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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
William C. McMaster, III, Circuit Court Judge

Appellate Case No. 2025-002264
Case No. 2025-CP-23-01757
Case No. 2025-CP-23-01759

Kimberly Haag, Individually and as Personal Representative of the Estate of Raymond Zeigler,……. Respondent,

v.

Carlyle Senior Care of Fountain Inn, LLC; Carlyle Senior Care Management Company, Inc.; New Day Health Ventures, LLC; LARK of Fountain Inn, LLC; Fountain Inn Healthcare, LLC d/b/a Fountain Inn Post Acute; Providence Group, Inc.; Providence Administrative Consulting Services, Inc.; PACS Group, Inc.; PACS Holdings, LLC; and 501 Gulliver Property, LLC,…… Appellants.

RECORD ON APPEAL

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[1] The South Carolina Court of Appeals consolidated notices of appeal originating from two separately filed civil actions involving the same parties and same underlying facts. The first is the Plaintiff/Respondent's civil action alleging a survival cause of action, which is indexed in the Greenville County Court of Common Pleas as C/A No. 2025-CP-23-01757 (hereinafter "Survival Action" or "SA").

[2] The second civil action is the Plaintiff/Respondent's civil action alleging a wrongful death cause of action, which is indexed in the Greenville County Court of Common Pleas as C/A No. 2025-CP-23-01759 (hereinafter "Wrongful Death" or "WD").

[3] "Carlyle Defendants" or "Carlyle Appellants" refers to the following above-named Appellants: (1) Carlyle Senior Care of Fountain Inn, LLC; (2) Carlyle Senior Care Management Company, Inc.; (3) New Day Health Ventures, LLC; and (4) LARK of Fountain Inn, LLC.

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[5] "Fountain Inn Defendants" or "Fountain Inn Appellants" refers to the following above-named Appellants: (1) Fountain Inn Healthcare, LLC d/b/a Fountain Inn Post Acute; (2) Providence Group, Inc.; (3) Providence Administrative Consulting Services, Inc.; (4) PACS Group, Inc.; (5) PACS Holdings, LLC; and (6) 501 Gulliver Property, LLC.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. No.: 2025-CP-23-01757 & 2025-CP-23-01759
	)	
Kimberly Haag, Individually and as Personal Representative of the Estate of Raymond Zeigler, Plaintiff, v. Carlyle Senior Care of Fountain Inn, LLC, Carlyle Senior Care Management Company, Inc., New Day Health Ventures, LLC, LARK of Fountain Inn, LLC, Fountain Inn Healthcare, LLC d/b/a Fountain Inn Post Acute, Providence Group, Inc., Providence Administrative Consulting Services, Inc., PACS Group, Inc., PACS Holdings, LLC, and 501 Gulliver Property, LLC, Defendant(s).	)	**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS CARLYLE SENIOR CARE OF FOUNTAIN INN, LLC, CARLYLE SENIOR CARE MANAGEMENT COMPANY, INC., NEW DAY HEALTH VENTURES, LLC, AND LARK OF FOUNTAIN INN, LLC'S MOTION TO COMPEL ARBITRATION AND DEFENDANTS FOUNTAIN INN HEALTHCARE, LLC D/B/A FOUNTAIN INN POST ACUTE, PROVIDENCE GROUP, INC. PROVIDENCE ADMINISTRATIVE CONSULTING SERVICES, INC., PACS GROUP, INC., PACS HOLDINGS, LLC, AND 501GULLIVER PROPERTY, LLC'S MOTION TO DISMISS, STAY LITIGATION AND DISCOVERY, AND COMPEL ARBITRATION AND MOTION FOR A PROTECTIVE ORDER**

PROCEDURAL AND FACTUAL BACKGROUND

Kimberly Haag, as daughter and Personal Representative of the Estate of Raymond Ziegler, brought this wrongful death action and a survival action against the above-captioned Defendants alleging nursing home neglect/negligence, ordinary negligence, and corporate negligence for failing to care for and failing to properly staff, fund, and operate the skilled nursing facility where Raymond Ziegler was a patient/resident. Raymond Ziegler was admitted to the Defendants' facility on March 3, 2022, for skilled nursing care after being discharged from Greenville Post-Acute after short-term rehabilitation. He was then readmitted to the hospital on several occasions,

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including an admission from December 15, 2022, through December 22, 2022. After his discharge from the hospital in December 2022, he was re-admitted to the Defendants' skilled nursing facility on December 22, 2022.

At the time of Raymond Ziegler's admission to the skilled nursing facility, the facility was owned by Defendants Carlyle Senior Care of Fountain Inn, LLC, Carlyle Senior Care Management Company, Inc., New Day Health Ventures, LLC, and LARK of Fountain Inn, LLC (hereinafter "Carlyle Defendants"). The actual licensee of the facility was Defendant Carlyle Senior Care of Fountain Inn, LLC. The remaining Defendants, Carlyle Senior Care Management Company, Inc., New Day Health Ventures, LLC, and LARK of Fountain Inn, LLC were all involved with the ownership, operation, and management of the facility as corporate entities in management/holding companies. These entities were responsible for setting the policies and procedures, overseeing the administrator, overseeing the general operation of the facility, and setting the budget and staffing levels at the facility.

On March 14, 2023, Defendants Fountain Inn Healthcare, LLC d/b/a Fountain Inn Post Acute, Providence Group, Inc., Providence Administrative Consulting Services, Inc., PACS Group, Inc., PACS Holdings, LLC, and 501 Gulliver Property, LLC (hereinafter "Providence Defendants") purchased the skilled nursing facility from the Carlyle Defendants. Defendant Fountain Inn Healthcare, LLC was the licensee of the facility, and Defendants Providence Group, Inc., Providence Administrative Consulting Services, Inc., PACS Group, Inc., PACS Holdings, LLC, and 501 Gulliver Property, LLC were all involved with the ownership, operation, management, oversight of the administrator,

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setting the policies and procedures, and setting the budget and staffing levels at the facility.

At the time of Raymond Ziegler's admission to Defendants' facility, Defendants knew or should have known that Raymond Ziegler was a high fall risk and needed assistance with transfers and ambulation to prevent falls. Despite knowing this, inadequate measures were implemented to keep Raymond Ziegler from falling, and as a result, he suffered with multiple falls during his admission to the Defendants' facility. These falls led to multiple injuries, including lacerations to his head and skin tears. Furthermore, a fall on February 3, 2023, resulted in Raymond Ziegler fracturing his right hip and requiring him to undergo surgery to repair same. In addition to the falls and fracture, Raymond Ziegler also suffered with multiple urinary tract infections as a result of Defendants' failure to properly clean him, properly provide catheter care, and failure to prevent dehydration. As a result of Raymond Ziegler's injuries, he continued to decline and died on June 7, 2023.

Plaintiff filed the Notice of Intent to File Suit on September 19, 2024, and the parties engaged in an unsuccessful mediation. Plaintiff then timely filed and served the Summons and Complaint. Defendants subsequently answered and filed these Motions to Compel Arbitration.

FACTUAL HISTORY OF ARBITRATION AGREEMENT

Despite Raymond Ziegler having been admitted to Defendant's facility for nearly nine months and having several admissions to the hospital from the facility prior to December 2022, the Carlyle Defendants never requested that anyone sign an arbitration agreement until the time of Raymond Ziegler's re-admission to the facility from the

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hospital on December 22, 2022. Kimberly Haag was presented with a large stack of re-admission documents/paperwork to sign on behalf of her father. The documents were provided to her at a time when Kimberly Haag was trying to get her father transferred from the hospital back to the skilled nursing facility, and as a result, she was under significant emotional and psychological stress. Further, she was presented with this large stack of documents which had numerous places for her to sign and/or initial. See Affidavit of Kimberly Haag at Exhibit A. These documents were presented to her as pre-printed forms and the Carlyle Defendants highlighted the areas for her to sign or initial which are reflected in the attached Exhibit B.

The stack of documents presented to Kimberly Haag had at least twenty-eight (28) places for Kimberly Haag to sign and/or initial. Despite the Federal Regulations requiring the facility to explain the Arbitration Agreement and advise Kimberly Haag that she had the opportunity to revoke the Arbitration Agreement, at no point did any employee from Carlyle Senior Care ever explain the Arbitration Agreement to her or explain the ability to revoke same. Furthermore, despite Federal Regulations not permitting the facility to require signing the Arbitration Agreement as a condition of Raymond Ziegler's admission to the facility, Kimberly Haag was, in fact, advised that she would have to sign all of the documents, which included the Arbitration Agreement for his re-admission. Exhibit A.

After signing the documents, Kimberly Haag was never advised of the ability to revoke the Arbitration Agreement, nor explained any process for being able to revoke the agreement. She was never even provided with a copy of any arbitration agreement. See Exhibit A.

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Subsequent to signing this Arbitration Agreement, the Providence Defendants purchased the facility in March 2023, and no notice was ever provided to Kimberly Haag about the change in ownership. At no point was Kimberly Haag ever asked to sign any arbitration agreement with the Providence Defendants. No one ever made her aware that any agreement signed with the Carlyle Defendants would apply to the Providence Defendants in any way. For the reasons set forth hereinbelow, this Arbitration Agreement is invalid and unenforceable under South Carolina contract law.

BRIEF SUMMARY OF ARGUMENTS

I. **The Arbitration Agreement is unenforceable because integral terms to the Arbitration Agreement are missing and there was no meeting of the minds period.**

II. **The Arbitration Agreement is unenforceable because Defendants violated Federal Law in the execution of the Arbitration Agreement.**

III. **The Arbitration Agreement cannot be enforced by both the Providence Defendants and Carlyle Defendants because either the agreement was not assigned to the Providence entities, or if it was assigned, the Carlyle Defendants no longer possessed the right to enforce the Arbitration Agreement.**

IV. **The Arbitration Agreement is unenforceable as to the wrongful death statutory beneficiary's claim.**

V. **The Arbitration Agreement does not apply to Defendants Carlyle Senior Care Management Company, Inc., New Day Health Ventures, LLC, LARK of Fountain Inn, LLC, Providence Group, Inc., Providence Administrative Consulting Services, Inc., PACS Group, Inc., PACS Holdings, LLC, and 501 Gulliver Property, LLC.**

ARGUMENT

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank,

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N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application to arbitrate. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (S.C. 2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67,78,749 S.E.2d 139, 144 (Ct. App. 2013).

Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause."). Any presumption in favor of arbitration applies to the scope of the agreement. It does not apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement. Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019). Arbitration agreements must satisfy the basic tenets and requirements of contract law. Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844, (Ct. App. 1999). Section 2 of the Federal Arbitration Act dictates that arbitration agreements are enforceable except "upon such grounds as exist at law or equity for the revocation of any contract". 9 U.S.C. §2. The courts, not arbitrators, are charged with deciding certain "gateway matters" including whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy. New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620,

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629, 667 S.E.2d 1, 5 (Ct. App. 2008). Thus, unless there is a valid, irrevocable, and enforceable contract, the Federal Arbitration Act does not even apply.

Further, the party seeking enforcement of the agreement bears the burden to prove a valid arbitration agreement exists that is enforceable, knowing, voluntary, and intentional. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008); Hinson-Barr, Inc. v. Pinckard, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1986). "A motion to compel arbitration pursuant to the FAA is 'akin to the burden on summary judgment.'" Thomas v. Progressive Leasing, Civ. No. 17-1249, 2017 WL 4805235, at *2 (D. Md. Oct. 25, 2017) (internal quotation marks omitted) (quoting Galloway v. Santander Consumer USA, Inc., 819 F.3d 79, 85 (4th Cir. 2016)). Therefore, the burden is on the moving party to demonstrate the absence of any genuine dispute of material fact, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970), and that the movant is "entitled to judgment [compelling arbitration] as a matter of law." Burrell v. 911 Restoration Franchise Inc., 2017 WL 5517383, at *3 (D. Md. November 17, 2017) (citing Fed. R. Civ. P. 56(a)).

I. The Arbitration Agreement is unenforceable because integral terms to the Arbitration Agreement are missing and there was no meeting of the minds period.

It is a basic tenet of contract law that there must be a meeting of the minds between the parties on all essential terms to the contract for the contract to be enforceable. This equally applies to arbitration agreements. In Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009), the South Carolina Supreme Court found that when the arbitration agreement identifies the arbitral forum, that the term is an integral part to

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the arbitration agreement. When that forum is no longer available, there can be no meeting of the minds. Further, the parties must have a meeting of the minds as to all integral terms of the arbitration agreement. Id.

On Page 3 of the Arbitration Agreement, the Arbitration Agreement states that, "The Arbitration **shall** be administered by one of the entities identified below and **mutually agreed upon and designated** by the Parties:"

> (b) **Procedure for Arbitration**. The Arbitration shall be administered by one of the entities identified below and mutually agreed upon and designated by the Parties:
>
> Option 1: Carolina Dispute Settlement Services); or
>
> Option 2: National Arbitration. Forum
>
> If the options identified above are not mutually agreeable to the Parties, an alternate arbitration forum and/or qualified arbitrator may be mutually agreed upon and identified below:
>
> Option 3: _____
>
> We selection Option _____ (choose options 1, 2 or 3 and initial below)

Three options existed for the entity who is to administer arbitration according to the agreement. Option 1 identified Carolina Dispute Settlement Services. Option 2 identified the National Arbitration Forum[1]. Option 3 is left blank. The parties were then required to select Option 1, 2, or 3 to identify the entity that would be administering the Arbitration Agreement. The parties did not select any of the options. The fact that the Arbitration Agreement identifies which entity must hear the arbitration made it an integral part of the agreement. (Further, the entity which is to hear the arbitration uses its rules. The fact that no arbitrator was identified as required by the agreement also means there is no meeting of the minds on which rules will apply to the proceedings.) However,

[1] It should also be noted that the National Arbitration Forum is no longer willing to hear pre-dispute healthcare related arbitration matters and therefore, that forum is also unavailable as similar to Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009).

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because the parties did not select any of the options to identify which arbitration service would hear the matter, there could be no meeting of the minds in accordance with South Carolina law and Grant v. Magnolia Manor-Greenwood, Inc. Id.

Numerous courts have found that when the arbitration forum is not available, that the agreement is unenforceable for no meeting of the minds. Hart v. Evangelical Lutheran Good Samaritan Soc'y, 2013 N.M. App. Unpub. Lexis 180, 2013 WL 4526274; GGNSC Tylertown, LLC v. Dillon, 2011 Miss. App. Lexis 455, 87 So.3d 1063; Beverly Enters., Inc. v. Cyr, 608 Fed. Appx. 924, 2013 U.S. App. Lexis 13380. In this instance, the same must be true when the parties never selected one of the arbitral forums that the contract required them to select.

It is anticipated that Defendants will argue that York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013) held that when an arbitrator is not specified in the agreement, it is not a material term. However, in York, the Court of Appeals was not reversing the Supreme Court in Grant. It was simply holding that when the agreement is completely silent on the arbitrator, it is not a material term. This agreement is not silent as to who the arbitrator may be. It specifically identifies that the parties must select one of the listed arbitrators or state who the arbitrator is, specifically making it an integral term under Grant. In fact, the agreement states the arbitration "shall be administered by one of the entities below," therefore, making it necessary using the term "shall". As a result, this case falls under Grant, not York.

Therefore, because there is no meeting of the minds as to the selection of the arbitrator, the Arbitration Agreement is unenforceable because there is no meeting of the minds.

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II. The Arbitration Agreement is unenforceable because Defendants violated Federal Law in the execution of the Arbitration Agreement.

Federal regulations governing the operation of nursing homes, specifically with regards to binding arbitration agreements, went into effect on September 16, 2019. The regulations are implemented by virtue of the "Guidance to Surveyors" which is the federal authority providing instruction on how to interpret the regulations. These applicable regulations and the Guidance to Surveyors are attached hereto as Exhibit C. As noted at the outset of the Guidance to Surveyors and regulations, the federal government has stated that:

> "Concerns have been raised about the fairness and transparency related to both the means by which these agreements are created and the fairness of the arbitration processes themselves in the specific context of long-term care facilities… These individuals are often quite ill and are not in a position to engage in meaningful negotiations over the terms of an arbitration agreement or to coordinate care at another facility. As a result, this is quite often an extremely stressful situation with limited time to review documents before signing them. During this time, long-term care facilities so often require individuals to sign pre-dispute arbitration agreements to obtain healthcare. These factors among others, impede individuals' ability to obtain care and simultaneously make it extremely difficult for residents or their representatives to make an informed decision about arbitration. Therefore, asking individuals to commit to binding arbitration agreements in these situations may not represent the best option in terms of advancing the healthcare of residents."

The regulations require a number of items that must be "**clearly** explained to the resident or his/her representative." (emphasis added) 42 CFR 483.70(m). The regulations require the facilities to be able to provide evidence and proof of the following:

1) That the terms and conditions of the arbitration agreement are clearly explained to the resident and/or his/her representative;

2) It is explained to the resident and his/her representative that the arbitration agreement is voluntary and not required for admission to the facility;

3) The facility must explain the arbitration agreement to the resident and resident's representative in a manner and form which they understand, and the facility "must ensure there is evidence that the resident or their representative has acknowledged understanding of the agreement;"

4) Further, when a signature is used to acknowledge understanding, additional evidence is needed to establish that the resident or their representative understood what was being signed;

5) If the resident is cognitively impaired, such should be taken into account in determining whether or not the resident is able to understand the contents of the agreement;

6) The facility is required to distinguish the arbitration agreement from the admission agreement, especially if the arbitration agreement is contained within the admission agreement and allow the resident or their representative to decline the arbitration agreement without declining the admission agreement;

7) It must be clearly explained to the resident or resident's representative that there is thirty (30) days to withdraw or terminate the agreement should they change their mind;

8) The facility must explain to the resident or their representative how the resident or their representative may withdraw from or terminate the arbitration agreement within the thirty (30) days should they desire to do so; and

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9) The facility may not require, force, or pressure the resident or his/her representative to sign the binding arbitration agreement.

Defendants were required to meet these regulations in order for there to be a binding arbitration agreement. Any arbitration agreement that violates federal law or legal requirements is an invalid contract. An illegal contract is unenforceable. Berkebile v. Outen, 426 S.E.2d 760, 762 n. 2 (1993). "The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Id. Other South Carolina courts have also held that violation of regulations relating to arbitration invalidate the agreement as an illegal contract. See Boozer, Holmes, Wilds, Stroud, and Edwards Orders at Exhibits D, E, F, G, and H.

The Arbitration Agreement is buried in a package of documents that is at least forty (40) pages long with at least twenty-eight (28) blanks to be signed or initialed by Daughter. Defendants offer zero evidence that the Arbitration Agreement was explained in the manner set forth above. Daughter's Affidavit demonstrates Defendants did not comply with these regulatory requirements. The regulations clearly require that the Facility be able to explain the terms and provisions of the particular arbitration agreement. However, there is nothing that reflects that the actual terms and agreement of this particular Arbitration Agreement were explained to Daughter. Next, there is no evidence that the Defendants explained to Raymond Zeigler or Daughter the process for revoking or terminating the agreement within thirty (30) days. Further, other provisions were not explained to Raymond Zeigler or Daughter including, but not limited to:

(1) Which parties are bound by the Arbitration Agreement;

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(2) That third-party providers of services at the facility are not included within the Arbitration Agreement;

(3) Which law applies to the Arbitration Agreement and the arbitration;

(4) Who pays the arbitrator's fees and expenses;

(5) How arbitration is commenced;

(6) The time period required for commencing arbitration;

(7) The location and venue of the arbitration;

(8) The process by which the arbitrator is selected;

(9) Whether or not discovery is limited and the ability obtain discovery;

(10) The ability to issue subpoenas; and

(11) Whether or not Daughter had a right to consult with an attorney before signing the Arbitration Agreement, as well as others.

Defendants offered no evidence that any of these provisions which are vital to the contract were ever identified as being explained to Daughter. The only evidence is that the Arbitration Agreement was not explained to Daughter. See Exhibit A, Daughter's Affidavit. Furthermore, as Daughter indicated, Defendants communicated to her that the signature of all of these documents, including the Arbitration Agreement, were required for admission to the facility which is clearly in violation of the federal regulations and statutes. 42 CFR 483.70(m). The requirement to sign the Arbitration Agreement is violation of federal law. Medicare and Medicaid regulations make it illegal for the Facility to require any other consideration for admission to the Facility which would include requiring the execution of an arbitration agreement. See 42 C.F.R. § 489.30; 42 C.F.R. §483.70(m); C.F.R. §447.15; 42 USC §1396r(c)(5)(A)(iii). To the extent

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Defendants contend the Arbitration Agreement is binding on Daughter, then federal law mandated both the option to sign and the explanation of the agreement to her as well, neither of which occurred.

Because the Defendants failed to comply with the federal regulatory requirements for arbitration agreements in nursing homes, the Arbitration Agreement is illegal and invalid and should not be enforced.

III. The Arbitration Agreement cannot be enforced by both the Providence Defendants and Carlyle Defendants because either the agreement was not assigned to the Providence entities, or if it was assigned, the Carlyle Defendants no longer possessed the right to enforce the Arbitration Agreement.

Under South Carolina law, the general rule is that an arbitration agreement is binding only upon parties to the agreement. In fact, South Carolina law makes it clear that there is an extremely high standard for third parties for third party non-signatories to be able to enforce an arbitration agreement. Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019).

For a third party to qualify, the determination of whether an individual/third party non-signatory may be covered by an arbitration agreement depends specifically on the party's intent determined by the contractual language in the arbitration agreement. Courts should focus on whether the language of the contract is clear and unambiguous. Thompson v. Pruitt Corp., 784 S.E.2d 679, 687 (S.C. Ct. App. 2016). If the contract is ambiguous, then the language must be construed against the drafters and parties attempting to enforce the agreement. If no such language in the agreement exists for the agreement to clearly apply to subsequent purchasers and assigns, then there could be no agreement to be enforced by the Providence Defendants.

The present case presents an interesting dilemma for the two sets of Defendants attempting to enforce the Arbitration Agreement. The law is clear that the Carlyle entities

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and the Providence entities may not both enforce the arbitration agreement, if it were even an enforceable agreement in the first place, which Plaintiff contends it is not. South Carolina law reflects that the arbitration agreement must clearly reflect that the agreement is assignable to any subsequent purchasers of the facility while this agreement does not have any language reflecting same, as it provides specifically that is only between Raymond Zeigler and/or Kimberly Haag as Resident's Representative. It attempts to later broaden the definition of "Facility", creating ambiguity, but still then would not contemplate future purchasers and assignees:

This MEDIATION AND BINDING ARBITRATION AGREEMENT is entered into on December 22, 2022, by and between Carlyle Senior Care (hereinafter "Facility") and Raymond Zeigler ("Resident") and/or Kimberly Haag, the Resident's Legally Designated Representative, if any.

THIS IS A BINDING AGREEMENT TO ARBITRATE ALL CLAIMS ARISING OUT OF THE RELATIONSHIP BETWEEN RESIDENT AND FACILITY. THE EXPRESS INTENT OF THE PARTIES IS TO SUBMIT ALL CLAIMS TO BINDING ARBITRATION EXCEPT AS EXPRESSLY SET FORTH HEREIN. ANY AMBIGUITY OR DOUBT AS TO THE INTENDED SCOPE OF THIS AGREEMENT SHALL BE RESOLVED IN FAVOR OF SUBMITTING ALL CLAIMS TO BINDING ARBITRATION.

In this **MEDIATION AND BINDING ARBITRATION AGREEMENT** (hereinafter "Agreement"), the following definitions apply:

"Resident" "you" and "your" refers to the Resident identified above who is being admitted to the Facility. Resident also includes Resident's Legally Designated Representative(s), Resident's Responsible Party, Resident's family, and anyone situated in such a manner so as to assert a Claim against the Facility.

"Resident's Legally Designated Representative" refers to the person who possesses actual legal authority to conduct affairs and make decisions on behalf of the Resident. This person includes, but is not limited to, the person who has been appointed as Guardian for the resident, and/or the person who possesses a Power of Attorney executed by the Resident.

"Resident's Responsible Party" refers to _____, who is the person identified as the Resident's Responsible Party in the Admission materials executed by Resident and/or the Resident's Legally Designated Representative, and who has agreed to serve as the primary point of contact for communications between the Facility and the Resident's family.

"Facility" refers to the Facility identified above, and includes the Facility's employees, agents, subcontractors, and parent and affiliated companies (including, but not limited to, Cooke Management Company, Inc.) and their employees and agents.

"Parties" and "party" refers to persons and entities defined within the scope of "Resident" and "Facility."

As a result, the Arbitration Agreement does not reflect in any way that this agreement was assignable. However, to the extent the Defendants contend it was assignable, the South Carolina law clearly holds that if it was assigned to the Providence entities, then the Carlyle Defendants have assigned away all of their interests in the

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contract to another entity, and as a result, any "right to compel arbitration was extinguished". In re Wholesale Grocery Products Antitrust Litigation, 97 F.supp.3d 1101, 1106 (D. Minn 2015), aff'd 850 F.3d 344 (8th Cir. 2017) quoting HT of Highlands Ranch, Inc. v. Hollywood Tanning Sys., Inc., 590 F. Supp.2d 677, 684-85 (D.N.J. 2008) cited by Sanders v. Savannah Highway Auto Company, 440 S.C. 377, 892 S.E.2d 112 (2023).

As a result, the acquiring company, Providence Defendants, could only enforce an arbitration agreement if it can demonstrate that the original contracting parties intended to directly benefit the Providence entities through the arbitration provision. However, while the Arbitration Agreement is not enforceable in the first place, should the Court determine it is enforceable, the Court would have to determine which of these Defendants may enforce the Arbitration Agreement. The Defendants cannot have their cake and eat it too. The right to compel arbitration has either been assigned to the Providence Defendants and that right is no longer possessed by the Carlyle Defendants, or the right to compel arbitration was never assigned to the Providence Defendants, and they may not then enforce the agreement.

IV. The Arbitration Agreement is unenforceable as to the wrongful death statutory beneficiary's claim.

South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914). The alleged Arbitration Agreement with Facility by its own terms is an agreement between "Carlyle Senior Care (hereinafter "Facility") and Raymond Zeigler ("Resident") and/or Kimberly Haag, the Resident's Legally Designated Representative, if any." (Arbitration Agreement, p. 1). The agreement is not between Kimberly Haag

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individually and the Facility, only in her capacity as Power of Attorney for her father. Therefore, any purported agreement to arbitrate any claims was clearly (by the terms of the contract which was drafted by the Defendants) only on behalf of the Facility and Resident.

However, even if the agreement purported to include the statutory beneficiaries, Kimberly Haag did not have the legal authority to bind the statutory beneficiaries who are not parties to the Arbitration Agreement. The signatories of the agreement are Kimberly Haag and Joyce Holliday on behalf of Facility. No other parties are parties to this agreement. The scope of the agreement does not include the statutory beneficiaries' claims. Other South Carolina courts have agreed that arbitration agreements do not reach the wrongful death beneficiaries' claims in these circumstances. See Exhibits D, F, H, I, J, K, L, M, N, O, and P, Boozer, Wilds, Putman, Coleman, Young, Royston, Joyner, Testerman, Wilson, Clinkscales and Edwards Orders.

However, while Defendants would like to contend that the agreement covers the statutory beneficiaries' claims, which they do not, the problem with this contention is that Kimberly Haag had no authority to waive the statutory beneficiaries' claims. Defendants may erroneously contend that the South Carolina Supreme Court has held that arbitration agreements are binding as to the wrongful death claims. Defendants may rely on Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014) for this proposition. To the contrary, in a footnote, the Dean Court indicated that a court may not refuse to compel arbitration "simply because a wrongful death claim is involved". However, the Supreme Court has been clear that a court may find a wrongful death claim not covered by an arbitration agreement - not because it is a wrongful death claim, but

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because of state law contract defenses such as a person(s) not being a party or signatory to the contract. In the present case, the statutory beneficiaries clearly are not parties/signatories to the contract. This is the exact type of basis courts have upheld invalidating an arbitration agreement.

While dealing with a separate arbitration issue in a nursing home case and finding the arbitration agreement to be unenforceable, the Court of Appeals in Hodge v. Uni-Health Post-Acute Care of Bamberg, Opinion No. 5541 (S.C. Ct. App. March 7, 2018), recognized the separateness of the statutory beneficiaries/estate's claims from those of the patient/resident. In discussing the Maryland court's case of Dickerson, the Court noted that the nursing home was attempting "to use equitable estoppel against [the patient's] estate based on actions that [Son] took *in her individual capacity*. The fact that [Son] is *now the Personal Representative for [the patient's] [e]state* is of no moment; we will not hold this circumstance against [the patient's] [e]state. Simply put, [the patient's] [e]state is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] [e]state, or by [Son] in *her capacity as Personal Representative* of [the patient's] [e]state…." Hodge quoting Dickerson v. Longoria, 995 A.2d. 721, 743 (Md. 2010). As recognized in this discussion, actions taken by Daughter in her individual capacity will not be held against the estate and as the Court noted, the estate may well have other beneficiaries or creditors.

Defendants may further incorrectly assert other cases hold that the statutory beneficiaries are bound as third-party beneficiaries. The Defendants may cite Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012). In Pearson, the Plaintiff who sought to avoid the arbitration agreement had filed suit for a breach of the

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very contract that contained the arbitration clause. In the present case, no claim for breach of contract has been made whatsoever. Further, the Plaintiff in Pearson personally received direct benefits from the contract. Here, the statutory beneficiaries personally received zero benefit from any contract. Plaintiff's claim arises in tort, not based on a contract. Weaver v. Brookdale Senior Living, Inc., 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020).

Defendants insist that Decedent had the power to waive the right to a jury trial on a claim that did not exist when the Arbitration Agreement was presented but never belonged to him and covered injuries suffered exclusively by other people. Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019), provides the specific times when a contract may be enforced against a non-party and the Defendants would have the burden of proving each of the elements of one of those instances where such a contract may be enforced against a non-party. Defendants cannot prove these elements existed with regard to this specific case.

The statutory beneficiaries' claim is much more akin to the claims of the non-signatory Plaintiffs in Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019), where the South Carolina Supreme Court held the non-signatories could not be bound by the arbitration agreement. Much like the non-signatories in Wilson, the statutory beneficiaries in the instant case are not attempting to exploit or receive a direct benefit from the agreement and were not even aware of the existence of the arbitration provision. Defendants confuse the benefit Decedent received from admission and attempt to argue the statutory beneficiaries received a benefit personally from the admission. That argument is without merit.

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As the Wilson Court notes, "Equitable estoppel is ultimately a theory designed to prevent injustice, and it should be used sparingly. See Hirsch v. Amper Fin. Servs., LLC, 71 A.3d 849, 852 (N.J. 2013)(observing equitable estoppel should be used sparingly to compel arbitration and noting 'it is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration'); 28 Am.Jr.2d Estoppel and Waiver §29 (2011)(stating equitable estoppel should be used with restraint and only in exceptional circumstances)."

Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, a Federal District Court in South Carolina has analyzed this issue under the South Carolina Non-Economic Awards Act of 2005. Diane Boyle as Personal Representative of the Estate of John Francis Boyle v. United States of America, United States District Court for the District of South Carolina, Beaufort Division (2009). In Boyle, the Court concluded that the wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. See Exhibit Q, Boyle Order. Further, at least one other South Carolina court judge has come to the same conclusion. See Wilson v. Amisub Order at Exhibit R. These analyses confirm that the wrongful death claimants have separate and distinct claims apart from that of the survival action. As such, Daughter or Decedent were incapable of waiving the statutory beneficiaries' right to a trial by jury.

Many other states have come to this same conclusion, Daniels v. Sunrise Senior Living, Inc., 212 Cal.App 4th 674, 151 Cal.Rptr.3d 273 (Cal.App.4 Dist., 2013) (wrongful death claims not bound to arbitration), Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (wrongful death claimants not bound by arbitration agreement.)

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The only signatures to the agreement with Facility were Daughter and Joyce Holliday on behalf of the Facility. Therefore, the only parties executing this Agreement were Daughter purportedly on behalf of Decedent and an employee as an agent for Facility.

