trying to just hit the high points. I'd be happy, if Your Honor would appreciate me to try to do it via oral argument, I'd be happy to do that. Otherwise, in the interest of time, I can -- I can simply -- well, if the Court would allow me a brief reply to opposing counsel's argument, then I can rest on what we've written.

THE COURT: Certainly.

ATTORNEY HOLMES: May it please the Court.

THE COURT: Yes, sir.

ATTORNEY HOLMES: Your Honor, Gray Holmes with the Parker Law Group on behalf of the plaintiffs, along with Caitlin Pope who wrote our briefs on this issue.

Your Honor, because we're dealing with the third-party beneficiary aspects and that rest on whether or not there's a valid contract, both the estoppel and the third-party beneficiary arguments, you have to have a valid contract to get there, I'm going to have to go through a little bit more than just the merger and that argument.

THE COURT: Okay.

ATTORNEY HOLMES: And first I'm going to start with -- I'm having trouble trying to figure out whether or not I can see from here.

THE COURT: The struggle is real.

ATTORNEY HOLMES: First, a little bit of background of just what the burden of proof in an arbitration issue is. First, before we get to some of the preemption issues and some of those issues, the Court first has to determine that there is, that the arbitration agreement that's been executed is actually a binding contract. And the defendant bears the burden of proof on that issue, and the Court actually applies a summary judgment standard to determine if there is a genuine issue of fact as to the enforceability of the contract. And that's the *Aiken v. World*

Finance case, Your Honor.

In this case the defendants just haven't put forth any sort of evidence to support the motion to create an issue of fact or to satisfy their burden. And one of the issues here as to whether or not the contract would be enforceable is whether or not it was actually signed by an agent of Ms. Brisbon. And in this case the arbitration agreement, which was a standalone agreement, was signed by her son, Kevin Smith. Now, Kevin Smith did not have a power of attorney; he did not have a healthcare power of attorney; the only power that he had would have come from the Adult Healthcare Consent Act.

And, Your Honor, in the *Coleman* case that you've been -- that's been discussed, it lays out the powers that the Adult Healthcare Consent Act confers on an agent, and those powers are limited, they're limited to healthcare decisions and financial decisions.

And in both the *Coleman* case and the *Thompson* case, Your Honor, they both state that healthcare and financial decisions do not extend to an authority to enter into an arbitration agreement; they do not give you a right to surrender a person's constitutional right to a jury trial.

And the Adult Healthcare Consent Act also sets out priority for agents. Kevin Smith is the son of Mary Brisbon. We have provided you with the death certificate for Ms. Brisbon who lists her husband, Martin Brisbon, as having survived her. Under that

act, he has priority over the son to act as her agent in that decision. So even though that act wouldn't give him authority to sign an arbitration agreement, Kevin Brisbin wasn't even the proper -- or Kevin Smith, excuse me -- wasn't even the proper agent under the act, the adult healthcare act, Your Honor.

And further, Section (B) of the act provides that the defendant must document the efforts they make to identify the people of record that are of priority, and they must include that in the medical record, and there's no proof here that they did that, so there's no authority there under the adult healthcare act.

Now going to merger, Your Honor, if you look at the *Thompson v. Pruitt* case which Mr. Hines correctly stated, that in the absence of anything indicating a contrary intention, contract signed at the same time, by the same parties, for the same person can be merged together into one contract. And he's right, this was signed, these two agreements were signed, at the same time, the parties are the same, and the purpose of those agreements were to have the mother admitted and receive care there at the facility. But there is language in both the arbitration agreement, which stands alone, and in the admission agreement that both state that they're intended to be viewed as separate documents.

And also, Your Honor, any ambiguity as to what the intentions are in these contracts are to be construed against the

drafter which, in this case is the facility, but one of the reasons that they should be construed against -- or, as separate documents and their intention is -- how their intention is shown that they intend for them to be construed as separate documents is in the arbitration agreement they state "this agreement shall remain in effect for all care rendered at the facility and shall survive any termination or breach of this agreement or the admission agreement."

So by that very sentence, they're saying, Look, even if you terminate the admission agreement in this case, then the arbitration agreement still stands on its own. So by their very terms they're absolutely recognizing that these two contracts are separate contracts, and they're reserving their rights to enforce one if they decide to terminate the other.

Now, it also was pointed out to you that in the *Coleman* case there was a right to terminate the admissions agreement within 30 days and there was not a provision that allowed for the termination of the arbitration agreement within 30 days. Well, actually there is a provision that allows -- excuse me, I have that reversed. There was a provision in the arbitration agreement that allowed for it to be terminated within 30 days but not the admissions agreement.

In this case we have the same thing. We just have them reversed. If you look at the admissions agreement which has been submitted, it states on page 10 that the facility maintains the

right to unilaterally modify or terminate the admissions agreement. So for the same reasons in *Coleman* -- it's just flip-flopped as to which agreement reserved that right -- they're having that -- they're keeping that right to terminate the agreement.

Your Honor, we've made some arguments as to equitable estoppel. I don't think that it's really necessary. We can rely on our briefs as to those issues because I don't think they've really been addressed. But, Your Honor, so those are the grounds that we don't believe the two contracts merge.

And as far as the apparent authority which, I believe, was mentioned in their brief, one thing here, when Ms. Brisbon was admitted to the facility she suffered from dementia, so she had no ability to make any representations to anybody, and it's not been asserted that she did. There's no evidence and, of course, they carry the burden of proof on that issue.

When looking at apparent authority, if you'll look at the *Cowburn v. Leventis* case, Your Honor, the focuses are on the principal's actions, not on the agent's actions, so Ms. Brisbon would have had to have made some sort of statement or some sort of action representing this to be, Kevin Smith to be, her agent, and there's absolutely no evidence of that and it couldn't have happened because she had dementia and couldn't communicate properly and that's why she was going into a nursing home.

And, Your Honor, as to the third-party beneficiary argument,

under the *Thompson* case you have to have a valid contract to have estoppel or the third-party beneficiary, and when the merger argument fails, which it must because of the plain language of the arbitration agreement, that argument fails as well.

Your Honor, lastly, we'd just point out the *Solesbee* case is good law and it's directly on point until the Supreme Court says otherwise, so that is the authority in the case.

The *Coleman* case, the *Thompson* case, the *Hodge's* case, all those cases that have been relied on, they all, on similar arguments, nearly directly on point, ruled against the proponent of arbitration in basically identical circumstances.

And the orders that have been submitted -- and it's my fault and not Mr. Hines, I didn't receive -- his memo was submitted on Friday and because I'm covering for somebody, I just wasn't on the list to get it, so I've only been able to brush through that memo and the orders that were provided in support of it, but all the orders predate *Solesbee;* most of them predate the *Thompson* case, the *Coleman* case, and the *Hodge's* case.

And if Your Honor would like additional circuit court orders, we have many that we can provide. In this case we're in sort of a different situation because we've got a blank motion just stating they're moving to compel arbitration. We then submitted our memorandum in opposition just anticipating what the arguments were going to be because we've had plenty of these against one another, and then we got a response to theirs at that

time so we didn't include those orders, but if the Court would like them then we certainly can provide them.

Your Honor, as far as the Calloway case that we were talking about where the arguments are virtually identical, we're dealing with the exact same arbitration agreement and the exact same admission agreement. The only difference is in that case the agreement was signed by the daughter and there were multiple other children.

If you look at the priorities under the healthcare consent act, the children have to get together and vote, there has to be a majority of the children that consent to it, that has to be recorded in the medical records, and that wasn't done. And that would be essentially the only change in the arguments that I believe either one of us would have as to in that regard. So as we were able to incorporate our arguments for both of those, then you can avoid having to hear from us for another 30 minutes.

THE COURT: Okay.

ATTORNEY HINES: Your Honor, briefly, and I'll start right where Mr. Holmes began. Yes, we are certainly fine with the benefits for judicial economy of not replaying all this, specifically in the Calloway case, so long as our record shows that the arguments we put forth here today in the White case will also be considered to have been made in the Calloway case because we argued the same arguments and issues.

THE COURT: Right.

ATTORNEY HINES: But, Your Honor, just briefly trying to kick off a few points, and I want to be clear that the argument that we're making for merger and equitable estoppel is not an argument that requires there to be a valid contract. That is the point of estoppel and the equitable device that allows you to -- what it does is it actually prevents the opponent of the enforcement of the contract from arguing that it is not enforceable, that it is not valid. There's what it estops, it estops that on the basis of equitable considerations that would make that inequitable.

So I understand opposing counsel's arguments about authority and the Adult Healthcare Consent Act. And maybe to clean things up a little bit for Your Honor's benefit and just for opposing counsel's, as well, we don't rely on the Adult Healthcare Consent Act providing authority here to either the son in this case or the daughter in the Calloway case. It's perfectly true that in the *Coleman* case that argument was made and rejected, and as far as the Adult Healthcare Consent Act provided the authority to re-arbitration, we agree that it does not and so we can dispense with that.

The idea of authority, again, it's not essential to our estoppel argument because, again, if our estoppel argument prevails, that estoppel argument estops the opponent of arbitration from denying enforceability on the basis of an equitable consideration, because obviously if we had an

enforceable contract then we wouldn't need estoppel to get us there. So estoppel operates in a world where you don't have an enforceable contract, so that's -- I would just make that point.

And then the last thing I guess I'd mention is about the idea of termination and showing some -- providing evidence of an intention contrary to merger. Here's a case that we cite in our brief, it's called *Hooters of America v. Phillips*. And I'm quoting, "Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract."

Well, this idea of termination, that the arbitration agreement survives termination of the admission agreement, that's just how arbitration agreements work, and that's the way they work even when they're included in the very same document, meaning that we have here a situation here where we do have two instruments, one, an arbitration agreement, one, an admission agreement. That's not always what you have.

For instance, in this very case you have a situation where you have an admission agreement that includes within the same instrument an arbitration clause. The law is that the arbitration component survives termination of the rest, and, again, that would be the same whether it's separate instruments or a single instrument. And so on that basis I don't see how that provides any evidence of an intention contrary to merger when you're always going to have the arbitration clause held out

as not being terminated at the same time as the rest of the contract. That's, again, how arbitration clauses work.

Only one very last thing I would mention, Your Honor, because I see where it's briefed in opponent's response, which is that this is a case where we have wrongful death and survival claims, and the argument is that even if Your Honor were to compel arbitration as to the survival claims, the wrongful death claims could not be compelled to arbitration because essentially, as I understand it, because the wrongful-death beneficiaries themselves would not have signed an arbitration agreement and you would have no basis to apply an estoppel argument, for instance, as to them. Our response to that is to say that that analysis would be true if you didn't have this derivative nature of the wrongful death claim.

And I know I need to be a little bit careful here in terms of the wrongful death claim as far as -- this the part where I mean derivative -- is that any defense that would be good against the decedent; for instance, well, if you had comparative negligence, or if you had a situation where you have an accident and the decedent, before they died, signed a full and complete release of everything and then happen to pass away sometime later, and there was an argument that could be made that the death was actually caused by the accident, well, if they tried, if the estate tried, to bring a wrongful death claim in, you'd be able to take the release and say to the estate, You don't have a

claim because the decedent waived that.

Well, in the same way that those defenses would work against the decedent, they also work against the estate, so my point is that that analysis that would say that wrongful death claims are not, would not be, subject to arbitration -- and again, that argument in this case is even if you find that the survival claims should be compelled to arbitration, wrongful death should be held out and not compelled, we disagree with that because if you find that arbitration should be compelled as to the survival claim, your doing that would be based upon the idea that the resident and therefore in turn their estate is subject to arbitration, and that would be all you need to find to find that the wrongful death claim is subject to arbitration.

This is where I can try to wrap it up. I would also note in that regard the wrongful death claim obviously cannot be brought by wrongful-death beneficiaries anyways; statutorily it's required to be brought by the personal representative of the estate. So it's not like the claim actually belongs to those beneficiaries anyways. They might be the beneficiary to recover the claim, but the claim is not one they, themselves, could assert.

And I guess the very last thing I'd make on this point is that this is an arbitration agreement that is subject to the Federal Arbitration Act, the FAA, and that's because it is an agreement that involves a transaction -- a transaction involving

interstate commerce.

We also have a case called *Dean v. Heritage Healthcare* which makes it clear that an arbitration agreement signed in conjunction with nursing-home admissions are -- they implicate, or the FAA, because those contracts involve interstate commerce, you cannot have -- under the FAA, you cannot have a rule that singles out arbitration agreements for disfavored treatment.

And our final position on this issue of wrongful death not being able to be compelled to arbitration is that to have a rule that require all of the wrongful death beneficiaries to agree to arbitration would essentially be a rule that singles out arbitration disfavored treatment, and that would violate the FAA's rule that requires arbitration agreements to be placed on equal footing with all other contracts under state law.