As the Supreme Court of Kentucky said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises. Inc.:

> [A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefiting third-party are appropriately subjected the contract's arbitration provisions, at least where the tort and contract are significantly intertwined. See, In re Weekley Homes, L.P., 180 S.W. 3d 127 (Tex. 2005) (negligent repair claim by homeowner's Son against contractor was subject to repair contract's arbitration clause because Son, although a non-party, was direct and principal beneficiary under the contract). It is something else entirely, however, to say that incidental beneficiaries of a contact-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely be being mentioned in the contract as potential claimants. This is what Beverly purports to do. Arbitration is a matter of contract, however, it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79,83, 123 S. Ct. 588, l54 L. Ed.2d 491 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit", Citation and internal quotation marks omitted.) Since

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> Beverly's theory would allow just that, i.e., would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a "third party beneficiary" of the arbitration agreement, we reject it out of hand.

Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 599-600 (KY 2012).

Defendants are left to argue the wrongful death claim actually belongs to Raymond Zeigler's estate rather than the statutorily designated beneficiaries. However, this argument incorrectly lumps together the wrongful death claims and the survival of tort claims Decedent had against Defendants at the time of his death. The differences with these claims begin with the statutes themselves.

The wrongful death claims are separate claims apart from Raymond Zeigler's claims. According to South Carolina's Wrongful Death Act:

> "Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued shall be liable to an action for damages."

South Carolina Code Annotated §15-51-10 (1977)

> The wrongful death beneficiaries are as follows:
>
> "Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs or the person whose death shall have been so caused."

South Carolina Code Annotated §15-51-20 (Supp. 2001)

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The general element of damages recoverable are pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of Decedent's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries. Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d. 713, 714 S.C. (Ct. App. 1989). Damages are paid to these beneficiaries because a wrongful death claim is directed at their losses suffered as a result of Raymond Zeigler's absence. Scott v. Porter, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000) (citing F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 610 (2d ed 1997). In contrast, the legislature positions the survival statute in a completely different code chapter. The wrongful death claim is a distinct claim warranting its own designation (Chapter 51). The survival statute is classified within an existing chapter (Chapter 5) identifying the proper "parties" for pursuing legal claims.

The wrongful death claim is a separate claim from the claims a decedent might bring on his own behalf under the survival statute. In Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914), the Supreme Court held that wrongful death and survival actions are different claims for different injuries. The Court stated "necessarily, therefore, there must be separate verdicts and separate judgments, there should be separate actions." Id. at 31. See also Strickland v. Southern Ry Co., 111 S.C. 248, 97 S.E. 695 (1918) (Supreme Court Affirmed Appeal from Circuit Court's ruling noting that survival claims are independent of wrongful death claims), Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539 (1928) (discussing the difference between survival and wrongful death claims as being independent of each other).

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In Grainger v. Greenville S&A Railway Co., the South Carolina Supreme Court traced the divergent tracks that wrongful death and survival claims have taken over their development. Grainger v. Greenville S&A Railway Co., 101 S.C. 399, 85 S.E. 968 (915). In that case, the trial court had dismissed the survival action because the decedent's administrator (equivalent to the modern "Personal Representative") had previously recovered on a wrongful death claim. Id. at 968. When the legislature recognized this abnormality, it responded by creating the predecessor to the modern survival statute. Id. citing 1912 Code §3693. Grainger held this legislative history conclusively established wrongful death and survival actions are distinct and independent. Id. The claims are distinct because "the beneficiaries, the cause of action, the measure of damages, are all different." Grainger 85 S.E. at 969. Our courts have further held that judgement in a wrongful death claim does not have preclusive effect on survival claims. 229 S.C. at 611-12 93 S.E.2d at 914. Further, the law is clear that in wrongful death claims, the personal representative "functions under two separate and distinct trusteeships." Id. In other words, while it is the personal representative's name in the caption for the wrongful death claim, "it is clear…the real parties to the action were the beneficiaries." Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539, 541 (1928).

Further, as early as 1907, our Supreme Court recognized a wrongful death action is not the survival of an action which the deceased had in his lifetime but is a "new cause of action". Osteen v. Southern Ry., Carolina Division, 76 S.C. 368, 57 S.E. 196, 200 (1907). Claussen held a wrongful death claim is "not a continuation" of any claim the decedent had before her death. 145 S.E. at 540. A wrongful death claim is "independent" of claims the decedent had during her life and "wholly different" than any other claim

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available at her death. Wellman v. Bethea, 243 F. 222 (E.D.S.C. 1917). Our court continues to recognize the distinctiveness of the two actions and that the wrongful death statute created a new cause of action that did not exist at common law and only accrues at the decedent's death as the wrongful death claim is subject to its own statute of limitations. Weaver v. Lentz, 348 S.C. 672, 678, 561 S.E.2d 360, 363 (Ct. App. 2002).

It is true that our Supreme Court reaffirmed that a claim under the Wrongful Death Act lies in the decedent's estate only when the decedent possessed the right of recovery at his death. Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 699 S.E. 2d 143 (2010). This rule, however, does not dictate the conclusion that a wrongful death claim is wholly derivative of the decedent's claim. Instead, the rule provides that if the defendant has a defense that would completely bar the decedent's claim had the decedent survived, then the wrongful death beneficiaries may not bring a claim under the statute. For instance, in Stokes, the statute of limitations had run on the decedent's claim, and the wrongful death beneficiaries were accordingly totally barred from pursuing their claims under the statute. The Supreme Court cited the following from United States District Court case of Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. l988): "anything that would have *defeated the decedent's recovery* had he survived the accident, (such as contributory negligence, a valid release, or similar acts on his part." (Emphasis added). The Court held Quattlebaum was correctly decided and adheres to the principle that that a decedent's estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived." Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 143, 146, 699 S.E.2d (S.C. 2010) at 146.

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Facility has never asserted that the claims here are completely barred or that Raymond Zeigler's recovery has been "defeated" by operation of law, such as by the running of the statute of limitations or the execution of a release. Instead, what Facility asserts is that Raymond Zeigler may not bring a claim in court but must pursue his remedies in arbitration. Thus, neither Stokes nor the wrongful death statute operate to cut off the statutory beneficiaries' rights, even if the claims had been subject to arbitration. See also Carter v. SSC Odin Operating Co., LLC, 2012 IL 113204, ¶57, 976 N.E.2d 344, 359 (IL 2012) (noting the defendants overstated the significance of the derivative nature of a wrongful death action, and stating "Although a wrongful-death action is dependent upon the decedent's entitlement to maintain an action for his or her injury, had death not ensued, neither the Wrongful Death Act nor this court's case law suggests that this limitation on the cause of action provides a basis for dispensing with basic principles of contract law in deciding who is bound by an arbitration agreement"). Additionally, the legal provisions holding that an individual may prevent a wrongful death claim by ignoring or settling a personal injury suit during his life do not mean the individual may control the manner in which the wrongful death claim will be resolved should he choose to leave it intact.

The Pennsylvania Superior Court in Pisano v. Extended Homes, Inc., operating under the fictitious name Belaire Health 84 Rehabilitation Center, 2013 PA Super 232, 77 A.3d 651, 662 (PA 2013) affirmed the trial court decision that the nursing home arbitration agreement did not apply to the statutory beneficiaries' wrongful death claim. The Court noted the wrongful death and survival actions are not derivative of each other but are flowing from the same underlining tortious conduct. Like the South Carolina

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statute, Pennsylvania's wrongful death statute provides that the right of action exists only for the benefit of the spouse, children, parents, or parents of the deceased. Id. at 656. The Pennsylvania Court further held that since the wrongful death claim is independent of the survival action and because the wrongful death statute does not characterize the wrongful death claim as that of a third-party beneficiary, that the trial court properly refused to compel arbitration to the non-signatory wrongful death beneficiaries who were not parties to the arbitration agreement and in this case, would include the waiver of jury trial as well.

Likewise, in Bybee v. Abdulla, M.D., 189. P.3d 40, 2008 UT 35 (Utah, 2008), the Supreme Court of Utah held that an agreement to arbitrate that was signed by the decedent cannot extend to the statutory beneficiaries of a wrongful death claim. The Utah Supreme Court noted that certain defenses from the decedent's personal injury action may be raised against the heirs of a wrongful death action such as comparative negligence and statutes of limitations as key common characteristics. However, as the Supreme Court of Utah noted, both of these defenses go to the viability of the underlying personal injury action. The Court further stated that "by contract, an agreement to bind heirs to arbitrate disputes does not implicate the viability of underlying claims." Id. at 47, citing Horwich v. Superior Court, 21 Cal. 4th 272, 87 Cal. Rptr. 2d 222, 980 P. 2d 927, 935 (1999). The Utah Supreme Court went on to note that "we have never intended to suggest, however, that because Decedent is the master of his claim he may by contract expose his unwilling heirs to any imaginable defense." Bybee v. Abdulla, M.D. at 46. The Utah Supreme Court further held that the defenses against the decedent's claim which are less likely to be found enforceable against the heirs' claims in a wrongful death

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action "are contract provisions that purport to affect the rights of heirs that do not affect the existence of the decedent's personal injury claim during his lifetime. The arbitration agreement...falls squarely within this category and is, therefore, unenforceable against the heir." Id. at 47.

The Court of Appeals in Washington in Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn. App. 919, 231 P. 3d 1252 (Wash. App. Div. 1 2010) held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit." Id. quoting Satomi Owners Association v. Satomi. LLC, 167 Wash. 2d 781, 225 P.3d 213 (2009). The Washington Court of Appeals further noted that the wrongful death claims asserted in that case were not on behalf of the estate just as South Carolina's wrongful death claims are not on behalf of the estate. The Washington Court of Appeals further discussed the Supreme Court of Ohio's ruling in Peters v. Columbus Steel Casting Co., 115 Ohio St.3d 134, 873 N.E.2d 1258 (2007), wherein the Supreme Court of Ohio held that the wrongful death claim of a spouse who was Administrator of her husband's estate was not subject to the Decedent's arbitration agreement. The Washington Court of Appeals in discussing Peters, stated "In sum, the decedent's agreement was an agreement 'to arbitrate his claims against the company,' and thus the provision in the agreement binding the decedent's heirs applied to a survival action. But the decedent could not 'restrict his beneficiaries to arbitration of their wrongful death claims because he held no right to those claims." Woodall v. Avalon Care Center - Federal Way, LLC at 929. In the Washington Court of Appeals' analysis, the Court concluded that the wrongful death beneficiaries could not be bound to the arbitration agreement which they did not sign.

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Because the statutory beneficiaries have separate and independent claims and were not covered by the scope of this agreement nor were parties to this agreement, the Arbitration Agreement drafted by Facility cannot reach the claims of the wrongful death statutory beneficiaries. Many other South Carolina courts agree as well. See Boozer, Wilds, Putman, Coleman, Young, Joyner, Testerman, Wilson, Clinkscales and Edwards Orders at Exhibits D, F, H, I, J, K, M, N, O, and P.

V. The Arbitration Agreement does not apply to Defendants Carlyle Senior Care Management Company, Inc., New Day Health Ventures, LLC, LARK of Fountain Inn, LLC, Providence Group, Inc., Providence Administrative Consulting Services, Inc., PACS Group, Inc., PACS Holdings, LLC, and 501 Gulliver Property, LLC.

The Arbitration Agreement clearly states that it is between "Carlyle Senior Care (hereinafter "Facility") and Raymond Zeiger ("Resident") and/or Kimberly Haag, the Resident's Legally Designated Representative, if any." ["Facility" is later defined to include parent companies and specifically identifies "Cooke Management Company, Inc.," a party who is not a Defendant in this case.] No other entity or individual is identified as a party to the agreement at any point in the Arbitration Agreement. Defendants Carlyle Senior Care Management Company, Inc., New Day Health Ventures, LLC, LARK of Fountain Inn, LLC, Providence Group, Inc., Providence Administrative Consulting Services, Inc., PACS Group, Inc., PACS Holdings, LLC, and 501 Gulliver Property, LLC are not identified in the Arbitration Agreement nor does the Arbitration Agreement state that Carlyle Senior Care's parent companies, management companies, affiliates, or any other descriptive language which would include these two entities as parties to the contract.

South Carolina law is very clear in that Carlyle Senior Care's Co-Defendants are not third-party beneficiaries to either of these contracts. South Carolina courts have held

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that third-party non-signatories should only be included in arbitration agreements in exceptionally limited circumstances. Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019). Further, "South Carolina contract law carries a presumption that an individual who is not a party to a contract lacks privity to enforce it". Trancik v. USAA Insurance Company, 354 S.C. 549, 553, 581 S.E.2d 858, 861 (Ct. App. 2003). "It is to be observed that the presumption is that the parties contract for their own benefit and not for that of others not parties to the contract." Ancrum v. Camden Water, Light and Ice Company, 82 S.C. 284, 295, 64 S.E. 151, 155 (1909). The rule of contract interpretation is to ascertain and give legal effect to the intentions of the parties as determined by the contract language. Schulmeyer v. State Farm Fire and Casualty Company, 353 S.C. 492, 495, 579 S.E.2d 132, 134 (2003). Generally, courts do not have the authority to alter a contract by construction or make new contracts for the parties and words cannot be read into a contract which give an intent not expressed within the contract. Gilstrap v. Culpepper, 283 S.C. 83, 86, 320 S.E.2d 445, 447 (1984). Only if a contract is made for the benefit of the third person and the contracting parties intended to create a direct, rather than incidental or consequential, benefit to the third person can the third person make a claim based on the contract. Windsor Green Owners Association v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004).

As a result, Defendants Carlyle Senior Care Management Company, Inc., New Day Health Ventures, LLC, LARK of Fountain Inn, LLC, Providence Group, Inc., Providence Administrative Consulting Services, Inc., PACS Group, Inc., PACS Holdings, LLC, and 501 Gulliver Property, LLC are unable to carry their burden to overcome the presumption that the contract was only intended for the benefit of the

parties to the contract. There is no indication in the agreement that these entities were intended to benefit from these provisions. Therefore, the Arbitration Agreement does not extend to these Defendants.

CONCLUSION

The arbitration agreement is not enforceable for the reasons set forth hereinabove. More specifically, the Arbitration Agreement is not enforceable because the parties did not agree to the essential terms of the Arbitration Agreement, and as a result, there is no meeting of the minds. The Arbitration Agreement is also unenforceable because Defendants violated the Federal Regulations in the manner in which the agreement was executed. Furthermore, even if the Arbitration Agreement were enforceable, then it does not extend to the wrongful death claims, nor does it include the claims by any of the corporate Defendants, including Carlyle Senior Care Management Company, Inc., New Day Health Ventures, LLC, LARK of Fountain Inn, LLC, Providence Group, Inc., Providence Administrative Consulting Services, Inc., PACS Group, Inc., PACS Holdings, LLC, and 501 Gulliver Property, LLC. Finally, if the Court were to conclude that any part of the claims was covered by the Arbitration Agreement, then only one set of the Defendants may enforce the Arbitration Agreement, as both the Carlyle and Providence Defendants may not enforce the arbitration provisions.

[SIGNATURE ON NEXT PAGE]

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Respectfully submitted,

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s/Matthew W. Christian
Matthew W. Christian
S.C. Bar No.: 70516
Attorney for Plaintiff

Greenville, South Carolina
Date: September 17, 2025

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EXHIBIT A

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS C.A. No.: 2025-CP-23-01757 & 2025-CP-23-01759
Kimberly Haag, Individually and as Personal Representative of the Estate of Raymond Zeigler, Plaintiff, v. Carlyle Senior Care of Fountain Inn, LLC, Carlyle Senior Care Management Company, Inc., New Day Health Ventures, LLC, LARK of Fountain Inn, LLC, Fountain Inn Healthcare, LLC d/b/a Fountain Inn Post Acute, Providence Group, Inc., Providence Administrative Consulting Services, Inc., PACS Group, Inc., PACS Holdings, LLC, and 501 Gulliver Property, LLC, Defendant(s).	)	**AFFIDAVIT OF KIMBERLY HAAG**

PERSONALLY appeared before me, the undersigned, who being duly sworn, hereby states and attests that the following is true and correct under penalties of perjury:

1. I am a citizen and resident of Greenville County, South Carolina. I reside at 400C Fowler Road, Simpsonville, SC 29681.

2. I am the daughter of Raymond Zeigler and the Personal Representative of the Estate of Raymond Zeigler which is administered through the Probate Court of Greenville County.

3. My father was admitted to Carlyle Senior Care of Fountain Inn, a skilled nursing facility, on or about March 3, 2022, for long-term care.

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4. My father was hospitalized several times while a resident at Carlyle Senior Care of Fountain Inn, and on several occasions when he was re-admitted to the facility after a hospitalization, I was required to sign several documents.

5. My father was hospitalized from December 15, 2022 through December 22, 2022. On December 22, 2022, while he was awaiting transfer back to Carlyle Senior Care of Fountain Inn, the facility requested that I sign a stack of documents for his re-admission which apparently included the arbitration agreement, among several other consent forms. These documents were presented to me pre-printed with highlighted areas for my signature. The highlighted areas on the documents were highlighted by Defendant Carlyle Senior Care of Fountain Inn.

6. At no point did an employee from Carlyle Senior Care of Fountain Inn ever explain an arbitration agreement to me and I was told I would have to sign all of the documents for my father to be re-admitted.

7. I was advised and led to believe that I was required to sign all of the documents presented to me, including the alleged arbitration agreement for my father to be re-admitted to Carlyle Senior Care of Fountain Inn. There were numerous places for me to sign, and I did not fully understand all of the documents but signed out of the urgency to have my father re-admitted to the skilled nursing facility.

8. I was given copies of some documents I signed but was never given a copy of any arbitration agreement.

9. No one from Carlyle Senior Care of Fountain Inn made me aware that there would ever be an opportunity to revoke or rescind any agreement which I signed, nor was I ever explained any process for revocation should I desire to do so.

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10. Had I known I was signing an arbitration agreement and its consequences, I would never have signed the agreement.

11. That further, my father was admitted to the hospital in February 2023 after a fall with a fracture which occurred while he was at Carlyle Senior Care of Fountain Inn which resulted in surgery. Upon re-admission, I was never asked to sign another arbitration agreement despite his being discharged and re-admitted. On prior re-admissions, I was asked to sign more documents, but not this one.

12. That I have now learned that Defendants Fountain Inn Healthcare, LLC d/b/a Fountain Inn Post Acute, Providence Group, Inc., Providence Administrative Consulting Services, Inc., PACS Group, Inc., PACS Holdings, LLC, and 501 Gulliver Property, LLC apparently purchased this facility in March 2023. I never signed any agreement with them and never imagined that any agreement I would have signed with Carlyle Senior Care of Fountain Inn would apply to the new purchasers. These purchasers and the former owners never notified me of any change in ownership nor any implications from that change.

Date: 9-8-25

Kimberly Haag

SWORN to and subscribed before me this
8th day of September, 2025

Amanda V. Johnson
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 1-25-27

AMANDA V. JOHNSON
Notary Public, State of South Carolina
My Commission Expires
January 25, 2027

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EXHIBIT B

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ADMISSION AGREEMENT

This ***Admission Agreement*** (the "Agreement") by and among the parties listed below, is a legally binding contract. As such, please read all areas carefully and thoroughly and be sure you fully understand all of its terms.

Representative
If the Resident is unable to make decisions for himself/herself, a Representative may be available to make certain decisions on behalf of the Resident. This term is defined below:

- Representative – For the purposes of this Agreement, a Representative is a person who manages, uses, or controls funds/assets that may be legally used to pay the Resident's charges or who otherwise acts on behalf of the Resident. The Representative may or may not be court appointed. A Representative may be an Attorney-in-fact acting under a durable power of attorney for healthcare, guardian, conservator, next-of-kin, or other person allowed to act for the Resident under State Law. The Representative's financial obligations are limited to the amount of funds received or held by the Representative for the Resident. The Representative does not assume responsibility for payment of the costs of the Resident's care out of the Representative's personal funds. However, the Representative is contractually bound by the terms of this Agreement and may become liable for failure to perform duties under the Agreement. The Representative is required to sign this Agreement for admission and agrees to ensure first priority distribution to the Facility, from the Resident's income or resources, payment when due for items/services provided to the Resident. The Representative may be required to produce financial documentation as proof of the Resident's ability to pay for charges when due. Wherever this Agreement refers to the Resident's financial obligations under this agreement, "Resident" shall be construed to include obligations of "Representative" to act on behalf of the Resident.

Parties:

a. The parties of this Agreement are:

Carlyle Senior Care of Fountain Inn ("Facility")
Raymond Zeigler ("Resident")
Kimberly Hagg ("Representative")

Note: If this agreement is signed by a Representative of Resident (in addition to or in lieu of Resident), please state the Representative's relationship to Resident: Daughter. If Representative status has been conferred by a court of law or through appointment by the Resident, verification of such status must be provided to the Facility at the time of Admission.

Admission:

1. ***General***
This Agreement is made this 22 day of December, 20 22, by and between the Resident (herein-after referred to as "Resident") and the Facility (herein-after referred to as "Facility"). The Facility shall admit Resident and provide routine and customary skilled nursing services until the date of Resident's discharge. Resident agrees to pay Facility in full for services provided by Facility pursuant to the terms and conditions set forth herein at Facility's prevailing prices.

2. ***Nondiscrimination***
The Facility does not discriminate against any person on the basis of race, color, national origin, disability, or age in admission, treatment, or participation in its program, services and activities, or in employment.

3. ***Facility Guidelines for Residents and Families***
The Facility maintains reasonable guidelines for the comfort and well-being of all of its residents. The Resident acknowledges that the Facility guidelines have been explained and a copy of these guidelines is included in this agreement as **Attachment A**.

(Initial) Resident_____ Representative KH Facility JH

EXHIBIT
ALLSTATE LEGAL®
B

Financial Responsibility:

1. ***Private Pay Residents***
A Resident is considered private pay (herein-after referred to as "Private Pay Resident") when no State or Federal Program is paying for the Resident's Room and Board. Facility room rates are set forth and included in this agreement as **Attachment B**. Daily private room rates are determined by the type of room assigned to the Private Pay Resident, and therefore, may be changed should the Private Pay Resident transfer to a different room. In addition, the Resident shall be responsible to payment of all charges of the Facility for supplies and services which are not included in the Facility's routine daily rate.

   Upon admission the Resident or Representative agree to pay, in advance, an amount equal to a prorated one month's stay. Subsequently, charges for each month's stay are billed in advance and due by the tenth (10th) day of each month. If the Private Pay Resident converts to either Medicaid or Medicare as a primary paysource, the Facility shall refund any unused advance payment, if any, in excess of the Resident's liability. The Facility shall refund any unused advance payments should the Resident leave the Facility prior to the end of the month.

   It is understood and agreed that the Facility, because of changing circumstances, shall have the right to increase or decrease the daily cost of care and/or ancillary fees during the term of this agreement. The Resident will be notified no less than thirty (30) days in advance of any rate change. Regardless of any change in your payment status during your stay at the Facility or any rejection or delay in obtaining eligibility under any payment source, your are responsible for all applicable Facility charges and fees that are not paid timely under a payment program.

2. ***Medicaid/Medicare Participation***
The Facility participates in and accepts payments from the Medicaid and Medicare program. For Resident's who participate in the Medicaid Program, the facility shall not require a deposit as a condition of providing services. In addition, the Facility agrees to accept as payment in full for covered Medicaid services furnished by the Facility the rates payable by the Medicaid Program. The Facility makes no guarantee of any kind that the Resident's care will be covered by Medicare or Medicaid. The Resident agrees to promptly adhere to all application requirements relative to receipt of benefits under the Medicaid and Medicare programs. In order for the Facility to appropriately assess the Resident's status in the Medicaid approval process, the Resident shall provide information necessary to complete the Financial Services Worksheet as outlined in **Attachment F**. In order for the Facility to appropriately identify if Medicare is an eligible primary payer source according to MSP guidelines, the Resident shall provide information necessary to complete the Medicare Secondary Payer Screen as outlined in **Attachments G and G1.**

3. ***Private Insurance***
The Resident shall remain primarily responsible for paying all Facility charges, even when there is private insurance coverage. All charges not covered by the third party payor are also the responsibility of the Resident; these non-covered charges include any coinsurance and/or deductible amounts required by the third party payor, to the extent allowed under Federal and State laws.

4. ***Timely Obligation to Pay***
Facility charges for services provided shall be billed monthly to the Resident. These charges are due and payable by the tenth (10th) day of each month. If payment is not received by the tenth (10th) day of each month, the account is considered past due or delinquent, and the Facility may add a late fee to the Resident's account. This late charge shall be assessed on the monthly balance at the lesser of the monthly rate of 1.5% (one and one-half percent) or the maximum permitted by law. If the Resident fails to make a required payment within twenty one (21) days of the due date, the Facility may require the Resident to vacate the Facility. In the event it is necessary for the Facility to take action for the purpose of enforcing this Agreement or the collecting of any sums of money due under the Agreement, the Facility shall be entitled to recover reasonable attorney's fees, out-of-pocket expenses and court costs. If a check is returned for insufficient funds, the Facility may charge its prevailing returned check charge and may require payment be made by certified check or money order.

5. ***Consent to Treatment***
The Resident consents to admission to the facility and to routine care as provided by the Facility and/or any of their contractors (collectively referred to as "provider"). The Facility realizes the right of the Resident to be fully informed of his or her medical condition and to be afforded the opportunity to participate in the planning of his or her care and/or medical treatment.

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6. *Assignment of Benefits*
Except where the Resident's health care benefit plan(s) provides for automatic payment to the provider of services, the Resident authorizes payment of benefits (including Medicaid, Medicare, and/or private insurance) to the Facility, otherwise payable to the Resident, for services rendered by the Facility and/or any of their contractors (physical therapy, occupational therapy, speech therapy, psychological services or other related services). The Resident hereby authorizes the provider to apply for and file such benefit payments on behalf of Resident and direct that such payments be made directly to the provider. Any insurance benefits received by the undersigned for services rendered by provider shall be paid to provider

7. *Financial Contract*

a. If a Private Pay Resident, the Resident or Representative agree to pay on or before the day of the Resident's admission the amount of $____. This advance payment shall be applied to cover charges for services in the first calendar month (or portion thereof) of admission. Thereafter, the Resident agrees to pay the regular applicable daily charge for room, board, and routine nursing services in the sum of $____ per day payable in advance by the tenth (10th) day of each month. In addition, the Resident agrees to pay all allowable charges (including the cost of medication) and for special care equipment prescribed or desired for the resident's exclusive use if not covered by insurance or public aid funds when billed therefore or in the event insurance or public aid funds are not available. The daily rate is charged for the day of admission; however, there is no charge for the day of discharge, if discharged by 12:00am.
b. If a Medicaid Resident, the Facility agrees to accept as payment in full the amount paid by the Medicaid program for those claims submitted for payment under that program for Medicaid covered services. According to D.S.S., monthly liability will be if resident receives social security or retirement benefits in the amount established by D.S.S.
c. The Facility shall not bill for physician's services. The Resident will receive a separate bill from his/her attending physician or any other physician involved in his/her care. The Resident is responsible for payment of all physician charges.
d. All medications ordered by physicians for private residents, as well as legend drugs above the number allowed for Medicaid eligible Resident's in each month will be billed directly to the Resident and/or Representative unless other arrangements are made.
e. Applicable refunds will be computed and paid in full within thirty (30) days after discharge or transfer to another facility.

Resident Rights and Property:

1. *Resident Rights*
The Facility insures the Resident all rights in the "Patients' Bill of Rights" existing in State and Federal law and regulation, and the Health Insurance Portability and Accountability Act of 1996, as delineated in the Notice of Privacy Practices. The Facility, upon admission, has informed the Resident and Representative about the "Patients' Bill of Rights" and the Resident has a full knowledge and understanding of them. The "Patients' Bill of Rights" is included in this agreement as **Attachment C.**

2. *Grievance Procedures*
The Facility will assist Residents, their Representatives, or other interested family members, or advocates in filing grievance or complaints when such requests are made. The Resident acknowledges that the Facility's grievance procedures have been explained and are available for review upon request at the Social Services Office. If following your efforts with the Facility regarding the grievance resolution process, and you remain dissatisfied or concerned; please contact our Customer Hotline at: (800) 826-6762. Resident's or their Representatives also may contact the Department of Health and Environmental Control or Long Term Care Ombudsman. See **Attachment L** for a full listing of names, addresses, and telephone numbers of all pertinent State client advocacy groups.

3. *Personal Property*
To promote a homelike environment within the Facility, the Resident may be allowed to bring items to the Facility such as dressers, chairs, pictures, accessories, etc., as space, safety, and regulations permit. Items in question should be initially discussed with the Social Services Director or Administrator prior to bringing them into the Facility.

The Facility has established policies and procedures designed to prevent theft and loss of Resident's personal property. The Resident has been informed of the risk involved in keeping valuables (such as jewelry, large sums of money, hearing aids) in the room. All clothing and other personal items shall be clearly marked by the Resident or Representative to indicate ownership by the Resident. In addition, the Resident should strongly consider purchasing private insurance should he/she

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decide to maintain valuable personal property within the Facility. The Facility shall not be responsible for loss, theft or destruction of Resident's personal items. The Resident acknowledges that the Facility's theft and loss procedures have been explained and are available for review upon request at the Social Services Office. The Resident shall provide the Facility with an inventory of all personal effects accompanying the Resident on admission utilizing the Inventory of Personal Items form as outlined in **Attachment M.** As personal effects are added and/or removed from the facility by the Resident, it shall be the Resident's responsibility to ensure the Inventory of Personal Items form is updated appropriately.

4. ***Personal Fund Account***

The Resident has the right to manage his or her own personal funds. If the Resident wants assistance with management of personal funds, the Facility shall assist if requested to do so in writing. The Facility shall hold, safeguard, manage, and account for these funds.

Resident personal funds deposited with the Facility shall be handled as follows:

- The Facility shall deposit funds in excess of Fifty Dollars ($50.00) in an interest bearing account insured by the Federal Deposit Insurance Corporation (FDIC) that is separate from any Facility operating accounts. All interest earned on the Resident's funds shall be credited to his or her account. The Facility shall have the option of depositing funds of less than Fifty Dollars ($50.00) in one of the following: a non-interest bearing account, an interest bearing account, or petty cash fund. The Facility shall inform the Resident as to how his or her funds are being held. The Facility's policy is to maintain all resident funds in a separate account, except for a nominal amount maintained in a petty cash fund for the Resident's convenience.
- The Facility shall have a system to ensure that a complete and separate accounting, based on generally accepted accounting principles, of the personal funds deposited with the Facility on the Resident's behalf. This system shall also ensure that the Resident's funds are not commingled with the Facility's funds or with any other funds besides those of other Residents. In addition to the required quarterly accounting, the Facility shall provide individual financial records at the request of the Resident.
- The personal fund balances of Residents who receive Medicaid benefits must remain in a certain dollar range to satisfy State and Federal laws. The Facility shall notify a Medicaid resident if his or her account balances is within Two Hundred Dollars ($200.00) of the Federal Supplemental Security Income (SSI) limit. The Facility shall also notify the Resident if the account balance, in addition to the Resident's known non-exempt assets, reaches the SSI resource limit. A balance in excess of this limit may cause the Resident to lose eligibility for Medicaid or SSI.
- If a Resident who has personal funds deposited with the Facility expires, the Facility shall refund the Resident's account balance within thirty (30) days and provide a full accounting of these funds to the probate jurisdiction administering the Resident's estate, the designated funeral home if an estate does not exists, or other entity as required by State law or regulation.
- The Facility may not impose a charge against the personal funds of a resident for any item or services for which payment is made under Medicaid or Medicare (except for applicable deductible and coinsurance amounts). The Facility may charge the resident for requested services that are more expensive than or in excess of covered services. See **Attachment B** for a list of covered items and services during a resident's Medicaid stay. (Initial below)

✓ The Resident authorizes the Business Office of the Facility to maintain a Personal Fund Account for the Resident and hereby authorizes and entrusts the Facility to receive his/her personal funds and disburse said funds on behalf of the Resident for the health, welfare, and personal needs of the Resident. I understand and agree that this gives the facility, through its designated personnel, approval to transfer monies from the account to cover any patient liability charges, or any personal care items not covered under the Medicaid program which appears on my receivable account while a resident or upon discharge.

___ The Resident chooses not to maintain a Personal Fund with the Facility.

5. ***Mail***

The Facility shall, to the greatest extent possible, provide the Resident with reasonable privacy in written communications, including the sending and receiving of mail.

6. ***Use of Restraints***

It is the policy of this facility to use restraint(s) only after assessment and care planning deem it appropriate to treat the Resident's medical symptoms and assist the Resident in attaining or maintaining his or her highest practicable physical and psychosocial well-being, and other methods or interventions are inadequate. In all instances, the least restrictive restraint, which is effective, will be used. See **Attachment O** for related information.