I realize, Your Honor, that's quite a mouthful to say in closing, but I think those are the only points that I wanted to make, and otherwise we would just rest on our brief. Thank you.

THE COURT: Okay. Mr. Holmes, you got anything else to add?

ATTORNEY HOLMES: Your Honor, just very briefly since I didn't -- I skipped the equitable estoppel argument. The burden of proof as to equitable estoppel is also on the proponent of arbitration, and what they would have to show is that the party to be estopped made -- that they either said something or acted in a way that amounted to a false representation that was intended to be relied on, and that they had constructive notice

of the facts that were contrary. Of course, there's no evidence to support those elements.

And then also as to the party that's asserting estoppel, what they have to prove is that they lack knowledge, or the means of knowledge, to ascertain the truth as to those facts, that they relied on the contract of the other people and they had a prejudicial change in position, there's no evidence to support any of those facts.

But, also, Your Honor, they had a means of acquiring the information. All they had to do was ask the son, Who are your relatives?, which they're required to do under the act, and they could also just say, Do you have a healthcare power of attorney?, Do you have a power of attorney?, Show it to us. It actually says in their admissions agreement that they're required to give them those documents, so they absolutely have the means of acquiring any information as to whether or not Mr. Smith had authority, as well as Ms. Calloway. And those arguments are also addressed in the *Coleman* and *Thompson* cases.

ATTORNEY HINES: Your Honor, if I'm at the risk of trying your patience --

THE COURT: No, you're fine.

ATTORNEY HINES: I'll keep it under a minute. What Mr. Holmes said about the test for estoppel, that's called a traditional six-factor test, and I think it is in their brief. That's addressed in a case called *Wilson v. Willis.* In *Wilson v.*

Willis, in that case it supports the application not of that six-factor test but of the direct-benefits test. The direct-benefits test doesn't have the same elements as the test that Mr. Holmes was just mentioning; it is a test of receiving direct benefits -- and we explained this in our brief -- it's receiving direct benefits under a contract and then at the same time trying to deny the enforceability of an arbitration clause in that same contract.

And again, the same-contract part comes into my merger argument, so you have to go with me on merger to get beyond estoppel, just to be clear.

The other last little thing about asking him, Mr. White in this case -- and the same would go for in the Calloway case -- the signatory, the last line of the arbitration agreement reads: "By his/her signature below, the executing party represents that he/she has the authority to sign on resident's behalf so as to bind the resident, as well as the representative."

We don't take the position that that language gives us proof positive of authority, but it does give us proof positive that they represented their authority to the facility, because under our law if you sign something it is assumed that you read, understood, and agreed to what you signed. And that was signed. It's just a one-page document. So they did represent in both cases the authority to do that.

And again, we don't claim that means that they did, in fact,

have authority, but it certainly means that that doesn't cut against us in any kind of estoppel sense --

THE COURT: Let me stop you there because I do have a question about that. If the plaintiff is correct and he did not have authority to sign the document, how do you get off square one?

ATTORNEY HINES: Because the nature of the estoppel argument is one that allows us to overcome that problem. If we were arguing to Your Honor -- estoppel is a device that allows us to, based upon equitable considerations, estop the opponent from arguing against enforceability. I mean, I understand -- so it's two different tracks. One track would be, Yep, he's got authority, he signed a binding arbitration agreement and, therefore, just enforcing the contract just sort of straight-up.

The estoppel argument is, all right, even if there was not authority and even if this is not a valid agreement that is enforceable per se, you, opponent of arbitration, cannot stand up and complain about that; you're estopped to do so because equity steps in.

THE COURT: Because they got the benefits of the contract.

ATTORNEY HINES: Correct.

THE COURT: Okay.

ATTORNEY HINES: And thank you very much for your indulgence, Your Honor. I realize I rambled a little bit long --

THE COURT: Not a problem.

ATTORNEY HINES: -- but hopefully we combined this case with Calloway and maybe saved a little bit of time.

THE COURT: Okay. Anything else?

ATTORNEY HOLMES: Thank you, Your Honor.

ATTORNEY HINES: No, thank you.

THE COURT: All right. We'll look at everything and let you all know something.

(End of Transcript of Record.)

CERTIFICATE OF REPORTER

I, Cathy J. Provost, Official Court Reporter for the Fourteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial/proceedings of the captioned case in the Court of Common Pleas for Dorchester County, South Carolina, on the 23rd day of October, 2023.

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

Date: June 16, 2024

\s\ Cathy J. Provost
Cathy J. Provost, RMR
Official Circuit Reporter

STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER KEVIN WHITE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY BRISBON, PLAINTIFF, vs. ST. GEORGE HEALTH CARE, LLC, D/B/A ST. GEORGE HEALTHCARE CENTER AND VICKI SIDES , DEFENDANTS.	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT CASE NO. 2022-CP-18-01775 **DEFENDANT ST. GEORGE HEALTH CARE, LLC D/B/A ST/ GEORGE HEALTHCARE CENTER'S MOTION TO DISMISS AND COMPEL ARBITRATION**

TO: LEE COPE AND MARGIE MATTHEWS, ATTORNEYS FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant St. George Health Care, LLC d/b/a St. George Healthcare Center (hereinafter "this Defendant" or "Facility"), by and through its undersigned counsel, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure and compelling this matter to arbitration, or, alternatively, staying the action pending arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.

Plaintiff has sued this Defendant pursuant to his mother's residency at the Facility. However, prior to being admitted to the Facility, Plaintiff's mother, Mary Brisbon, entered into an Arbitration Agreement with the Facility. (See Arbitration Agreement attached as **Exhibit A**). The Arbitration Agreement was signed on behalf of Ms. Brisbon by Plaintiff Kevin White. See

Ex. A. Mr. White identified himself as Ms. Brisbon's "Durable Power of Attorney for Health Care/Legal Guardian/Responsible Party" in the Arbitration Agreement. Id.

The parties to the Arbitration Agreement agreed that the South Carolina Uniform Arbitration Act would not apply; rather, arbitration would be governed by the Federal Arbitration Act ("FAA"), because the services and reimbursement thereof to be provided to the Plaintiff upon his admission to the facility involved interstate commerce. In accordance with the terms of this agreement, the Defendant respectfully requests that this matter be compelled to arbitration. Alternatively, this Defendant requests that these proceedings be stayed pending the outcome of arbitration pursuant to Section 3 of the FAA.

Defendant respectfully requests that this Honorable Court specifically stay any further requirement to respond to any other motions or discovery filed or served by Plaintiff while the current motion is pending.

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

CLEMENT RIVERS, LLP

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

D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
T. Ashton Phillips, III
SC State Bar ID No.: 104227
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com,
mriddle@ycrlaw.com, aphillips@ycrlaw.com
Attorneys for the Defendant St. George Health Care, LLC d/b/a St. George Healthcare Center

Charleston, South Carolina

Dated: March 20, 2023

PLEASE READ CAREFULLY

FACILITY - RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT

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

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

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

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

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

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

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

X Kevin White 4-24-19
Resident/Representative Signature Date

_____
Printed Name of Resident/Representative

_____ 4-24-19
Authorized Agent of Facility Date

_____
Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

DEFENDANT'S EXHIBIT
Page 1 of 1
A

STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER KEVIN WHITE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY BRISBON, PLAINTIFF, vs. ST. GEORGE HEALTH CARE, LLC, D/B/A ST. GEORGE HEALTHCARE CENTER AND VICKI SIDES , DEFENDANTS.	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT CASE NO. 2022-CP-18-01775 **DEFENDANT VICKI SIDES' MOTION TO DISMISS AND COMPEL ARBITRATION**

TO: LEE COPE AND MARGIE MATTHEWS, ATTORNEYS FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant Vicki Sides (hereinafter "this Defendant"), by and through her undersigned counsel, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure and compelling this matter to arbitration, or, alternatively, staying the action pending arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.

Plaintiff has sued this Defendant pursuant to his mother's residency at St. George Healthcare Center ("the Facility"). However, prior to being admitted to the Facility, Plaintiff's mother, Mary Brisbon, entered into an Arbitration Agreement with the Defendants. (See Arbitration Agreement attached as **Exhibit A**). The Arbitration Agreement was signed on behalf of Ms. Brisbon by Plaintiff Kevin White. See Ex. A. Mr. White identified himself as Ms.

Brisbon's "Durable Power of Attorney for Health Care/Legal Guardian/Responsible Party" in the Arbitration Agreement. Id.

The parties to the Arbitration Agreement agreed that the South Carolina Uniform Arbitration Act would not apply; rather, arbitration would be governed by the Federal Arbitration Act ("FAA"), because the services and reimbursement thereof to be provided to the Plaintiff upon his admission to the facility involved interstate commerce. In accordance with the terms of this agreement, this Defendant respectfully requests that this matter be compelled to arbitration. Alternatively, this Defendant requests that these proceedings be stayed pending the outcome of arbitration pursuant to Section 3 of the FAA.

This Defendant respectfully requests that this Honorable Court specifically stay any further requirement to respond to any other motions or discovery filed or served by Plaintiff while the current motion is pending.

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

CLEMENT RIVERS, LLP

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

D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
T. Ashton Phillips, III
SC State Bar ID No.: 104227
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com,
mriddle@ycrlaw.com, aphillips@ycrlaw.com
Attorneys for the Defendant Vicki Sides

Charleston, South Carolina

Dated: March 20, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
KEVIN WHITE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY BRISBON,	)	CASE NO. 2022-CP-18-01775
PLAINTIFF,	)	
vs.	)	**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL ARBITRATION**
ST. GEORGE HEALTH CARE, LLC, d/b/a ST. GEORGE HEALTHCARE CENTER AND VICKI SIDES,	)	
DEFENDANTS.	)	

Defendants, St. George Healthcare, LLC d/b/a St. George Healthcare Center ("the Facility") and Vicki Sides ("Sides") (collectively referred to herein as "Defendants"), submit this memorandum of law in support of their motion to compel arbitration.

The Facility is a skilled nursing facility, and Plaintiff's decedent, Mary Brisbon ("Ms. Brisbon"), was a resident of the Facility from April 24, 2019, through September 30, 2019. Following Ms. Brisbon's death, which occurred after her discharge from the Facility, Plaintiff filed this wrongful death and survival action based on alleged deficiencies in the care/treatment Ms. Brisbon received at the Facility. In conjunction with her admission to the Facility, however, an Arbitration Agreement was executed that covers the entirety of Plaintiff's claims against Defendants. Despite Plaintiff's contentions to the contrary, the Arbitration Agreement is enforceable—or at least Plaintiff should be estopped from denying its enforceability—and, as such, Defendants respectfully request that this Honorable Court compel this matter to arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.

BACKGROUND

With the help of Mr. White, Ms. Brisbon was admitted to the Facility on April 24, 2019. In conjunction with Ms. Brisbon's admission, Mr. White signed an Admission Agreement and an Arbitration Agreement on her behalf. (*See* **Exhibits 1 and 2** respectively, attached hereto).

Accordingly, Ms. Brisbon was admitted to the Facility, whereupon she received and accepted various benefits attendant thereto, including, without limitation, skilled nursing care and treatment, room, board, and other services.

Mr. White explicitly represented that he was authorized to admit Ms. Brisbon to the Facility and to execute documents on her behalf, including the Arbitration Agreement. Indeed, the very first provision of the Admission Agreement states that *all information submitted to the Facility* is true and correct, including Mr. White's authority to bind his mother, Ms. Brisbon. (*See* **Ex. 1.**)

Mr. White signed the Admission Agreement on behalf of Ms. Brisbon as her "Representative."

The relevant provisions of the Arbitration Agreement state the following:

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

The Arbitration Agreement further provides:

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

Regarding Mr. White's authority to sign on behalf of his mother, the Arbitration Agreement states:

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

Moreover, the Arbitration Agreement states "It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assignees, personal representatives, guardians, or any persons deriving their claims through or on behalf of Resident." (*Id.*) By its terms, the Arbitration Agreement is binding on the Facility's "agents, employees, and servants" as well. (*Id.*) This includes Sides, whom Plaintiff sues as "the Administrator of the Facility." (Compl. ¶ 3.)

The Arbitration Agreement was executed by Mr. White as the "Resident's Durable Power of Attorney for Health Care"/ "Resident's Legal Guardian"/ "Resident's Responsible Party" Representative," collectively referred to as "Representative," of Ms. Brisbon and Lequiha Lesane on behalf of the Facility. (*See* **Ex. 2.**) Ms. Brisbon never repudiated or invalidated Mr. White's act of signing the Arbitration Agreement and never indicated to Ms. Lesane that her daughter lacked the authority to sign on her behalf.