(Initial) Resident_____ Representative_____ Facility_____

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7. ***Consent for Photographs and/or Other Visual and/or Audio Recordings***
The Resident agrees to allow the Facility to photograph or videotape the Resident as means of identification, health related purposes or other various media to be used in and out of the Facility. The photographs or videotapes may also be used to help locate the Resident in the event of any unauthorized absence from the Facility, but shall otherwise be kept confidential. If the Facility intends to use the photograph or videotape for purposes other than those noted above, the Facility shall get written permission from the Resident in advance of such use. The Resident retains the right to refuse the taking of a photograph at any time. The Resident may also rescind this authorization at any time via written notice provided to the Facility, with such notice to become effective on the third business day following receipt of the notice. (Initial below)

✓ Approve ___ Disapprove.

8. ***Written Advance Directives***
It is agreed that said Facility will exercise it's professional services in providing care and treatment to the Resident. Such care and treatment will take into account written directives provided by the Resident and included in the Resident's file maintained by the Facility. These directives and other necessary data should be exercised prior to admission. The Resident acknowledges that the Facility cannot act in accordance with any Advance Directives until the Resident's attending physician writes orders based on the decisions that have been made. The Facility reserves the right to discharge a Resident who request directives which, in the opinion of the staff of the Facility, cannot morally, ethically, legally or professional be followed.

The Facility's policy regarding the implementation of the resident's Advance Directive is included in this agreement as **Attachment D**. The Resident acknowledges that he or she has been asked whether he or she has executed an Advance Directive and also has been asked to provide the Facility with a copy of any Advance Directive he or she has executed. ***(Initial where applicable)***

___ Resident does not choose to formulate or issue any Advance Directive at this time.

___ Resident has chosen to formulate and issue an Advance Directive which includes:

___ Living Will	___ Do Not Hospitalize
___ Healthcare Power of Attorney	___ Organ Donor
✓ Full Code	___ Enteral Nutrition
___ Do Not Resuscitate	___ Other _____

9. ***Resident Directory Authorization***
There may be occasions when the Resident may request not to be included in the Facility's Resident Directory. The Facility's policy is intended to implement each Resident's right to object to his/her information being contained in the Resident Directory in accordance with applicable federal and state laws. See the attached Resident Directory Instructions form as outlined in **Attachment N**, for signature and related information regarding the Facility's disclosure of the Resident's directory information.

Residents Records:

1. ***Release of Medical Record Information***
The Resident authorizes the Facility to furnish confidential medical information to independent health care professionals treating the Resident outside the facility, when the Resident is referred to the outside professional. Individual authorizations for disclosure of Protected Health Information will be obtained in accordance with provisions of the Health Insurance Portability and Accountability act of 1996 when they are required. The Notice of Privacy Practices and Acknowledgement Form are set forth and included in this agreement as **Attachment J**.

2. ***Confidentiality***
The Facility shall provide privacy and confidentiality of the Resident's personal and clinical records, and disclosure to persons shall not be provided without written consent from the Resident, except as required or permitted by HIPAA, State and Federal laws.

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3. ***Resident Access***
The Facility shall grant the Resident access to all medical records pertaining to himself/herself within twenty-four hours (excluding weekends or holidays) of either an oral or written request. After receipt of his/her records from the Facility for review, the Resident may purchase copies of the record upon written request within two (2) working days. The Facility shall charge a reasonable amount for copies not to exceed the community standard.

Bed Holds and Discharges:

$279.00 per day for a private room $243.00 per day for a semi private room

1. ***Bed Hold Procedure***
The Resident may need to be absent from the Facility temporarily for hospitalization. The Resident may request that the Facility hold open the Resident's bed during this time. This is known as a "bed hold." The Resident shall be given notice of the bed hold option at the time of hospitalization.

If the Resident's care is paid under the Medicaid program (as either a primary or secondary paysource), Medicaid allows for ten (10) bed hold days. If the Resident's care is not paid under the Medicaid program (as either a primary or secondary paysource), the Resident requesting a bed hold must pay the Facility's private daily rate for the bed being held during the bed hold period. If the Medicaid resident's hospitalization exceeds the bed-hold period paid under the Medicaid program, the Resident may request an additional bed hold period from the Facility by agreeing to pay the applicable daily rate during the additional bed hold period. Otherwise, the Resident shall be readmitted on a priority basis to the first available desired room, provided the resident meets the admission criteria. During a bed hold, the Resident's recurring income shall be paid to the Facility during the Resident's period of hospitalization.

2. ***Termination of Residency***
The Resident may voluntarily leave the Facility and cancel this agreement at any time. The Resident is requested, however, to give at least five (5) day notice of intent to terminate residency. Conversely, the Facility may cancel this agreement and discharge the Resident under the following circumstances:

a. When a Resident has failed after reasonable and appropriate notice, to pay for (or to have paid under a third party payment plan) a stay in the Facility. (This would normally occur when the Resident's account balance is 60 or more days past due.);
b. When transfer or discharge is necessary for the Resident's welfare and the Resident's needs cannot be met by the Facility;
c. When the health or safety of individuals in the Facility is endangered;
d. When the Resident's health has improved sufficiently so the Resident no longer needs the services provided by the Facility.
e. If the Facility ceases to operate.

Such action will be documented and explained to the Resident and reasonable advance written notice will be given unless an emergency situation exists. Personal property of the resident left in the facility at the time of discharge or death will be stored and retained in a secure area for five (5) days. The facility will appropriately dispose of personal property not claimed after the five (5) day period.

Services: Raymond Zeigler

1. ***Transportation***
The Facility shall provide or secure medically necessary transportation for the resident to other healthcare services provided outside the facility (e.g. hospital, doctors' office, dentist) as needed in accordance with physician's orders.

2. ***Physician Authorization***
The Resident has the right to select an attending physician or may designate the Facility's Medical Director (or a member of the Medical Director's medical practice) as the Resident's attending physician. The physician selected must have admission privileges to the Facility and must comply with all state and federal licensing laws and requirements, as well as those that apply to physicians practicing in South Carolina nursing facilities. The physician selected shall bill the Resident's Medicaid, Medicare, or Private Insurance for the services rendered and any payments made by the Resident shall be mailed directly to the Medical Practice. The Resident may be billed for any non-covered services. It is understood that in the event of an emergency and the attending physician cannot be reached, the Facility is granted full authority to secure emergency care for the Resident until the Resident's attending physician can be contacted.

(Initial) Resident____ Representative KH Facility

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The Resident hereby authorizes the following to serve as the Resident's attending physician while a resident of the Facility *(Initial appropriate response)*:

✓ Medical Director of the Facility
___ Other physician (having admission privileges to the Facility)

Dr. Lisa Forgione	Elite Patient Care Asheville, NC
Name of Physician	Name of Medical Practice
[redacted]	Summerville, SC 29483
Address	City, State, Zip, Telephone

3. ***Extended Services Agreement***
The Resident has the right to choose a professional service (i.e. Dentist, Podiatrist, Optometrist, etc.) or may use the professional services designated by the Facility. It is understood the professional service(s) designated must comply with all state and federal laws and requirements, as well as those that apply to such professional practice in South Carolina nursing facilities. It is further understood that in the event of an emergency and the primary professional service cannot be reached, the Facility is granted full authority to secure emergency care for the Resident until the primary professional service can be contacted. The Extended Services Agreement is set forth and included in this agreement as **Attachment E.**

4. ***Pharmacy Services***
The Facility has an arrangement with a pharmacy to provide necessary prescriptions and over the counter medications to its residents. The Resident agrees to pay for medications unless Medicaid, Medicare or other third party payor otherwise pays for them. All medications, including over the counter medications, must be prescribed by a licensed physician or other individuals authorized by state law to write prescriptions. All medications must be administered according to physician's orders. Medications shall be administered by qualified staff unless the Facility's inter-disciplinary team determines that the Resident may safely self-administer medications. The Pharmacy/Patient Agreement form is set forth and included in this agreement as **Attachment K.**

5. ***Outside Trips***
I ___ do ✓ do not hereby give permission to be taken out of the facility by a responsible staff member for Activity purposes (entertainment, rides, shopping, visiting local places of interest). The Facility will not allow Resident to leave the facility for outside trips unless he/she is deemed physically and mentally able to do so by the Director of Nursing, attending Physician, or Activities Director.

6. ***Laundry Service***
I ___ do ✓ do not want the Facility to provide personal laundry services to the Resident. Residents who elect not to use the Facility's personal laundry services are required to provide a clothes hamper or container with a lid for this purpose. **The Resident or Representative shall be responsible for appropriately labeling all clothing with the Resident's name.**

7. ***Beauty/Barber Shop Service***
I ✓ do ___ do not want the Facility to provide beauty and barber shop services to the Resident. The Resident understands that he/she will be charged at the rates specified. See the attached Authorization for Beauty/Barber Shop Services, **Attachment H,** for beauty/barber shop preferences, prices and related information.

8. ***Influenza and Pneumococcal Vaccination***
The Facility shall have available and offer the Influenza and Pneumococcal vaccinations to the Resident. See the attached Influenza and Pneumococcal Vaccination Consent Form as outlined in **Attachment I,** for signature and related information regarding Influenza and Pneumococcal Vaccinations.

Miscellaneous:

1. **Assignment**, no party to the Agreement may assign his/her rights or responsibilities under the Agreement.

2. **Merger Clause**, this Agreement constitutes the entire agreement among the parties hereto and this Agreement may not be amended except in writing signed by the parties to the Agreement.

3. **Choice of Law**, the Agreement will be governed and construed in accordance with the laws and regulations of the State of South Carolina.

(Initial) Resident_____ Representative_____ Facility_____

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4. **Binding Obligation**, the Resident agrees that the obligations, conditions, terms and restrictions of this Agreement also bind his or her respective heirs, successors and self-designated representatives acting on behalf of the Resident including, but not limited to, family members, guardians, and any other private organization or advocacy group.

5. **Incidents Beyond the Control of Facility**, the Resident agrees that Facility will not be liable for and agree to hold Facility harmless from any circumstances that are beyond the control of the Facility including, but not limited to, acts of God, staff shortages, strikes and changes in economic conditions that affect the Facility's operation. Additionally, the Resident agrees that Facility will not be liable for and agree to hold Facility harmless from any changes in services or service limits due to changes in payment levels received by the Facility from Resident and/or third party payors, including but not limited to, Medicare and Medicaid.

The Resident acknowledges receipt of a copy of this executed agreement. This agreement includes all documents signed by the Resident at the time of admission, as well as Attachments A though O. A copy of the Agreement shall remain in the Resident's file for the duration of residency in this Facility. I understand that this Agreement is a legally binding contract and further understand each and all of the terms of this Agreement.

Date	Signature of Resident (or Mark – see below)
12-22-2022	
Date	Signature of Representative
	Relationship to Resident
12-22-2022	Joyce Holliday
Date	Signature of Designated Admissions Officer
Date	Signature of Executive Director/Administrator

One witness should sign if Resident is unable to sign and/or signs with only a mark.

Date	Signature of Witness

(Initial) Resident_____ Representative_____ Facility

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CARLYLE SENIOR CARE		
RESIDENT CARE		Page: 1 of 5
Section RESIDENT RIGHTS		Approval Date:11/28/16
Title: RESIDENT RIGHTS		Effective Date:11/28/16

Policy:
It is the practice of this facility to protect and promote resident rights and treat each resident with respect and dignity as well as care for each resident in a manner and in an environment that maintains or enhances resident's quality of life by recognizing each resident's individuality.

Compliance Guidelines:
1. All staff members are involved in providing care to residents to promote and maintain resident dignity and respect resident rights.
2. During interactions with residents, staff must report, document and act upon information regarding resident preferences.
3. Interview results will be documented; the provision of care and care plans will be revised, if appropriate, based on information obtained from resident interviews.
4. The resident's former lifestyle and personal choices will be considered when providing care and services to meet the resident's needs and preferences.
5. When interacting with a resident, pay attention to the resident as an individual.
6. Respond to requests for assistance in a timely manner.
7. Explain care or procedures to the resident before initiating the activity.
8. Staff members do not talk to each other while performing a task for the resident as if the resident is not there. Conversation should be resident focused and resident centered.
9. Groom and dress residents according to resident preference.
10. Speak respectfully to residents; avoid discussions about residents that may be overheard.
11. Respect the resident's living space and personal possessions.
12. Maintain resident privacy.
13. Assist residents to participate in activities of choice.
14. Each resident will be provided equal access to quality care regardless of diagnosis, severity of condition or payment source.
15. Random observations and/or verifications are conducted by the Director of Nursing Services (DNS), or designee, to ensure compliance with this policy.

Policy:
The facility will inform the resident both orally and in writing in a language that the resident understands of his or her rights and all rules and regulations governing resident conduct and responsibilities during the stay in the facility.
The facility will also provide the resident with prompt notice (if any) of changes in any State or Federal laws relating to resident rights or facility rules during the resident's stay in the facility. Receipt of any such information must be acknowledged in writing.

Policy Explanation and Compliance Guidelines:
1. Prior to or upon admission, the social service designee, or another designated staff member, will inform the resident and/or the resident's representative of the resident's rights and responsibilities.
2. Information about resident rights and responsibilities will be given to the resident both orally and in writing.
3. Information about resident rights will be given to the resident in a language that the resident understands to the extent possible, considering impediments which may be created by the resident's health and mental status.
4. If a resident's knowledge of English or the predominant language of the facility is inadequate for comprehension, a means to communicate the information concerning rights and responsibilities in a language familiar to the resident will be made available and implemented.
5. The facility will have written translations of its statements of rights and responsibilities in commonly encountered foreign languages, if/as applicable.

6. Large print texts of the facility's statement of resident rights and responsibilities should be available.
7. The facility will promptly inform residents of any changes to State or Federal laws relating to resident rights or facility rules. Receipt of any such changes must be acknowledged in writing.
8. A posting of names, addresses and phone numbers of all pertinent state client advocacy groups will be available in the facility.
9. The facility prominently displays written information regarding how to apply for and use Medicare and Medicaid benefits.
10. All residents will be treated equally regardless of age, race, ethnicity, religion, culture, language, physical or mental disability, socioeconomic status, sex, sexual orientation, or gender identity or expression.

Resident Rights
The resident has the right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility.

Exercise of rights. The resident has the right to exercise his or her rights as a resident of the facility and as a citizen or resident of the United States.

a. The resident has the right to be free of interference, coercion, discrimination, and reprisal from the facility in exercising his or her rights and to be supported by the facility in the exercise of his or her rights.

b. In the case of a resident who has not been adjudged incompetent by the State court, the resident has the right to designate a representative, in accordance with State law and any legal surrogate so designated may exercise the resident's rights to the extent provided by State law.

c. The same-sex spouse of a resident must be afforded treatment equal to that afforded to an opposite-sex spouse if the marriage was valid in the jurisdiction in which it was celebrated.

d. The resident representative has the right to exercise the resident's rights to the extent those rights are delegated to the resident representative.

e. The resident retains the right to exercise those rights not delegated to a resident representative, including the right to revoke a delegation or rights, except as limited by State law.

Planning and implementing care. The resident has the right to be informed of, and participate in, his or her treatment, including:

a. The right to be fully informed in language that he or she can understand of his or her total health status, including but not limited to, his or her medical condition.

b. The right to participate in the development and implementation of his or her person-centered plan of care, including but not limited to:

c. The right to participate in the planning process, including the right to identify individuals or roles to be included in the planning process, the right to request meetings and the right to request revisions to the person-centered plan of care.

d. The right to participate in establishing the expected goals and outcomes of care, the type, amount, frequency, and duration of care, and any other factors related to the effectiveness of the plan of care.

e. The right to be informed, in advance, of changes to the plan of care.

f. The right to receive the services and/or items included in the plan of care.

g. The right to see the care plan, including the right to sign after changes to the plan of care.

h. The right to be informed in advance, of the care to be furnished and the type of care giver or professional that will furnish care.

i. The right to be informed by the physician or other practitioner or professional, of the risks and benefits of proposed care, of treatment and treatment alternatives or treatment options and to choose the alternative or option he or she prefers.

j. The right to request, refuse, and/or discontinue treatment, to participate in or refuse to participate in experimental research, and to formulate and advance directive.

k. The right to self-administer medications if the interdisciplinary team has determined that this practice is clinically appropriate.

l. Nothing in this paragraph should be construed as the right of the resident to receive the

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provision of medical treatment or medical services deemed medically unnecessary or inappropriate.

Choice of attending physician. The resident has the right to choose his or her attending physician.

Respect and dignity. The resident has a right to be treated with respect and dignity, including:

a. The right to be free from any physical or chemical restraints imposed for purposes of discipline or convenience, and not required to treat the resident's medical symptoms.

b. The right to retain and use personal possessions, including furnishings, and clothing, as space permits, unless to do so would infringe upon the rights or health and safety of other residents.

c. The right to reside and receive services in the facility with reasonable accommodation of resident needs and preferences, except when to do so would endanger the health or safety of the resident or other residents.

d. The right to share a room with his or her spouse when married residents live in the same facility and both spouses consent to the arrangement.

e. The right to share a room with his or her roommate of choice when practicable, when both residents live in the same facility and both residents consent to the arrangement.

f. The right to receive written notice, including the reason for the change, before the resident's room or roommate in the facility is changed.

g. The right to refuse to transfer to another room in the facility, if the purpose of the transfer is:

i. to relocate a resident of a SNF from the distinct part of the institution that is a SNF to a part of the institution that is not a SNF, or

ii. to relocate a resident of a NF from the distinct part of the institution that is a NF to a distinct part of the institution that is a SNF.

iii. solely for the convenience of staff.

h. A resident's exercise of the right to refuse transfer does not affect the resident's eligibility or entitlement to Medicare or Medicaid benefits.

Self-determination. The resident has the right to and the facility must promote and facilitate resident self-determination through support of resident choice, including but not limited to:

a. The resident has a right to choose activities, schedules (including sleeping and waking times), health care and providers of health care services consistent with his or her interests, assessments, and plan of care and other applicable provisions of this part.

b. The resident has the right to make choices about aspects of his or her life in the facility that are significant to the resident.

c. The resident has a right to interact with members of the community and participate in community activities both inside and outside the facility.

d. The resident has a right to receive visitors of his or her choosing at the time of his or her choosing, subject to the resident's right to deny visitation when applicable, and in a manner, that does not impose on the rights of another resident.

e. The resident has a right to organize and participate in resident groups in the facility.

f. The resident has a right to participate in family groups.

g. The resident has a right to have family member(s) or other resident representative(s) meet in the facility with the families or resident representative(s) or other residents in the facility.

h. The resident has a right to participate in other activities, including social, religious, and community activities that do not interfere with the rights of other residents in the facility.

i. The resident has a right to choose to or refuse to perform services for the facility and the facility must not require a resident to perform services for the facility. The resident may perform services for the facility, if he or she chooses, when

i. The facility has documented the resident's need or desire for work in the plan of care:

ii. The plan specifies the nature of the services performed and whether the services are voluntary or paid;

iii. Compensation for paid services is at or above prevailing rates; and

iv. The resident agrees to the work arrangement described in the plan of care.

The resident has the right to manage his or her financial affairs. This includes the right to know, in advance, what charges a facility may impose against a resident's personal funds.

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Information and communication. The resident has the right to be informed of his or her rights and of all rules and regulations governing resident conduct and responsibilities during his or her stay in the facility.

a. The resident has the right to access personal and medical records pertaining to him or herself.

b. The resident has the right to receive notices orally (meaning spoken) and in writing (including Braille) in a format and a language he or she understands, including:

i. Required notices as specified in this section. The facility must furnish to each resident a written description of legal rights which includes—

- A description of the manner in protecting personal funds,
- A description of the requirements and procedures for establishing eligibility for Medicaid, including the right to request an assessment of resources
- A list of names, addresses (mailing and email), and telephone numbers of all pertinent State regulatory and informational agencies, resident advocacy groups such as the State Survey Agency, the State licensure office, the State Long-Term Care Ombudsman program, the protection and advocacy agency, adult protective services where state law provides for jurisdiction in long-term care facilities, the local contact agency for information about returning to the community and the Medicaid Fraud Control Unit; and
- A statement that the resident may file a complaint with the State Survey Agency concerning any suspected violation of state or federal nursing facility regulations, including but not limited to resident abuse, neglect, exploitation, misappropriation of resident property in the facility, non-compliance with the advance directives requirements and requests for information regarding returning to the community.. Information and contact information for State and local advocacy organizations, including but not limited to the State Survey Agency, the State Long-Term Care Ombudsman program and the protection and advocacy system;

Information regarding Medicare and Medicaid eligibility and coverage;

a. Contact information for the Aging and Disability Resource Center; or other No Wrong Door Program

b. Contact information for the Medicaid Fraud Control Unit; and

c. Information and contact information for filing grievances or complaints concerning any suspected violation of state or federal nursing facility regulations, including but not limited to resident abuse, neglect, exploitation, misappropriation of resident property in the facility, non- compliance with the advance directives requirements and requests for information regarding returning to the community.

d. The resident has the right to have reasonable access to the use of a telephone, including TTY and TDD services, and a place in the facility where calls can be made without being overhead. This includes the right to retain and use a cellular phone at the resident's own expense.

e. The resident has the right to send and receive mail, and to receive letters, packages and other materials delivered to the facility for the resident through a means other than a postal service, including the right to:

f. Privacy of such communications consistent with this section; and

g. Access to stationary, postage, and writing implements at the resident's own expense.

h. The resident has the right to have reasonable access to and privacy of their use of electronic communication such as email and video communications and for internet research.

i. If the access is available to the facility

ii. At the resident's expense, if any additional expense is incurred by the facility to provide such access to the resident.

iii. Such use must comply with state and federal law.

The resident has a right to—

a. Examine the results of the most recent survey of the facility conducted by Federal or State surveyors and any plan of correction in effect with respect to the facility; and

b. Receive information from agencies acting as client advocates, and be afforded the opportunity to contact these agencies.

c. Privacy and confidentiality. The resident has a right to personal privacy and confidentiality of his or her personal and medical records.

i. Personal privacy includes accommodations, medical treatment, written and telephone communications, personal care, visits, and meetings of family and resident groups, but this does not

require the facility to provide a private room for each resident.

d. The resident has a right to secure and confidential personal and medical records.

e. The resident has the right to refuse the release of personal and medical records except as provided at §483.70(i)(2) or other applicable federal or state laws.

Safe environment:
The resident has a right to a safe, clean, comfortable and Homelike environment, including but not limited to receiving treatment and supports for daily living safely.

Grievances. The resident has the right to—

a. Voice grievances to the facility or other agency or entity that hears grievances without discrimination or reprisal. Such grievances include those with respect to care and treatment which has been furnished as well as that which has not been furnished; and the behavior of staff and of other residents; and other concerns regarding their LTC facility stay.

b. The resident has the right to and the facility must make prompt efforts by the facility to resolve grievances the resident may have.

Signature: _____ Date: 12-22-2022

Relationship: Daughter

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Center: Carlyle Senior Care of Fountain Inn

Resident's Name: Raymond Zeigler Date: 12-22-2022

INFORMED CONSENT FOR PHOTOGRAPHS/VIDEO/AUDIO/MAIL ASSISTANCE

Photographs, videos, and mail delivery are an integral part of everyday life in a resident's continuum of care.

Please indicate below how we may/may not involve you or your loved one in these areas of service:

Photos/Videos are routinely taken during various activities. Occasionally, positive verbal statements are recorded on video. *Circle Yes or No:*

- **Yes / No** I give consent for my/my loved one's photo to be taken/used for identification purposes.
- **Yes / No** I give consent for my/my loved one's photos to be sent to my family members.
- **Yes / No** I consent to having my/my loved one's picture made for posting within the center, i.e. birthday board, bulletin board, picture board.
- **Yes / No** I consent to having my/my loved one's picture made for release to the general public through the center newsletter, local newspaper, scrapbooks, community organizations.
- **Yes / No** I consent to having my/my loved one's picture made for release on the internet through the center's social media pages.
- **Yes / No** I consent to having my/my loved one's picture/video and/or audio recordings for in-service training within the center and/or the Carlyle Senior Care region of which the center is a part. (Example: slide show presentations)

Personal Mail is delivered to the center by the US Postal Service. Upon arrival to the center, it is delivered unopened to individual residents and assistance in opening and/or reading mail will be offered.

Circle Yes or No:

- **Yes / No** I consent to having assistance with opening and/or reading my personal mail.

I further understand that this is **not** giving consent for my picture/video/audio to be used in any marketing materials for this center. If these items are of interest to Carlyle Senior Care for marketing purposes, a separate consent form will be requested and signatures obtained.

Resident / Legal Representative: _____ Date: 12-22-2022

Witness: _____ Date: 12-22-2022

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PHONE SERVICE

As a convenience to our residents and their families, Carlyle Senior Care of Fountain Inn is equipped to offer a private telephone line in each resident's room.

If the stay of a resident is being paid by Medicare Part A, the cost is included in the per-diem paid for by that source. If the resident is covered under Medicaid, certain insurances or is private pay, there is a $25 per month charge for phone service.

With your signature, Carlyle Senior Care of Fountain Inn will gladly connect a phone in the room.

Medicare ✓

Medicaid _____

Private Pay _____

Insurance _____

Resident Name & Room Number Raymond Zeigler Room 112A

✓ Yes I would like a phone _____ No I would not like a phone

Signature _____

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ADVANCE DIRECTIVES
ACKNOWLEDGEMENT OF RECEIPT

This is to acknowledge that I have been informed of my rights and all rules and regulations regarding:

- The right to accept or refuse medical or surgical treatment
- The right to formulate and issue Advance Directives to be followed should I become incapacitated

**initial where appropriate*

___ Resident does not choose to formulate or issue any Advance Directive at this time.

___ Resident has chosen to formulate and issue an Advance Directive. Resident acknowledges that all pertinent documentation which verify those Advance Directives specified below, shall be provided to the facility for placement in the medical record.

___ Living Will

___ Healthcare Power of Attorney

___ Do Not Resuscitate

✓ Full Code

___ Do Not Hospitalize

___ Enteral Nutrition

___ Other: _____

Resident Signature		Date
Representative Signature	Daughter Relationship	12-22-2022 Date
Joyce Holliday Facility Representative Signature		12-22-2022 Date
Witness Signature		Date

Residents Name	Physician Name	Medical Record #	Room #
Raymond Zeigler	Dr. Lisa Forgione	125120	112A

Raymond Zeigler

ATTACHMENT F

Financial Questionnaire

A. Gross Monthly Income:

Please indicate, to the best of your knowledge, if you are receiving the following monthly income types by placing a circle around "Yes" or "No" above the income category. If yes, please complete the income "Amount" and "Frequency" fields.

[YES] / [NO] Social Security Income	Amount	Frequency
[YES] / [NO] Pension/Retirement Income	Amount	Frequency
[YES] / [NO] Investment Income	Amount	Frequency
[YES] / [NO] Other: _____	Amount	Frequency

B. Current Assets/Resources/Bank Accounts:

Please indicate your current assets/resources/bank accounts below by placing a circle around "Yes" or "No" above the asset category. If yes, please complete the asset "Location" and "Amount/Value" fields.

[YES] / [NO] Checking/Savings Account	Location	Amount/Value
[YES] / [NO] Checking/Savings Account	Location	Amount/Value
[YES] / [NO] Property/Real Estate	Location	Amount/Value
[YES] / [NO] Investment/Retirement Account	Location	Amount/Value
[YES] / [NO] Life Insurance Policy	Location	Amount/Value
[YES] / [NO] Other: _____	Location	Amount/Value

[YES] / [NO] The Resident is the sole individual listed on any of the above assets, etc.....:. If NO, please provide detail on any other individuals listed on any of the above items:

_____

C. Transfer of Assets/Resources:

[YES] / [NO] The Resident has not experienced any transfers of assets occurring within 5 years of the Admission Date:. If YES, please detail any and all transfer of assets that have occurred within the past 5 years:

_____

D. Financial Responsibility Kimberly Haag

[YES] / [NO] The Resident shall be responsible for remitting timely payment to the Facility for any applicable charges for which they are billed. If "No", Raymond Zeigler shall be responsible for remitting timely payment, on the Resident's behalf, to the Facility for any applicable changes for which the Resident is billed.

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a. The Resident's primary payor source is (complete the appropriate fields):

☑ **Medicare Part A or Medicare Replacement Plan**

- During days 1-20 of the Resident's Medicare stay: If the resident satisfies the Medicare qualifications, the Resident's Room and Board and Medicare included supplies and services are generally paid 100% by Medicare.
- During days 21-100 of the Resident's Medicare stay: If the resident satisfies the Medicare qualifications, the Resident's secondary payor source, if applicable, will be billed each month for the payment of the Medicare Co-Insurance. The current Medicare Co-Insurance rate is $_____ per day.

☐ **Private**

- $_____ will be due today and $_____ will be due each month by the 10th plus any ancillary charges, if applicable. _____ shall be responsible for remitting timely payment to the Facility each month?

  Note: The Resident or Representative shall provide the Facility with a 60-day notice prior to exhausting the financial resources necessary to remain as a Private Pay Resident.

☐ **Medicaid**

- If the Resident does not have nursing home Medicaid, a Medicaid application and supplementary information will need to be completed and submitted to DHHS no later than _____. (*refer to **Medicaid Application** below).*
- If the Resident's has been approved for nursing home Medicaid, the Resident's liability/recurring income will be due on admission (prorated) as well as by the 10th day of each month thereafter.
  - i. $_____ will be due on admission and $_____ will be due each month thereafter by the 10th.
  - ii. [YES] / [NO] Would you like the Facility to become Rep-Payee of Social Security Income and/or Retirement Benefits?
  - iii. If "NO", _____ shall be responsible for remitting timely payment of Social Security Income and/or Retirement Benefits (refer to Section A) each month?

☑ **Insurance** BCBS

- The Resident's insurance company will be billed each month for the care and services provided by the Facility. The Resident's secondary payor source will be billed for any portion of any unpaid 3rd party billing claim.

☐ **Medicaid Pending (refer to Medicaid Application below)**

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b. The Resident's secondary payor source is (complete the appropriate fields):

□ **Private**

- **(Medicare Co-Insurance)** Medicare Co-Insurance will be billed in the amount of $_____ per day based on total length of stay during the billing month. Medicare Co-Insurance charges will be due by the 10th day of each month.
- **(Medicaid Application – Denied)** – The Resident shall be directly billed for any outstanding and ongoing charges incurred each month for the care and services provided by the Facility.
- **(3rd Party Insurance Payor - Non-Payment)** The Resident may be directly billed for any portion of any unpaid 3rd party billing claim and any ongoing charges incurred each month thereafter for the care and services provided by the Facility.
    i. _____ shall be responsible for remitting timely payment to the Facility each month?

□ **Medicaid**

- **(Medicare Co-Insurance)** Medicaid will be billed for the Medicare Co-Insurance amount (refer to #1 Medicare) based on total length of stay during the billing month. During this time, the Resident's liability/recurring income of $_____ will be due o by the 10th day of each month thereafter.
    - Gross Monthly Income minus $30 will be due each month, during day 21-100 of the Resident's Medicare stay. $_____ will be due each month by the 10th.
    - [YES] / [NO] Would you like the Facility to become Rep-Payee of Social Security Income and/or Retirement Benefits: (Request to be Selected as Payee form attached)?
    - If "NO", _____ shall be responsible for remitting timely payment of Social Security Income and/or Retirement Benefits (refer to Section A) each month?
- **(3rd Party Payor Non-Payment)** Medicaid will be billed for any portion of any unpaid 3rd party billing claim.

□ **Insurance**

- The Resident's insurance company will be billed each month for the care and services provided by the Facility. The Resident may be directly billed for any portion of any unpaid 3rd party billing claim.

□ **Medicaid Pending (refer to Medicaid Application below)**

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MEDICAID APPLICATION:

(Medicaid Application & Form 1282 attached)

- Date application submitted (if applicable): _____.
- Date Form 1282 submitted (if applicable): _____.
- _____ will be responsible for assisting resident in completing the Medicaid Application and submitting all required information/documentation requested by DHHS: _____.
  - Phone Number: _____
  - Cell Number: _____
  - Email: _____

While resident is awaiting approval of the Medicaid Application:

- If Medicare or Medicaid Pending is the Primary Payor Source:
  - Gross Monthly Income minus $30 will be due each month, during day 21-100 of the Resident's Medicare stay. $_____ will be due each month by the 10th.
  - **[YES] / [NO]** Would you like the Facility to become Rep-Payee of Social Security Income and/or Retirement Benefits: (Request to be Selected as Payee form attached)?
  - If "NO", _____ shall be responsible for remitting timely payment of Social Security Income and/or Retirement Benefits each month?

***Note: If and when Medicaid is approved and the patient liability/recurring income amount is established by DHHS, you may receive a billing adjustment for any over/under payments.

I understand the information contained within Attachment F Financial Questionnaire and agree that the financial information I have provided to the Facility is true and accurate to the best of my knowledge.

12-22-2022
Date

Signature of Resident/Legal Representative/Responsible Party

EXTENDED SERVICES AGREEMENT

Raymond Zeigler — 12-22-2022
Resident Name — Date

1. **Dentist Authorization**
The Resident has the right to choose a dentist or may use the services of the Dentist of the Facility. It is understood that the primary Dentist must comply with all state and federal laws and requirements, as well as those that apply to dentists practicing in South Carolina nursing facilities. The Dentist selected shall bill the Resident's Medicaid, Medicare, or Private Insurance for the services rendered and that any payment will be mailed directly to the Dental Practice. The Resident may be billed for any non-covered services. It is further understood that in the event of an emergency and the Dentist cannot be reached, the Facility is granted full authority to secure emergency care for the Resident until the primary Dentist can be contacted.

I ___ do ___ do not authorize the Dentist to perform services for the above named Resident.

TBD at time of service — Aria Care Partners
Name of Dentist — Name of Dental Practice
[redacted] — Overland Park, KS 66210 [redacted]
Address — City, State, Zip, Telephone

2. **Podiatry Authorization**
The Resident has the right to choose a Podiatrist or may use the services of the Podiatrist of the Facility. It is understood that the primary Podiatrist must comply with all state and federal laws and requirements, as well as those that apply to podiatrists practicing in South Carolina nursing facilities. The Podiatrist selected shall bill the Resident's Medicaid, Medicare, or Private Insurance for the services rendered and that any payment will be mailed directly to the Medical Practice. The Resident may be billed for any non-covered services.

I ✓ do ___ do not authorize the Podiatrist to perform services for the above named Resident.

Ian Barker — 360 Care
Name of Podiatrist — Name of Practice
[redacted] — Rocky Mount, NC, 27804 [redacted]
City, State, Zip, Telephone

3. **Optometry Authorization**
The Resident has the right to choose an Optometrist or may use the services of the Optometrist of the Facility. It is understood that the primary Optometrist must comply with all state and federal laws and requirements, as well as those that apply to Optometrists practicing in South Carolina nursing facilities. The Optometrist selected shall bill the Resident's Medicaid, Medicare, or Private Insurance for the services rendered and that any payment will be mailed directly to the Medical Practice. The Resident may be billed for any non-covered services.

I ___ do ___ do not authorize the Optometrist to perform services for the above named Resident.

___ — Aria Care Partners
Name of Optometrist — Name of Practice
[redacted] — Overland Park, KS 66210 [redacted]
Address — City, State, Zip, Telephone

I acknowledge that I have been informed by the Facility and have read and reviewed the above releases, statements, and information and have signified my response for approval or denial with my initials in the appropriate space. I fully understand and accept the above information.

[signature] — 12-22-2022
Resident or Representative — Date

Joyce Holliday — 12-22-2022
Witness — Date

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CURANA HEALTH™

Patient Name: Raymond Wisler Date of Birth: [redacted]

General Consent for Care and Treatment Consent

TO THE PATIENT: You have the right, as a patient, to be informed about your condition and the recommended surgical, medical or diagnostic procedure to be used so that you may make the decision whether or not to undergo any suggested treatment or procedure after knowing the risks and hazards involved. At this point in your care, no specific treatment plan has been recommended. This consent form is simply an effort to obtain your permission to perform the evaluation necessary to identify the appropriate treatment and/or procedure for any identified condition(s).

This consent provides us with your permission to perform reasonable and necessary medical examinations, testing, and treatment. By signing below, you are indicating that (1) you intend that this consent is continuing in nature even after a specific diagnosis has been made and treatment recommended; (2) you consent to treatment by any Curana Health provider, and (3) you consent to communication via electronic and/or written format. The consent will remain fully effective until it is revoked in writing. You have the right at any time to discontinue services. You have the right to discuss the treatment plan with your provider about the purpose, potential risks, and benefits of any test ordered for you. If you have any concerns regarding any test or treatment recommended by your health care provider, we encourage you to ask questions.

I voluntarily request a physician, and/or mid-level provider (Nurse Practitioner, Physician Assistant, or Clinical Nurse Specialist), and other health care providers or the designees as deemed necessary, to perform a reasonable and necessary medical examination, testing, and treatment for the condition which has brought me to seek care at this practice.

Assignment of Professional Benefits: I hereby assign all insurance benefits and/or Medicare/Medicaid benefits to Providers and/or medical professionals providing services to me and authorize direct payment to Providers. This assignment specifically includes, but is not limited to, major medical and disability insurance proceeds and benefits. I agree to pay for any and all charges not paid pursuant to this assignment. A photocopy of this assignment shall be valid as the original.

Statement of Responsibility: I understand that I am financially responsible to the Provider as the patient, parent, guardian, and conservator or insured for all charges not covered by the above assignment. Charges may include co-payments, insurance deductibles, co-insurance or out-of-pocket expenses

I certify that I have read and fully understand the above statements and consent fully and voluntarily to its contents. I also acknowledge that I have been given a copy of the practice's Notice of Privacy Practices.

Signature of Patient or Medical Power of Attorney — Date: 12.22.22

Kimberly Haag — Printed Name of Patient or Medical Power of Attorney

Daughter — Relationship to Patient

Rev 1-10-22 V2.0

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CHE FACILITY PATIENT INTAKE FORM

CONSENT FOR TREATMENT

I consent to CHE Behavioral Health's provision of counseling, psychological, psychiatric, or other behavioral health services. I understand that behavioral health treatment may result in unexpected side effects, such as intense or uncomfortable emotions, and that it is important that I discuss any reactions to my treatment with my treating clinician. Behavioral health treatment can also provide benefits, such as a significant reduction in feelings of stress and improved self-esteem. I am aware, however, that no guarantees have been made to me about the results of services. Some alternatives to behavioral health treatment include peer self-help groups, support groups, 12-step programs, and other similar programs.

RELEASE OF INFORMATION

I authorize CHE Behavioral Health to release medical records, financial and other health information about me as described in CHE Behavioral Health's Notice of Privacy Practices, a copy of which I have received. I acknowledge and understand that CHE Behavioral Health can release my information to (a) government programs, third party insurance carriers, health service plans, health maintenance organizations, or third party administrators for payment purposes; (b) to health care providers (including my designated primary care provider) for my continuing patient care and other related purposes; and (c) to caregivers, including but not limited to family members.

FINANCIAL RESPONSIBILITY AND ASSIGNMENT OF BENEFITS

I agree that I am financially responsible for all charges related to services provided by CHE Behavioral Health. Third-party payers (including, as applicable, government programs such as Medicare and Medicaid) may make payments directly to CHE Behavioral Health. My signature on this form is my authorized signature for the filing of a claim and request for direct payment of benefits by any such payer to CHE Behavioral Health. I agree that unless CHE Behavioral Health or my attending health care provider have expressly agreed in writing with the third-party payer to accept payment from the payer as full payment, I am personally responsible to pay any charges not paid by the payer. These charges can include but are not limited to co-pays, deductibles, co-insurance amounts, and charges for non-covered services.

PRIOR EXPRESS CONSENT FOR TELEPHONE, SMS OR EMAIL CONTACT

I agree CHE Behavioral Health, or its third party vendor, may contact me by telephone at any telephone number associated with my account, including wireless telephone numbers. I also agree that if I have provided CHE Behavioral Health with an e-mail address or telephone number for a cellular phone or other wireless device, CHE Behavioral Health may contact me by text message or e-mail. This express consent applies to each such e-mail address or telephone number I provide CHE Behavioral Health now or in the future and permits such calls, texts and e-mails regardless of their purpose. I understand that calls and messages may incur access fees from my cellular provider.

ACKNOWLEDGMENT

I have read the information above, and have had the opportunity to ask questions and have them answered to my satisfaction. If I am not the patient identified on this form, I represent that I am authorized by law to agree to these conditions on the patient's behalf and am the authorized representative of the patient. A copy of this form is as effective and valid as the original.

Patient or Authorized Representative Signature:

Date: 12-22-2022

Name of Patient:
Raymond Zeigler

Name of Authorized Representative, if Authorized Representative is Signing:
Kimberly Haag

MEDICARE SECONDARY PAYER QUESTIONNAIRE
(Short Version)

Raymond Zeigler — **Resident Name**

12-22-2022 — **Date**

1. Is the Patient or Patient's Spouse actively employed? Yes___No✓
2. Is the Patient being treated as a result of an accident? Yes___No✓
3. Is the Patient entitled to Medicare Benefits as a result of End Stage Renal Disease (ESRD)? Yes___No✓
4. Is the Patient under age 65 and entitled to Medicare as a result of a disability? Yes___No✓

NOTE: If any of the above questions were answered "yes", it will be necessary that you refer to the specific section of the Medicare Development (Long Version) in order to obtain information regarding insurance coverage which may be primary to Medicare.

Resident Signature — Date

Representative — Date 12-22-2022

Joyce Holliday- Admissions/Assistant Administrator — Date 12-22-2022
Facility Representative/Title

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MEDICARE SECONDARY PAYER QUESTIONNAIRE (LONG VERSION)

Raymond Zeigler _____ 12-22-2022 _____

Resident Name **Date**

Part I

1. Are you receiving benefits from a Federal Black Lung (BL) Program?
   ___ No
   ___ Yes – Federal BL Program is primary payer for claims related to BL. Obtain the following information:

Federal BL Program: _____

Address: _____ City: _____ State: _____ Zip: _____

Policy/ID number: _____ Date benefits began: _____

2. Are the services to be paid by a government program such as a research grant?
   ___ No
   ___ Yes – Government Program is primary payer for claims related to these services.

3. Has the Department of Veterans Affairs (DVA) authorized and agreed to pay for care at this facility?
   ___ No
   ___ Yes – DVA is primary payer for claims related to these services.

4. Is the illness/injury due to a work related accident/condition and covered by a Workers' Compensation (WC) plan?
   ___ No
   ___ Yes – WC plan is primary payer for claims related to these services. Obtain the following information and go to Part III.

Name of WC Plan: _____ Policy/ID number: _____

Address: _____ City: _____ State: _____ Zip: _____

Name and address of employer: _____

Part II

1. Was illness/injury due to a non-work related accident?
   ___ No – Go To Part III
   ___ Yes – Date of Accident: _____

2. What type of accident caused the illness/injury?
   ___ Automobile
   ___ Non-Automobile
   ___ Other

Name of no-fault or liability insurer: _____

Address: _____ City: _____ State: _____ Zip: _____

Name of insured party: _____

Policy/ID number: _____ Insurance claim number: _____

No-fault insurer is primary payer for claims related to the accident. Go to Part III.

3. Was another party responsible for this accident?
   ___ No – Go To Part III.
   ___ Yes

Name of liability insurer: _____

Address: _____ City: _____ State: _____ Zip: _____

Name of insured party: _____

Policy/ID number: _____ Insurance claim number: _____

Liability insurer is primary payer for claims related to the accident. Proceed to Part III.

Part III

1. Are you entitled to Medicare based on:
   ___ Age – Go to Part IV.
   ___ Disability – Go to Part V.
   ___ ESRD – Go to Part VI.

Part IV – Age

1. Are you currently employed?
   ___ No – Date of retirement: _____
   ___ No – Never employed.
   ___ Yes

Name of employer: _____

Address: _____ City: _____ State: _____ Zip: _____

2. Is your spouse currently employed?
   ___ No – Date of retirement: _____
   ___ No – Never employed.
   ___ Yes

Name of employer: _____

Address: _____ City: _____ State: _____ Zip: _____

If the Resident answered NO to both questions 1 and 2, Medicare is primary payer unless the patient answered YES to questions in Part I and II. DO NOT PROCEED ANY FURTHER.

3. Do you have group health plan (GHP) coverage based on your own or a spouse's current employment?
   ___ No – Stop – Medicare Is Primary Payer Unless the Patient Answered Yes To Questions In Part I or II.
   ___ Yes

4. Does the employer that sponsors your GHP employ 20 or more employees?
   ___ NO – STOP – Medicare Is Primary Payer Unless the Patient Answered YES To Questions In Part I or II.
   ___ Yes – Group Health Plan (GHP) is primary. Obtain the following information:

Name of GHP: _____

Address: _____ City: _____ State: _____ Zip: _____

Policy/ID number: _____ Group ID number: _____

Name of insured: _____ Relationship to patient: _____

Part V – Disability

1. Are you currently employed?
   ___ No – Date of retirement: _____
   ___ Yes

Name of employer: _____

Address: _____ City: _____ State: _____ Zip: _____

2. Is a family member currently employed?
   ___ No
   ___ Yes

Name of employer: _____

Address: _____ City: _____ State: _____ Zip: _____

If the patient answered NO to both questions 1 and 2, Medicare is primary payer unless the patient answered YES to questions in Part I or II. DO NOT PROCEED ANY FURTHER.

3. Do you have group health plan (GHP) coverage based on your own or a family member's current employment?
   ___ NO – STOP – Medicare Is Primary Payer Unless the Patient Answered YES To Questions In Part I or II.
   ___ Yes

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4. Does the employer that sponsors your GHP employ 100 or more employees?
___NO – STOP – Medicare Is Primary Payer Unless the Patient Answered YES To Questions In Part I or II.
___Yes – Group health plan (GHP) is primary. Obtain the following information:

Name of GHP: _____

Address: _____ City: _____ State: _____ Zip: _____

Policy/ID number: _____ Group ID number: _____

Name of insured: _____ Relationship to patient: _____

Part VI – ESRD

1. Do you have group health plan (GHP) coverage?
___No – Stop – Medicare Is Primary Payer.
___Yes – Group health plan is primary. Obtain the following information:

Name of GHP: _____

Address: _____ City: _____ State: _____ Zip: _____

Policy/ID number: _____ Group ID number: _____

Name of insured: _____ Relationship to patient: _____

2. Have you received a kidney transplant?
___No
___Yes – Date of transplant: _____

3. Have you received maintenance dialysis treatment?
___No
___Yes – Date dialysis began: _____

If you participated in a self-dialysis training program, provide date training started: _____

4. Are you within the 30-month coordination period?
___No – Stop – Medicare Is Primary Payer.
___Yes

5. Are you entitled to Medicare on the basis of either ESRD and age or ESRD and disability?
___No – Stop – GHP Is Primary During The 30-Month Coordination Period.
___Yes

6. Was your initial entitlement to Medicare (including simultaneous entitlement) based on ERSD?
___No – Initial entitlement based on age or disability.
___Yes – STOP – GHP continues to pay primary during the 30-month coordination period.

7. Does the working aged or disability MSP provision apply (i.e. if the GHP is primary payer based on age or disability entitlement)?
___No – Medicare continues to be primary payer.
___Yes – GHP continues to pay primary during the 30-month coordination period.

Resident Signature _____ Date _____

Agent/Legal Representative _____ Date 12-22-2022

Joyce Holliday - Admissions/Assistant Administrator
Facility Representative/Title

12-22-2022
Date

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Authorization for Beauty/Barber Shop Services

Resident Name: Raymond Zeigler Date: 12-22-2022

As representative for Raymond Zeigler, I would like to him/her to receive services from a licensed and trained beautician. I understand the beautician/barber, because of changing circumstances, shall have the right to increase or decrease the cost of services. The Resident will be notified by the beautician/barber no less than thirty (30) days in advance of any rate of change.

Please note that Payment is due at time of service. I understand that the cost of services may be paid from a Resident's personal funds. The current rates for services are as follows:

A. Women basic wet cut.....$18
B. Women shampoo, cut, finger blow dry.....$23
C. Women shampoo, Cut & Style.....$35-44
D. Men shampoo & cut.....$15
E. Bang trim (no shampoo).....$3
F. Beard, neck trim or shape up.....$3 each-All for $8
½ razor clean up after shape up or neck trim extra.....$3
G. Eyebrow or Ear trim.....$2 each
H. Shampoo & finger blow dry.....$7
I. Shampoo & basic curl/flat iron.....$25
J. Shampoo press or flat iron for natural hair.....$35 & up
K .Shampoo & style (spiral) *Any tool.....$40-50
L. Shampoo & round brush, roller set, blowout.....$20-25
M. Permanent Wave (length, type).....$50 & up
N. Relaxers (retouch, virgin).....$40-65
O. Braid Service (cornrows).....$20-30
P. Undo braids.....$5-10
Q. Single process color (semi, demi, perm).....$10, $33-55
Rinse...$10 Semi...$30 & up Demi...$35 & up...Permanent..$45 & up

Shampooing may be required in some services
All chemical services are accompanied by a trim
Additional $10 added for a style after a chemical service (under $45) $5 (over $45)
$5 product charge for extra chemicals in a chemical service

Call daughter

All services are basic & may not be available in all facilities/locations. Please ask.

Please indicate the frequency of services preferred:

____Weekly ____Every two (2) weeks ____Monthly ✓ Other

Need Cut as soon as you can

Please indicate type of services preferred: _____

I ✓ do ____do not hereby give consent and authority for barber and beauty services to be performed for the above named Resident. I understand that I will be charged for these services at the specified rates. I acknowledge that a copy is attached for my records.

Resident Signature: _____ Date: _____

Agent/Legal Representative: [signature] Date: 12-22-2022

Facility Representative/Title [signature] Date: 12-22-2022

Attachment I

Immunization Informed Consent Record

Name: Raymond Zeigler **Date:** 12-22-2022 **Record #:** 125120

Attestation
I certify that I have received relevant Vaccine Information Statements (VIS) that provides current CDC information about the vaccine(s) I have elected to receive. I further certify that the benefits and potential side effects of such immunization(s) have been thoroughly explained to me and I do understand such information.

I have accepted the vaccine(s) checked below:

Covid Vaccine:
Name: _ ___
Date: _____ _____
_____

- ☐ **Pneumococcal Conjugate (PCV 13)**
- ☐ **Pneumococcal Polysaccharide (PPSV)**
- ☐ **Influenza (Live, Intranasal)**

I have already received the following vaccine(s) check below

- ☐ **Pneumococcal Conjugate (PCV 13)** **date received**_____
- ☐ **Pneumococcal Polysaccharide (PPSV)** **date received**_____
- ☐ **Influenza (Live, Intranasal)** **date received** 12/2022

Resident Signature_____ **date**_____

Resident Representative Signature [signature] **date** 12-22-2022

Facility Representative Signature [signature] **date** 12-22-2022

Attestation
I certify that I have received relevant Vaccine Information Statements (VIS) that provides current CDC information about the above vaccine(s) I have elected to not receive the following vaccines. I further certify that the benefits and potential side effects of such immunization(s) have been thoroughly explained to me and I do understand such information.

I do not want to receive the following vaccine(s) check below all that apply

- ☐ **Pneumococcal Conjugate (PCV 13)**
- ☐ **Pneumococcal Polysaccharide (PPSV)**
- ☐ **Influenza (Live, Intranasal)**

Resident signature_____ **date**_____

Resident Representative Signature_____ **date**_____

Facility Representative Signature_____ **date**_____

Name: Name:-

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NOTICE OF PRIVACY PRACTICES
RECORD OF ACKNOWLEGMENT

We are committed to preserving the privacy and confidentiality of your health information whether created by us or maintained on our premises. We are required by certain state and federal regulations to implement policies and procedures to safeguard the privacy of your health information. We are required by state and federal regulations to abide by the privacy practices described in the Notice provided to you including any future revisions that we may make to the notice as may become necessary or is authorized by law.

We reserve the right to change our organization's Privacy Notice at any time and to make the revised or changed notice effective for health information we already have about you as well as any information we receive in the future about you. Should we revise or change our Privacy Notice, we will post a copy of the new or revised notice in our main lobby. You may obtain a copy of the new/revised Privacy Notice from the business office.

Should you have questions concerning obtaining copies of our privacy notice, requesting restrictions on the release of your information, revoking an authorization, amending or correcting your health information, obtaining a listing of the information we disclose concerning your health information, request to inspect or copy your medical information, request that we communicate information about your health matters in a certain way or denial of access of your health information, please contact the facility Administrator. Should you have any questions concerning our organization's privacy practices, filing complaints, or any other concerns you may have relative to our organizations privacy practices, please contact:

Carlyle Senior Care, LLC
P.O. Box 12519
Florence, SC 29505
1-843-799-0756

YOU MAY ALSO FILE COMPLAINTS WITH:
U.S. Department of Health and Human Services
Washington, DC 20201
(202) 619-0257
Toll Free 1-877-696-6775

Ackowledgement

I certify that I received a copy of this organization's privacy notice and that I have had an opportunity to review this document and ask questions to assist me in understanding my rights relative to the protection of my health information. I am satisfied with the explanations provided to me and I am confident that the organization is committed to protecting my health information.

Date:_____ My Signature:_____

Printed Name:_____

Date:_____ Relationship to Individual:_____

Signature of Witness:_____

I certify that I am the authorized representative of _____ and that I have received the privacy notice on behalf of this individual and that the organization provided me with an opportunity to review this document and ask questions to assist me in understanding his/her privacy rights. I am satisfied with the explanations provided to me and I am confident that the organization is committed to protecting my health information.

Date: 12-22-2022 My Signature: [signature]

Printed Name: Kimberly Hagg

Relationship to Individual: Daughter

Date: 12-22-2022 Signature of Witness: [signature]

Raymond Zeigler

Resident Name

Incontinence Management Program

Managing Incontinence is an important part of quality resident care. An effective program includes the use of supplies such as briefs, wipes, peri-wash and barrier creams. Residents who are incontinent must be checked regularly for incontinent episodes and must be changed and must receive incontinent care as necessary. Caregivers devote a great deal of time to ensuring that residents are clean and dry. To effectively manage our incontinence program, recover the costs of incontinence supplies and additional services provided, and to assist families with budgeting for costs of incontinence care a daily charge of **$10.00** per day will be added to the cost of care statement for each resident identified as being incontinent. The definition of incontinent shall be that as determined by the minimum data set (MDS) and a resident shall be either continent or incontinent. If a resident requires any staff assistance to maintain their continence, even on a periodic basis, the daily incontinence fee shall apply. A family may choose to provide certain items related to incontinence care, however, such provision shall not change the charge of the daily incontinence fee. If the stay of a resident is being paid for by Medicare Part A, Medicaid and certain insurances, the cost of continence care may be included in the per-diem paid for by that source.

I have read, understand and agree to the Fountain Inn Nursing Home Incontinence Management Program and authorize the appropriate charge for this service to my account.

Resident/Responsible Party

12-22-2022

DATE:

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INVENTORY OF PERSONAL ITEMS

Resident Name: Raymond Zeigler

QTY.	Articles	QTY.	Items Acquired/Removed After Admission: Item	Added/Removed	Initial
	Belts/Suspenders	1	Shoes white		
	Blouses	1	Gray T-Shirt		
	Dresses	1	Gray Socks		
	Gloves/Hats	1	flame pants		
	Housecoats/Robes/Coats	1	blue jacket		
	Nightgowns/pajamas	1	watch		
	Purses				
	Electric razor/Shaving Kit				
	Shoes/Slippers				
	Shorts				
	Slacks				
	Slips				
	Shirts				
	Suitcases				
	Suits/Ties				
	Sweaters				
	Hearing aid: ☐ Rt ☐ Lt				
	Dentures: ☐ Up ☐ Low ☐ Part				
	Eyewear				
	Wheelchair/Cane/Walker				
	Brace/Prosthesis				
	Television				
	Radio/cassette player/headsets				
	Chair				
	Dresser				
	Pictures				
	Comforter/quilt/afghan				
	Clock				
	Rings				
	Watches				

Certification of Receipt

On Admission	On Discharge
Signed [signature] Resident or Resident Representative Date 12-22-2022	Signed _____ Resident or Resident Representative Date
Signed Joyce Holliday Facility Representative Date 12-22-2022	Signed _____ Facility Representative Date

*The Facility shall not be responsible for lost items. The Facility advises the Resident of the risk involved in keeping valuables (such as jewelry, large sums of money, hearing aids) in the room rather than depositing them in a safe and secure place. In addition, the Resident should strongly consider purchasing private insurance should he/she decide to maintain valuable personal property within the Facility.

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PHARMACY/PATIENT AGREEMENT

Carlyle Senior Care of Fountain Inn
Name of Facility

Fax # 1-866-840-8604

Pruitt Health (hereinafter referred to as "Pharmacy")/328 Riverchase Way Suite A, Lexington, SC 29072 / 800-224-4088
Pharmacy Name | Address | City, State, Zip | Telephone

To provide billing services and determine eligibility on your behalf, please complete the following information.

Raymond Zeigler	[redacted]	[redacted]	[redacted]
Patient's Name	Social Security #	Medicare#	Date of Birth

Relationship to Insured: ☑ Self ☐ Spouse ☐ Child ☐ Legal Representative

Insured Name_____ Social Security#_____

Reminder: Please attach copy of all insurance cards (front and back).
Each month, an itemized bill for non-covered services will be sent to you. This bill is payable directly to the Pharmacy upon receipt. If payment is not received by the next statement cycle, a 1.5% late fee will automatically be charged. To ensure proper credit, please include the account number on your check. The Pharmacy also accepts payments via major credit cards and money orders for you convenience.

Request of Provider Services

I understand that I am under the supervision and control of my attending physician. I understand too, that my physician has prescribed the therapy, equipment, and/or supplies noted as part of my treatment. I understand that the Pharmacy services do not include diagnostic, prescribing drugs and therapy for my condition and otherwise supervising and controlling my medical care.

Agreement to Pay

In consideration of Pharmacy supply products and services ordered by the patient or on behalf of the patient, the undersigned patient, spouse, guarantor and/or guardian agrees that each of them is responsible to the Pharmacy for payment to the Pharmacy for such products and services provided to the patient, unless they are a Medicare Part B recipient where the Pharmacy has accepted assignment for a Medicaid recipient. Additionally, I agree to be responsible for the full amount of charges if no payment is made for claims submitted to an insurance company, in addition to any collection cost incurred, or if my physician or I fail to provide, within forty-five (45) days, the information necessary to submit the claim for services. I agree to transfer immediately to the Pharmacy any payment made directly to me for services provided by the Pharmacy on an assigned basis.

Assignment of Benefits

I hereby authorize the Pharmacy to request on my/our behalf and to collect all public and private insurance coverage benefits due for the products and services supplied to the patient by the company. In the event payments for insurance benefits are made directly to any of the undersigned, the payee will endorse the Pharmacy all checks for such payment.

Release of Information

The undersigned authorizes the insurer(s) and any other third party payor who provides the patient with coverage to disclose to the company any information regarding such coverage, including but not limited to (a) payment made by such insurer(s) or third party payor(s) to any of us, for therapy rendered to the patient by the Pharmacy, and (b) the scope and extent of coverage available form time to time. The patient authorizes all medical personnel to provide information to the Pharmacy concerning his/her medical history, as it may relate to customers' therapy.

The undersigned consents to the review of his/her records including medical records by any federal, state, or accrediting body or agency as required by the regulatory, licensing or accrediting body.

The undersigned certifies that he or she has read the foregoing and received a copy, as well as a copy of the Patient Rights and Responsibilities and Medicare Supplier Standards document on the reverse side of this form. The undersigned also certifies the he/she is the patient, or is authorized by the patient as the patient's general agent, to execute the above and accept its terms. Note: A duplicate copy of this agreement and consent will be considered the same as an original.

Patient's Signature_____ Date_____

Spouse/Guarantor/Guardian's Signature [signature] Date 12-22-2022

Relationship to Patient Daughter Reason Patient Cannot Sign Confusion

Address_____ Phone# [redacted]

Witness Signature Joyce Holliday Date 12-22-2022

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Resident Directory Instructions

I do /do not ___ want my name included as part of this Facility's Resident Directory. I understand that if I do not consent to this disclosure, visitors such as family and friends, outside phone callers, and delivery people, may not be able to contact me.

I do /do not___ want my location included as part of this Facility's Resident Directory.

I do /do not ___ want my name posted outside the door to my room.

I do /do not ___ consent to the disclosure of my religious affiliation to members of clergy. I understand that if I do not consent to this disclosure, members of the clergy, who do not know to ask for me by name, may not be able to contact me.

I consent to the disclosure of my directory information, specifically my name and location, to only the following people

Name	Goes By	Relationship

Signature of Resident or Representative | 12-22-2022 Date | Time

Kimberly Haag
Print Name

Daughter
Relationship of Representative to Resident

Please describe the Representative's authority to act on behalf of the Resident

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USE OF RESTRAINTS

Raymond Zeigler
Resident Name

12-22-2022
Date

1-866-840-8604

Definition of a Physical Restraint:

- Any manual method or physical or mechanical device, material, or equipment attached or adjacent to the resident's body that the individual cannot remove easily which restricts freedom of movement or normal access to one's body.

Benefits:

- A restraint may be beneficial when treating a resident's medical condition and/or assisting the resident in attaining or maintaining his/her highest practicable level of physical or physiological well-being. Potential benefits may include, but are not limited to:
  - Preventing falls or other accidents which could result in injury
  - Facilitating medical treatment
  - Protecting the resident or other residents
  - Providing an increased feeling of safety and/or security
  - Other:_____

Potential Negative Outcomes:

- Potential negative outcomes of restraint use include, but are not limited to, declines in the resident's physical functioning and muscle condition, contractures, increased incidence of infections and development of pressure ulcers, delirium, agitation and incontinence. Restraint use has the potential to create an accident hazard. Residents have been found in some cases to increase the incidence of falls or head trauma due to falls and other accidents (e.g. strangulation, entrapment). Finally, resident who are restrained may face a loss of autonomy, dignity, and self-respect, and may show symptoms of withdrawal, depression, or reduced social contact.

It is the policy of this facility to use restraint(s) only after assessment and care planning deem it appropriate to treat the resident's medical symptoms and assist the resident in attaining or maintaining his or her highest practicable physical and psychosocial well-being, and other methods or interventions are inadequate. In all instances, the least restrictive, which is effective, will be used.

The facility will monitor the resident's status and adjust care, as necessary. The facility will have a systematic and gradual process to reduce the use of restraint(s) to unsure the resident safety while treating the resident's medical symptoms.

I have read and understand the definitions, benefits and potential negative outcomes to restraint use.

Resident Signature — Date 12-22-2022

Representative Signature — Date 12-22-2022

Facility Representative Signature — Date

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MEDIATION AND BINDING ARBITRATION AGREEMENT

made pursuant to the

FEDERAL ARBITRATION ACT (9 U.S.C. § 1 *et seq.*)

and pursuant to the

SOUTH CAROLINA UNIFORM ARBITRATION ACT

(S.C. CODE ANN. §§ 15-48-10 *et seq.*)

This MEDIATION AND BINDING ARBITRATION AGREEMENT is entered into on December 22, 2022, by and between Carlyle Senior Care (hereinafter "Facility") and Raymond Zeigler ("Resident") and/or Kimberly Haag, the Resident's Legally Designated Representative, if any.

THIS IS A BINDING AGREEMENT TO ARBITRATE ALL CLAIMS ARISING OUT OF THE RELATIONSHIP BETWEEN RESIDENT AND FACILITY. THE EXPRESS INTENT OF THE PARTIES IS TO SUBMIT ALL CLAIMS TO BINDING ARBITRATION EXCEPT AS EXPRESSLY SET FORTH HEREIN. ANY AMBIGUITY OR DOUBT AS TO THE INTENDED SCOPE OF THIS AGREEMENT SHALL BE RESOLVED IN FAVOR OF SUBMITTING ALL CLAIMS TO BINDING ARBITRATION.

In this MEDIATION AND BINDING ARBITRATION AGREEMENT (hereinafter "Agreement"), the following definitions apply:

"Resident" "you" and "your" refers to the Resident identified above who is being admitted to the Facility. Resident also includes Resident's Legally Designated Representative(s), Resident's Responsible Party, Resident's family, and anyone situated in such a manner so as to assert a Claim against the Facility.