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

ARGUMENT

I. THE FAA GOVERNS THE ARBITRATION AGREEMENT.

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

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

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

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

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

"[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate"[1] and "ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). To that end, the FAA provides that an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "By its terms, the [FAA] leaves no place for the exercise of discretion by a . . . court, but instead *mandates* that . . . courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis added); *see also* 9 U.S.C. § 4 ("The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement*.") (emphasis added).

While a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not do so based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). Under the FAA, "courts *must* place arbitration agreements on *equal footing with other contracts* . . ." *Concepcion* at 339 (emphasis added); *see also Allied–Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses,

[1] *Allied–Bruce*, 513 U.S. at 270.

under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted).

III. THE ARBITRATION AGREEMENT IS VALID ON ITS FACE.

The Arbitration Agreement is valid on its face. In other words, there is nothing within the four corners of the document itself that calls its validity into question. It bears Mr. White's signature on behalf of Ms. Brisbon, along with Mr. White's express representation that he is authorized to sign for Ms. Brisbon.[2] Additionally, the Agreement lists Ms. Brisbon as a party. It is countersigned by the Facility. It is duly supported by consideration and sets forth all necessary terms, containing, as it does, the parties' mutual promises to submit a certain defined scope of disputes to binding arbitration[3] before an arbitrator who is either agreed upon by the parties themselves or selected by the Court, in a proceeding to be conducted pursuant to the South

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

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

Carolina ADR Rules, which will result in a decision that is enforceable in a court of competent jurisdiction. To require more just because an arbitration agreement is in issue would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *Concepcion*, 563 U.S. at 339.

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

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

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

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

By signing the Arbitration Agreement and Admission Agreement, Mr. White, acting on behalf of Ms. Brisbon, represented that he understood and assented to their terms. Indeed, he was given the option of entering into the Arbitration Agreement – *or not* – and he freely and voluntarily made the decision to proceed. The Arbitration Agreement by its plain language was not a precondition of admission to the Facility and simply could not have been an adhesion or "take it or leave it" contract. Mr. White had the option not to enter into the Arbitration Agreement on behalf of his mother, yet he voluntarily did so, voluntarily did not retract his agreement thereto, and his mother stayed at the Facility and received and accepted direct benefits attendant to her admission.

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

When determining this aspect of unconscionability, this Court must focus on "whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision maker." *Id.* at 25, 644 S.E.2d at 668. Under the terms of the Arbitration Agreement, the parties are to select a third-party arbitrator *jointly* "from a panel having experience and knowledge of the health care

industry." *See* **Ex. 2.** If the parties are unable to agree upon such an arbitrator, the agreement vests the Court with authority to make a selection. The selected neutral arbitrator is vested with authority to hear the case and make a decision which is "binding on all parties." As a result, it can only be said that the Arbitration Agreement allows for complete mutuality of remedies. Neither party is given an advantage by its terms. The Arbitration Agreement simply binds the parties (both sides) to resolve disputes via arbitration. And there is nothing about the Arbitration Agreement—which, again, calls for arbitration conducted pursuant to the South Carolina ADR Rules—that would suggest it is not geared towards achieving an unbiased decision by a neutral decision-maker. Indeed, Rule 1 of the South Carolina ADR Rules expressly states, "These rules shall be construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply."

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

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

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

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

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

V. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE, OR AT LEAST PLAINTIFF SHOULD BE ESTOPPED TO DENY ITS ENFORCEABILITY.

A. The Plain Language of the Agreement Binds Plaintiff

According to the plain language of the Arbitration Agreement and consistent with his actions during the admissions process, Mr. White represented himself to admissions personnel at the Facility as his mother's representative with the authority to sign documents and enter

agreements on her behalf.[4] It was clearly Mr. White's intention to bind Ms. Brisbon according to the terms of the Admission Agreement and Arbitration Agreement. Moreover, Ms. Brisbon evinced no intentions or directions to the contrary. Accordingly, the plain language of the Arbitration Agreement confirms that Mr. White was authorized to enter this Agreement binding his mother to arbitration, and the Agreement directly applies to the instant dispute. For these reasons, the Court should find this Agreement is valid and enforceable, and the present action must be stayed and compelled to arbitration.

This Court has found the plain language of arbitration agreements to support enforceability in at least two other cases with circumstances nearly identical to the case at bar. *See e.g. Macie Price v. THI of South Carolina at Magnolia Manor Inman, LLC et. Al,* 2018-CP-42-01054 (S.C. Com. Pls. August 7, 2018) (attached hereto as **Exhibit 3**); *Josephine Spears v. Rehab Center of Cheraw, LLC et al.* 2019-CP-13-00308 (January 10, 2020) (attached hereto as **Exhibit 4**). In both cases, the plaintiff was the wife of a resident at a skilled nursing facility in South Carolina. The resident's wife in each case executed an admissions agreement and an arbitration agreement *identical* to the ones in the case at bar, and as here represented to the facility that she had authority to enter these agreements on her husband's behalf. (*See* **Ex. 3**, p. 2-3; *see* **Ex. 4**, p. 1.) In those cases, this Court found that the signatory plaintiffs' attestations of authority in the arbitration agreements prevailed over the contradictory affidavits, and bound plaintiffs in both cases to the terms of the agreements. The Court should reach the same conclusion in the present case and enforce the Arbitration Agreement.

[4] *See* **Ex. 2** "It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assignees, personal representatives, guardians, or **any persons deriving their claims through or on behalf of Resident**." (emphasis added).

Specifically, this Court determined in *Price* that "the terms of the Arbitration Agreement clearly apply to the instant dispute[,]" because was it clearly the intent of the wife to bind her husband (and herself, as personal representative) according to the plain language terms of the arbitration agreement. (See **Ex. 3**, p. 5.) Likewise, in *Spears*, the arbitration agreement at issue contained an express attestation of authority to enter into the agreement on behalf of the resident identical to Plaintiff's attestation in the Arbitration Agreement noted above. As such, this Court in *Spears* held, in part, that the wife's authority to sign the arbitration agreement at issue was "valid on its face" by its plain language (and indeed the arbitration agreement as a whole was found to be valid on its face) and that the skilled nursing facility had no obligation whatsoever to inquire as to the signatory plaintiff's authority beyond her own attestation. (See **Ex. 4**, p. 4.) As in *Price* and in *Spears*, Mr. White in this matter expressly attested to his own authority to enter into the Arbitration Agreement on behalf of his mother, Ms. Brisbon. Therefore, the Court should find that Plaintiff is bound by the plain language of the Arbitration Agreement and compel this matter to arbitration.

B. Mr. White Possessed the Apparent and Inherent Authority to Execute and Bind Ms. Brisbon to the Arbitration Agreement, and/or Plaintiff should be Estopped from Denying Mr. White's Authority.

1. Agency Relationship

In addition to representing himself as authorized to enter the Arbitration Agreement on his mother's behalf by the plain language of the Arbitration Agreement and by his own express representations, Mr. White possessed the *apparent and inherent authority* to bind Ms. Brisbon under this Agreement. A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "Agency is the fiduciary relationship that arises when one

person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)).

Alternatively "[a]n agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145-146, 425 S.E.2d 764, 773 (Ct. App. 1992.) The doctrine of apparent authority provides that a principal may be bound by the acts of its agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.,* 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

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

When signing the arbitration agreement, the brother in *Carraway* left the resident signature line blank and signed it as the "authorized representative" of her sister. Suit was later filed, and the facility moved to compel arbitration, which the trial court granted. On appeal, the Alabama Supreme Court affirmed the trial court's decision holding, relevant here, that the resident's brother possessed the apparent authority to enter into the arbitration agreement on her sister's behalf, as evidenced by the fact that she never objected to him signing on her behalf and the arbitration agreement specifically provided that any person authorized by the resident may execute it on her behalf. *Id.* See also, *Tenn. Health Mgmt. v. Johnson*, 49 So. 3d 175 (Ala. 2010) (holding that a daughter possessed the apparent authority to enter into an arbitration agreement on her mother's behalf). Notably, the Supreme Court of Alabama's holding in *Carraway* was applied as "persuasive authority" by this Court in *Price, supra.* (**Ex. 3**, p. 8.)

Clearly, in this matter, Mr. White held himself out as an agent for his mother without any indication to the contrary when he executed various admission documents on behalf of her mother, including the Arbitration Agreement. Based on Mr. White's conduct and explicit representations, Ms. Lesane believed he possessed the authority to execute all admissions documents on her behalf, including the Arbitration Agreement. Therefore, it was Ms. Lesane's and the Facility's reasonable and justified belief that Mr. White was his mother's authorized representative and had the authority to execute the documents on her behalf.

Moreover, by allowing Mr. White to procure her admission to the Facility and, thereafter, by accepting the benefits of the contracts entered into in connection with that admission, Ms. Brisbon represented that Mr. White was Ms. Brisbon's authorized representative to act on her behalf in connection with admission. *See R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000) (If a principal holds another out as

having the authority to act on her behalf or knowingly permits another to act as her agent, "either *generally* or for a particular purpose, she will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances") (emphasis added).

A holding to the contrary would contradict the fundamental concept of apparent agency: *an agency relationship is based on a third party's understanding of a principal's manifestations and a reasonable belief that the agent has been authorized to act*. Ms. Lesane and the Facility had reason to believe that, by allowing Mr. White to sign the admissions paperwork, including the documents providing for Ms. Brisbon's stay and the skilled nursing care provided at the Facility, Ms. Brisbon cloaked Mr. White with the authority to execute those documents. Further, Neither Ms. Brisbon nor any other family member repudiated or invalidated Mr. White's actions. Instead, Ms. Brisbon accepted the benefits of the contracts with the Facility by remaining at the Facility and receiving skilled nursing care and services, thereby ratifying her son's actions. Because no one attempted to repudiate the Arbitration Agreement or even question it, the Facility was further justified in believing Mr. White had been authorized to execute it. It is clear that an apparent agency relationship existed such that the Arbitration Agreement should be deemed enforceable.

Even if Mr. White lacked the actual or apparent authority to enter into the terms of the Arbitration Agreement, he still possessed sufficient inherent agency powers to render the agreement enforceable. Such powers are recognized by South Carolina courts and are used to enforce agreements where supposed unauthorized actions "accompany or are incidental to transactions which the agent is authorized to conduct…." *See,* §§ 8A, 161 *Restatement (Second) of Agency* (1958); *Smith v. Fitton & Pittman, Inc.*, 264 S.C. 129, 212 S.E.2d 925 (1975)

(*abrogated on unrelated grounds)* (examining whether party had properly demonstrated the existence of inherent agency powers); *Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r,* 309 P.3d 372 (Wash. 2013); *Daly v. Aspen Ctr. for Women's Health, Inc.*, 134 P.3d 450, 452 (Colo. App. 2005); *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210-11 (Ind. 2000); *Cange v. Stotler & Co.,* 826 F.2d 581, 591 (7th Cir. 1987) ("[t]he powers of an agent are, prima facia, coextensive with the business entrusted to her care, and will not be narrowed by limitations not communicated to the person with whom she deals.") (*citing Lumbermen's Mut. Ins. Co. v. Slide Rule & Scale Eng'g Co.*, 177 F.2d 305, 309 (7th Cir. 1949)).

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

2. Agency by Estoppel

"When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be her agent, either generally or for a particular purpose, she will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances." *R & G*,

supra, 343 S.C. at 433, 540 S.E.2d at 118. To properly show estoppel in South Carolina, a party must show: "(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change her position prejudicially." *Boyd v. Bellsouth Tel.Co.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006).

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

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

(See **Ex. 3**, p. 9.) Accordingly, the court concluded that the arbitration agreement was valid and enforceable.

Similarly, in *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011) the United States District Court of South Carolina concluded the plaintiff was estopped from denying she had authority to bind her wife to arbitration. (Attached hereto as **Exhibit 5.**) As in the present case, the husband in *McCutcheon* executed a number of documents on her wife's behalf upon her admission to a nursing home facility, including an admissions agreement and an arbitration agreement. As in this case, the admissions agreement in *McCutcheon* provided that the husband was her wife's legal

representative for the purposes of admission, as she was her next-of-kin and represented himself as authorized to make health care decisions on her behalf. The court held:

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

Id. at *5.

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

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

In any event, the Admission Agreement and the Arbitration Agreement merged (and therefore should be considered as one), and because Ms. Brisbon received direct benefits under

the Admission Agreement (with which the Arbitration Agreement merged), Plaintiff should be estopped to deny the enforceability of the Arbitration Agreement.