"Resident's Legally Designated Representative" refers to the person who possesses actual legal authority to conduct affairs and make decisions on behalf of the Resident. This person includes, but is not limited to, the person who has been appointed as Guardian for the resident, and/or the person who possesses a Power of Attorney executed by the Resident.

"Resident's Responsible Party" refers to _____, who is the person identified as the Resident's Responsible Party in the Admission materials executed by Resident and/or the Resident's Legally Designated Representative, and who has agreed to serve as the primary point of contact for communications between the Facility and the Resident's family.

"Facility" refers to the Facility identified above, and includes the Facility's employees, agents, subcontractors, and parent and affiliated companies (including, but not limited to, Cooke Management Company, Inc.) and their employees and agents.

"Parties" and **"party"** refers to persons and entities defined within the scope of "Resident" and "Facility."

"Claim(s)" include any and all claims, disputes or controversies of any and every variety between the Parties relating in any respect to the relationship and interactions of the Parties. The Parties' express intent is for this Agreement to apply to Claims that presently exist, as well as any Claims as may arise or come to exist in the future. Except as expressly set forth herein or as excluded in Section II(c) of the Agreement, it is the intent of the Parties that all Claims be resolved between the Parties via binding arbitration.

The Parties agree that any ambiguity with regard to whether or not the Claim(s) fall within the scope of this Agreement should be construed in favor of submitting the Claim(s) to binding arbitration pursuant to the terms of this Agreement.

All Claims must be asserted by the Parties within the time allowed by the applicable statute(s) of limitation.

I. **Voluntary Mediation:** This Agreement provides for voluntary mediation whereby the Parties may, upon mutual agreement, engage in mediation before resorting to binding arbitration. Mediation is a form of alternative dispute resolution whereby an impartial third party is selected by the Parties to preside over a meeting of the Parties and/or their representatives so to facilitate communication between the Parties, with a goal of bringing the Parties together and negotiating the terms for a mutually agreeable Settlement Agreement. Depending upon the location of the litigation and the nature of the Claims, South Carolina courts presently requires that litigants engage in pre-suit mediation. This Agreement will make such mediation voluntary. The goal of mediation is to resolve the dispute promptly, amicably, and without requiring either Party to engage in the significant time and expense required in the litigation process. The advantage of mediation is that it allows the Parties the opportunity to establish mutually agreeable terms to resolve any Claims. If the Parties do not mutually agree to mediate any Claims between them, then they may proceed directly to arbitration.

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(a) **Selection of the Mediation Site and Mediator:** If the Parties mutually agree to mediate any Claims that may arise between them, then the mediation will be conducted at a location either within the County in which the Facility is situated, or at a location mutually agreeable to the Parties. The Parties shall mutually select a certified mediator. The costs of the mediation shall be borne equally by each Party, and each Party shall be responsible for their own legal fees. If the Parties cannot agree upon a location or a mediator for the mediation, or if the Parties are unable to resolve their Claims through mediation, then the Claims shall be resolved by binding arbitration as set forth in this Agreement.

(b) **Settlement at Mediation:** Although the mediation process is voluntary and non-binding, should the Parties reach a settlement in the course of the Mediation that is memorialized into a Settlement Agreement executed by the Parties, this Settlement Agreement's terms and conditions shall be binding upon the Parties.

II. **Binding Arbitration:** Arbitration is a specific method of resolving Claim(s) between the Parties outside of the traditional state or federal court system. Instead of a judge and/or jury resolving the Claim(s), a neutral third party ("Arbitrator") renders the decision, which is binding on both Parties. Generally, an Arbitrator's decision is final and not open to appeal. The Arbitrator will hear both sides present their Claim(s) and their responses to the other Party, and then render a decision based on fairness, law, common sense and the rules established by the arbitration association selected by the Parties in Section II(b) of this Agreement. Because this arbitration is binding, it is the only legal process available to the Parties. Binding Arbitration has been mutually selected by the Parties with the goal of reducing the time, formalities and cost of utilizing the court system.

(a) **Intent of the Parties.** The Parties expressly intend that all matters be resolved by arbitration, including, but not limited to, resolving any questions regarding the applicability and/or enforceability of this Agreement as well as resolving all Claims, existing presently or in the future, between the parties without regard for whether such Claims are presently known or unknown.

(1) **Scope of Agreement:** Unless the Claims are resolved by mediation, or are expressly excluded in Section II(c), or are excluded from the scope of this Agreement by mutual written consent of the Parties, the Parties expressly intend that the binding arbitration provisions of this Agreement apply to any and all Claims arising out of the relationship between the Parties, without regard for the nature of the Claim(s), the facts alleged to support or refute the Claim(s), or circumstances from which the alleged Claim(s) arose. This means that neither the Facility nor the Resident will be able to file a lawsuit in court to resolve any Claim(s) against the other. It also means that both the Facility and the Resident are relinquishing their right to a trial by judge and/or jury to resolve any Claim(s) against the other. The Parties freely choose arbitration, and the Parties understand that the arbitrator's decision is final and binding.

(2) **Implementation of Arbitration:** The Parties expressly intend to arbitrate all Claims; therefore, should the determination be made that a Claim is not subject to arbitration pursuant to the Federal Arbitration Act, then the Parties intend that such Claim shall be arbitrated in accordance with the South Carolina Uniform Arbitration Act. Similarly, should the determination be made that any Claim is not subject to arbitration pursuant to the South Carolina Uniform Arbitration Act, then the Parties intend that such Claim shall be arbitrated in accordance with the Federal Arbitration Act. In the event that the determination is made that any Claim is not subject to arbitration pursuant to either the Federal Arbitration Act or the South Carolina Uniform Arbitration Act, then the Parties hereby stipulate and agree to conduct voluntary binding arbitration in accordance with Section II(b). The Parties agree that this specific provision of this Agreement is enforceable by specific performance by either Party. In the event that despite the Parties' express intent that all Claims be resolve by binding arbitration, it is determined that only certain claims may be arbitrated, then the Parties agree that binding arbitration of those claims shall proceed. This binding arbitration shall proceed during the pendency of any appeal or any other litigation in civil court, unless both Parties mutually agree that this arbitration be stayed.

(3) **Involvement of Interstate Commerce:** The Facility expressly represents and provides notice to the Resident that the Facility must and will engage in interstate commerce in the course of its relationship with Resident. The Resident is aware of this fact, acknowledges this fact, and explicitly expects that interstate commerce will be involved in the course of the relationship between the Parties. The Resident agrees that (s)he could specifically seek residency at a different facility if Resident expected and/or desired to reside in a facility that did not and would not engage in interstate commerce in the course of the relationship between the Parties, which includes, but is not limited to, the provision of care to the Resident. Therefore, it is the express intent and expectation of the Parties that the care provided by the Facility to the Resident will and does involve, implicate, and affect interstate commerce.

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The Parties expressly acknowledge and agree that the relationship between the Parties, which includes, but is not limited to, the provision of care, products, and services to the Resident by and through the Facility, necessarily will, and in fact does, necessitate transaction(s) involving and affecting interstate commerce by needing and in fact utilizing people, information and tangible materials that originate out of state and that must be and in fact are transported across state lines to the Facility. The extent of this involvement and affect on interstate commerce includes, but is not limited to: (1) the equipment utilized by the Facility in the course of both general operations and the provision of specific care to the Resident; (2) the medicines prescribed to the Resident; (3) the supplies sought by, prescribed to, and/or provided to the Resident; (4) the staffing of personnel, specialists, and independent contractors at the Facility in the course of the care and treatment of Resident; (5) the information used in the course of the care and treatment of the Resident; and (6) the food and other products offered by the Facility to Resident. Additionally, the Facility is required to comply with state and federal statutes and regulations. Further, the Facility accepts payments from federal programs as well as from out of state providers and out of state income sources.

In the course of providing care, products and services, the Facility cannot and does not limit itself to utilizing only items and services that originate in South Carolina. Therefore, the relationship between the Parties specifically contemplates and requires the purchase, acquisition, and/or utilization of materials, services, and items from outside the state of South Carolina that must be transported across state lines to the Facility, thereby involving, implicating and substantially affecting interstate commerce. The Parties acknowledge and agree that the Facility would be unable to fulfill its obligations to Resident without involving, implicating and substantially affecting interstate commerce within the scope and meaning of Congress' Commerce Clause.

(b) **Procedure for Arbitration**. The Arbitration shall be administered by one of the entities identified below and mutually agreed upon and designated by the Parties:

Option 1: Carolina Dispute Settlement Services); or

Option 2: National Arbitration. Forum

If the options identified above are not mutually agreeable to the Parties, an alternate arbitration forum and/or qualified arbitrator may be mutually agreed upon and identified below:

Option 3: _____

We selection Option _____ (choose options 1, 2 or 3 and initial below)

Initials: _____ _____ KH _____ _____

Resident	Resident's Legally Designated Representative	Resident's Responsible Party	Facility

Any Request for Arbitration of Claim(s) ("Request") must be submitted in writing to the Arbitrator at the address set forth below in accordance with the procedural rules established by that Arbitrator existing at the time the Request is made. A copy of the Request must also be sent to the Facility at the address set forth below. In the event the Arbitrator is unable or unwilling to serve, then the Resident must provide written Notice to the Facility within thirty (30) days of the Resident's receipt of notice of the Arbitrator's unwillingness or inability to serve. Within thirty (30) days of receipt of this Notice from the Resident, the Facility shall select another neutral arbitration service, either from the list below or from another source, and this alternate arbitration service's procedural rules shall apply to the arbitration proceeding. The Resident's failure to submit a Request within the period set by the applicable state of limitations for the Claim(s) to which the Request applies shall operate as a bar to such Claim(s). A copy of the applicable Rules and Procedures for Arbitration may be acquired from the selected Arbitrator, either online or directly. Judgment on any award rendered by the Arbitrator may be entered in any court having appropriate jurisdiction.

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Carolina Dispute Settlement Services:
234 Fayetteville Street Mall, Suite 200
Raleigh, N.C. 27601
Telephone: 1-919-755-4646
Fax: 1-919-155-4644
www.notrials.com

National Arbitration Forum
P.O. Box 50191
Minneapolis, MN 55405-0191
Telephone: 1-800-474-2371
Fax: 952-345-1160
www.adrforum.com

Facility:

_____

Option 3 Alternate Arbitrator:

_____

(c) **Exclusion from Arbitration.** The Parties expressly agree to exclude the following Claim(s) from binding arbitration: (1) guardianship proceedings resulting from the alleged incapacity of the Resident; (2) Claim(s) involving less than Five Thousand Dollars ($5,000.00); (3) Claim(s) brought after the expiration of the applicable statute(s) of limitation; and (4) any Claim that the Parties mutually agree to resolve in a manner not entailing binding arbitration, either as set forth at the time the Parties execute this Agreement, or as later mutually agreed upon in writing by both Parties. In situations involving Claim(s) excluded from binding arbitration, neither the Resident nor the Facility is required to use the arbitration process, but the Parties may mutually agree to do so should they so choose. Any legal actions related to excluded Claim(s) may be filed and litigated in any court possessing jurisdiction. Additionally, this Agreement shall not impair the rights of the Resident to appeal any transfer and/or discharge action initiated by the Facility to the appropriate administrative agency if such transfer or appeal is governed by State or Federal law prescribing the instances in which a resident may be transferred or discharged, and after the exhaustion of such administrative appeals, to appeal to the court exercising appellate jurisdiction over that administrative agency.

(d) **Right to Legal Counsel.** Both Parties have the right to be represented by legal counsel in any binding arbitration proceedings initiated under this Agreement. Because this Agreement addresses important legal rights, the Facility encourages and recommends that the Resident obtain the advice and assistance of legal counsel to review the legal significance of this binding arbitration provision either prior to signing this Agreement, or subsequent to signing but within the rescission period. Should any Party fail to obtain legal counsel at any point, they do so willingly and voluntarily.

(e) **Location of Arbitration.** The arbitration will he conducted in the County in which the Facility is located, or in accordance with the Arbitrator's applicable rules of procedure (for instance, certain Arbitrators may require that the arbitration take place at their offices), or at another site that is mutually agreeable to the Parties. In the event that the Parties cannot mutually agree upon a location for the arbitration, the Parties shall be bound by the Arbitrator's decision of the location in which the arbitration is to occur.

(f) **Applicable Law.** The Parties agree that the Arbitrator shall apply South Carolina law in order to resolve any state law Claims related to their relationship. The Parties agree that the arbitrator shall apply federal law as set forth by the United State Supreme Court, the Fourth Circuit Court of Appeals and the District Court of South Carolina to any Claims premised upon federal statutes. The Parties agree that the application of South Carolina law in this choice of law provision shall not be construed to prevent the Parties from arbitrating all Claims arising from their relationship. For instance, if a Claim is deemed not able to be arbitrated under the South Carolina Uniform Arbitration Act, then this choice of law provision shall not be construed to prevent application of the Federal Arbitration Act to resolve the Claim via binding arbitration. Further, the Parties agree that the legal maxim that ambiguities should be construed against the party that drafted the document shall not apply; rather the Parties agree that ambiguities, if any, are to be construed in favor of submitting all Claims to binding arbitration.

(g) **Warranty of Capacity and Comprehension.** Resident and, if present, Resident's Responsible Party hereby affirm that (s)he possesses the mental capacity to execute this Agreement and that (s)he has not been diagnosed as incapacitated by a physician or adjudicated as incapacitated by a Court. Both Resident and the Resident's Responsible Party agree and affirm that they have reviewed and understand this Agreement.

_____ _____

Resident Resident's Responsible Party

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In the event that either Resident or Resident's Responsible Party have any concerns or reservations regarding the Resident's capacity, please identify them on space below:

_____

_____

_____

In the event that the Resident is incapacitated, the Resident's Legally Designated Representative hereby affirms and warrants that (s)he possesses actual legal authority to act and make decisions on behalf of the Resident, and that (s)he has entered into this Agreement voluntarily after reviewing and understanding its terms, and (s)he believes that this Agreement is in the best interests of the Resident.

_____
Resident Legally Designated Representative

(h) **Allocation of Costs and Fees for Arbitration.** The costs of the arbitration shall be shared equally by each party, and each party shall be responsible for their own legal fees, costs, and expenses.

(i) **Severability.** In the event any provision of this Agreement is determined to be invalid, illegal, or unenforceable, the offending provision shall be severed from the Agreement, and the validity, legality, and enforceability of the remaining provisions shall not be affected or impaired thereby. This provision reflects the Parties intent to arbitrate all Claims.

(j) **Limited Right to Rescind this Agreement.** Resident or, in the event of Resident's incapacity, Resident's Legally Designated Representative, has the right to rescind this Agreement by notifying the Facility in writing within thirty (30) days of the date set forth above. This right to rescind is fully set forth in the attached Notice of Right to Rescind ("Notice"). This Notice must be properly executed by either the Resident or the Resident's Legally Designated Representative and sent via certified mail to the attention of the Facility's Administrator at the address set forth above. The Notice must be post-marked within thirty (30) days of the execution of this Agreement. The Notice may also be hand-delivered to the Administrator and the acknowledgement of the Notice's receipt must be executed and dated within the same thirty (30) day period. The filing of a Claim in a court of law within the thirty (30) days provided for above will automatically rescind this Agreement without any further action by Resident or Resident's Legally Designated Representative.

(k) **Entire Agreement.** The Parties agree that, with respect to the subject matter hereof, this Agreement constitutes the full and complete understanding and agreement of the Parties. The Parties also agree that there is absolutely no agreement or reservation not clearly expressed herein, and that the execution hereof is with the full knowledge that this Agreement covers all possible Claims between the Parties. This Agreement shall be binding upon and inure to the benefit of the Parties hereto, their respective heirs, personal representatives, successors, purchasers and assigns.

_____
Resident

_____
Responsible Person

_____
Resident Legally Designated Representative

_____ Title Admissions
Duly Designated Facility Representative

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EXHIBIT C

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NOTE: §488.426(a)(1) and(2) - Transfer of residents, or closure of the facility and transfer of residents, gives authority to the State for temporary facility closure in emergency situations. If the State Survey Agency approves a facility's temporary relocation of residents during an emergency with the expectation that the residents will return to the facility, this would not be regarded as a facility closure under these requirements and the notification requirements would not be applicable. However, if a facility ultimately closes permanently due to an emergency, the administrator is required to provide proper notifications and follow the procedures outlined in this guidance.

F847 Entering Into Binding Arbitration Agreements

(Rev. 211; Issued: 02-03-23; Effective: 10-21-22; Implementation: 10-24-22)

§483.70(n) Binding Arbitration Agreements

If a facility chooses to ask a resident or his or her representative to enter into an agreement for binding arbitration, the facility must comply with all of the requirements in this section.

§483.70(n)(1) The facility must not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility and must explicitly inform the resident or his or her representative of his or her right not to sign the agreement as a condition of admission to, or as a requirement to continue to receive care at, the facility.

§483.70(n)(2) The facility must ensure that:

(i) The agreement is explained to the resident and his or her representative in a form and manner that he or she understands, including in a language the resident and his or her representative understands;

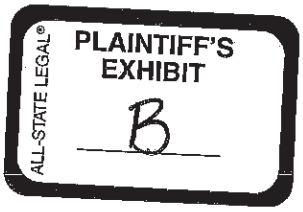
(ii) The resident or his or her representative acknowledges that he or she understands the agreement…

§483.70(n)(3) The agreement must explicitly grant the resident or his or her representative the right to rescind the agreement within 30 calendar days of signing it.

§483.70(n)(4) The agreement must explicitly state that neither the resident nor his or her representative is required to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility.

§483.70(n)(5) The agreement may not contain any language that prohibits or discourages the resident or anyone else from communicating with federal, state, or local officials, including but not limited to, federal and state surveyors, other federal or state health department employees, and representative of the Office of the State Long-Term Care Ombudsman, in accordance with §483.10(k). . .

NOTE: *The requirements at 483.70(n) went into effect on September 16, 2019. This guidance is intended for the review of arbitration agreements entered into on or after September 16, 2019.*



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INTENT

To ensure that long-term care facilities inform residents or their representatives of the nature and implications of any proposed binding arbitration agreement, to inform their decision on whether or not to enter into such agreements.

The requirements at F847emphasize the residents' or their representatives' right to make informed decisions and choices about important aspects of residents' health, safety and welfare. Facilities may present residents or their representatives the opportunity to utilize a binding arbitration agreement to resolve disputes at any time during a resident's stay as long as the agreement complies with the regulations at §483.70(n)(1)-(5).

DEFINITIONS

***Arbitration**: a private process where disputing parties agree that one or several other individuals can make a decision about the dispute after receiving evidence and hearing arguments.* [1]

***Binding Arbitration Agreement (Arbitration Agreement or Agreement):** a binding agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not. The decision is final, can be enforced by a court, and can only be appealed on very narrow grounds.* [2]

***Pre-dispute binding arbitration agreement (pre-dispute arbitration agreement or pre-dispute agreement):** A binding agreement to resolve a future unknown dispute with an arbitrator prior to any issue or dispute arising.*

***Post-dispute binding arbitration agreement (post-dispute arbitration agreement, or post-dispute agreement):** A binding agreement signed after the circumstances of the dispute have occurred to resolve the dispute with an arbitrator.*

***Dispute:** A disagreement, controversy, or claim amongst parties where one party claims to have been harmed.*

***Judicial Proceedings**: any action by a judge (i.e., trials, hearings, petitions, or other matters) formally before the court.*

GUIDANCE §483.70(n)(1)(2)(i)(ii)(3)-(5)

Over the years, long-term care facilities and residents have used arbitration to resolve many disputes. Parties subject to arbitration give up their right to have some or all claims heard in court (The arbitration epidemic: Mandatory arbitration deprives workers and consumers of their rights, https://www.epi.org/publication/the-arbitration-epidemic/, Accessed 1/6/2021). The results of arbitration decisions are typically not disclosed to the public and arbitrators' decisions are generally final and binding with little or no opportunity to initiate judicial proceedings that challenge unfavorable decisions.

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Concerns have been raised about the fairness and transparency related to both the means by which these agreements are created and the fairness of the arbitration processes themselves in the specific context of long-term care facilities. For example, an individual is often admitted to a long-term care facility directly from the hospital after a decline in their health. These individuals are often quite ill and are not in a position to engage in meaningful negotiations over the terms of an arbitration agreement or to coordinate care at another facility. As a result, this is quite often an extremely stressful situation with limited time to review documents before signing them. During this time, long-term care facilities have often required individuals to sign pre-dispute arbitration agreements to obtain health care. These factors, among others, impede individuals' ability to obtain care and simultaneously make it extremely difficult for residents or their representatives to make an informed decision about arbitration. Therefore, asking individuals to commit to binding arbitration agreement in these situations may not represent the best option in terms of advancing the health care of residents.

Use of a binding arbitration agreement must be voluntary and must be clearly communicated to the residents or their representatives as optional and not required as a condition of admission or to continue to receive care at the facility. The agreement must be explained so that the resident or his or her representative understands the terms of the agreement. This should include an explanation that the resident may be giving up his or her right to have a dispute decided in a court proceeding. And residents and their representatives must be provided 30 days after signing to fully review and potentially rescind any agreement that was not understood at the time of admission.

Pre- and Post-dispute Arbitration Agreements: *Binding arbitration agreements may be offered either before (pre-dispute) or after (post-dispute) a dispute arises. A pre-dispute binding arbitration agreement is an agreement to resolve an unspecified future dispute(s) through arbitration. Disputes may vary from a non-life threatening situation such as a financial disagreement, up to and including significant concerns such as abuse, neglect, and/or wrongful injury or death of a resident. By entering into a pre-dispute binding arbitration agreement, the parties are not settling an existing dispute but deciding, in advance, the forum in which any future disputes would be resolved. For example, if a resident enters into a pre-dispute arbitration agreement when admitted to a facility, and a few months later the facility is alleged to have wrongfully caused a type of harm covered by the agreement, such as abuse, the resident cannot seek legal action through the traditional court system. Rather, they must resolve the dispute through the agreed-upon arbitration proceeding.*

Facilities wishing to utilize pre-dispute binding arbitration agreements will generally offer these arrangements prior to, or early in the admission process. Facilities must not require residents or their representatives to enter into a binding pre-dispute arbitration agreement as a condition of being admitted to the facility or as a requirement for continued care.

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Post-dispute arbitration agreements involve the use of the arbitration process after a dispute occurs, which would otherwise be resolved in a court proceeding. In such cases, following an issue which gives rise to a dispute, the facility may propose using an arbitrator to resolve the dispute, rather than engage in litigation in court. When the facility wishes to use a post-dispute binding arbitration agreement, existing legal authorities generally provide that the facility must not compel, pressure, or coerce a resident or his or her representative to enter into a binding arbitration agreement, and the regulation provides that the facility must not require arbitration as a condition of receiving continued care at the facility.

Requirements for Arbitration Agreements - Transparency in the Arbitration Process: *The requirements at §483.70(n)(2)(i) specify that the arbitration* ***"agreement is explained to the resident and his or her representative in a form and manner that he or she understands, including in a language the resident and his or her representative understands."*** *It is important that the arbitration process is transparent. This means that facilities should take every step to meet the resident's needs or special accommodations (e.g. literacy level, font size, format, language, etc.) when explaining the arbitration agreement. When explaining the agreement, facilities must identify and use the resident's or their representative's preferred communication method, including language, to ensure understanding of the arbitration agreement. The terms and conditions of arbitration agreements must be clearly explained to the resident or his or her representative.*

The requirement at §483.70(n)(2)(ii) specifies that ***"the resident or his or her representative acknowledges that he or she understands the agreement."*** *After the arbitration agreement is explained in a manner and form the resident or their representative understands, the facility must ensure there is evidence that the resident or their representative has acknowledged understanding of the agreement. In some cases, the binding arbitration agreement may specify that the resident or his or her representative acknowledges understanding by signing the document. When a signature is used to acknowledge understanding, additional evidence may be needed to establish that in fact the resident or their representative understood what he or she was signing. It may not be sufficient that the resident or their representative signed the document. It is also important that facilities clarify when a signature is used to acknowledge understanding, when it indicates consent to enter into an agreement, or is used for both purposes.*

Surveyors should determine how the facility ensures residents or their representatives understood the terms of the binding arbitration agreement, and how this understanding is acknowledged. Surveyors must verify through interview and record review, that the resident or their representative understood what they were signing. In situations where the resident may have cognitive impairment, surveyors should refer to the medical record to identify the resident's health care decision-making capacity at the time the agreement was offered, explained, and entered into.

Arbitration Agreements Embedded within other Contracts or Agreements: *Binding arbitration agreements may not necessarily be a stand-alone document. Facilities may choose to offer pre-dispute arbitration agreements at the time of admission. Some facilities*

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may embed the arbitration agreement within the admission agreement, contract, or other documents. In these cases, all of the requirements related to arbitration agreements still apply. For example, the facility must explain that the admissions agreement includes a binding arbitration agreement, and inform the resident of all of their rights related to this agreement in a form and manner that they understand. Additionally, the facility should clearly distinguish the arbitration agreement from the admission agreement, so that, residents or their representatives have a clear understanding of each agreement, and are able to enter into or decline the arbitration agreement. In other words, residents must be allowed to sign an admissions agreement without consenting to the facility's arbitration agreement. Surveyors should determine how the facility ensures residents or their representatives are made aware of arbitration agreements which are embedded within another document. Surveyors should also obtain copies of any documents or agreements that include information about arbitration. For example, if a facility's admission agreement has a paragraph referencing arbitration, but also has a separate arbitration agreement, the surveyor will need to examine both documents to ensure compliance.

Requirements for Arbitration Agreements – Language: *The requirements at §483.70(n)(1), (3)-(5) identify specific terms and conditions which must be "explicitly" stated in any arbitration agreement between a resident or their representative, and a Medicare and/or Medicaid certified facility. Explicitly means clearly and without any vagueness or ambiguity. Thus, these terms and conditions must be disclosed in the agreement in a clear and detailed manner, leaving no room for confusion. For further arbitration agreement language to be included, refer to F848, specifically §483.70(n)(2)(iii), (iv).*

§483.70(n)(1): The arbitration agreement ***"…must explicitly inform the resident or his or her representative of his or her right not to sign the agreement as a condition of admission to, or as a requirement to continue to receive care at, the facility."*** *This means that the agreement must clearly explain that the resident or their representative has the right to refuse to enter into the arbitration agreement without fear of:*

- *Not being admitted; or*
- *Being transferred or discharged as a result of refusing to enter into an arbitration agreement.*

Facilities cannot refuse to admit any resident who has, or whose representative has, declined to enter into an arbitration agreement. Additionally, facilities must not discharge any resident for failure to use arbitration to settle a dispute.

NOTE: *Surveyors should thoroughly investigate the basis for transfer or discharge for any resident who has refused to enter into a binding arbitration agreement, and has been, or will be subsequently transferred or discharged. For additional information, refer to the guidance at §483.15(c) - F622, Transfer and Discharge Requirements.*

§483.70(n)(3): The arbitration ***"agreement must explicitly grant the resident or his or her representative the right to rescind this agreement within 30 calendar days of signing it."***

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This means the agreement must clearly explain that the resident or his or her representative has 30 calendar days to withdraw from or terminate the agreement, should he or she change their mind. This ensures that residents or their representatives have time to reconsider the decision to use arbitration to settle a dispute with the facility. This also allows time for them to seek legal advice, if he or she chooses to do so.

Facilities should have a process, that is also explained to the resident or their representative, which ensures timely communication to the appropriate facility staff of a resident's or resident representative's desire to withdraw from, or terminate the arbitration agreement. Otherwise, miscommunications or delays could deny the resident or representative the right to withdraw from the agreement within the 30-day period.

*§483.70(n)(4): The arbitration agreement "**must explicitly state neither the resident nor his or her representative is required to sign this agreement as a condition of admission to, or as a requirement to continue to receive care at the facility.**" This means the agreement itself must contain clear language that neither the resident nor the representative are required to enter into the agreement as a condition of admission or to continue to reside at the facility. As stated above at §483.70(n)(1), this must be clearly conveyed without any ambiguity, thereby ensuring that no resident or his or her representative will have to choose between signing an arbitration agreement and receiving care at the facility.*

*§483.70(n)(5): The arbitration **"agreement may not contain any language that prohibits or discourages the resident or anyone else from communicating with federal, state, or local officials, including but not limited to, federal and state surveyors, other federal or state health department employees, and representative of the Office of the State Long-Term Care Ombudsman, in accordance with §483.10(k)."** Residents or their representatives have the right to unrestricted communication with officials from federal agencies, as well as with state and local officials, including representatives from the State Survey Agency, State Health department, and representatives from the Office of the State Long-Term Care Ombudsman. In addition to prohibition of language in the agreement which discourages such contact or communication, this also means that there should be no attempt by facility staff to discourage this communication verbally.*

Surveyors should verify through interview that the resident or his or her representative were not discouraged in any way from contacting federal, state, or local officials, which includes and is not limited to surveyors and ombudsmen, when entering into a binding arbitration agreement. For additional information, refer to the guidance at §483.10(k) - F586, Contact with External Entities.

PROCEDURES AND PROBES §483.70(n)(1)(2)(i)(ii)(3)-(5)

Surveyors should verify with the facility whether arbitration agreements are used to resolve disputes. If so, determine compliance with F847 through interview of sampled residents, resident representatives, resident council/family council (if one exists), Long-Term Care Ombudsman, facility staff; and record review, which includes reviewing the agreement and other relevant documentation. For facilities that offer arbitration agreements, the

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following are interview questions that may assist Surveyors in their investigation. Surveyors are not required to ask all of the below interview questions, but instead use these example questions as a guide during interviews.
Note: These provisions are not intended to, "supersede or interfere with state laws or other state contract and consumer protection laws . . . except to the extent any such laws are actually in conflict with this regulation." 84 Fed. Reg. 34718, 34721 (July 18, 2019).

Interviews

a. Resident and/or his or her Representative: *For residents who have arbitration agreements, determine the extent to which the arbitration agreement was explained to the resident or representative by asking:*

- *What is your understanding of the arbitration process when a dispute arises?*
- *Do you understand that you are giving up your right to litigation in a court proceeding?*
- *Were you told that the facility could not require you to enter into an arbitration agreement in order to be admitted, or in order to remain in the facility?*
- *Were you told that you had the right to terminate or withdraw from the agreement within 30 days of signing? If yes, were you told how to do so?*
- *Did you feel you were obligated, required, forced or pressured to sign the binding arbitration agreement? If yes, how so?*
- *Have you filed any complaint(s) or grievance(s) with the facility and/or state survey agency about the arbitration agreement?*
- *Is there anything you would have liked to have known before signing the arbitration agreement?*
- *Was the arbitration agreement explained in a way that you understood?*
- *If the arbitration agreement was included within another document, were you told first that you had the right to decline the agreement; and second, how to exercise this right (crossing out, etc.)?*

b. Resident Council/ Family Council: *For facilities having resident and/or family councils, and that have elected to utilize arbitration agreements, determine if there are general concerns with arbitration agreements. If concerns are identified, surveyors should arrange to meet individually with the resident to discuss their personal/private concerns related to arbitration agreements (for individual interview probes, see resident/representative interview questions above). Ask the following:*

- *Has the Resident's Council ever voiced any concerns to the facility about arbitration agreements, such as the way they are explained, pressure or being forced into signing them, or concerns with the process for withdrawing or terminating an agreement?*
- *Do you know if residents feel forced (coerced) to sign the arbitration agreement? If yes, how so?*
- *Whom from the facility discusses or reviews the binding arbitration agreement with residents or their representatives?*

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*c. **Facility staff:** Interview facility staff responsible for explaining the arbitration agreement to residents or their representatives. Determine how the facility staff ensure the resident or his or her representative understands the agreement by asking:*

- *When, and under what circumstances, do you request that a resident or his or her representative agree to an arbitration agreement?*
- *How do you ensure the resident or representative understands the terms of the arbitration agreement?*
- *How do you ensure the arbitration agreement is explained in a form and manner that accommodates the resident or his or her representative's needs?*
- *How do you make sure the resident understands their rights with regard to the arbitration agreement, such as their right to refuse to enter into it, and their right to rescind it within 30 days?*
- *What is the process in your facility for allowing residents or their representatives to terminate, or withdraw from an arbitration agreement in the first 30 days?*
- *Do you know any resident(s) whom your facility refused admission to, or discharged due to refusal to sign a binding arbitration agreement?*
- *Have any residents filed a complaint or grievances with the facility regarding the use of an arbitration agreement?*
- *How do you determine if the resident's physical condition and his/her cognitive status may be contributing factors in understanding of the binding arbitration agreement, including their ability to make an informed and appropriate decision?*

d. State Long-Term Care Ombudsman (if available):

- *Did any resident or his or her representative report that he/she felt forced or pressured into signing the binding arbitration agreements as a condition of admission or as a requirement to continue receiving care at the facility?*
- *Do you know any resident whom the facility may have refused admission to, or who was discharged, due to refusal to sign a binding arbitration agreement?*
- *Are you aware of any issues that have been raised regarding binding arbitration agreements?*
- *Are you aware of any residents or representatives who sought to rescind a binding arbitration agreement? If yes, how did the facility respond to the rescission request?*

***Record Review:** Review the resident record, as well as the arbitration agreement to ensure:*

- *The binding arbitration agreement clearly states that the resident or his or her representative is not required to enter into the agreement as a condition of admission to the facility, or as a requirement to continue to receive care.*
- *The binding arbitration agreement does not include language, which prohibits or discourages the resident or representative from communicating with federal, state, or local officials.*
- *There is evidence the binding arbitration agreement was explained in a form, manner and language that the resident or his or her representative understands.*

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- *There is evidence that the resident had the cognitive ability to understand the terms of the agreement, and evidence the resident acknowledged this understanding.*
- *The binding arbitration agreement gives the resident or his or her representative the right to rescind the agreement within 30 calendar days of signing it.*
- *For residents who have a representative, there is evidence the representative has the legal authority to sign the binding arbitration agreement.*

POTENTIAL TAGS FOR ADDITIONAL CONSIDERATION

If there are concerns regarding communication with external entities such as federal and state surveyors, other federal or state health department employees, and representative of the Office of the State Long-Term Care Ombudsman, surveyors should further investigate and review regulatory requirements at §483.10(k), F586, Contact with External Entities.

If there are concerns regarding admission agreement, surveyors should further investigate and review regulatory requirement at §483.15(a), F620, Admissions Policy.

If there are concerns regarding the basis for transfer and discharge for any resident who has refused to enter into a binding arbitration agreement and has been, or will be subsequently transferred or discharged, surveyors should further investigate and review regulatory requirements at §483.15(c), F622 Transfer and Discharge.

KEY ELEMENTS OF NONCOMPLIANCE

To cite deficient practice at F847, the surveyors' investigation will generally show:
The facility failed to:

- *Explain the terms of the agreement to the resident or his or her representative in a form and manner (including language) that he or she understands; and/or*
- *Inform the resident or his or her representative they are not required to enter into a binding arbitration agreement as a condition of admission, or as a condition to continue to receive care at the facility; or*
- *Inform the resident or representative they have the right to rescind or terminate the agreement within 30 calendar days of signing.*

The agreement itself:

- *Contains language that prohibits or discourages the resident or his or her representative from communicating with federal, state, or local officials, including:*
  - *Federal and state surveyors, and/or*
  - *Other federal or state health department employees, and/or*
  - *Representative of the Office of the State Long-Term Care Ombudsman; or*
- *Fails to contain language which clearly informs the resident or their representative they are not required to sign the agreement as a condition of admission to, or as a requirement to continue to receive care at the facility.*

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Guidance on Identifying Noncompliance at F847: *In some cases, a resident or his or her representative may not be able to recall the specifics of a conversation explaining arbitration agreements held during admission or at some point previous to the survey. It is not uncommon for an individual to not remember all the technical details of something they signed in the past (e.g., six months ago). If a resident or their representative cannot recall the conversation explaining arbitration agreements, or details of the terms of the agreement, this alone may not necessarily indicate noncompliance. However, if several residents do not recall being advised of their rights related to arbitration agreements, the surveyor should conduct further investigation.*

Conversely, if a resident or his or her representative actively asserts or complains that they remember the admissions conversation, and can affirm that the facility staff member did not inform them of their rights related to arbitration, this ***may*** *indicate noncompliance. In either case, surveyors are expected to verify noncompliance through further investigation with the resident or representative, as well as other residents, staff members, and resident council.*

Guidance on Determining Severity of Noncompliance at F847: *When determining the severity of noncompliance at F847, surveyors must always consider what impact the identified noncompliance had on the affected resident(s). However, unlike noncompliance at other tags, such as Abuse or Quality of Care, which may result in physical, mental, and/or psychosocial outcomes, noncompliance at F847 will almost exclusively have a psychosocial impact or outcome. Surveyors must gather sufficient evidence through interviews, record review and observation to demonstrate what the psychosocial impact was to the resident. In some cases, the surveyor may have to use the reasonable person concept to determine severity. Refer to the Psychosocial Severity Outcome Guide for further information.*

The failure of the facility to meet the requirements at F847 is more than minimal harm. Therefore, Severity Level 1 does not apply for this regulatory requirement.

Absent evidence of actual harm, noncompliance at F847 would likely be cited at severity level 2, No Actual Harm with Potential for More than Minimal Harm that is not Immediate Jeopardy.

However, if the surveyor identifies that noncompliance at F847 has caused psychosocial ***harm*** *to the resident (per the Psychosocial Severity Outcome Guide), this should be cited at severity level 3, Actual Harm that is not Immediate Jeopardy.*

In order to cite Immediate Jeopardy, the surveyor's investigation would have to show that noncompliance resulted in the likelihood for serious psychosocial injury or harm, or caused actual serious psychosocial injury or harm, and required immediate action to prevent further serious psychosocial injury or harm from occurring or recurring. Refer to Appendix Q for further information.

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Guidance on Correcting Noncompliance at F847: *When noncompliance exists at F847, the Plan of Correction (POC) is expected to include the required elements as identified at State Operations Manual, Chapter 7, §7317 – Acceptable Plan of Correction. These include:*

- *Address how corrective action will be accomplished for those residents found to have been affected by the deficient practice;*
- *Address how the facility will identify other residents having the potential to be affected by the same deficient practice;*
- *Address what measures will be put into place or systemic changes made to ensure that the deficient practice will not recur;*
- *Indicate how the facility plans to monitor its performance to make sure that solutions are sustained; and*
- *Include dates when corrective action will be completed.*

When the surveyor's investigation shows systemic noncompliance, indicating a complete disregard or unawareness of the requirements, such as the standard use of arbitration agreements containing language which violates the requirements at F847, evidence that the facility has made no attempt to explain arbitration agreements, or evidence of overt attempts to conceal arbitration agreements within other documents, in addition to the requirements for POCs listed above, CMS has the following expectations with regard to the accepted POC:

- *The POC must ensure that any new or revised arbitration agreements in use in the facility complies with the requirements at F847 – Surveyors must review the revised agreements and confirm that they comply with F847;*
- *If a resident or their representative has signed a non-compliant agreement, the facility must ensure that the resident or their representative is promptly notified that the agreement does not comply with §483.70(n), and it must promptly offer the resident or their representative a compliant agreement;*
- *The facility must explain the terms of the new agreement to the residents or their representatives, and do so in terms the residents or their representatives can understand; and*
- *All other requirements at F847 are met.*

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[1] *Adapted from American Bar Association. "Dispute Resolution Processes: Arbitration." Americanbar.org. Accessed 1/6/2021)*

[2] *Adapted from American Bar Association. "Dispute Resolution Processes: Arbitration." Americanbar.org, Accessed 1/6/2021)*

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F848 Arbitrator/Venue Selection and Retention of Agreements
(Rev. 211; Issued: 02-03-23; Effective: 10-21-22; Implementation: 10-24-22)

§483.70(n) Binding Arbitration Agreements.
If a facility chooses to ask a resident or his or her representative to enter into an agreement for binding arbitration, the facility must comply with all of the requirements in this section. . .

§483.70(n)(2) The facility must ensure that . . .
(iii) The agreement provides for the selection of a neutral arbitrator agreed upon by both parties; and
(iv)The agreement provides for the selection of a venue that is convenient to both parties. . .

§483.70(n)(6) When the facility and a resident resolve a dispute through arbitration, a copy of the signed agreement for binding arbitration and the arbitrator's final decision must be retained by the facility for 5 years after the resolution of that dispute on and be available for inspection upon request by CMS or its designee.

NOTE: *The requirements at 483.70(n) went into effect on September 16, 2019. This guidance is intended for the review of arbitration agreements entered into on or after September 16, 2019.*

INTENT

To provide a neutral and fair arbitration process by ensuring both the resident or his or her representative, and the facility agree on the selection of a neutral arbitrator, and that the venue is convenient to both parties. In addition, the requirement to retain a copy of the signed agreement for binding arbitration and the arbitrator's final decision enables CMS to ensure that CMS can fully evaluate quality of care complaints that are addressed in arbitration and assess the overall impact of these agreements on the safety and quality of care provided in long-term care facilities.

DEFINITIONS

Arbitrator: *A third party who resolves a dispute between others by arbitration and pursuant to an arbitration agreement. Arbitrators are decision makers, with procedures set by the arbitration agreement and state law, except they may not be required to follow federal or state rules of evidence and their decisions may not be reviewable by a court absent extraordinary circumstances.*

Convenient Venue: *A location in which to carry out arbitration proceedings which should be agreed upon and suitable to both parties.*

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Neutral Arbitrator: An impartial, or unbiased third-party decision maker, contracted with, and agreed to by both parties to resolve their dispute.

GUIDANCE

The requirement at §483.70(n)(2)(iii) states ***"the facility must ensure that the agreement provides for the selection of a neutral arbitrator agreed upon by both parties."*** *Facilities wishing to utilize binding arbitration agreements should make reasonable efforts to ensure that any arbitration agreement entered into with a resident or his or her representative provides for the selection of an arbitrator who is impartial, unbiased, and without the appearance of a conflict of interest. This ensures the integrity of the arbitration process, and also ensures that residents who choose this alternative dispute resolution are treated with the same fairness they would have if they chose to litigate.*

Facilities may put forward suggestions for the use of specific arbitrators for residents (or their representatives) to select. The resident or his or her representative is not obligated to use the arbitrator (either an arbitration services company or an individual arbitrator) suggested by the facility, and may suggest an alternative arbitrator of their choosing. Facilities are expected to make a reasonable attempt to come to agreement with the resident or resident's representative on the selection of a neutral arbitrator and provide a fair process for selecting an arbitrator or arbitration services company.

To ensure a neutral arbitrator is selected, the facility should avoid even the appearance of bias, partiality, or a conflict of interest, and should promptly disclose to the resident or his or her representative the extent of any relationship which exists with an arbitrator or arbitration services company, including how often the facility has contracted with the arbitrator or arbitration service, and when the arbitrator or arbitration service has ruled for or against the facility.

The requirement at §483.70(n)(2)(iv) states ***"the facility must ensure the agreement provides for the selection of a venue that is convenient to both parties."*** *The binding arbitration agreement* ***must*** *allow for the selection of a venue that is suitable in meeting the needs of both the resident or his or her representative, and the facility. The venue should be agreed upon by both parties. The venue is the geographical location of the arbitration proceeding that may be chosen, in part, on the basis of convenience. Convenience for the resident or resident's representative may be determined by his or her needs in terms of ability to get to the venue.*

The requirements at §483.70(n)(6) state that ***"when the facility and a resident resolve a dispute through arbitration, a copy of the signed agreement for binding arbitration and the arbitrator's final decision must be retained by the facility for 5 years after the resolution of that dispute on and be available for inspection upon request by CMS or its designee."*** *When a dispute is resolved through arbitration, facilities are accountable and responsible for retaining a copy of the signed binding arbitration agreement and final decision for a period of 5 years following resolution of the arbitrated dispute. These records must be made available for review to surveyors upon request.*

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NOTE: It is important for surveyors to focus on the record retention requirement, not the content of the arbitration agreement or final decision(s) in determining compliance with this requirement.

PROCEDURES AND PROBES §483.70(n)(2)(iii) & (iv)

Surveyors should verify with the facility whether arbitration agreements are used to resolve disputes. If so, determine compliance with F848 through interview of sampled residents, resident representatives, resident council/family council (if one exists), Long-Term Care Ombudsman, facility staff; and record review, which includes reviewing the agreement and other relevant documentation. For facilities that offer arbitration agreements, the following are interview questions that may assist Surveyors in their investigation. Surveyors are not required to ask all of the below interview questions, but instead use these example questions as a guide during interviews.

Note: These provisions are not intended to, "supersede or interfere with state laws or other state contract and consumer protection laws . . . except to the extent any such laws are actually in conflict with this regulation." 84 Fed. Reg. 34718, 34721 (July 18, 2019).

Interviews

a. Resident or Representative(s): *Interview the resident or their representative to determine the process for selecting a neutral arbitrator and convenient venue. Ask:*

- *How were you included in selecting the arbitrator?*
- *Were you given a choice in arbitrator?*
- *Were you given an opportunity to suggest an arbitrator?*
- *Do you agree with the arbitrator that was selected?*
- *Was more than one arbitrator suggested?*
- *Was a list of arbitrators to select from provided or alternatively were you made aware of how to search for arbitration companies?*
- *What did the facility tell you about the arbitrator or arbitration services company?*
- *Are you aware of any relationship or association between the facility and the arbitrator?*
- *How were you included in selecting the venue?*
- *Were you given a choice in venue?*
- *Was the agreed upon venue convenient to you and/or your representative?*
- *When were the arbitrator and venue selected? Under what circumstances?*
- *Did the facility reject any of your preferred arbitrators or venues? Why?*
- *Are you aware whether or not the facility used the same arbitrator or company in the past?*

b. Resident Council/Family Council: *For facilities having resident and/or family councils and have elected to utilize arbitration agreements, determine if there are general concerns with arbitration agreements. If concerns are identified, surveyors should arrange to meet*

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individually with the resident to discuss their personal/private concerns related to arbitration agreements (for individual interview probes, see resident/representative interview questions above). Ask the following:

- *Are you aware of any concerns about the selection of a neutral arbitrator and/or the selection of a convenient venue? (Remind residents not to share personal, private information in the group setting.)*

c. Facility Staff: *Interview the facility staff responsible for facilitating the selection of a neutral arbitrator and convenient venue. Ask:*

- *How do you ensure that the resident or his or her representative has an equal role in selecting a neutral arbitrator?*
- *What is your process for selecting a neutral arbitrator?*
- *How do you ensure that the resident or his or her representative has an equal role in selecting a convenient venue?*
- *What is your process for selecting a convenient venue?*
- *When a resident or his or her representative do not agree with the arbitrator and/or venue, what are the next steps?*
- *How does the agreement provide for the selection of the arbitrator is agreed upon by both parties? What is the facility's policy on retention of the signed binding arbitration agreements and the final dispute documentation?*
- *When, and under what circumstances, do you approach residents or their representatives about selecting an arbitrator or venue?*
- *Are there any active complaints or grievances regarding the selection of an arbitrator or venue? How are you addressing these concerns?*
- *What information do you provide residents or their representatives regarding specific arbitrators or arbitration services companies (i.e., regarding parent corporation/owners using specific arbitration company)?*
- *Have you used more than one arbitrator/arbitration services company in the past few years? How many times have you contracted with the same company?*

d. State Long Term Care Ombudsmen (if available): *Interview the representative of the State Long-Term Care Ombudsman who serves resident of the facility. Ask:*

- *Did any resident or his or her representative ask your assistance to select an arbitrator or venue?*
- *Did any resident or his or her representative complain to you that he/she was forced or pressured to select a particular arbitrator/arbitration company or venue?*
- *Did any resident or his or her representative report that an arbitrator and/or venue was pre-selected (i.e., the resident or his or her representative did not have an opportunity to agree to an arbitrator and/or venue)?*
- *Did any resident or his or her representative complain the venue was inconvenient to them?*

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Record Review: *Review the binding arbitration agreement, any other pertinent information relevant to the selection of the arbitrator and venue as well as the arbitrator's final decision after resolution of a dispute (if applicable) to identify the following:*

- *Is there evidence that the resident or his or her representative were provided with the opportunity to select a neutral arbitrator?*
- *Is there evidence that the resident or his or her representative were provided with the opportunity to select a convenient venue?*
- *Is there evidence the facility retained a copy of the signed agreement for binding arbitration and the arbitrator's final decision, after the resolution of a dispute through arbitration for five (5) years?*

KEY ELEMENTS OF NON-COMPLIANCE

To cite deficient practice at F848, the surveyor's investigation will generally show that the facility failed to do ***any one or more*** *of the following:*

- *Ensure that the arbitration agreement specifically provides for the selection of a neutral arbitrator; or*
- *Ensure that the arbitration agreement specifically provides for the selection of a venue that is convenient; or*

For disputes resolved by arbitration, the facility failed to:

- *Retain a copy of the signed agreement for binding arbitration and the arbitrator's final decision (for disputes resolved by arbitration) after the facility and a resident or their representative resolve a dispute through arbitration for five (5) years; or*
- *Refuse to make the signed agreement or final decision available for inspections upon request by CMS or its designee.*

Guidance on Identifying Noncompliance at F848: *In some cases, a resident or his or her representative may not be able to recall all the specifics about the selection of a neutral arbitrator or convenient venue. If a resident or their representative cannot recall the details of the selection of a neutral arbitrator or a convenient venue, this alone may not necessarily indicate noncompliance. However, if several residents do not recall the process of selecting a neutral arbitrator, or a convenient venue, the surveyor should conduct further investigation.*

Conversely, if a resident or his or her representative actively asserts or complains that there is no process for the selection of a neutral arbitrator or a convenient venue to both parties, this ***likely*** *constitutes noncompliance.*

In either case, surveyors are expected to verify noncompliance through further investigation with the resident or representative, as well as other residents, staff members, and resident council.

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Guidance on Determining Severity of Noncompliance at F848: *When determining the severity of noncompliance at F848, surveyors must always consider what impact the identified noncompliance had on the affected resident(s). However, unlike noncompliance at other tags, such as Abuse or Quality of Care, which may result in physical, mental, and/or psychosocial outcomes, noncompliance at F848 will almost exclusively have a psychosocial impact or outcome. Surveyors must gather sufficient evidence through interviews, record review and observation to demonstrate what the psychosocial impact was to the resident. In some cases, the surveyor may have to use the reasonable person concept to determine severity. Refer to the Psychosocial Severity Outcome Guide for further information.*

If the surveyor identifies noncompliance at F848 for the failure to retain signed arbitration agreements and/or the arbitrator's final decision for residents that have resolved a dispute through arbitration for 5 years, Severity Level 1 may be the appropriate severity level for this regulatory requirement.

In other cases, noncompliance at the other requirements at F848 (failure for the agreement to provide for the selection of a neutral arbitrator or convenient location) would likely be cited at severity level 2, No Actual Harm with Potential for More than Minimal Harm that is not Immediate Jeopardy.

If the surveyor identifies that noncompliance at F848 has caused psychosocial ***harm*** *to the resident (per the Psychosocial Severity Outcome Guide), this should be cited at severity level 3, Actual Harm that is not Immediate Jeopardy.*

In order to cite Immediate Jeopardy, the surveyor's investigation would have to show that noncompliance resulted in the likelihood for serious psychosocial injury or harm, or caused actual serious psychosocial injury or harm, and required immediate action to prevent further serious psychosocial injury or harm from occurring or recurring. Refer to State Operations Manual (SOM) Appendix Q for further information.

Guidance on Correcting Noncompliance at F848: *When noncompliance exists at F848, the Plan of Correction (POC) is expected to include the required elements as identified in the SOM, Chapter 7, at 7317 – Acceptable Plan of Correction. These include:*

- *Address how corrective action will be accomplished for those residents found to have been affected by the deficient practice;*
- *Address how the facility will identify other residents having the potential to be affected by the same deficient practice;*
- *Address what measures will be put into place or systemic changes made to ensure that the deficient practice will not recur;*
- *Indicate how the facility plans to monitor its performance to make sure that solutions are sustained; and*
- *Include dates when corrective action will be completed.*

When the surveyor's investigation shows systemic noncompliance with F848, indicating a complete disregard or unawareness of the requirements, such as agreements, which make no provision for the selection of a neutral arbitrator or convenient venue, CMS has the following expectations (in addition to the requirements for POCs listed above) with regard to the accepted POC:

- *The POC must ensure that all arbitration agreements allow for the selection of a neutral arbitrator and convenient venue; and*
- *There must be a process to ensure records are retained for 5 years.*

F849

(Rev. 173, Issued: 11-22-17, Effective: 11-28-17, Implementation: 11-28-17)

§483.70(o) Hospice services.

§483.70(o)(1) A long-term care (LTC) facility may do either of the following:

(i) Arrange for the provision of hospice services through an agreement with one or more Medicare-certified hospices.

(ii) Not arrange for the provision of hospice services at the facility through an agreement with a Medicare-certified hospice and assist the resident in transferring to a facility that will arrange for the provision of hospice services when a resident requests a transfer.

§483.70(o)(2) If hospice care is furnished in an LTC facility through an agreement as specified in paragraph (o)(1)(i) of this section with a hospice, the LTC facility must meet the following requirements:

(i) Ensure that the hospice services meet professional standards and principles that apply to individuals providing services in the facility, and to the timeliness of the services.

(ii) Have a written agreement with the hospice that is signed by an authorized representative of the hospice and an authorized representative of the LTC facility before hospice care is furnished to any resident. The written agreement must set out at least the following:

(A) The services the hospice will provide.

(B) The hospice's responsibilities for determining the appropriate hospice plan of care as specified in §418.112 (d) of this chapter.

(C) The services the LTC facility will continue to provide based on each resident's plan of care.

(D) A communication process, including how the communication will be documented between the LTC facility and the hospice provider, to ensure that the needs of the resident are addressed and met 24 hours per day.

(E) A provision that the LTC facility immediately notifies the hospice about the following:

(1) A significant change in the resident's physical, mental, social, or emotional status.

(2) Clinical complications that suggest a need to alter the plan of care.

(3) A need to transfer the resident from the facility for any condition.

(4) The resident's death.

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EXHIBIT D

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF GREENVILLE)	C.A. No.: 2019-CP-23-00545 & 2019-CP-23-00546
)	
Janet King, Individually and as Personal Representative of the Estate of Hartford Parks Boozer, Jr.,)	
)	
Plaintiff,)	**ORDER**
)	
v.)	
)	
Emericare, Inc. d/b/a Emeritus at Greenville d/b/a Brookdale Greenville; Emerical, Inc.; Brookdale Senior Living, Inc.; Emeritus Senior Living; Emeritus Corporation a/k/a Brookdale Southpointe Drive; Bre Knight SH SC Owner, LLC; HCP MA3 South Carolina, LP; and Welltower, Inc. f/k/a Health Care REIT, Inc.,)	
)	
Defendant(s).)	
)	

This matter came before the Court in Greenville County on July 22, 2019 on Defendants' Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration and Stay Proceedings.

This matter arises out of civil actions for wrongful death and survival actions involving allegations of nursing home and assisted living facility abuse and neglect and corporate negligence with allegations of understaffing, underfunding, undertraining, and corporate mismanagement. Both parties submitted briefs/memoranda as well as exhibits in support of their positions. Having listened to oral arguments from counsel and having reviewed the parties' legal memoranda and exhibits and for the reasons set forth more fully

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below, the Court hereby denies the Defendants' Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration and Stay Proceedings.

BACKGROUND

Plaintiff Janet King (hereinafter "Daughter") was the daughter and is the Personal Representative of the Estate of Hartford Parks Boozer, Jr. (hereinafter "Decedent"), a resident/patient at Defendants' assisted living facility and skilled nursing facility. The assisted living facility was Emeritus Corporation a/k/a Brookdale Southpointe Drive (hereinafter "Brookdale Southpointe"), an assisted living facility which Plaintiff contends was owned, controlled, and operated by Brookdale Senior Living, Inc., Welltower, Inc. f/k/a Healthcare REIT, Inc., and Emeritus Senior Living. Decedent was admitted to Brookdale Southpointe on or about September 24, 2015, at which time an arbitration agreement was signed.

Plaintiff alleges that Decedent suffered with numerous falls during the admission which resulted in a brain injury and transfer to the hospital on December 28, 2016. Decedent was discharged from the hospital to the skilled nursing facility, Emericare Inc. d/b/a Emeritus at Greenville d/b/a Brookdale Greenville (hereinafter "Brookdale Greenville") on January 3, 2017 for short-term rehabilitation at which time an arbitration agreement was signed by Daughter Brookdale Greenville. Plaintiff alleges that Decedent suffered with additional falls at Brookdale Greenville resulting in further brain injury and was shortly thereafter discharged to Brookdale Southpointe again where he suffered from further falls on the night of admission resulting in another brain bleed and was discharged back to the hospital on January 24, 2017, for his injuries. He suffered until he succumbed

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to his injuries and died on February 10, 2017. Defendants vehemently deny Plaintiff's allegations.

Defendants filed this Motion to Dismiss and Compel Arbitration on May 15, 2019. For the reasons stated hereinbelow, Defendants' Motion is denied as to the Motion to Compel Arbitration for any claims related to the Brookdale Greenville admission and granted as to any survival action claims only for Brookdale Southpointe. All wrongful death action claims against the Brookdale Southpointe Defendants are also denied.

LEGAL ANALYSIS AND CONCLUSION

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application to arbitrate." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (S.C. 2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67,78,749 S.E.2d 139, 144 (Ct. App. 2013). Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

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I. The Arbitration Agreement with Brookdale Greenville is Unenforceable in its Entirety Because There was no Mutual Assent and Meeting of the Minds.

The arbitration agreement with Brookdale Greenville was included within the Admission Agreement with Brookdale Greenville. Page 16 of the agreement provides for the signature line for both the resident and the facility. On January 4, 2017, Daughter signed at the signature line reserved for "Resident Representative Signature". A signature line existed for the facility to execute the agreement as well. A blank was provided for the facility to sign as "Provider Representative", a separate blank for the Provider Representative to print his/her name, and a third blank for the Provider Representative to date when the facility executed the agreement on its own behalf.

At no time did anyone from Brookdale Greenville ever sign and execute the agreement on behalf of the facility. As previously noted, Brookdale Greenville bears the burden of proving that a valid arbitration agreement exists and was executed. Arbitration cannot be compelled in the absence of an express agreement to arbitrate. EEOC v. Waffle House, Inc., 534 U.S. 279 (2002); Emlenton Area Municipal Authority v. Miles, 548 A.2d 623, 625 (Pa. Super. 1988). The touchstone of any valid contract is mutual consideration. The issue whether the parties agree to arbitrate is generally one for the court, not for the arbitrators.

Because the facility did not sign the agreement, there is no indicia of mutual assent as required for a valid enforceable arbitration agreement. The alleged agreement by its express terms requires both parties to sign and confirm in writing that they are waiving their right to a jury trial and consenting to the terms of the agreement by affixing their signatures. The arbitration provision itself references the "signatories to this arbitration

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provision" and references "the parties' decision to select arbitration", however, there is no party signature on behalf of Brookdale Greenville and its affiliates. The fact that there is a signature line for "Provider Representative" and that it is left blank further indicates that there was no mutual assent. See Baier v. Darden Restaurants, 420 S.W.3d 733, 739 (Mo. Ct. App. 2014).

As the Pennsylvania Superior Court noted in Bair v. Manor Care of Elizabethton, PA, LLC, et al., 108 A3d 94 (2015), the issue is not necessarily just whether or not the arbitration agreement was signed by the parties sought to be bound but whether there was a meeting of the minds, that is, whether the parties agreed in a clear and unmistakable manner to arbitrate their disputes. Id. at 97. The Court concluded that the parties did not agree in a clear and unmistakable manner to arbitrate the disputes due to the lack of signature on behalf of the nursing home facility. As the Court noted, by failing to affix its signature, the facility did not consent to arbitrate. Absent mutual assent at the time of the creation of the agreement, there was no enforceable agreement to arbitrate. Id. at 98. As the Pennsylvania Court noted, "it is not just the lack of the signature of the nursing home facility that is problematic but the fact that there was not mutual assent of the parties to the alleged contract. It is not the resident's consent that is the problem, it is Manor Care's failure to fill in essential terms and sign the agreement that fell short in manifesting its consent to arbitrate". Id. at 98.

South Carolina law requires that "in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009) citing Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891

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(1989). Parties cannot be said to have a meeting of the minds on matters which are indefinite, vague, uncertain, and even incomprehensible. "Vagueness of expression, indefiniteness, and uncertainty as to any of the essential terms of an agreement have often been held to prevent the creation of an enforceable contract". Reed v. Boykin, 282 S.C. 614, 320 S.E.2d 68 (S.C. App., 1984). Because Brookdale Greenville never indicated its assent to the terms of the agreement, failed to complete all of the necessary portions of the agreement, failed to fill in the necessary blanks, and otherwise failed to come to agreement on the material terms of the agreement by signing the agreement, the arbitration agreement is unenforceable as to Brookdale Greenville.

II. The Brookdale Greenville Arbitration Agreement is Unenforceable Because it is Illegal Consideration for the Admission Agreement.

Plaintiff's Affidavit submitted for the Motion states that Plaintiff was not aware of the arbitration provision nor explained the arbitration provision in the Admission Agreement. No evidence was presented by the Defendants to indicate otherwise. The Admission Agreement contained the arbitration provision with no opportunity for the Plaintiff to decline the arbitration agreement. There was not a separate signature page for the arbitration agreement. As a result, the arbitration provision was required as a condition of admission to the facility. This requirement for admission to the facility is a violation of federal regulations.

Federal regulations require Medicare and Medicaid certified facilities to accept Medicare/Medicaid reimbursement rates as payment in full. See 42 C.F.R.§489.30; 42 C.F.R. §447.15. Moreover, such facilities, in the case of an individual who is entitled to

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medical assistance, must "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the state plan…any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay at the facility". 42 USC §1396r(c)(5)(A)(iii).

An illegal contract is unenforceable. Berkebile v. Outen, 426 S.E.2d 760, 762 n. 2 (1993). "The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Id. In the instant case, it is undisputed that Decedent was a Medicare beneficiary while residing at Defendants' facility. Further, there is no doubt that the arbitration provision was a mandatory term to the Admission Agreement and was, in part, illegal consideration for admission and an illegal required pre-condition to admission as Decedent and Daughter had no way to decline the arbitration provision and were required to sign the Admission Agreement which contained the arbitration provision and is therefore, unenforceable.

III. The Brookdale Greenville and Brookdale Southpointe Arbitration Agreements are Unenforceable Against Decedent's Wrongful Death Statutory Beneficiaries.

It is the conclusion and order of this Court that the Arbitration Agreement of Brookdale Greenville is unenforceable in its entirety for the above-stated reasons. However, even if there was a meeting of the minds and no illegal consideration, the Arbitration Agreements as to both Brookdale Greenville and Brookdale Southpointe are unenforceable against the Decedent's wrongful death statutory beneficiaries under South Carolina contract law defenses. The Arbitration Agreements neither cover the wrongful

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death statutory beneficiaries' claims within the scope of the agreement nor were the Arbitration Agreements signed by an individual who had authority to bind the statutory beneficiaries.

South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914). The alleged arbitration agreement with Brookdale Southpointe by its own terms is an agreement between "Park Booser ('Resident', 'you', or 'your')" and "Emeritus Corporation d/b/a Brookdale Southpointe Drive ('The Company', 'us', 'we', or 'our')". The alleged admission agreement/arbitration agreement with Brookdale Greenville by its own terms is an agreement between "Emericare, Inc. d/b/a Brookdale Greenville AL/MC/SNF (SC) a licensed Nursing Care Institution located at 1306 Pelham Road, Greenville SC 29615 (the 'Provider', 'us', 'we', or 'our')" and "H P BOOZER (the 'Resident', 'you', or 'your') and/or (Name of 'Resident Representative') on behalf of Resident". Even if Decedent had agreed to arbitration, he did not have the legal authority to bind his statutory beneficiaries who are not parties to the Arbitration Agreements. The signatories to the agreements are Daughter as representative of Decedent and the agent for Brookdale Southpointe (no signature for Brookdale Greenville). No other persons are parties to these agreements. The scope of the agreements does not include the statutory beneficiaries' claims.

However, even if the Arbitration Agreements did contemplate the wrongful death statutory beneficiaries' claims, Decedent and/or Daughter had no authority to waive the statutory beneficiaries' claims. Daughter signed the Arbitration Agreements in her

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individual capacity in a representative capacity of Decedent only. As the Hodge court noted, actions taken by Daughter in her *individual capacity* will not be held against the estate as the estate has other beneficiaries and may have other creditors. Moreover, the wrongful death claim is not based on the contract or agreement to arbitrate with the facility. The statutory beneficiaries received no benefit from any contract which Decedent may have entered into with the Defendants. See Wilson v. Willis, No. 27879, 2019 S.C. LEXIS 27.

Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, a Federal District Court in South Carolina has analyzed this issue under the South Carolina Non-Economic Awards Act of 2005. Diane Boyle as Personal Representative of the Estate of John Francis Boyle v. United States of America, 944 F.Supp.2d 577 (D.S.C. 2012). In Boyle, the Court concluded that the wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. This analysis supports the contention that the wrongful death claimants have separate and distinct claims apart from that of the survival action.

Many other states have come to this same conclusion, Daniels v. Sunrise Senior Living, Inc., 212 Cal.App 4th 674, 151 Cal.Rptr.3d 273 (Cal.App.4 Dist, 2013) (Wrongful Death claims not bound to arbitration), Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (Wrongful Death claimants not bound by arbitration agreement.) As previously discussed, the only parties executing these agreements were Daughter purportedly on behalf of Decedent and an employee as an agent for Brookdale Southpointe. (No signature for Brookdale Greenville.) Defendants would contend that these agreements are binding

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on the non-signatory statutory beneficiaries simply because it contends the Arbitration Agreements say so.

However, as the Supreme Court of Kentucky said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises. Inc.:

> [A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third-party are appropriately subjected the contract's arbitration provisions, at least where the tort and contract are significantly intertwined. See, In re Weekley Homes, L.P., 180 S.W. 3d 127 (Tex. 2005) (negligent repair claim by homeowner's Son against contractor was subject to repair contract's arbitration clause because Son, although a non-party, was direct and principal beneficiary under the contract). It is something else entirely, however, to say that incidental beneficiaries of a contact-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely be being mentioned in the contract as potential claimants. This is what Beverly purports to do. Arbitration is a matter of contract, however, it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79,83, 123 S. Ct. 588, l54 L. Ed.2d 491 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit", Citation and internal quotation marks omitted.) Since Beverly's theory would allow just that, i.e., would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to

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> arbitration as a "third party beneficiary" of the arbitration agreement, we reject it out of hand.

Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 599-600 (KY 2012).

Likewise, Brookdale Southpointe and Brookdale Greenville's mentioning of "any spouse, children, heir, representatives, agents, executors, administrators, successors, family members, or other persons claiming through the Resident, or other person claiming through the Resident's estate, whether such third parties make a claim in a resident representative capacity or in a personal capacity. Any claims or grievances against the Community or the Community's corporate parent, subsidiaries, affiliates, employees, officers, or directors" as being bound by the Arbitration Agreement does not make it so. It is no more than an *ipse elixir* which Defendants expect this Court to embrace. The law simply does not permit a party to cut off the rights of a non-signatory to an agreement who receives no benefit thereunder.

The wrongful death claims are separate claims apart from the Decedent's claims. According to South Carolina's Wrongful Death Act:

> "Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued shall be liable to an action for damages."

South Carolina Code Annotated §15-51-10 (1977)

> The wrongful death beneficiaries are as follows:
>
> "Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of

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> the heirs or the person whose death shall have been so caused."

South Carolina Code Annotated §15-51-20 (Supp. 2001)

The general element of damages recoverable are pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of the Decedent, society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries. Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d. 713, 714 S.C. (Ct. App. 1989).

The wrongful death claim is a separate claim from the claims a decedent might bring on his own behalf under the survival statute. In Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914), the Supreme Court held that wrongful death and survival actions are different claims for different injuries. The Court stated "necessarily, therefore, there must be separate verdicts and separate judgments, there should be separate actions." Id. at 31. See also Strickland v. Southern Ry Co., 111 S.C. 248, 97 S.E. 695 (1918) (Supreme Court Affirmed Appeal from Circuit Court's ruling noting that survival claims are independent of wrongful death claims), Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539 (1928) (discussing the difference between survival and wrongful death claims as being independent of each other).

The Pennsylvania Superior Court in Pisano v. Extended Homes, Inc., operating under the fictitious name Belaire Health 84 Rehabilitation Center, 2013 PA Super 232, 77 A.3d 651, 662 (PA 2013) affirmed the trial court decision that the nursing home arbitration agreement did not apply to the statutory beneficiaries' wrongful death claim. The Court noted the wrongful death and survival actions are not derivative of each other but are flowing from the same underlining tortious conduct. Like the South Carolina statute,

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Pennsylvania's wrongful death statute provides that the right of action exists only for the benefit of the spouse, children, parents, or parents of the deceased. Id. at 656. The Pennsylvania Court further held that since the wrongful death claim is independent of the survival action and because the wrongful death statute does not characterize the wrongful death claim as that of a third-party beneficiary, that the trial court properly refused to compel arbitration to the non-signatory wrongful death beneficiaries who were not parties to the arbitration agreement.

Likewise, in Bybee v. Abdulla, M.D., 189. P.3d 40, 2008 UT 35 (Utah, 2008), the Supreme Court of Utah held that an agreement to arbitrate that was signed by the decedent cannot extend to the statutory beneficiaries of a wrongful death claim. The Utah Supreme Court noted that certain defenses from the decedent's personal injury action may be raised against the heirs of a wrongful death action such as comparative negligence and statutes of limitations as key common characteristics. However, as the Supreme Court of Utah noted, both of these defenses go to the viability of the underlying personal injury action. The Court further stated that "by contract, an agreement to bind heirs to arbitrate disputes does not implicate the viability of underlying claims." Id. at 47, citing Horwich v. Superior Court, 21 Cal. 4th 272, 87 Cal. Rptr. 2d 222, 980 P. 2d 927, 935 (1999). The Utah Supreme Court went on to note that "we have never intended to suggest, however, that because Decedent is the master of his claim he may by contract expose his unwilling heirs to any imaginable defense." Bybee v. Abdulla, M.D. at 46. The Utah Supreme Court further held that the defenses against the decedent's claim which are less likely to be found enforceable against the heirs' claims in a wrongful death action "are contract provisions that purport to affect the rights of heirs that do not affect the existence of the decedent's personal injury claim

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during his lifetime. The arbitration agreement...falls squarely within this category and is, therefore, unenforceable against the heir." Id. at 47.

The Court of Appeals in Washington in Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn. App. 919, 231 P. 3d 1252 (Wash. App. Div. 1 2010) held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit." Id. quoting Satomi Owners Association v. Satomi. LLC, 167 Wash. 2d 781, 225 P.3d 213 (2009). The Washington Court of Appeals further noted that the wrongful death claims asserted in that case were not on behalf of the estate just as South Carolina's wrongful death claims are not on behalf of the estate. The Washington Court of Appeals further discussed the Supreme Court of Ohio's ruling in Peters v. Columbus Steel Casting Co., 115 Ohio St.3d 134, 873 N.E.2d 1258 (2007), wherein the Supreme Court of Ohio held that the wrongful death claim of a spouse who was Administrator of her husband's estate was not subject to the Decedent's arbitration agreement. The Washington Court of Appeals in discussing Peters, stated "In sum, the decedent's agreement was an agreement 'to arbitrate his claims against the company,' and thus the provision in the agreement binding the decedent's heirs applied to a survival action. But the decedent could not 'restrict his beneficiaries to arbitration of their wrongful death claims because he held no right to those claims." Woodall v. Avalon Care Center - Federal Way, LLC at 929. In the Washington Court of Appeals' analysis, the Court concluded that the wrongful death beneficiaries could not be bound to the arbitration agreement which they did not sign.

Therefore, even if Daughter had actual or apparent authority/agency to execute the Arbitration Agreements, the Arbitration Agreements did not include the wrongful death

statutory beneficiaries' claims within the scope of the Arbitration Agreements, nor did Decedent and/or Daughter have authority to bind the wrongful death statutory beneficiaries' claims to the Arbitration Agreements. As a result, the Arbitration Agreements cannot reach the claims of the wrongful death statutory beneficiaries.

CONCLUSION

Therefore, based upon the foregoing reasons, the Defendants' Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration and Stay Proceedings as to all claims against Brookdale Greenville are hereby denied. Further, the Motion to Compel Arbitration as to Brookdale Southpointe is granted only as to the Survival Action claims and denied as to the Wrongful Death Action claims.

IT IS SO ORDERED.

Greenville, South Carolina
Date: _____

_____
The Honorable Edward W. Miller
Judge, Thirteenth Judicial Circuit
State of South Carolina

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Greenville Common Pleas

Case Caption: Janet King , plaintiff, et al vs. Emericare Inc , defendant, et al

Case Number: 2019CP2300546

Type: Order/Other

So Ordered

s/ Edward W. Miller

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EXHIBIT E

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017-CP-07-02636

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

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

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

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

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

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

ORDER INFORMATION

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

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

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

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

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

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

For Clerk of Court Office Use Only

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

Eric M. Poulin / Stefan B. Feidler	W. McElhaney White
[redacted]	[redacted]
Charleston, SC 29403	Spartanburg, SC 29306
ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**

CLERK OF COURT

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

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

BACKGROUND

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

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

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

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

LAW

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

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

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

ANALYSIS

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

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

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

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

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

CONCLUSION

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

IT IS SO ORDERED!

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

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

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Beaufort Common Pleas

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

Case Number: 2017CP0702636

Type: Order/Jury Trial

It is so Ordered

s/ Perry M Buckner III 2122

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EXHIBIT F

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DARLINGTON	)	C.A. No.: 2023-CP-16-00511 & 2023-CP-16-00512
	)	
Tanya Bailey, Individually and as Personal Representative of the Estate of Della Wilds,	)	
Plaintiff,	)	**ORDER**
v.	)	
Oakhaven Nursing Center, LLC, Wilson Senior Care, Inc., and Oakhaven Properties, Inc.,	)	
Defendant(s).	)	

This matter came before the Court on December 4, 2023, on Defendants' Motion to Stay Action and Compel Arbitration and for a Protective Order. Present for Defendants was Joshua Thompson, Esq. of Boulier Thompson & Barnes, LLC and Matthew Christian of Christian & Christian, LLC for the Plaintiff. After considering all evidence of record, memoranda, exhibits, and arguments presented by counsel for the parties, the Court hereby denies Defendants' Motion to Stay Action and Compel Arbitration and for a Protective Order.

PROCEDURAL BACKGROUND

On February 13, 2023, Plaintiff filed a Notice of Intent to File Suit pursuant to South Carolina Code §15-79-125, et seq. The parties engaged in mediation as required by this section and mediation was unsuccessful. Accordingly, Plaintiff filed the Summons and Complaint on July 14, 2023, and served all Defendants. Defendants subsequently filed their Motion to Stay Action and Compel Arbitration and for a Protective Order on

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October 5, 2023. Plaintiff has alleged in the Complaint causes of action for nursing home negligence, ordinary negligence, and corporate negligence for the underfunding and understaffing of the nursing home under the wrongful death and survival actions.

Plaintiff alleges that Della Wilds was admitted to Defendants' skilled nursing facility/nursing home (hereinafter "Facility") on or about January 14, 2020 for long-term care. Complaint, p. 5. Plaintiff alleges that given Della Wilds' past medical history as well as current injuries, that the Defendants knew or should have known that Della Wilds was at high risk of developing pressure ulcers/bedsores. Plaintiff alleges that as a result of negligent, inadequate care, that Della Wilds developed multiple pressure ulcers/bedsores and the worsening thereof resulting in necrotic, exposed bone and tissue with malodorous drainage. Plaintiff further alleges that as a result of poor care, that Della Wilds developed severe urinary tract infection, aspiration pneumonia, and nutritional compromise with significant weight loss. Plaintiff alleged that as a result of these injuries, that Della Wilds was admitted to the hospital where she succumbed to her injuries on or about December 1, 2020. Defendants vehemently deny all of Plaintiff's allegations.

FACTUAL BACKGROUND/FINDINGS

On January 14, 2020, Della Wilds was waiting to be transferred and admitted to Defendants' facility. Daughter Affidavit, p. 1, paragraph 4. At or near that time, Defendants requested Daughter to sign and execute an Admission Agreement. Daughter Affidavit, pp. 1-2. It is undisputed that Defendants knew that Daughter had no actual authority including, but limited to, no guardianship, conservatorship, or any other valid power of attorney for Della Wilds. Additionally, it is undisputed that Defendants knew that Della Wilds was not competent at the time of her admission to the Defendants'

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facility and would have been unable to consent to any contract or agreement or otherwise make any representation that Daughter could act on her behalf.

Defendants further allege that at or near the time of the execution of the Admission Agreement, that Daughter signed an Arbitration Agreement. Defendants agree that the Arbitration Agreement is a separate agreement from the Admission Agreement. Defendants' Memorandum in Support, p. 9. The Admission Agreement was separately paginated and had separate signature lines from the Arbitration Agreement in addition to many other distinctions addressed hereinbelow. While Defendants attempt to argue that the Arbitration Agreement was incorporated into the Admission Agreement, the language of the agreements reflect that the documents did not merge, as this case is nearly identical to recent appellate cases finding no merger in the same circumstances. Hodge v. Uni-Health Post-Acute Care of Bamberg, 813 S.E.2d 292, 422 S.C. 544 (S.C. Ct. App. 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 755 S.E.2d 450, 407 S.C. 346 (S.C. 2014). The South Carolina Court of Appeals most recently rejected estoppel in a nearly identical situation in a nursing home case in Solesbee v. Fundamental Clinical and Operational Services, LLC, 426 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023)

Other than the language contained within the Arbitration Agreement itself, Defendants provide no evidence that the Arbitration Agreement was explained to Daughter whereas Daughter's affidavit avers that the Arbitration Agreement was not explained to her. Daughter Affidavit, p. 2, paragraphs 6-11. Furthermore, the Arbitration Agreement requires the identification of both the resident and the name of the facility as the parties to the Arbitration Agreement, and Defendants failed to identify the parties to

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the agreement. Arbitration Agreement, p. 31. Additionally, the Arbitration Agreement demands that the Defendants sign the Arbitration Agreement, but Defendants instead chose not to sign the agreement as required. Arbitration Agreement, pp. 31, 34. Finally, there are multiple statutory beneficiaries to the wrongful death claim who were not parties nor signatories to the Arbitration Agreement. Daughter Affidavit, p. 1, paragraph 3; Arbitration Agreement, pp. 31, 34.

STANDARD OF REVIEW

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application to arbitrate. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (S.C. 2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67,78,749 S.E.2d 139, 144 (Ct. App. 2013).

Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause."). Arbitration agreements must satisfy the basic tenets and requirements of contract law. Towles v. United Healthcare Corp., 338 S.C. 29,

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37, 524 S.E.2d 839, 844, (Ct. App. 1999). Section 2 of the Federal Arbitration Act dictates that arbitration agreements are enforceable except "upon such grounds as exist at law or equity for the revocation of any contract". 9 U.S.C. §2. The courts, not arbitrators, are charged with deciding certain "gateway matters" including whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy. New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008). Thus, unless there is a valid, irrevocable, and enforceable contract, the Federal Arbitration Act does not even apply.

Further, the party seeking enforcement of the agreement bears the burden to prove a valid arbitration agreement exists that is enforceable, knowing, voluntary, and intentional. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008); Hinson-Barr, Inc. v. Pinckard, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1986). "A motion to compel arbitration pursuant to the FAA is 'akin to the burden on summary judgment.'" Thomas v. Progressive Leasing, Civ. No. 17-1249, 2017 WL 4805235, at *2 (D. Md. Oct. 25, 2017)(internal quotation marks omitted) (quoting Galloway v. Santander Consumer USA, Inc., 819 F.3d 79, 85 (4th Cir. 2016)). Therefore, the burden is on the moving party to demonstrate the absence of any genuine dispute of material fact, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970), and that the movant is "entitled to judgment [compelling arbitration] as a matter of law." Burrell v. 911 Restoration Franchise Inc., 2017 WL 5517383, at *3 (D. Md. November 17, 2017) (citing Fed. R. Civ. P. 56(a)). Further, "there is, however, no public policy – federal or state – favoring arbitration." Simmons v. Benson Hyundai, LLC, 2022 S.C. App. LEXIS 37,

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22WL791174 quoting Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021).

CONCLUSIONS OF LAW

I. Equitable estoppel does not apply to the Arbitration Agreement.

A. The Admission Agreement and Arbitration Agreement did not Merge.

South Carolina Appellate Courts have considered equitable estoppel in nursing home cases multiple times over the past fourteen (14) years and have yet to hold that equitable estoppel exists for an arbitration agreement. In fact, the present case is extremely similar, if not identical, to the circumstances and language of the agreements in multiple appellate cases finding no equitable estoppel for the arbitration agreement. Hodge v. Uni-Health Post-Acute Care of Bamberg, 813 S.E.2d 292, 422 S.C. 544 (S.C. Ct. App. 2018); Coleman v. Mariner Health Care, Inc., 755 S.E.2d 450, 407 S.C. 346 (S.C. 2014). The South Carolina Court of Appeals most recently rejected estoppel in another nearly identical situation in a nursing home case in Solesbee v. Fundamental Clinical and Operational Services, LLC, 426 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023). Defendants, on the other hand, rely on a trial court case and a federal district court case that both pre-date nearly all of the South Carolina appellate court cases on this matter which have effectively overturned any cases relied upon by Defendants. Defendants' Memorandum in Support, pp. 13-14 (relying upon Price, supra and McCutcheon v. THI of S.C. at Charleston, LLC, No. 2:11-cv-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011).

As the South Carolina Supreme Court recently noted, "equitable estoppel is ultimately a theory designed to prevent injustice and it should be used sparingly." See

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Hirsch v. Amper Fin. Servs., LLC, 71 A.3d 849, 852 (N.J. 2013)(observing equitable estoppel should be used sparingly to compel arbitration and noting 'it is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration'); 28 Am.Jr.2d Estoppel and Waiver §29 (2011)(stating equitable estoppel should be used with restraint and only in exceptional circumstances)." Moreover, the South Carolina Court of Appeals recently noted that, "…if the party resisting arbitration is a non-signatory, a presumption **against** arbitration arises." Weaver v. Brookdale Senior Living, Inc., 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020) citing Wilson, 426 S.C. at 337, 827 S.E.2d at 173; (emphasis added).

In the present case, there is no question that Defendants are attempting to enforce an arbitration agreement against a third-party non-signatory, Della Wilds. As a result, not only do Defendants have the burden to prove all of the elements of equitable estoppel including all of the elements required to prove merger, but it should be noted at the outset that there is a presumption against arbitration in light of the above-referenced cases determined by our South Carolina Court of Appeals and South Carolina Supreme Court.

In order for the Defendants to prove that merger existed, Defendants must prove that the Arbitration Agreement and Admission Agreement were executed at the "same time, by the same parties, for the same purpose, and in the course of the same transaction." Coleman, 407 S.C. at 355, 755 S.E.2d at 455. Even then, merger does not apply if there is "**anything** indicating a contrary intention." Id. (Emphasis added.)

First, the Facility cannot show the Admission Agreement and Arbitration Agreement were executed for the same purpose. The Admission Agreement was clearly formed for the purpose of admitting Della Wilds to the Facility and for her healthcare

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services. Defendants admit as much by noting that, "The Admission Agreement governs the provision of healthcare services to Ms. Wilds by Oakhaven…." Defendants' Memorandum in Support, p. 3. The Admission Agreement covers payment for services, selection of physicians, Medicare and Medicaid payments, and other healthcare related matters. These purposes are born out in the Admission Agreement's forty (40) pages.

The Arbitration Agreement, on the other hand, covers a completely different matter. As Defendants emphasize in their Memorandum in Support on page 4, and as the Arbitration Agreement expressly states, it covers "important legal rights" and provides for an alternative dispute resolution process, all representing a different purpose than those contained within the Admission Agreement. Defendants' Memorandum in Support, p. 4; Arbitration Agreement, p. 31. Further, the Admission Agreement was a required agreement for Della Wilds' admission to the facility whereas the Arbitration Agreement is, by its own express terms, voluntary, as it states, "This is a voluntary Agreement to arbitrate… even if this Voluntary Arbitration Agreement is not signed. Signing this document is not a condition of admission." Arbitration Agreement, p. 31. As a result, the two agreements serve different purposes, and therefore, do not meet all of the necessary elements of merger. Additionally, significant evidence exists reflecting a contrary intention to merger.

As noted hereinabove, our Courts have repeatedly held that merger does not apply if there is ""**anything** indicating a contrary intention" to merger. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. (Emphasis added.) In Coleman, Thompson, and Hodge, our Courts have outlined multiple factors which may exist to reflect a contract intention to

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merger. Nearly all of those factors identified in the applicable appellate court cases exist in the present case.

Our appellate courts have identified the following as just a few of the possible factors indicating a contrary intention to merger:

1) Admission Agreement contains an "entire agreement" or integration provision limiting its parameters;
2) Admission Agreement and Arbitration Agreement contain inconsistent terms, especially as to how each contract may be terminated;
3) The Admission Agreement and Arbitration Agreement are separate agreements with separate signature lines;
4) The Admission Agreement and Arbitration Agreement are paginated separately;
5) The Arbitration Agreement was not a condition to admission and not required to be signed;
6) The Admission Agreement and Arbitration Agreement are governed by different sets of laws; and
7) Other inconsistent terms such as different parties or different ways to modify the agreement.

Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 551, 813 S.E.2d at 296; Solesbee v. Fundamental Clinical and Operational Services, LLC, 426 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023).

In addition to the fact that the Admission Agreement and Arbitration Agreement serve different purposes, the present case has nearly every one of the same factors to reflect that a contrary intention to merger exists with regard to the two agreements. First,

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as noted hereinabove, the Arbitration Agreement and Admission Agreement are separate agreements. Simply because the Defendants labeled it an attachment or an exhibit to the Admission Agreement does not make it the same agreement. In fact, in Coleman, Thompson, Hodge, and Solesbee our appellate courts dealt with a nearly identical scenario where the admission agreement attempted to incorporate the arbitration agreements by including language within the admission agreement that attempted to incorporate the second agreement. Nonetheless, our appellate courts found that the documents did not merge, and the fact that the admission agreement and arbitration agreement were separate agreements were further indications of an intent to not merge. In the present case, the two agreements are distinct and separate, and Defendants admit as much in their Memorandum. Defendants' Memorandum in Support, p. 9.

Second, the Arbitration Agreement and Admission Agreement contain separate signature lines as existed in Coleman, Thompson, and Hodge. Furthermore, the Arbitration Agreement and Admission Agreement apply to different parties. While the Arbitration Agreement does not identify which resident or which facility it applies to, it does state that it intends to bind many other individuals and entities to the agreement including, but not limited to, the resident, parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the resident and also attempts to include the facility's member, owner, governing body, officers, agents, parents, affiliates, subsidiaries, and employees, including, but not limited to, Wilson Senior Care, Inc. Arbitration Agreement, p. 33. The Admission Agreement does not identify or include all of these entities as being parties to the agreement or as being bound by the agreement which further represents inconsistent terms and an intent against merger.

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Third, the Arbitration Agreement, as admitted by Defendants, was not required for Della Wilds to be admitted to the facility. The Arbitration Agreement by its own explicit terms states that it is voluntary and not required for admission to the facility. This is one of the other factors specifically identified by our appellate courts reflecting a contrary intent to merger which existed in Coleman, Hodge, Thompson, and Solesbee. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 551, 813 S.E.2d at 296. Solesbee v. Fundamental Clinical and Operational Services, LLC, 426 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023).

Fourth, as Coleman, Thompson, Solesbee, and Hodge recognize, having different requirements for termination of the admission agreement and arbitration agreement reflect a contrary intention to merger. In Coleman, and Hodge, the arbitration agreement allowed the resident to disclaim or revoke the provisions within thirty days, but the admission contract did not include the same time period or similar right. Id. In the present case, the contracts' termination provisions are just as inconsistent as in those cases whereas here, the Arbitration Agreement could only be revoked within the first thirty (30) days of execution but the Admission Agreement presumably could be canceled by the resident at any point in time, as a resident could be discharged to a different facility at the resident's whim. Further, the facility could revoke the Admission Agreement with **no less than** thirty (30) days' notice to the resident. Additionally, the Admission Agreement could only be modified in writing, signed by the chief executive only, whereas the Arbitration Agreement could only be modified when signed by **any** of the parties. Admission Agreement, p. 33; Arbitration Agreement, p. 33. Therefore, this

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provides further evidence of the separateness of the Admission Agreement and Arbitration Agreement that also continues to rebut any evidence of merger.

Fifth, the Admission Agreement contains a "sole agreement" provision nearly identical to the "entire agreement" provisions found in Coleman and its progeny reflecting a contrary intention to merger. In the present case, this provision specifically states that, "This agreement, and any documents that are attached hereto and/or incorporated herein by reference, is the entirety of the agreement between Facility and Resident." "Agreement" is capitalized because it is a defined term which the Admission Agreement's opening line limits to "THIS ADMISSION AGREEMENT." (Admission Agreement, p. 1)(Emphasis in original). This provision specifically limits the contract's interpretation to the "Agreement" and then defines that term narrowly in a way that does not include the Arbitration Agreement or any other writing. Admission Agreement, p. 1. This language tracks nearly the identical language from Coleman, Thompson, and Hodge. Id. In fact, in Coleman, the Court focused on the fact that the admission contract's "entire agreement" provision referenced "this agreement… and the arbitration agreement." Referencing the two writings distinctly was "the admission agreement's recognition of the arbitration agreement as a separate document." Thompson, 416 S.C. at 52, 784 S.E.2d at 684 (citing Coleman, 407 S.C. at 355, 755 S.E.2d at 455). Hodge applied the same principle using language from an arbitration contract that referenced an admission contract in distinct terms. 422 S.C. at 562, 813 S.E.2d at 302. If an arbitration contract explains its scope extends to disputes arising from "this Agreement or the . . . Admission Agreement," then the parties "recognized a separateness" between the two contracts. Id. The Arbitration Agreement in this case does exactly what Coleman, Thompson, and

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Hodge identify as proof that defeats the Facility's merger argument. In describing its term, the Arbitration Agreement states that its effect "shall survive and remain in full force and effect notwithstanding the death of Resident, the discontinuance of operations or the facility, or the termination, cancellations, or expiration of the **Admission Agreement**." (Admission Agreement, p. 33, paragraph R) (emphasis added).

While Facility may argue that the Admission Agreement attempts to incorporate other "attachments" in an attempt to argue merger to the extent that Facility tries to make such argument and imply that the Arbitration Agreement was incorporated by reference in to the Admission Agreement, the Facility cannot support this conclusion. "Attachments" is not a defined term and there is nothing to suggest that the Arbitration Agreement was intended to be included within it. Further, since Facility admits agreeing to arbitration was not required for admission, it would be counter-intuitive to conclude the Arbitration Agreement was an "admissions material." Thompson rejected a similar argument when a nursing home argued its admission contract's "entire agreement" provision incorporated a separate arbitration contract by referring broadly to "exhibits." Since "exhibit" was undefined and not referenced elsewhere in either contract, the term was ambiguous and was interpreted against the nursing home who drafted it. 416 S.C. at 53-54, 784 S.E.2d at 685 (citing Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455).

Sixth, as our courts have recognized, formatting the documents separately reflect an intent for the agreements to not merge. In the present case, the Admission Agreement is paginated pages "1 of 40" to "40 of 40". However, the Arbitration Agreement was all on its own running from a separate set of documents paginated, "31" through "34" and not include within the forty (40) pages of the Admission Agreement.

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Finally, another factor recognized by our appellate courts reflecting that the agreements do not merge includes the fact that the agreements are governed by a different set of laws. In Coleman and its progeny, our appellate courts have recognized the fact that arbitration agreements are governed the Federal Arbitration Act and federal law whereas the Admission Agreements are governed by a different set of laws. In the present case, the Arbitration Agreement specifically provides that it must be interpreted under the Federal Arbitration Act. Arbitration Agreement, p. 32, paragraph F. The Admission Agreement specifically states that it is to be governed by South Carolina law. Admission Agreement, p. 35. As a result, not only does the Admission Agreement not serve the same purpose to even meet the threshold elements of merger, nearly all of the exact same factors that existed in our appellate court cases which find that there can be no merger due to a contrary intention being expressed by the terms and formatting of the documents exist in this present case. Defendants must prove that all of the indicators of a contrary intent to merger are absent and cannot do so because they specifically and explicitly exist in the two agreements. Further, because Defendants drafted these form contracts of adhesion, any ambiguities must be construed against the Facility. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53-54; 784 S.E.2d at 685.

B. Defendants cannot show the elements of equitable estoppel exist even if the agreements did merge.

The "direct benefits estoppel" discussed in Wilson could only apply if Plaintiff has "consistently maintained that other provisions of the same contract should be enforced to benefit" her. 426 S.C. at 340, 827 S.E.2d at 175 (quoting Pearson, 400 S.C. at 290, 733 S.E.2d at 601). When rejecting a "direct benefits" estoppel in the context of nursing home arbitration, the South Carolina Court of Appeals has held that the party

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asserting estoppel must make three distinct showings. Weaver v. Brookdale Sr. Living, Inc., 431 S.C. 223,230, 847 S.E.2d 223 (Ct. App. 2020). Defendants would have to show (1) Ms. Wilds' claim arose from a contractual relationship; (2) Ms. Wilds "exploited" other parts of the contract by reaping its benefits; and (3) her claim "relies solely on the contract terms to impose liability." Id. (citing Wilson, 426 S.C. at 340-44, 827 S.E.2d at 175-77).

Applying these elements, Weaver found a nursing home's resident does not gain a "direct benefit" for estoppel purposes simply by accepting the services obtained upon admission to the nursing home. 431 S.C. at 230-31, 847 S.E.2d at 272-73[1]. The estate's personal injury claims also do not "arise from" the Admission Agreement. There is no breach of contract claim, and the Admission Agreement is not referenced at all in the Complaint. Id. at 231, 847 S.E.2d at 272 (finding "arising from" requirement is not met just because claim would not exist "but for" a contract's existence). Instead, the estate grounds its claims in duties arising from common law with no reference to any contract. Id. at 232, 847 S.E.2d at 273 (finding nursing home resident's claims "rely on general tort duties . . . not any provision of the residency agreement"). Under those circumstances, estoppel cannot apply because the claims do not "arise from" a contract and certainly do not "rely solely" on a contract's terms. Id. at 232-33, 847 S.E.2d at 273 (citing Hodge as further support to show "direct benefit" estoppel does not apply to nursing home resident's common law tort claim). Defendants cannot distinguish Weaver from the

[1] It should be stressed that Weaver involved a claim against a nursing home where the admission agreement contained the arbitration agreement as part of the same contract and the Court of Appeals still found that estoppel did not exist. Weaver v. Brookdale Sr. Living, Inc., 431 S.C. 223,230, 847 S.E.2d 223 (Ct. App. 2020).

present case which forecloses the estoppel argument. Weaver is strong precedent against applying estoppel in this context.

Moreover, the South Carolina Court of Appeals has previously rejected a nursing home's attempt to use direct benefits estoppel to compel a non-signatory nursing home resident to arbitrate even before Weaver. Thompson, 416 S.C. at 58-59, 784 S.E.2d at 687-88; see also Hodge, 422 S.C. at 556-57, 813 S.E.2d at 299-300 (applying Thompson). After surveying Pearson and Fourth Circuit cases, Thompson refused to apply this form of estoppel because it generally requires proof of some benefit to the party opposing estoppel in "*the contract that includes the arbitration provision*." 416 S.C. at 59, 784 S.E.2d at 688 (emphasis added). The Facility, therefore, cannot build an estoppel argument by citing supposed benefits Ms. Wilds gained in the Admission Agreement. Thompson also rejected any effort to argue Ms. Wilds gained a "direct benefit" from the Arbitration Agreement. Id. at 60, 784 S.E.2d at 688 ("any possible benefit emanating from the [Arbitration Agreement alone is offset by the [Arbitration Agreement's] requirement that Mother waive her right of access to the courts . . ."). In any event, the Facility's estoppel claim is wholly dependent on a merger argument it cannot prove. As discussed above, there is no merger here because the contracts were created for different purposes and there are many indications from the contracts' language they were not intended to be construed as one.