1. Merger

The Arbitration Agreement and Admission Agreement were executed by Mr. White on behalf of Ms. Brisbon. The enforceability of these instruments must be determined in accordance with the general principles of contract law and agency law that would apply to any other contract. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010).

The Arbitration Agreement provides that "any controversy or dispute between the parties *arising out of or relating to Facility's Admission Agreement* . . . or relating in any way to Resident's stay at Facility" shall be resolved by arbitration pursuant to the terms of the Arbitration Agreement. (*See* **Ex. 2**.) (Emphasis added.) As previously described, the Arbitration Agreement and the Admissions Agreement were both signed by Mr. White on behalf of his mother on the same day, at the same time, for the same purpose, and in the course of the same transaction—Ms. Brisbon's admission to the Facility.

Courts in South Carolina construe contemporaneous instruments together; if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated. *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977). Absent some evidence indicating a contrary intention, when instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will generally consider and construe them together on the theory that the instruments are effectively one instrument or contract. *Id. See also Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994)

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

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

As indicated previously, the court in *McCutcheon* analyzed facts almost identical to the case at bar and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011WL6318575. (*See* **Ex. 5.**) Indeed, this Court has cited *McCutcheon* on numerous occasions in holding that a nursing home arbitration agreement merged with the admission agreement for purposes of equitable estoppel under precisely the same circumstances. *See Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C.

Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012). (*See Abrams, Campsen* attached hereto as **Exhibits 6 and 7, respectively**.)

The Admission Agreement and the Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction.[5] They should be considered merged, i.e., they should be considered and construed together as effectively one contract.

2. Equitable Estoppel of Merged Agreement

"South Carolina has recognized several theories that could bind non-signatories to arbitration agreements under general principles of contract and agency law, including . . . estoppel." *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019). "Equitable estoppel precludes a party from asserting rights she otherwise would have had against another when her own conduct renders assertion of those rights contrary to equity." *Int'l Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). "A nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause.'" *Id*. (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)); *see also Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290–297, 733 S.E.2d 597, 601–605 (Ct. App. 2012) (applying the direct benefits test as set forth in *International Paper Co.*

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

to reverse the circuit court's denial of a motion to compel arbitration); *Wilson*, 426 S.C. 326, 339–345, 827 S.E.2d 167, 174–177 (favorably discussing the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals' earlier decision in *Pearson*, 400 S.C. 281, 733 S.E.2d 597, and under which the Facility contends Plaintiff is estopped to deny the enforceability of the Arbitration Agreement here, where Ms. Doe received direct benefits (in the form of her admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement merged); *see also id.* at 340, 827 S.E.2d at 175 n. 6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added).

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

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

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

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

524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007) (quoting in part *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bide. Corp*., 659 F.2d 836, 839 (7th Cir. 1981) (citing in part *Int'l Paper Co.*, 206 F.3d at 416) (internal quotations omitted).[6]

Of note, this Court applied this precise reasoning in *Spears,* referenced above. (*See* **Ex. 4**, pg. 9). In that case and as discussed above, a woman admitted her husband to a skilled nursing facility and in connection with her admission, executed admission and arbitration agreements *identical* to the ones here. The agreements were both executed by the woman and a

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

representative of the skilled nursing facility at the same time. This Court considered the agreements as merged and held that the plaintiff was estopped from refusing to comply with the arbitration agreement where, like here, the resident received "direct benefits from the Admission Agreement in the form of her admission to the Facility, including, without limitation, the room, board, care, and treatment she received therein." *Id.*, pg. 10 (footnote omitted).

The key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability but whether benefits to the nonsignatory are direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 ("Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause. In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. Stated another way, [u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement . . .") (internal citations and quotation marks omitted); *id.* at 343, 827 S.E.2d at 176 ("It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties but does not exploit (and thereby assume) the agreement itself.") (internal citations omitted). Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to

enjoy direct benefits under an agreement containing an arbitration clause (which is the case here because the Admission Agreement and the Arbitration Agreement merge) while at the same time denying that the arbitration clause is enforceable. *See*, 400 S.C. at 290, 733 S.E.2d at 601 ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.") (citation and internal quotation marks omitted).

As set forth in our Supreme Court's controlling decision in *Wilson*, and consistent with the Court of Appeals' decision in *Pearson*, which the *Wilson* Court favorably cites, the essence of the test for direct benefits estoppel is simply whether the nonsignatory has exploited other parts of the contract by reaping its benefits. Indeed, to require more than this—or, in other words, to limit the applicability of direct benefits estoppel to only instances where the nonsignatory's claim relies solely on the contract terms to impose liability—is to invite the very sort of have-your-cake-and-eat-it-too inequity that the doctrine aims to prevent in the first place. Neither *Wilson* nor *Pearson* nor general notions of equity countenance,[7] much less call for, such a result.

Here, Ms. Brisbon embraced all aspects of the Admission Agreement with the Facility. Indeed, her receipt of direct benefits under the Admission Agreement (with which the Arbitration Agreement merged) cannot reasonably be denied. Undoubtedly, Ms. Brisbon received direct benefits (in the form of room, board, various amenities/services, and the care/treatment she received at the Facility). To deny her receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of her residency: every night's

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

stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even Plaintiff's complaint does not go nearly so far as that. (*See generally* Compl.)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Ms. Brisbon received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment she received therein. This Court should find that the Arbitration Agreement merged with the Admission Agreement and that Plaintiff is estopped to deny the Admission Agreement/Arbitration Agreement's enforceability, Ms. Brisbon having effectively embraced the contract with the Facility for the purpose of her admission and receipt of the benefits thereof.

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

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

In *Coleman*, Ann Coleman signed a number of documents, including arbitration agreements, when admitting her sister to a health care facility. 407 S.C. at 350, 755 S.E.2d at 452. Coleman brought suit after her sister's death, and the facility sought to compel arbitration. In determining that the arbitration and admission agreements in the case had not merged, the Supreme Court found, "On its face, this clause recognizes the 'separatedness' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts. Moreover, the [arbitration agreement] could be disclaimed within thirty days of signing while the admission

agreement could not, evidencing an intention that each contract remain separate." *Id*. at 452. "By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply." *Id.*

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

Unlike the arbitration agreements in *Coleman, Thompson,* and *Hodge*, the Arbitration Agreement and Admission Agreement in the case at bar should not be considered "separate" for purposes of denying merger. Unlike *Coleman, Thompson,* and *Hodge*, the Arbitration Agreement in this case does not state that it can be revoked after it has been signed. Further, it did not have to be agreed to as a precondition to admission to the Facility.

Instead, in the present case, the agreements were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction and, therefore, the documents merged. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts*, *supra,* 268 S.C. at 88, 232 S.E.2d at 24).[8]

[8] To be clear, even though the *Coleman* Court found evidence of an intent contrary to merger on the particular facts before it, it nonetheless recognized as *correct* the general proposition of law on which the *Coleman* Appellants' based their merger argument, i.e., the

While the Admission Agreement in this case does contain an "Entire Agreement" clause, unlike the admission agreements in those other cases, the provision in this case does not separately reference the Arbitration Agreement (in fact, it doesn't refer to it at all). Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[9]), the "Entire Agreement" clause in the instant Admission Agreement expressly states that "other Admissions materials" are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed "separatedness." And without question, the Arbitration Agreement is among these other admissions materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) ("The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's *admission documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted) ; *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 ("Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement*.") (emphasis added)).

Also, absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* Admission Agreement p. 10 (providing "This Agreement will be governed by and construed in accordance with applicable

---

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

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

Federal regulations and those laws of the State in which Facility is located.") *with* Arbitration Agreement (providing that, "because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action;" but also providing that arbitration shall be "as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules").) Essentially, both instruments provide that South Carolina law applies except where it is displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, the termination provisions provide no evidence of "separatedness." Again, the only reason for the Arbitration Agreement is the Admission Agreement—the only point of the Arbitration Agreement is to cover disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still *connected* to the Admission Agreement even after the termination of the Admission Agreement. This is simply how agreements to arbitrate work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

The merger question examines whether, "where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,"[10] there is evidence to upset the *default presumption* that the contracting parties intended the instruments to be construed together as effectively one contract. As a practical matter, if this

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

presumption is to mean anything, upsetting it must require actual evidence of sufficient probity that, notwithstanding the concurrence of all the circumstances that must come together for the presumption of merger to even arise in the first place—i.e., same time, parties, purpose, and transaction—a reasonable, non-speculative inference can be drawn that the parties' possessed a contrary intention. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). No such inference can be drawn here. It does not even make sense that the parties would not have intended the Admission Agreement and the Arbitration Agreement to merge.

Such superficial things as the fact that the admission arbitration agreements have their own titles, are separately paginated, and/or are separately signed cannot suffice to show evidence of intent contrary to merger. To point to such things is really to do no more than to point out that the admission agreement and arbitration agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. The very nature of merger is to *merge* separate documents.

And—besides the fact that there is no ambiguity as to the merger of the Admission Agreement and the Arbitration Agreement to begin with—to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that, as a matter of law, *merger is the default position*, i.e.,

it is *presumed,* and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention.

The *Coleman* Court clearly endorsed the rule of law that a presumption of merger arises where, as here, multiple instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction and that upsetting this presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." 407 S.C. at 355, 755 S.E.2d at 455. While it is true that the *Coleman* Court also cited the rule that ambiguity is construed against the drafter,[11] (a) it did so in dicta and (b) it never addressed the logical inconsistency—which thus remains fair game as an argument in this case[12]—in recognizing a rule of law creating a presumption in favor of merger (i.e., in recognizing the occurrence of a set of circumstances (same time, parties, purpose, and transaction) as sufficiently probative to affirmatively tip the scales in favor of merger) while at the same time allowing that presumption to be completely overturned by evidence that is merely ambiguous, i.e., that does not even go so far as to clearly indicate a contrary intention and, indeed, is actually still susceptible to a reasonable conclusion in favor of merger. *See S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation."). To allow

[11] *Id.* at 407 S.C. at 355–56, 755 S.E.2d at 455.

[12] To be clear, none of *Coleman's* progeny has addressed this either.

the merger presumption to be upset based on evidence that is merely ambiguous is to allow the exception to devour the rule.

Even though, as noted above, the Arbitration Agreement was not a precondition to admission, this does not mean that the two instruments did not work hand-in-hand once the arbitration agreement came into existence (i.e., once it was in fact entered into). While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true; the Admission Agreement is indeed necessary to the Arbitration Agreement. In other words, yes, the Admission Agreement *could* have stood on its own, without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with; *but that is not what happened*. The Arbitration Agreement was in fact executed, of course, and it was executed under circumstances giving rise to a presumption of merger—again, same time, parties, purpose, and transaction. Unlike the Admission Agreement, however, which is capable of making sense either standing alone or, alternatively, together with the Arbitration Agreement, the Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitrations Agreement's) sole reason for being.

It matters not whether the Arbitration Agreement was a condition of admission, only that it was in fact agreed to in conjunction with admission; and, here, there can be no question that the Arbitration Agreement—once agreed upon—was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument, governing various interrelated aspects of Ms. Brisbon's relationship with the Facility. Indeed, this conclusion finds direct support in the Admission Agreement's "Entire Agreement" provision, which states, "[t]he undersigned further acknowledges that he/she has received and read the Admission Handbook and other Admissions materials and understand that these

documents are made a part of this Agreement by reference herein." (**Ex. 1**, p. 12 (emphasis added)). Had the Arbitration Agreement not been executed, it would not constitute admissions material, but, of course, it was executed, and it does constitute admissions material; most respectfully, to conclude otherwise simply does not make sense.

A finding against merger here can only rest on impermissible speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding intent. It must be remembered that the presumption of merger arises only where the four elements of time, parties, purpose, and transaction coincide—as they all do here. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. If even one of these is lacking, there is no merger. This is why, for the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). The merger presumption is "earned," so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

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

4. Respectfully, the Court of Appeals' recent decision in *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023), is erroneous and should not control the disposition of the instant motion.

During the pendency of this case, the Court of Appeals decided *Solesbee*, wherein it affirmed the denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as the Facility's here. Indeed, the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*.

In affirming the denial of the motion to compel arbitration in *Solesbee*, the Court of Appeals likened that case to *Coleman* and *Hodge* and found that the circuit court had correctly determined that there was no merger of the Admission Agreement and the Arbitration Agreement and, in turn, had properly denied the Facility's equitable estoppel argument. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149 ("Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and [the Facility's] equitable estoppel argument was properly denied.").)[13] Most respectfully, the *Solesbee* Court's merger analysis is itself erroneous—and *Solesbee* should not control the disposition of the instant motion.[14]

First, the *Solesbee* Court erroneously found against merger on the basis that "the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law." 438 S.C. at 648, 885 S.E.2d at 149. It is simply not true that "the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law."

---

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

[14] In this regard, Defendants would also note that it is still possible that the Supreme Court might review *Solesbee* via a writ of certiorari.

Regarding governing law, what the Admission Agreement actually states is this: "This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which the Facility is located." (Admission Agreement p. 10.) And what the Arbitration Agreement actually states is this:

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

(Arbitration Agreement.)

As explained above, the FAA applies whenever an arbitration agreement involves interstate commerce—and this is so even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law. *See Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (The FAA "create[d] a body of federal substantive law," which is "applicable in state and federal courts."); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) ("[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."); *see also Allied-Bruce*, 513 U.S. 265, 270–77. Moreover, even under the FAA, the general state law of contracts continues to apply. *Allied-Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary

to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted). Furthermore, the Arbitration Agreement expressly calls for the arbitration proceedings to be conducted pursuant to the South Carolina ADR Rules. (Arbitration Agreement.)

Again, essentially, the provisions of the Admission Agreement and the Arbitration Agreement regarding governing law are to the effect that South Carolina law applies except where displaced by federal law, and they do not support any reasonable inference of any intent contrary to merger.

Second, the *Solesbee* Court erroneously found against merger on the basis that "[t]he Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement 'shall survive any termination or breach of this Agreement or the Admission Agreement.'" 438 S.C. at 648–49, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger here. Unlike in *Coleman* and *Hodge*, the supposed textual recognition of the Admission Agreement as being separate from the Arbitration Agreement is not included in any "Entire Agreement" provision. Rather, the "Entire Agreement" provision of the Admission Agreement expressly states, "other Admissions materials . . . are made a part of this Agreement by reference." (Admission Agreement p. 12.) And as in the instant case, the Arbitration Agreement that was signed in conjunction with the admission is clearly among these "other Admissions materials." Moreover, that the Arbitration Agreement "shall survive any termination or breach of this Agreement or the Admission Agreement" just means that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. Again, this is simply how arbitration agreements work—and

would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. 2d at 612–13 ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

Third, the *Solesbee* Court erroneously found against merger on the basis that "[t]he Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, 'Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.'" 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. The absence of a "revocation" provision is one way in which the Arbitration Agreement is materially different from those at issue in *Coleman* and *Hodge*, and, for that matter, *Thompson*. Moreover, the *Solesbee* Court drew a false equivalency between the concepts of "revocation" and "termination." A "revocation" is an annulment (i.e., making something a nullity),[15] whereas "termination" is putting or bringing something that properly exists to an end—which is materially different from making something a nullity, i.e., void and never having properly existed in the first place. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. at 612–13.

Fourth, the *Solesbee* Court erroneously found against merger on the basis that "the Admission Agreement and Arbitration Agreement were separately paginated and had their own signature pages." 438 S.C. at 648, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. Again, the fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no

[15] *Black's Law Dictionary* p. 1321 revocation (7th ed. 1999); *id.* at 89 annulment ("The act of nullifying or making void.").

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

Finally, the *Solesbee* Court erroneously found against the Facility on merger on the basis that Arbitration Agreement was voluntary. 438 S.C. at 648, 885 S.E.2d at 149. While, again, it is certainly true that the Arbitration Agreement was voluntary (*see* No. 3 above), this fact provides no reasonable inference of an intent contrary to merger. Again, to be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. But all this means is that it did not have to be agreed to for the resident to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was signed. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. Again, the two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

To say that the Arbitration Agreement was not required for admission, which it was not, is not to say that it was not intended to be part of the admissions materials in the event it was agreed to, which it was, by Mr. Dover on Ms. Solesbee's behalf in *Solesbee* and by Mr. White on

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

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

CONCLUSION

For the reasons set forth herein, Defendants respectfully request that this Court enter an Order staying the pending action and compelling arbitration.

Respectfully submitted,

CLEMENT RIVERS, LLP

By: *s/Russell G. Hines*

D. Jay Davis, Jr. (SC Bar No. 12084)
jdavis@ycrlaw.com
Matthew O. Riddle (SC Bar No. 76650)
mriddle@ycrlaw.com
Russell G. Hines (SC Bar No. 72100)
rhines@ycrlaw.com
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
(843) 577-4000

Attorneys for Defendants St. George Healthcare, LLC d/b/a St. George Healthcare Center and Vicki Sides

Dated: October 19, 2023
Charleston, South Carolina

ADMISSION AGREEMENT – SOUTH CAROLINA

RESIDENT NAME: Mary Brisbon

RESIDENT NUMBER:

DATE OF ADMISSION: 4-21-19

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

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

I. GENERAL CONDITIONS

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

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

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

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

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

DEFENDANT'S EXHIBIT 1

II. AGREEMENT FOR CARE

A. FACILITY AGREES TO:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. FINANCIAL AGREEMENT

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

1. Room and board, including meals, laundering of linens and bedding, nursing care, personal care or custodial care for the health, grooming and well-being of Resident in (☑-private) (☐-semi-private) accommodations, for a basic fee of $ 255.00 per day, payable one month in advance. In the event Resident is unable or unwilling to receive any of the services included in the room and board charge, such as meals, laundry, etc., no adjustment will be made to the daily rate. Payment for all invoices is due upon receipt. In the event public aid funds are denied for services for which coverage has been expected, Resident and/or Representative will be responsible for payment and will pay such charges upon receipt of invoice. Resident and/or Representative agree(s) to pay any rate change charged to Resident so long as each party to this Agreement is given at least thirty (30) days written notice of the new rate, including any increases or adjustments in Resident's liability by any financial third party or regulatory agency. Additional notice may be provided under applicable state regulations.

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

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

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

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

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

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

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

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

IV. TERMINATION

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

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

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

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

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

V. MEDICAID BENEFICIARIES

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

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

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

3. **Non-Covered Services.**

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

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

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

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

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

VI. MEDICARE BENEFICIARIES

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

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

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

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

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

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

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

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

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

VII. PRIVATE PAY/INSURANCE

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

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

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

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

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

VIII. NOTICES

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

_____

_____

_____

_____

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

_____

_____

_____

_____

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

IX. GOVERNING LAW

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

X. SEVERABILITY

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

XI. CAPTIONS

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

XII. MODIFICATIONS

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

XIII. WAIVER

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

XIV. RESIDENT

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

XV. ASSIGNABILITY

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

XVI. INFORMATION RELEASE/BILLING AUTHORIZATION

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

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

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

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

XVII. MISCELLANEOUS

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

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

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

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

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

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

XVIII. ENTIRE AGREEMENT

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

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

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

Signature of Resident	Date	Printed Name of Resident
Resident Social Security Number		
Witness Signature	Date	Printed Name of Witness

OR

V Kevin White	4-26-19	
Signature of Representative, if any	Date	Printed Name of Representative
Witness Signature	Date	Printed Name of Witness

Representative Social Security No. (Voluntary Info.)

Signature of Facility Official		Printed Name of Facility Official & Title
Date 4-26-19		

Original: Business File • Photocopy: Resident/Representative

AUTHORIZATIONS, CONSENTS & ACKNOWLEDGMENTS

Please read, review and acknowledge each the following:

Treatment/Health Care Professionals:

Authorization for Treatment

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

Medical Treatment

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

General Duty Nursing

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

Independent Status of Health Care Providers and their Agents/Designees

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

Selection of Medical Professionals:

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

PHYSICIAN:

Name: Dr. Popp

Address: _____

Phone: _____

DENTAL ☐ Yes ☐ No Examination Charge $_____

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

Name: _____

Address: _____

Phone: _____

VISION ☐ Yes ☐ No Examination Charge $_____

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

Name: _____

Address: _____

Phone: _____

PODIATRY ☐ Yes ☐ No Examination Charge $_____

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

Name: _____

Address: _____

Phone: _____

Self-Administration of Medications

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

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

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

Personal Property/Valuables/Money:

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

☑ K.W I acknowledge and understand that Facility is not responsible for damage to or theft/loss of any personal property/valuables/money not kept in compliance with Facility policies.

Deposit of Personal Funds:

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

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

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

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

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

Advance Directive Acknowledgment:

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

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

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

Special Services:

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

Telephone	☑ Yes	☐ No	☐ N/A	Charge $ _____
Television	☑ Yes	☐ No	☐ N/A	Charge $ _____
Newspaper	☐ Yes	☐ No	☑ N/A	Charge $ _____
Laundry	☑ Yes	☐ No	☐ N/A	Charge $ _____
Beauty Shop	☐ Yes	☐ No	☐ N/A	See charge list
Other(s) (Please Specify Below)				
_____	☐ Yes	☐ No		Charge $ _____
_____	☐ Yes	☐ No		Charge $ _____

Photographs by State/Federal Survey Agencies

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

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

Photograph/Audiotape/Videotape ☑ Yes K.W ☐ No _____

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

Posted Information ☑ Yes K.W ☐ No _____

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

Authorization to Release and Obtain Information ☑ Yes K.W ☐ No _____

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

Authorization to Receive/Open Mail ☐ Yes _____ ☑ No K.W

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

***** SIGNATURE PAGE FOLLOWS*****

Resident Signature	**Date**	**Printed Name of Resident**
X Kevin White	4-26-19	
Legal Representative Signature, if any	**Date**	**Printed Name of Representative**
Witness Signature	**Date**	**Printed Name of Witness**
	4-26-19	
Facility Representative Signature	**Date**	**Printed Name and Title**

CONSENT FOR THE RELEASE OF MEDICAL RECORDS

NOTE: This form is to be used only when the facility needs to request a patient's/resident's medical records from another health care provider. This form does NOT authorize the facility to release a patient's/resident's medical record.

Patient/Resident Name Mary Britton Medicare No._____

Provider _____ Social Security No._____

Service Dates: From _____ To _____ DOB: _____

By my signature below, I hereby authorize and request Provider to release the following information contained in the medical/financial record of: _____ ("Patient/Resident") to _____ ("Facility"). I understand these records will be made a permanent part of Patient's/Resident's medical record currently at Facility and that the information will be used for purposes of Patient's/Resident's continued treatment and care at Facility.

Information to be disclosed shall include:

[ ]	complete record	[ ]	history and physical
[ ]	abstract	[ ]	progress notes
[ ]	clinical resume	[ ]	emergency/urgent care
[ ]	consultation reports	[ ]	procedures: operative/anesthetic
[ ]	therapy record	[ ]	discharge summary
[ ]	lab/x-ray/diagnostic results	[ ]	other_____

I understand that this medical record may include information concerning psychiatric diagnoses, drug abuse, alcoholism or communicable or venereal diseases (including but not limited to diseases such as hepatitis, syphilis, gonorrhea or the human immunodeficiency virus, also known as Acquired Immune Deficiency Syndrome ["AIDS"]). **With this knowledge, I hereby give my consent to release the requested information from Patient's/Resident's medical record, including any information concerning Patient's/Resident's identity.**

I understand that Provider will not condition Patient's/Resident's continued treatment, payment, enrollment or eligibility for benefits on my signing this authorization and that I may revoke this authorization at any time by notifying Provider in writing, except to the extent that action has been taken in reliance on this authorization prior to the revocation. I further understand that the Facility is bound by federal privacy regulations, and that the information described above may not be re-disclosed by them without proper authorization.

This authorization shall expire on _____ OR _____ (event).
(If no expiration date or event, this authorization will expire six (6) months from the date on which it was signed.)

Signed By:

X Kevin White on 4-24-19 (date)

Patient/Resident OR Legal Representative

Original: Medical Chart • Photocopy: Resident/Representative

ASSIGNMENT AGREEMENT

THIS ASSIGNMENT AGREEMENT ("Agreement"), made and entered into as of this 24th day of April 20 19 by and between St. George ("Facility") AND Mary Dayton ("Resident") AND/OR _____ ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party," hereinafter collectively "Representative"), who together shall be referred to as "Resident" within this agreement;

NOW, THEREFORE, intending to be bound and as consideration for admission to the Facility, the Parties hereto agree as follows:

1. **Obligations of Resident.** Resident agrees to make full and complete disclosure to the local Medicaid Program Office regarding all financial resources and income during the application process, including all transfers of assets and/or financial resources having taken place within the preceding five years of the date of application for admission to Facility. Failure to identify all resources, income, and transfers or the submission of false information may result in the termination of this Agreement and financial liability. Resident is obligated to notify Facility when only $ 2,000, or the value thereof, exists to satisfy financial obligations under this Agreement and/or the *Admissions Agreement*. Resident agrees to apply for Medicaid benefits at such time as his/her resources will no longer be sufficient to pay all Facility charges for Resident's care and stay.

2. **Patient Pay Amount.** For residents approved for Medicaid benefits, Facility will accept payment from Medicaid and, if applicable, the Resident's Patient Liability Amount as determined by Medicaid as payment in full only for those services covered by the Medicaid Program. During the period of time that the application for Medicaid benefits is pending, Resident shall pay such monthly Patient Liability Amount (less any qualified medical expense deductions) as estimated by the Facility and the Medicaid Program at the time of application for Medicaid benefits.

3. **Determination of Medicaid Eligibility.** Resident is obligated to cooperate fully in any Medicaid eligibility determination or redetermination process. In the event that Resident's eligibility for Medicaid benefits is denied, interrupted or terminated due to his/her failure to cooperate in the Medicaid application process, redetermination or appeal process, Resident shall be liable for the applicable daily room rate plus charges for ancillary services and supplies, during any period of nonpayment.

4. **Eligibility for Third-Party Payments.** Resident may be or may become eligible to receive financial assistance, reimbursement, or other benefits from third parties, such as private insurance, employee benefit plans, benefits under the Medicaid Program, Medicare benefits, managed care coverage, supplementary medical or other health insurance, supplemental security income insurance, or old-age survivors' or disability insurance. It is Resident's responsibility to apply for these benefits. If Resident is or becomes eligible to receive payments from any third parties for Resident's stay and care, the Facility reserves the right to collect such payments directly from the third-party source. Resident shall at all times cooperate fully with Facility and each third-party payor to secure payment. Cooperation includes providing information, signing and delivering documents, and assigning to Facility (to the extent permitted by law) any payments from Federal Social Security benefits, from any other federal or state governmental assistance programs, reimbursement or benefits of any third party payor to the extent of all amounts due the Facility. Resident agrees to reimburse Facility for any and all costs incurred by Facility to collect such payments directly from the third-party source.

Original: Business File • Photocopy: Resident/Representative

5. **Assignment of Payments.** Although it is Resident's responsibility to secure payment from third-party resources, including but not limited to Medicaid benefits, Resident authorizes Facility to make such claims and to take such actions as it deems necessary to secure for the Facility receipt of third-party payments to reimburse Facility for its charges associated with Resident's stay and care. This assignment includes, but is not limited to, filing an application for Medicaid benefits and pursuing any and all appeals in the event the application is denied. To the fullest extent permitted by law, as security for payment of charges, Resident hereby assigns to Facility all of his/her rights to any third-party payments now or subsequently payable to the extent of all charges due under this Agreement and/or the Admission Agreement. To the extent permitted by law, Resident shall promptly endorse and turn over to Facility any payments received from third parties to the extent necessary to satisfy the charges under this Agreement and/or the Admission Agreement.

By way of this assignment, Resident hereby authorizes and directs any financial institution, governmental agency, entity or person having or possessing information in whatever form that is requested or needed to determine Resident's eligibility for third-party payments, including, but not limited to Medicaid, to turn over or produce the information to the Facility upon written demand.

Signature of Resident — Date — Printed Name of Resident

Resident Social Security Number

Witness Signature — Date — Printed Name of Witness

OR

X Kevin White — 4-24-19

Signature of Representative, if any — Date — Printed Name of Representative

Witness Signature — Date — Printed Name of Witness

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

4-24-19

Date

Original: Business File • Photocopy: Resident/Representative

STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER	)))	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT CASE NO. 2023-CP-18-01775
KEVIN WHITE, as Personal Representative of the Estate of Mary Brisbon, Plaintiff, vs. ST. GEORGE HEALTH CARE, LLC, d/b/a St. George Healthcare Center and VICKI SIDES, Defendants.	))))))))))))	**MOTION TO ALTER, AMEND, AND/OR RECONSIDER ORDER DENYING DEFENDANTS' MOTIONS TO COMPEL ARBITRATION**

TO: THE HONORABLE HEATH P. TAYLOR, Presiding Judge, and PLAINTIFF'S COUNSEL OF RECORD

NOW COME Defendants, St. George Healthcare, LLC d/b/a St. George Healthcare Center (the "Facility") and Vicki Sides ("Sides") (collectively, "Defendants"), by and through their undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set forth below, hereby most respectfully move this Honorable Court to alter, amend, and/or reconsider its order filed November 2, 2023 (the "Subject Order"), denying Defendants' motions, filed March 20, 2023, to compel Plaintiff's[1] claims to arbitration (collectively, the "Underlying Motions").

[1] "Plaintiff" refers to Kevin White ("Mr. White"), as Personal Representative of the Estate of Mary Brisbon ("Ms. Brisbon").

I. Contending, most respectfully, that the Underlying Motions should have been (and should now be) granted, Defendants ask the Court to (re)consider and expressly rule on each and every distinct issue/argument raised in support of the Underlying Motions, i.e., each and every distinct issue/argument set forth in the Underlying Motions themselves; in Defendants' memo in support of the Underlying Motions, filed October 20, 2023; and via oral argument at the hearing on the Underlying Motions on October 23, 2023, all of which is/are hereby incorporated herein by reference.

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

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

A. The Court should have found (and should now find) that the Admission Agreement and the Arbitration Agreement merged and that, because Ms. Brisbon effectively embraced and directly benefitted from the Admission Agreement, she and, in turn, Plaintiff (her estate) is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.

1. The Court's merger analysis is erroneous.

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

> Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] under the [Adult Health Care Consent] Act, she is nevertheless equitably estopped to deny the [arbitration

> agreement's] enforceability. The circuit court held there was no estoppel here, and we agree.
>
> Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. In South Carolina,
>
> > The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
>
> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction*. *Unless there is a contrary intention, appellants are correct that there was a merger*.

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

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

The Court wrongfully concluded that the Admission Agreement and the Arbitration Agreement are separate contracts that do not merge. The merger question examines whether, "where instruments are executed at the same time, by the same parties, for the same purpose, and

in the course of the same transaction,"[2] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[3] there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the instruments were intended to be construed together as effectively one contract. This is a question of intention. *Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a contrary *intention* . . .") (emphasis added). And "in attempting to ascertain th[e] [parties'] intention," our courts "endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into." *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

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

---

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

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

Unlike the arbitration agreement at issue in *Coleman*—and, for that matter, the arbitration agreements at issue in *Coleman's* progeny *Thompson* and *Hodge*, all of which cases involved arbitration agreements that contained a provision allowing them to be disclaimed or revoked within 30 days of signing while the corresponding admission agreements did not—the instant Arbitration Agreement has no disclaimer/revocation provision. (Arbitration Agreement.) Moreover, while the instant Admission Agreement does contain an "Entire Agreement" clause, it does not reference the Arbitration Agreement as a separate contract. (Admission Agreement p. 12.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[4]), the "Entire Agreement" clause in the instant Admission Agreement expressly states that "other Admissions materials" are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed "separatedness." (Admission Agreement p. 12.) Without question, the Arbitration Agreement is among these other materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) ("The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's *admission documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 ("Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement*.") (emphasis added)).[5]

[4] 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike the instant case—the "Entire Agreement" clause expressly referred to a separate arbitration agreement and, thus, "recognize[d] the '*separatedness*' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.") (emphasis added).

[5] To be clear, Defendants' point here is not that the holding of either *Stott* or *Hodge* established a legal standard for what counts as admission paperwork, but rather that the very fact that the language that the *Stott* and *Hodge* Courts used in discussing the facts of the cases so readily made the natural and logical connection between arbitration agreements signed in conjunction with admission and "admission documentation" / "documents related to . . . admission" that it illustrates

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

Moreover, while it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement's) sole reason for being. (Arbitration Agreement

---

that, in its plain, ordinary, and popular sense, "Admissions materials" plainly includes the Arbitration Agreement. *See Beaufort Cnty. Sch. Dist. v. United Nat'l Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) ("If the contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect."). Moreover, this connection between the Admission Agreement and the Arbitration Agreement (with the Arbitration Agreement being understood in the plain, ordinary, and popular sense as included in the term "Admissions materials") is underscored by the *Coleman* Court's recognition that an admission agreement and arbitration agreement signed in conjunction with resident's admission to a nursing facility are indeed "executed at the same time, by the same parties, *for the same purposes, and in the course of the same transaction*." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

(providing for arbitration of "any controversy or dispute between the parties arising out of or relating to [the] Facility's Admission Agreement, or breach thereof, or relating in any way to [Ms. Brisbon's] stay at [the] Facility, or to the provisions of care or services to [Ms. Brisbon] . . . ."); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at [the] Facility . . . .").)[6] [7]

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

---

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

[7] There is also no question that the Arbitration Agreement covers both the Facility and Sides. The Arbitration Agreement states, "It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assignees, personal representatives, guardians, or any persons deriving their claims through or on behalf of Resident." (Arbitration Agreement.) By its terms, the Arbitration Agreement is binding on the Facility's "agents, employees, and servants" as well. (Arbitration Agreement) This includes Sides, whom Plaintiff sues as "the Administrator of the Facility." (Compl. ¶ 3.)

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

Similarly, the survival of the Arbitration Agreement is no evidence of "separatedness." Again, the only reason for the Arbitration Agreement is the Admission Agreement, as the point of the Arbitration Agreement is to cover disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

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

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

The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." 407 S.C. at 355, 755 S.E.2d at 455. While it is true that the *Coleman* Court also cited the rule that

ambiguity is construed against the drafter, (a) it did so in dicta[8] and (b) it never addressed the logical inconsistency—which thus remains fair game as an argument in this case[9]—in recognizing a rule of law creating a presumption in favor of merger (i.e., in recognizing the occurrence of a set of circumstances (same time, parties, purpose, and transaction) as sufficiently probative to affirmatively tip the scales in favor of merger) while at the same time allowing that presumption to be completely overturned by evidence that is merely ambiguous, i.e., evidence that does not even go so far as to clearly indicate a contrary intention and, indeed, is actually still susceptible to a reasonable conclusion in favor of merger. *See S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are *reasonably* susceptible of more than one interpretation.") (emphasis added).

Respectfully, the Court's finding against merger relies on improper speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding intent. The presumption of merger arises from the concurrence of the four elements of time, parties, purpose, and transaction. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. This is why for the merger presumption to mean anything in practice it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and

---

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

[9] To be clear, none of *Coleman's* progeny has addressed this either.

transaction)—can nonetheless support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). The merger presumption is "earned," so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

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

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

During the pendency of this case, our Court of Appeals decided *Solesbee*, 438 S.C. 638, 885 S.E.2d 144, wherein it affirmed the circuit court's denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as at present. Indeed, the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*.

In affirming the circuit court's denial of the motion to compel arbitration, the *Solesbee* Court likened that case to *Coleman* and *Hodge* and found that the circuit court had correctly determined that there was no merger of the Admission Agreement and the Arbitration Agreement

and, in turn, had properly denied the Facility's equitable estoppel argument. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149 ("Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and [the Facility's] equitable estoppel argument was properly denied.").) Most respectfully, the merger analysis in Solesbee is erroneous and incomplete, and it should not control the disposition of this case.[10]

First, the *Solesbee* Court erroneously found against merger on the basis that "the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law." It is not true that "the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law."

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

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

(Arbitration Agreement.)

Without question, the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (the "FAA"), applies to the Arbitration Agreement. The FAA applies "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties

[10] In this regard, Defendants would also note that it is still possible that the Supreme Court might review *Solesbee* via a writ of certiorari.

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

The rule that the FAA applies whenever an arbitration agreement involves interstate commerce of course applies even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law. *See Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (The FAA "create[d] a body of federal substantive law," which is "applicable in state and federal courts."); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) ("[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."); *see also Allied-Bruce*, 513 U.S. 265, 270–77. Moreover, even under the FAA, the general state law of contracts continues to apply. *Allied-Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted). Further still, the Arbitration Agreement

expressly calls for the arbitration proceedings to be conducted pursuant to the South Carolina ADR Rules. (Arbitration Agreement.)

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

Second, the *Solesbee* Court erroneously found against merger on the basis that "[t]he Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement 'shall survive any termination or breach of this Agreement or the Admission Agreement.'" 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger here. Unlike in *Coleman* and *Hodge*, the supposed textual recognition of the Admission Agreement as being separate from the Arbitration Agreement is not included in any "Entire Agreement" provision. Rather, the "Entire Agreement" provision of the Admission Agreement expressly states, "other Admissions materials . . . are made a part of this Agreement by reference." (Admission Agreement p. 12.) And as in the instant case, the Arbitration Agreement that was signed in conjunction with the admission is clearly among these "other Admissions materials." Moreover, that the Arbitration Agreement "shall survive any termination or breach of this Agreement or the Admission Agreement" just means that any claims relating to/arising out of

the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. Again, this is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. 2d at 612–13 ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

Third, the *Solesbee* Court erroneously found against merger on the basis that "[t]he Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, 'Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.'" 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. The absence of a "revocation" provision is one way in which the Arbitration Agreement is materially different from those at issue in *Coleman* and *Hodge*, and, for that matter, *Thompson*. Moreover, the *Solesbee* Court drew a false equivalency between the concept of "revocation" and that of "termination." A "revocation" is an annulment (i.e., to make something a nullity),[11] whereas "termination" is to put or bring something to an end. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. at 612–13.

[11] *Black's Law Dictionary* p. 1321 revocation (7th ed. 1999); *id.* at 89 annulment ("The act of nullifying or making void.").

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

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

To say that the Arbitration Agreement was not required for admission, which it was not, is not to say that it was not intended to be part of the admissions materials in the event it was agreed to, which it was, by Mr. Dover on Ms. Solesbee's behalf in *Solesbee* and by Mr. White on Ms. Brisbon's behalf in the instant case. While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitrations Agreement's) sole reason for being. (*See* Arbitration Agreement (providing for arbitration of "any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident . . . ."); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at Facility . . . .").)

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

the terms of the admission) *with* Arbitration Agreement (providing for arbitration of disputes arising out of the admission).)

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

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

Defendants' merger/equitable estoppel argument is a standalone argument that does not depend on any showing of authority (actual or apparent or otherwise) on the part of Mr. White or otherwise on the existence of any per se valid and enforceable agreement between the parties. *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) ("South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including . . . estoppel."); *see also Coleman*, 407 S.C. at 354–55, 755 S.E.2d at 455 (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel); *id.* (explaining that "Appellants' equitable estoppel argument," which "[wa]s premised on [Appellants'] contention that, under state law, the admission agreements and the [arbitration agreements] merged," as follows: "Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] . . . , she is nevertheless *equitably estopped to deny the [arbitration agreement's] enforceability*.") (emphasis added).

Conceptually, Defendants' merger/equitable estoppel argument is *not* an argument *for the enforceability* of the Admission Agreement/Arbitration Agreement *but rather* an argument *for Ms. Brisbon and, in turn, Plaintiff (her estate) to be estopped to deny the enforceability* of the Admission Agreement/Arbitration Agreement. In short, the idea is that the Admission Agreement

and the Arbitration Agreement merged, and Ms. Brisbon having effectively embraced and directly benefitted from the Admission Agreement, her estate is now estopped to deny the enforceability not only of the Admission Agreement but also the Arbitration Agreement merged therewith.

Accordingly, as to Defendants' merger/equitable estoppel argument, any contrary analysis regarding the Admission Agreement/Arbitration Agreement's supposed lack of enforceability—e.g., that Mr. White lacked authority to sign the Admission Agreement/Arbitration Agreement on behalf of Ms. Brisbon under the law of agency and/or under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80, and/or because Mr. White lacked power of attorney or guardianship over Ms. Brisbon—is beside the point and unavailing to refute Defendants' merger/equitable estoppel argument, which, again, turns not on the question of whether the Arbitration Agreement is enforceable but whether Ms. Brisbon and, in turn, Plaintiff (her estate) is estopped to deny its enforceability.

In *Wilson*, our Supreme Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals' earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which Defendants contend Ms. Brisbon and, in turn, Plaintiff (her estate) is estopped from refusing to comply with the Arbitration Agreement here, where Ms. Brisbon received direct benefits (in the form of her admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement was merged. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test

referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added).

Wilson supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration case like this, and it instructs that the key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability but whether benefits to the nonsignatory are direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 ("Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause. In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. Stated another way, [u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement . . . .") (internal citations and quotation marks omitted); *id.* at 343, 827 S.E.2d at 176 ("It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.") (internal citations omitted).

Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration

clause (which is the case here because the Admission Agreement and the Arbitration Agreement merge) while at the same time denying that the arbitration clause is enforceable. *See Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.") (citation and internal quotation marks omitted).

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

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Ms. Brisbon received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein. Respectfully, the Court should have found that the Arbitration Agreement merged with the Admission Agreement and that Ms. Brisbon and, in turn, Plaintiff (her estate) is estopped to deny the Admission Agreement/Arbitration Agreement's enforceability, Ms. Brisbon having effectively embraced the contract with the Facility for the purpose of her admission and receipt of the benefits thereof.[12]

WHEREFORE, for the foregoing reasons (and, again, for that matter, for all of the reasons previously advanced to the Court in and in support of the Underlying Motions (both those advanced in writing and those advanced via oral argument), all of which Defendants incorporate

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

by reference herein and asks the Court to (re)consider and expressly rule upon in full), Defendants ask that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Underlying Motions.

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

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines

D. Jay Davis, Jr. (SC Bar No. 12084)
jdavis@ycrlaw.com
Matthew O. Riddle (SC State Bar No. 76650)
mriddle@ycrlaw.com
Russell G. Hines (SC State Bar No. 72100)
rhines@ycrlaw.com
T. Ashton Phillips III (SC State Bar No. 104227)
aphillips@ycrlaw.com
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5406

Attorneys for Defendants

Charleston, South Carolina

November 13, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CIVIL ACTION NO.: 2022-CP-18-01775
	)	
KEVIN WHITE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY BRISBON,	)	
	)	
PLAINTIFF,	)	
	)	**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION**
v.	)	
	)	
ST. GEORGE HEALTH CARE, LLC, D/B/A ST. GEORGE HEALTHCARE CENTER AND VICKI SIDES,	)	
	)	
DEFENDANTS.	)	

The Defendants have moved the Court to reconsider its November 2, 2023 Order, arguing that the Court's merger and estoppel conclusions are erroneous. The Court should deny the Defendants' Motion for Reconsideration because its decision does not encompass any clear legal errors, the factual findings necessary to the Court's decision are reasonably supported by the evidence in this case, and the Court is bound to prior Court of Appeals precedent which finds that the subject Admission Agreement and Arbitration Agreement do not merge.

Under binding South Carolina authority, the exact same arbitration agreement and admission agreement at issue in this case have been previously found by the Court of Appeals not to merge, and that a nonsignatory would not be precluded from denying the validity of the arbitration agreement. *See Estate of Solesbee by Bayne v. Fundamental Clinical and Operational Servs., LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023). Defendants do not point to any new evidence indicating

that Kevin White had authority, actual or apparent, to enter the arbitration agreement at the time it was executed, nor do they make any arguments as to how he would have had authority under an effective power of attorney, conservatorship, guardianship, or common law agency principles. For these and the following reasons, the Court should deny the Defendants' Motion for Reconsideration.

I. The Court's Order correctly found that the arbitration agreement and admission agreement did not merge.

Because arbitration exists solely by agreement of the parties, a presumption against arbitration arises where the party resisting arbitration (the Estate) is a nonsignatory to the written agreement to arbitrate.[1] *Wilson v. Willis*, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019). State law provides when an arbitration agreement may be enforced against a nonsignatory, and South Carolina permits a nonsignatory to be bound by an arbitration agreement under several theories: incorporation by reference, assumption, agency, veil piercing/alter ego, and estoppel. *Solesbee*, 438 S.C. at 647, 885 S.E.2d at 148. Only two of these theories are implicated by the facts of this case: agency and estoppel. Defendants have failed to point to any evidence of agency. Therefore, Defendants may only prevail if they can show the Court's finding that the Estate was not estopped from denying the validity of the arbitration agreement is erroneous.

[1] White was acting in his individual capacity, and not in his capacity as personal representative of Ms. Brisbon's Estate, at the time he entered the arbitration agreement. *See Thompson v. Pruitt Corp.*, 416 S.C. 43, 61, 784 S.E.2d 679, 689 (Ct. App. 2016) (recognizing the principle that a person may act separately in individual and representative capacities).

A nonsignatory may be estopped from denying the validity of an arbitration agreement when it receives a direct benefit from a contract containing an arbitration clause. *Solesbee*, 438 S.C. at 647, 885 S.E.2d at 148. It is undisputed in this case that the Defendants' arbitration agreement was not a clause in its admission agreement, and neither White nor the Estate have received any direct benefit from the **arbitration agreement** itself. Defendants thus argue that under a theory of merger, the arbitration agreement and the admission agreement became a unified contract once they were executed, and since Ms. Brisbon benefited from the terms of the admission agreement, her Estate is precluded from denying the validity of the arbitration agreement. However, the language and formatting of the agreements serve as evidence that the two agreements were intended to be separate documents, and at minimum, create an ambiguity as to merger that must be construed against the Defendants.

> In South Carolina, "[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. The theory is that the instruments are effectively one instrument or contract.

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (emphasis added). This does not create an evidentiary presumption of merger. Here, the terms of the agreements indicate an intent that the doctrine of merger would not apply to the agreements, and at minimum create an ambiguity as to merger. *See id.*

at 355-56, 755 S.E.2d at 455 (stating that ambiguity as to merger must be construed against the drafter).

In determining whether a health care facility's admission and arbitration agreements merge, South Carolina appellate courts have looked to the following factors: (1) whether the two agreements are governed by separate bodies of law, (2) whether the language of the agreements recognizes the two agreements as separate, (3) whether the agreements contain different terms regarding revocation and termination, (4) whether the agreements are separately paginated and have their own signature pages, and (5) whether both agreements are required for the execution of the other, or whether one agreement is optional. *Hodge*, 422 S.C. at 562-63, 813 S.E.2d at 302. The Court of Appeals has previously analyzed the subject admission and arbitration agreements in *Solesbee* and found the agreements do not merge.

In *Solesbee*, the Court found that the admission agreement is governed by South Carolina law, while the arbitration agreement is governed by federal law. *Solesbee*, 438 S.C. at 648, 885 S.E.2d at 149. To be precise, the admission agreement is governed by "applicable Federal regulations" and South Carolina law. The arbitration agreement, on the other hand, claims to be governed by the FAA's statutes and specifically not by South Carolina law.[2] Therefore, the two agreements do not

[2] Defendants argue that both agreements are broadly governed by South Carolina and federal law; however, the arbitration agreement specifically claims it will only be enforced under the FAA. To the extent that the arbitration agreement provides that the arbitration **proceedings** will be governed by the South Carolina Alternate Dispute Resolution/Mediation Rules, these Rules only govern the proceedings and are irrelevant to the enforcement of the arbitration agreement and the Court's determination of merger.

purport to be governed by identical spheres of law: one is theoretically subject to state law and the federal code of regulations, while the other claims to be only subject to the statutes contained within the FAA.

Second, the Court of Appeals has previously found that the language of the agreements recognizes that they are separate: "The Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement 'shall survive any termination or breach of this Agreement or the Admission Agreement.'" *Solesbee*, 438 S.C. at 648-49, 885 S.E.2d at 149. This language mirrors that addressed in *Coleman* and *Thompson*, in which the Supreme Court and the Court of Appeals found such language to be proof that an admission agreement was separate and did not merge with an arbitration agreement:

> The court then explained the evidence of the parties' intent to keep the two agreements separate by highlighting the admission agreement's recognition of the arbitration agreement as a separate document, i.e., "This Agreement, including all Exhibits hereto, and the Arbitration Agreement . . . ."

Thompson, 416 S.C. at 52, 784 S.E.2d at 685.

The Defendants argue that the admission agreement's "Entire Agreement" clause contains language indicating that the agreements merged, specifically the statement that "[t]he undersigned further acknowledges that he/she has received and read the *Admission Handbook* and other Admissions materials and understand that these documents are made a part of this Agreement by reference **herein**." The "Entire Agreement" provision purports to incorporate the "Admissions materials" by reference within the admission agreement itself, but nowhere within the admission

agreement, including the "Entire Agreement" provision, does it ever refer to the arbitration agreement. The "Entire Agreement" provision creates at best an ambiguity as to merger when taken in context of the totality of the circumstances.

Third, the Court of Appeals has found that the arbitration agreement contains no language indicating that it may be revoked or terminated, but the admission agreement provides that a resident may terminate the admission agreement at any time. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149. Fourth, the Court of Appeals has found that the agreements are separately paginated and have their own signature pages. *Id.* Since the arbitration and admission contracts have different pagination with different signature pages, and the arbitration contract is entitled "Arbitration Agreement" at the top of its first page, these factors further indicate the drafter's intent for the arbitration agreement to stand by itself as an independent contract, at least when it suits the Defendants for it to do so. *See Thompson*, 416 S.C. at 53 n.1, 784 S.E.2d at 685 n.1 (noting that a separately labeled arbitration agreement indicates the drafter's intent for the agreement to stand by itself as an independent contract). Lastly, the Court of Appeals has found that the arbitration agreement is optional and voluntary, while the admission agreement is required for admission. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149. The Defendants do not dispute in this case that the arbitration agreement is voluntary and optional.

As observed by the Court of Appeals, the text of the agreements constitutes actual evidence contrary to merger and at minimum creates ambiguity as to whether the agreements merged. Defendants misconstrue that there is a legal presumption of

merger, and that the above-discussed factors are not sufficient to overcome this presumption. However, the language of *Coleman* never states that there is a presumption of merger in the context of health care facility arbitration agreements, or that one interpretation as to merger or the other is favored in any way, and in fact binding authority states that there is a presumption **against** merger when an arbitration agreement is attempted to be enforced against a nonsignatory, such as when a facility attempts to enforce the agreement against an estate when it was signed by the personal representative in their individual capacity without authority. *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173.

Instead, *Coleman* dictates that the Court can assume merger only if the agreements were made at the same time, by the same parties, for the same purpose, and in the course of the same transaction, so long as there is no language or other indications within the agreements of a contrary intent. The fact that there is ample evidence that the agreements were drafted in such a manner that they could, if necessary, be construed as separate contracts if anything cautions against a finding of merger. The language, pagination, and formatting of the admission agreement and arbitration agreement evince an intent for the agreements to be considered separate, presumably when such a position would work to the advantage of the Defendants.

Defendants argue that this evidence is not "actual evidence", and that the Court's finding of no merger is based on speculation. This begs the question of what else was the Court supposed to rely on to determine if there was an intent contrary to merger that could be gleaned from the agreements. Additionally, if the above-

discussed evidence is not indicative of a contrary intent, and the Defendants intended the documents to merge, then why haven't they made the arbitration agreement a provision of the admission agreement, or merged the two documents with an explicit merger provision? Why make separate documents to begin with? The answer to these questions is that for certain purposes, the Defendants and other skilled nursing facilities want the agreements to be separate. The language of the agreements purposefully creates an ambiguity that must be construed against the drafter and the Court correctly found in this instance there was no merger of the documents. The Court of Appeals has previously reached the same conclusion based on the same language and agreements. It was not legal error for the Court to rely on binding authority in finding that the subject agreements do not merge.

II. Even if the arbitration agreement and admission agreement did merge, the Estate still would not be estopped from denying the validity of the arbitration agreement.

Equitable estoppel is "a theory designed to prevent injustice, and it should be used sparingly." *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177. Equitable estoppel is only available when the party seeking to invoke the doctrine "was misled to his injury". *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916 (2017). If White did not have authority to enter the arbitration agreement, and there is no evidence he did, then the Estate would only be estopped from denying its validity if the Defendants carried their evidentiary burden of proving the elements of estoppel to the Court. The Defendants have failed to do so.

A nonsignatory such as the Estate is estopped from refusing to comply with an arbitration clause "when it receives a direct benefit from a contract containing an arbitration clause." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000)). The direct benefits test is frequently used to determine whether a theory of estoppel is applicable within the arbitration context. *Solesbee*, 438 S.C. at 647, 885 S.E.2d at 148. Here, the arbitration agreement is not a clause within the admission agreement, and the two agreements did not merge. However, even if the agreements did merge, the Defendants cannot satisfy the remaining requirements of the direct benefits estoppel test.

Direct benefits estoppel precludes a nonsignatory from denying the validity of an arbitration **provision** of a contract if "(1) the nonsigner's claim arises from the contractual relationship, (2) the nonsigner has "exploited" other parts of the contract by reaping its benefits, **and** (3) the claim relies solely on the contract terms to impose liability." *Weaver*, 431 S.C. at 230, 847 S.E.2d at 272. Thus, even if the arbitration agreement and admission agreement merged, the Defendants would still have to demonstrate that the Estate's negligence claims arise from **and** rely solely on the terms of the admission agreement to impose liability in order to benefit from a direct benefits estoppel theory.

The Estate has not asserted a breach of contract claim, or a violation of contractual duties, and instead has brought a lawsuit under a negligence theory arising from common law duties. *See Wilson*, 426 S.C. at 342, 827 S.E.2d at 176

(noting that a claim may rely on general principles of South Carolina law in addition to or to the exclusion of contractual rights). The Estate does not claim that the Defendants breached a contractual duty created by the admission agreement, but instead that they breached a duty owed by all healthcare practitioners, regardless of any contractual agreements, not to negligently care for their patients. Any contractual duties between Ms. Brisbon and the Defendants are irrelevant as to whether the Defendants breached common law tort duties owed to Ms. Brisbon. The Estate's claims rely on common law tort duties owed by the Defendants to everyone and not solely on any provision of the admission agreement and as such, the claims do not rely solely on the contract terms to impose liability, and the Estate is not precluded by direct benefits estoppel from denying the validity of the arbitration agreement. *Weaver*, 431 S.C. at 232-33, 847 S.E.2d at 273-74.

Simply because the alleged conduct would not have arisen in the absence of the admission agreement (and Ms. Brisbon's admission to the Defendants' facility) does not mean that direct benefits estoppel is implicated.

> When a claim depends on the contract's existence and cannot stand independently – that is, the alleged liability "arises solely from the contract or must be determined by reference to it" – equity prevents a person from avoiding the arbitration clause that was part of that agreement. But "when the substance of the claim arises from general obligations imposed by state law, including statutes, torts, and other common law duties, or federal law," direct benefits estoppel is not implicated even if the claim refers to or relates to the contract *or would not have arisen "but for" the contract's existence*.

Wilson, 426 S.C. at 343, 827 S.E.2d at 176 (quoting *Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 637 (Tex. 2018)). Therefore, just because Ms. Brisbon

benefited from the admission agreement by receiving "every night's stay, every meal, every amenity/service provided, every instance of care/treatment" as argued by the Defendants, it does not mean that her Estate's tort claim against the Defendants depends on the agreement's existence. This lawsuit is predicated on the breach of common law duties owed by the Defendants to Ms. Brisbon and would be justiciable even if White did not have authority to enter the admission agreement.

Despite the Defendant's contentions, the analysis does not stop and start with whether Ms. Brisbon, and thus her Estate, received any benefits from the admission agreement. There are other requirements that must be met before direct benefits estoppel is implicated. The Court correctly found that direct benefits estoppel was not applicable. The Court also correctly found that since the documents did not merge, the Estate was not estopped from denying the arbitration agreement's validity.

CONCLUSION

For the foregoing reasons, and those set forth in Plaintiff's Memorandum in Opposition to Defendants' Motion to Compel Arbitration, the Court should deny the Defendants' Motion for Reconsideration.

[SIGNATURE PAGE TO FOLLOW]

PARKER LAW GROUP, LLP

BY: *s/ Lee D. Cope*

Lee D. Cope SC Bar No.14361
John E. Parker, Jr. SC Bar No.104225
101 Mulberry Street East
P.O. Box 487
Hampton, SC 29924
Phone: (803) 903-1781
lcope@parkerlawgroupsc.com
jayparker@parkerlawgroupsc.com

ATTORNEYS FOR THE PLAINTIFF

November 14, 2023
Hampton, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

Heath P. Taylor, Circuit Court Judge

Case No. 2023-CP-18-01775

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

Respondent,

v.

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

Appellants.

NOTICE OF APPEAL

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Matthew O. Riddle (SC Bar No. 76650)
T. Ashton Phillips III (SC Bar No. 104227)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
P.O. Box 993 (29402)
Charleston, South Carolina 29401
(843) 720-5488

Attorneys for Appellants

Other Counsel of Record:

Lee D. Cope (SC Bar No. 14361)
John E. Parker, Jr. (SC Bar No. 104225)
PARKER LAW GROUP, LLP
101 Mulberry Street East
P.O. Box 487
Hampton, South Carolina 29924
(803) 943-2111

-and-

Margie Bright Matthews (SC Bar No. 13200)
BRIGHT MATTHEWS LAW FIRM, LLC
205 East Washington Street
P.O. Box 499
Walterboro, South Carolina 29488
(803) 256-4082

Attorneys for Respondent

Defendants/Appellants, St. George Health Care, LLC, d/b/a St. George Healthcare Center and Vicki Sides ("Appellants"), hereby appeal the following orders of the Honorable Heath P. Taylor, Circuit Court Judge:

- **Order Denying Appellants' Motions to Compel Arbitration**, filed November 2, 2023; and

- **Order Denying Appellants' Motion to Reconsider the Denial of their Motions to Compel Arbitration**, filed May 2, 2024.

Copies of the appealed orders are attached hereto and incorporated herein by reference. Appellants received written notice of entry of the most recent order on May 2, 2024.

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines

Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Matthew O. Riddle (SC Bar No. 76650)
T. Ashton Phillips III (SC Bar No. 104227)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
P.O. Box 993 (29402)
Charleston, South Carolina 29401
(843) 720-5488

Attorneys for Appellants

Charleston, South Carolina

June 3, 2024

RECEIVED
Jun 03 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

Heath P. Taylor, Circuit Court Judge

Case No. 2023-CP-18-01775

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

Respondent,

v.

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

Appellants.

PROOF OF SERVICE

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Matthew O. Riddle (SC Bar No. 76650)
T. Ashton Phillips III (SC Bar No. 104227)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
P.O. Box 993 (29402)
Charleston, South Carolina 29401
(843) 720-5488

Attorneys for Appellants

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellants, hereby certify that Appellants' **NOTICE OF APPEAL** was served on Respondent on June 3, 2024, by emailing (see attached email) a copy of the same to Respondent's counsel of record:

PARKER LAW GROUP, LLP
Lee D. Cope, Esquire
lcope@parkerlawgroupsc.com
John E. Parker, Jr., Esquire
jayparker@parkerlawgroupsc.com

-and-

BRIGHT MATTHEWS LAW FIRM, LLC
Margie Bright Matthews, Esquire
margie@brightmatthewslaw.com

Attorneys for Respondent

I also certify that a copy of Appellants' **NOTICE OF APPEAL** was today, June 3, 2024, E-Filed with the lower court (see attached NEF), which also, i.e., in addition to service by email, effected service of the notice today on the above-identified counsel of record via the E-Filing System.

Respectfully submitted,

CLEMENT RIVERS, LLP

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

Attorneys for Appellants

Charleston, South Carolina

June 3, 2024

From:	Hines, Russell
To:	lcope@parkerlawgroupsc.com; jayparker@parkerlawgroupsc.com; margie@brightmatthewslaw.com
Cc:	Shanna Jarrell; Brown, Stephen L.; Davis, Jay; Riddle, Matthew; Phillips, Ashton; Justman, Aimee; Bell, Pollyana (Polly); Peterson, Susan; Preiser, Skyla; Wakeham, Rebecca (Becky)
Subject:	White v. St. George (Case No. 2023-CP-18-01775) -- Notice of Appeal
Date:	Monday, June 3, 2024 1:08:08 PM
Attachments:	image001.png White v. St. George (Case No. 2023-CP-18-01775) -- Notice of Appeal.pdf Appealed Order 1 (White) -- 2023 11-02 -- Order Denying MTCA.pdf Appealed Order 2 (White) -- 2024 05-02 -- Order Denying MTR.pdf

---

Attached for service in the above-referenced matter please find our **Notice of Appeal** and copies of the **appealed orders**.

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

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2022CP1801775

Official File Stamp:	06-03-2024 01:11:25 PM
Court:	CIRCUIT COURT Common Pleas Dorchester
Case Caption:	Kevin White , plaintiff, et al VS St George Health Care Llc , defendant, et al
Document(s) Submitted:	Appeal/Notice of Appeal to Court of Appeals - Exhibit/Filing of Exhibits - Exhibit/Filing of Exhibits
Filed by or on behalf of:	Russell Grainger Hines

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Russell Grainger Hines for St George Health Care Llc et al
John Elliott Parker, Jr. for Kevin White, Mary Brisbon
Donald Jay Davis, Jr. for St George Health Care Llc et al
Matthew Oliver Riddle for St George Health Care Llc et al
Ted Ashton Phillips, III for St George Health Care Llc et al
Margie Bright Matthews for Kevin White, Mary Brisbon
Lee Deer Cope for Kevin White, Mary Brisbon

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Donald Jay Davis, Jr. for St George Health Care Llc et al
Matthew Oliver Riddle for St George Health Care Llc et al
Ted Ashton Phillips, III for St George Health Care Llc et al
Kevin White Personal Representative
Mary Brisbon Estate

RECEIVED
May 19 2025
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellants certifies that, in accordance with Rule 210(c), SCACR, this Record on Appeal contains all material proposed to be included by any party that was presented to the lower court and not any other material and that this Record on Appeal complies with the Supreme Court of South Carolina's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings issued April 15, 2014.

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines

Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Matthew O. Riddle (SC Bar No. 76650)
T. Ashton Phillips III (SC Bar No. 104227)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
P.O. Box 993 (29402)
Charleston, South Carolina 29401
(843) 720-5488
Attorneys for Appellants

Charleston, South Carolina

May 19, 2025