Further, Defendants make the unsupported leap that the South Carolina Adult Healthcare Consent Act provides support because Daughter may have had authority to execute the Admission Agreement under the Act, that she then had authority to execute the Arbitration Agreement and thus, estop Della Wilds from denying the existence of

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same. However, this argument is significantly flawed because our courts have repeatedly held that even if the Adult Healthcare Consent Act provides authority for Daughter to sign the Admission Agreement, it does not provide any authority for Daughter to execute an arbitration agreement. Hodge v. Uni-Health Post-Acute Care of Bamberg, 813 S.E.2d 292, 422 S.C. 544 (S.C. Ct. App. 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 755 S.E.2d 450, 407 S.C. 346 (S.C. 2014). Furthermore, even if it did provide such authority, which it does not, Della Wilds is still not attempting to exploit any benefit of any contract for her claims against Defendants. Instead, as noted hereinabove by our courts in the nursing home context, Della Wilds' claim arises in tort from an independent duty of the healthcare provider to the patient and not from the Admission Agreement or Arbitration Agreement. As a result, the Facility cannot prove the proper elements and cannot show Ms. Wilds obtained any "direct benefits" from the contract, and Defendants' estoppel claim is based on a flawed merger argument.

II. Daughter had no agency authority for Della Wilds to execute the Arbitration Agreement.

South Carolina appellate courts have considered the agency argument in multiple cases involving nursing home claims and rejected it on nearly every occasion. See Hodge v. Uni-Health Post-Acute Care of Bamberg, 813 S.E.2d 292, 422 S.C. 544 (S.C. Ct. App. 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 755 S.E.2d 450, 407 S.C. 346 (S.C. 2014); Arredondo v. SNH SE Ashley River Tenant, 433 S.C. 69 (2021), 856 S.E.2d 550. The South Carolina Supreme Court has rejected any contention of apparent agency under the same or similar circumstances in multiple cases. See Hodge v. Uni-Health Post-Acute Care of Bamberg,

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813 S.E.2d 292, 422 S.C. 544 (S.C. Ct. App. 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 755 S.E.2d 450, 407 S.C. 346 (S.C. 2014); Arredondo v. SNH SE Ashley River Tenant, 433 S.C. 69 (2021), 856 S.E.2d 550. Daughter had no authority to execute the Arbitration Agreement, and therefore, it is unenforceable.

Further, an argument of agency would require that Defendants prove that (a) Della Wilds consciously or impliedly represented Daughter to be her agent; (2) Defendants relied on Della Wilds' representation; and (3) Defendants changed their position to the detriment based upon the representation. Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016). Defendants point in their argument to representations allegedly made by Daughter. However, this is completely misplaced as our courts have continuously held, "agency **may not be** established solely by the declarations and conduct of an alleged agent." Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016) quoting Frazier v. Palmetto Homes of Florence, Inc., 323 S.C. 240 at 245, 473 S.E.2d 865 at 868 (S.C. Ct. App. 1996) (Emphasis added). As noted in Thompson, when the resident is incompetent or unable to consent, as Defendants admit Della Wilds was, then "her incapacity prevented her from 'consciously or impliedly' representing [Daughter] to be her agent." Thompson at 55.

Moreover, Defendants cannot show that they relied upon any representation even if Della Wilds could have made a representation because they had actual knowledge that Daughter had no authority. Further, the Defendants present no evidence that there was a change of position to their detriment even if there was a representation by Della Wilds.

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Nonetheless, as our Court of Appeals noted in Hodge, there is no evidence in the present case that Della Wilds even represented Daughter to be her agent. In fact, our courts have even held that: (1) A husband acting on behalf of his wife does not establish apparent agency; (2) A son who previously handled financial arrangements for his mother did not establish apparent agency; and (3) A healthcare power of attorney does not establish apparent agency to provide authority to enter into an arbitration agreement on behalf of a resident. Hodge v. Uni-Health Post-Acute Care of Bamberg, 813 S.E.2d 292, 422 S.C. 544 (S.C. Ct. App. 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016).

Defendants cite a number of out of state cases and an abrogated South Carolina case dealing with construction issues to assert that Daughter had inherent agency powers. However, this argument flies directly in the face of all of the applicable appellate court case law on this matter as noted hereinabove. Furthermore, in order to establish any inherent agency argument, Defendants would have to establish that the Adult Healthcare Consent Act provided authority for Daughter to execute the Arbitration Agreement, and South Carolina case law specifically states otherwise. ("The separate arbitration agreement concern neither healthcare nor payment, but instead provided an optional method for dispute resolution between [the healthcare facility] and [the patient] or [surrogate] should issues arise in the future under the **Act**. [The surrogate] did not have the capacity to bind [the patient] to this voluntary arbitration agreement.") Coleman v. Mariner Health Care, Inc., 407 S.C. at 354, 755 S.E.2d at 454. (We therefore affirm the Circuit Court's holding that the **Act** did not confer authority on [the surrogate] to execute a document which involved neither healthcare nor financial terms for payment of such

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care.") Id. (Emphasis added.) Therefore, no agency existed to enable the Daughter to execute the Arbitration Agreement.

III. Agency by estoppel does not apply and has been rejected by our courts in these circumstances

Della Wilds is not required to arbitrate through the doctrine of agency by estoppel because it does not apply. Defendants contend that Plaintiff is required to arbitrate through the doctrine of agency by estoppel despite the fact that any such arguments have been struck down each time it has been considered by our appellate courts in nursing home cases. Defendants rely upon two trial court cases, Price, supra and McCutcheon v. THI of S.C. at Charleston, LLC, No. 2:11-cv-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011), both of which pre-date and have been overturned by nearly all of the South Carolina appellate court cases for the past twelve (12) years. Defendants have no applicable, current authority to support their position.

Further, for Defendants to be able to prove what they contend is "agency by estoppel", estoppel must be established by the Defendants proving that: (1) Defendants lacked the knowledge and the means of the knowledge of the truth as to the facts in question; (2) that Defendants relied upon the conduct of **Della Wilds**; and (3) that Defendants changed their position prejudicially upon any such representations or conduct by Della Wilds. Boyd v. Bellsouth Tel. Co., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006). Defendants cannot meet any of these elements, much less all three.

First, Defendants cannot show that they had a lack of knowledge or the lack of means of knowledge as to the fact that Daughter had no authority for Della Wilds because Defendants actually knew by their explicit admission and forms submitted to this Court from the time of admission, that Daughter had no authority to act for Della Wilds

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including no power of attorney, no guardianship, no conservatorship, or other authority. Second, because Defendants admit that Della Wilds was not competent and incapable of consenting, then Defendants could not have relied upon any conduct or representation by Della Wilds. Third, there is no evidence that Defendants changed their position prejudicially based on any action of Della Wilds.

Finally, Defendants cannot be successful to prove their argument for "agency by estoppel" because, as mentioned extensively hereinabove, Della Wilds is not attempting to procure any benefit from the Admission Agreement or Arbitration Agreement in addition to the fact that the agreements do not merge. As our appellate courts have consistently held, Defendants would have to prove that Della Wilds was attempting to procure some benefit from these contracts, and because her claims arose in tort and not in contract, her claims do not rely in any way on the Admission Agreement or the Arbitration Agreement. Hodge v. Uni-Health Post-Acute Care of Bamberg, 813 S.E.2d 292, 422 S.C. 544 (S.C. Ct. App. 2018). Weaver v. Brookdale Sr. Living, Inc., 431 S.C. 223,230, 847 S.E.2d 223 (Ct. App. 2020).

IV. The Arbitration Agreement is not enforceable because it does not identify the proper parties to the agreement, was not signed by the Facility, and there was no meeting of the minds or mutual assent.

The Arbitration Agreement is unenforceable because it lacks mutual assent and meeting of the minds. Contract formation demands the mutual assent of the proposed parties. Eden v. Laurel Hill, Inc., 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978)(citing Kitchens v. Lee, 221 S.C. 59, 59, S.E.2d 67 (1952)).

It is a basic tenet of contract law that a contract must contain both mutual assent and a meeting of the minds in order for a valid contract to exist and be enforceable. The

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Arbitration Agreement has blanks requiring the Facility to identify both the resident and the name of the facility to set forth the defined parties to the agreement. Arbitration Agreement, p. 31. The Arbitration Agreement does not identify the resident party nor the facility party to the agreement. Further, the Arbitration Agreement is not signed at the blank for the Facility's signature as required by the agreement. Arbitration Agreement, p. 34.

Identifying the parties to a contract are essential terms to the contract. The Defendants have the burden to prove who the parties were in the contract within the four corners of the agreement. "Vagueness of expression, indefiniteness, and uncertainty as to any of the essential terms of an agreement have often been held to prevent the creation of an enforceable contract." Reed v. Boykin, 282 S.C. 614, 327 S.E.2d 68 (S.C. App., 1984). Our courts have held that identifying an arbitrator who would no longer hear healthcare arbitration agreements was an essential term of a contract of an arbitration agreement. Clearly, if there is no mutual assent and meeting of the minds because the Arbitration Agreement identifies an arbitrator who will not hear the dispute, then there is a much stronger argument that there is no mutual assent and meeting of the minds when the parties to the agreement are not identified, particularly when the contract itself requires the identification of those parties. Put simply, the language within the four corners of this Arbitration Agreement do not identify Della Wilds as a party to this agreement, nor does it identify the Facility as a party to the agreement, therefore, making it impossible to enforce because there is no mutual assent or meeting of the minds.

The document must be construed against the Defendants as the drafting entities. Nowhere does the document identify that Della Wilds was entering into an Arbitration

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Agreement with Oakhaven Nursing Center. Further, there is no mutual assent or meeting of the minds because the Defendants did not sign the Arbitration Agreement. When a proposed contract designates the parties' signatures as the means by which assent is to be manifested, any party's failure to sign means there is no contract to enforce. Dean v. Dean, 229 S.C. 430, 436, 93 S.E.2d 206, 209 (1956). The Arbitration Agreement, drafted exclusively by the Facility, designates the method by which the parties demonstrate assent to its terms. Unlike employee handbooks or other documents where the non-drafting party alone is asked to sign, the Facility chose to require both parties' signatures by placing signature blocks for itself and Ms. Wilds at the bottom of the Arbitration Agreement. Exhibit D, p. 34.

The Facility's drafting choice should be construed to require the Facility's signature for two reasons. First, the mutual assent requirement is based on a party's objective manifestations. Rodarte v. Univ. of S.C., 419 S.C. 592, 603, 799 S.E.2d 912, 917-18 (2017) (quoting Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009)). Given the Facility's choice to place a signature block for itself in the Arbitration Agreement, it was reasonable for Ms. Wilds to conclude the proposed contract was not binding without the Facility objectively manifesting assent through its signature. See also Abdiana Props., Inc. v. Bengtson, 575 S.W.3d 754, 761 (Mo. App. 2019) (finding it "reasonable to conclude" drafting party intended inclusion of signature line for itself to make its signature a condition of mutual assent). Second, to the extent the dual signature blocks create an ambiguity regarding the Arbitration Agreement's designated method of assent, it must be construed against the Facility because it alone chose the Arbitration Agreement's format and language. See

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Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 355-56, 755 S.E.2d 450, 455 (2014) (holding ambiguity in nursing home arbitration agreement must be construed against drafter).

Under long-standing South Carolina law, when a contract demands all parties' signatures, it is ineffective until all parties have signed. Dean, 229 S.C. at 436, 93 S.E.2d at 208. In Dean, the South Carolina Supreme Court affirmed a circuit court's refusal to enforce a proposed contract that demanded five parties' signature but included only four. Id. As Dean explained:

> "The reason for holding the instrument void is it was intended that all the parties should execute it and that each executes it on the implied condition that it is to be executed by the others, and, therefore, that until executed by all, it is inchoate and incomplete and never takes effect as a valid contract."

Id. (quoting 17 C.J.S., Contracts § 62 at 412). The same principle applies here. Since the Facility chose dual signatures as the designated means by which the Arbitration Agreement was to be executed, the Facility's failure to sign renders the Arbitration Agreement "inchoate and incomplete" such that it "never takes effect as a valid contract." The mutual assent required to make an arbitration agreement valid means the Facility and Ms. Wilds must agree at the "same time, upon the same subject, and in the same sense." Nugent v. Myles, 829 S.E.2d 623, 627 (Ga. App. 2019). The South Carolina Court of Appeals has recently affirmed the Circuit Court's decision to deny a motion to compel arbitration in nearly identical circumstances. While it is an unpublished opinion, it nonetheless reflects how our appellate courts are likely to rule. Royston v. Hunt Valley Holdings, LLC, Opinion No. 2022-UP-203.

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Multiple other jurisdictions have agreed. The Arkansas Supreme Court ruled a nursing home's failure to sign a series of arbitration contracts on the line designated for its signature "is fatal to the validity of these agreements." Robinson Nursing & Rehab. Ctr., LLC v. Phillips, 586 S.W.3d 624, 635 (Ark. 2019). Without the signature the contracts called for, the home could not meet its burden to demonstrate an objective manifestation of intent. Id. at 635-36; see also Pine Hills Health & Rehab., LLC v. Matthews, 431 S.W.3d 910, 915 (Ark. 2014). See also Bair v. Manor Care of Elizabethtown, PA, LLC, 108 A.3d 94, 98 (Pa. Super. 2015) ("By failing to affix its signature, [the nursing home] did not consent to arbitrate"); Caldwell v. SSC Lebanon Operating Co., LLC, Civil Action No. 3:16-cv-0036, 2016 WL 3905670 (M.D. Tenn. July 19, 2016) (quoting Flanary v. Carl Gregory Dodge of Johnson City, LLC, No. E2004-00620-COAR3-CV, 2005 WL 1277850, at * 9 (Tenn. App. May 31, 2005) (rejecting affidavit as "nothing more than a post-commencement of litigation statement" insufficient to make objective manifestation of assent). Therefore, because the Arbitration Agreement demands that the parties to the agreement be identified and further demands signature of both parties, there is no mutual agreement or meeting of the minds because the parties were not identified and the Defendants did not sign the Agreement.

V. The Arbitration Agreement is unenforceable because Defendants failed to follow regulatory requirements to enforce a valid arbitration agreement in a skilled nursing facility claim.

Federal regulations governing the operation of nursing homes have specific requirements for the creation and execution of arbitration agreements to residents and/or their families by the facility. 42 C.F.R. §483.70(n). The regulations and Guidance to Surveyors require that the facilities be able to prove the following:

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(1) That the terms and conditions of the arbitration agreement are clearly explained to the resident and/or his/her representative;

(2) It is explained to the resident and his/her representative that the arbitration agreement is voluntary and not required for admission to the facility;

(3) The facility must explain the arbitration agreement to the resident and resident's representative in a manner and form which they understand, and the facility "must ensure there is evidence that the resident or their representative has acknowledged understanding of the agreement;"

(4) Further, when a signature is used to acknowledge understanding, additional evidence is needed to establish that the resident or their representative understood what was being signed;

(5) If the resident is cognitively impaired, such should be taken into account in determining whether or not the resident is able to understand the contents of the agreement;

(6) The facility is required to distinguish the arbitration agreement from the admission agreement, especially if the arbitration agreement is contained within the admission agreement and allow the resident or their representative to decline the arbitration agreement without declining the admission agreement;

(7) It must be clearly explained to the resident or resident's representative that there is thirty (30) days to withdraw or terminate the agreement should they change their mind;

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(8) The facility must explain to the resident or their representative how the resident or their representative may withdraw from or terminate the arbitration agreement within the thirty (30) days should they desire to do so; and

(9) The facility may not require, force, or pressure the resident or his/her representative to sign the binding arbitration agreement.

42 C.F.R. §483.70(n).

Aside from the plain language of the Arbitration Agreement, Defendants offer no evidence to rebut Daughter's Affidavit that the agreement was not explained to her in the terms required as described above. In fact, the Guidance to Surveyors established by the Federal Government for the interpretation of these regulations specifically states:

> "In some cases, the binding arbitration agreement may specify that the resident or his/her representative acknowledges understanding by signing the document. When a signature is used to acknowledge understanding, additional evidence may be needed to establish that, in fact, the resident or their representative understood what he or she was signing. It may not be sufficient that the resident or their representative signed the document."

State Operations Manual, Appendix PP – Guidance to Surveyors for Long-Term Care Facilities, Guidance Section 483.70(n)(1)(2)(i)(ii)(3)-(5). Defendants were required to meet these regulations in order for there to be a binding arbitration agreement. Any arbitration agreement that violates federal law or legal requirements is an invalid contract. An illegal contract is unenforceable. Berkebile v. Outen, 426 S.E.2d 760, 762 n. 2 (1993). "The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Id. As a result, the Arbitration Agreement is unenforceable.

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VI. The Arbitration Agreement is not enforceable as to the wrongful death statutory beneficiaries' claims because they did not sign in their individual capacity.

South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914). The alleged Arbitration Agreement with Facility by its own terms is an agreement between " _____ (the 'Facility') and _____ ('Resident,' or 'Resident's Representative')." Arbitration Agreement, page 31. Therefore, any purported agreement to arbitrate any claims was (by the terms of the contract which was drafted by the Defendants) only on behalf of the Facility and Resident or Resident's Representative.

However, even were the agreement purported to include the statutory beneficiaries, Daughter did not have the legal authority to bind the statutory beneficiaries who are not parties/signatories to the Arbitration Agreement. The signatory to the agreement is Daughter. Daughter was only asked to sign the agreement on behalf of Decedent and was not even aware of the Arbitration Agreement. No other parties are parties to this agreement. The scope of the agreement does not include the statutory beneficiaries' claims.

Defendants' contention that the agreement covers the statutory beneficiaries' claims is not correct. The problem with such contention is that Daughter had no authority to waive the statutory beneficiaries' claims.

Defendants erroneously argue that the South Carolina Supreme Court has held that arbitration agreements are binding as to the wrongful death claims based on Dean v.

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Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014) for this proposition. To the contrary, in a footnote, the Dean Court indicated that a court may not refuse to compel arbitration "simply because a wrongful death claim is involved". However, the Supreme Court has been clear that a court may find a wrongful death claim to be not covered by an arbitration agreement - not because it is a wrongful death claim, but because of state law contract defenses such as a person(s) not being a party or signatory to the contract. In the present case, the statutory beneficiaries clearly are not parties/signatories to the contract. This is the exact type of basis courts have upheld invalidating an arbitration agreement.

While dealing with a separate arbitration issue in a nursing home case and finding the arbitration agreement to be unenforceable, the Court of Appeals in Hodge v. Uni-Health Post-Acute Care of Bamberg, 813 S.E.2d 292, 422 S.C. 544 (S.C. Ct. App. 2018), recognized the separateness of the statutory beneficiaries/estate's claims from those of the patient/resident. In discussing the Maryland court's case of Dickerson, the Court noted that the nursing home was attempting "to use equitable estoppel against [the patient's] estate based on actions that [Son] took *in her individual capacity*. The fact that [Son] is *now the Personal Representative for [the patient's] [e]state* is of no moment; we will not hold this circumstance against [the patient's] [e]state. Simply put, [the patient's] [e]state is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] [e]state, or by [Daughter] in *her capacity as Personal Representative* of [the patient's] [e]state…." Hodge quoting Dickerson v. Longoria, 995 A.2d. 721, 743 (Md. 2010). As recognized in this discussion, actions taken by Daughter in her

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individual capacity will not be held against the estate and as the Court noted, the estate may well have other beneficiaries or creditors.

Defendants further incorrectly assert other cases hold that the statutory beneficiaries are bound as third-party beneficiaries. The Defendants cite Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012). Defendants' Memorandum in Support, p. 19. In Pearson, the Plaintiff who sought to avoid the arbitration agreement had filed suit for a breach of the very contract that contained the arbitration clause. In the present case, no claim for breach of contract has been made whatsoever. Further, the Plaintiff in Pearson personally received direct benefits from the contract. Here, the statutory beneficiaries personally received zero benefit from any contract. Plaintiff's claim arises in tort, not based on a contract. Weaver v. Brookdale Senior Living, Inc., 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020).

Defendants insist that Daughter had the power to waive the right to a jury trial on a claim that did not exist when the Arbitration Agreement was presented but never belonged to her and covered injuries suffered exclusively by other people. Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019), provides the specific times when a contract may be enforced against a non-party and the Defendants would have the burden of proving each of the elements of one of those instances where such a contract may be enforced against a non-party. Defendants cannot prove these elements existed with regards to this specific case.

The statutory beneficiaries' claim is much more akin to the claims of the non-signatory Plaintiffs in Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019), where the South Carolina Supreme Court held the non-signatories could not be bound by the

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arbitration agreement. Much like the non-signatories in Wilson, the statutory beneficiaries in the instant case are not attempting to exploit or receive a direct benefit from the agreement and were not even aware of the existence of the arbitration provision. Defendants confuse the benefit Decedent received from admission and attempt to argue the statutory beneficiaries received a benefit personally from the admission. That argument is without merit.

As the Wilson Court notes, "Equitable estoppel is ultimately a theory designed to prevent injustice, and it should be used sparingly. See Hirsch v. Amper Fin. Servs., LLC, 71 A.3d 849, 852 (N.J. 2013)(observing equitable estoppel should be used sparingly to compel arbitration and noting 'it is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration'); 28 Am.Jr.2d Estoppel and Waiver §29 (2011)(stating equitable estoppel should be used with restraint and only in exceptional circumstances)."

Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, a Federal District Court in South Carolina has analyzed this issue under the South Carolina Non-Economic Awards Act of 2005. Diane Boyle as Personal Representative of the Estate of John Francis Boyle v. United States of America, United States District Court for the District of South Carolina, Beaufort Division (2009). In Boyle, the Court concluded that the wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. This analysis confirms that the wrongful death claimants have separate and distinct claims apart from that of the survival action. As such, Daughter or Decedent were incapable of waiving the statutory beneficiaries' right to a trial by jury.

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Many other states have come to this same conclusion, Daniels v. Sunrise Senior Living, Inc., 212 Cal.App 4th 674, 151 Cal.Rptr.3d 273 (Cal.App.4 Dist, 2013) (wrongful death claims not bound to arbitration), Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (wrongful death claimants not bound by arbitration agreement.) The only signature to the agreement with Facility was Daughter. Therefore, the only party executing this Agreement was Daughter purportedly on behalf of Decedent.

As the Supreme Court of Kentucky said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises. Inc.:

> [A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third-party are appropriately subjected the contract's arbitration provisions, at least where the tort and contract are significantly intertwined. See, In re Weekley Homes, L.P., 180 S.W. 3d 127 (Tex. 2005) (negligent repair claim by homeowner's Son against contractor was subject to repair contract's arbitration clause because Son, although a non-party, was direct and principal beneficiary under the contract). It is something else entirely, however, to say that incidental beneficiaries of a contact-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely be being mentioned in the contract as potential claimants. This is what Beverly purports to do. Arbitration is a matter of contract, however, it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another. Howsam v. Dean Witter Reynolds, Inc., 537 U.S.

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> 79,83, 123 S. Ct. 588, l54 L. Ed.2d 491 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit", Citation and internal quotation marks omitted.) Since Beverly's theory would allow just that, i.e., would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a "third party beneficiary" of the arbitration agreement, we reject it out of hand.

Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 599-600 (KY 2012).

Defendants are left to argue the wrongful death claim actually belongs to Della Wilds' estate rather than the statutorily designated beneficiaries. However, this argument incorrectly lumps together the wrongful death claims and the survival of tort claims Decedent had against Defendants at the time of her death. The differences with these claims begin with the statutes themselves.

The wrongful death claims are separate claims apart from the Della Wilds' claims. According to South Carolina's Wrongful Death Act:

> "Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued shall be liable to an action for damages."

South Carolina Code Annotated §15-51-10 (1977)

> The wrongful death beneficiaries are as follows:
>
> "Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs or the person whose death shall have been so caused."

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South Carolina Code Annotated §15-51-20 (Supp. 2001)

The general element of damages recoverable are pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of Decedent's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries. Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d. 713, 714 S.C. (Ct. App. 1989). Damages are paid to these beneficiaries because a wrongful death claim is directed at their losses suffered as a result of Della Wilds' absence. Scott v. Porter, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000)(citing F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 610 (2d ed 1997). In contrast, the legislature positions the survival statute in a completely different code chapter. The wrongful death claim is a distinct claim warranting its own designation (Chapter 51). The survival statute is classified within an existing chapter (Chapter 5) identifying the proper "parties" for pursuing legal claims.

The wrongful death claim is a separate claim from the claims a decedent might bring on his own behalf under the survival statute. In Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914), the Supreme Court held that wrongful death and survival actions are different claims for different injuries. The Court stated "necessarily, therefore, there must be separate verdicts and separate judgments, there should be separate actions." Id. at 31. See also Strickland v. Southern Ry Co., 111 S.C. 248, 97 S.E. 695 (1918) (Supreme Court Affirmed Appeal from Circuit Court's ruling noting that survival claims are independent of wrongful death claims), Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539 (1928) (discussing the difference between survival and wrongful death claims as being independent of each other).

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In Grainger v. Greenville S&A Railway Co., the South Carolina Supreme Court traced the divergent tracks that wrongful death and survival claims have taken over their development. Grainger v. Greenville S&A Railway Co., 101 S.C. 399, 85 S.E. 968 (915). In that case, the trial court had dismissed the survival action because the decedent's administrator (equivalent to the modern "Personal Representative") had previously recovered on a wrongful death claim. Id. at 968. When the legislature recognized this abnormality, it responded by creating the predecessor to the modern survival statute. Id. citing 1912 Code §3693. Grainger held this legislative history conclusively established wrongful death and survival actions are distinct and independent. Id. The claims are distinct because "the beneficiaries, the cause of action, the measure of damages, are all different." Grainger 85 S.E. at 969. Our courts have further held that judgement in a wrongful death claim does not have preclusive effect on survival claims. 229 S.C. at 611-12 93 S.E.2d at 914. Further, the law is clear that in wrongful death claims, the personal representative "functions under two separate and distinct trusteeships". Id. In other words, while it is the personal representative's name in the caption for the wrongful death claim, "it is clear…the real parties to the action were the beneficiaries." Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539, 541 (1928).

Further, as early as 1907, our Supreme Court recognized a wrongful death action is not the survival of an action which the deceased had in his lifetime but is a "new cause of action". Osteen v. Southern Ry., Carolina Division, 76 S.C. 368, 57 S.E. 196, 200 (1907). Claussen held a wrongful death claim is "not a continuation" of any claim the decedent had before her death. 145 S.E. at 540. A wrongful death claim is "independent" of claims the decedent had during her life and "wholly different" than any other claim

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available at her death. Wellman v. Bethea, 243 F. 222 (E.D.S.C. 1917). Our court continues to recognize the distinctiveness of the two actions and that the wrongful death statute created a new cause of action that did not exist at common law and only accrues at the decedent's death as the wrongful death claim is subject to its own statute of limitations. Weaver v. Lentz, 348 S.C. 672, 678, 561 S.E.2d 360, 363 (Ct. App. 2002).

It is true that our Supreme Court reaffirmed that a claim under the Wrongful Death Act lies in the decedent's estate only when the decedent possessed the right of recovery at his death. Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 699 S.E. 2d 143 (2010). This rule, however, does not dictate the conclusion that a wrongful death claim is wholly derivative of the decedent's claim. Instead, the rule provides that if the defendant has a defense that would completely bar the decedent's claim had the decedent survived, then the wrongful death beneficiaries may not bring a claim under the statute. For instance, in Stokes, the statute of limitations had run on the decedent's claim, and the wrongful death beneficiaries were accordingly totally barred from pursuing their claims under the statute. The Supreme Court cited the following from United States District Court case of Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. l988): "anything that would have *defeated the decedent's recovery* had he survived the accident, (such as contributory negligence, a valid release, or similar acts on his part." (Emphasis added). The Court held Quattlebaum was correctly decided and adheres to the principle that that a decedent's estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived." Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 143, 146, 699 S.E.2d (S.C. 2010) at 146.

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Facility has never asserted that the claims here are completely barred or Della Wilds' recovery has been "defeated" by operation of law, such as by the running of the statute of limitations or the execution of a release. Instead, what Facility asserts is that Della Wilds may not bring a claim in court but must pursue her remedies in arbitration. Thus, neither Stokes nor the wrongful death statute operate to cut off the statutory beneficiaries' rights, even if the claims had been subject to arbitration. See also Carter v. SSC Odin Operating Co., LLC, 2012 IL 113204, ¶57, 976 N.E.2d 344, 359 (IL 2012) (noting the defendants overstated the significance of the derivative nature of a wrongful death action, and stating "Although a wrongful-death action is dependent upon the decedent's entitlement to maintain an action for his or her injury, had death not ensued, neither the Wrongful Death Act nor this court's case law suggests that this limitation on the cause of action provides a basis for dispensing with basic principles of contract law in deciding who is bound by an arbitration agreement"). Additionally, the legal provisions holding that an individual may prevent a wrongful death claim by ignoring or settling a personal injury suit during his life do not mean the individual may control the manner in which the wrongful death claim will be resolved should she choose to leave it intact.

The Pennsylvania Superior Court in Pisano v. Extended Homes, Inc., operating under the fictitious name Belaire Health 84 Rehabilitation Center, 2013 PA Super 232, 77 A.3d 651, 662 (PA 2013) affirmed the trial court decision that the nursing home arbitration agreement did not apply to the statutory beneficiaries' wrongful death claim. The Court noted the wrongful death and survival actions are not derivative of each other but are flowing from the same underlining tortious conduct. Like the South Carolina statute, Pennsylvania's wrongful death statute provides that the right of action exists only

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for the benefit of the spouse, children, parents, or parents of the deceased. Id. at 656. The Pennsylvania Court further held that since the wrongful death claim is independent of the survival action and because the wrongful death statute does not characterize the wrongful death claim as that of a third-party beneficiary, that the trial court properly refused to compel arbitration to the non-signatory wrongful death beneficiaries who were not parties to the arbitration agreement and in this case, would include the waiver of jury trial as well.

Likewise, in Bybee v. Abdulla, M.D., 189. P.3d 40, 2008 UT 35 (Utah, 2008), the Supreme Court of Utah held that an agreement to arbitrate that was signed by the decedent cannot extend to the statutory beneficiaries of a wrongful death claim. The Utah Supreme Court noted that certain defenses from the decedent's personal injury action may be raised against the heirs of a wrongful death action such as comparative negligence and statutes of limitations as key common characteristics. However, as the Supreme Court of Utah noted, both of these defenses go to the viability of the underlying personal injury action. The Court further stated that "by contract, an agreement to bind heirs to arbitrate disputes does not implicate the viability of underlying claims." Id. at 47, citing Horwich v. Superior Court, 21 Cal. 4th 272, 87 Cal. Rptr. 2d 222, 980 P. 2d 927, 935 (1999). The Utah Supreme Court went on to note that "we have never intended to suggest, however, that because Decedent is the master of his claim he may by contract expose his unwilling heirs to any imaginable defense." Bybee v. Abdulla, M.D. at 46. The Utah Supreme Court further held that the defenses against the decedent's claim which are less likely to be found enforceable against the heirs' claims in a wrongful death action "are contract provisions that purport to affect the rights of heirs that do not affect

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the existence of the decedent's personal injury claim during his lifetime. The arbitration agreement...falls squarely within this category and is, therefore, unenforceable against the heir." Id. at 47.

The Court of Appeals in Washington in Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn. App. 919, 231 P. 3d 1252 (Wash. App. Div. 1 2010) held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit." Id. quoting Satomi Owners Association v. Satomi. LLC, 167 Wash. 2d 781, 225 P.3d 213 (2009). The Washington Court of Appeals further noted that the wrongful death claims asserted in that case were not on behalf of the estate just as South Carolina's wrongful death claims are not on behalf of the estate. The Washington Court of Appeals further discussed the Supreme Court of Ohio's ruling in Peters v. Columbus Steel Casting Co., 115 Ohio St.3d 134, 873 N.E.2d 1258 (2007), wherein the Supreme Court of Ohio held that the wrongful death claim of a spouse who was Administrator of her husband's estate was not subject to the Decedent's arbitration agreement. The Washington Court of Appeals in discussing Peters, stated "In sum, the decedent's agreement was an agreement 'to arbitrate his claims against the company,' and thus the provision in the agreement binding the decedent's heirs applied to a survival action. But the decedent could not 'restrict his beneficiaries to arbitration of their wrongful death claims because he held no right to those claims." Woodall v. Avalon Care Center - Federal Way, LLC at 929. In the Washington Court of Appeals' analysis, the Court concluded that the wrongful death beneficiaries could not be bound to the arbitration agreement which they did not sign.

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Because the statutory beneficiaries have separate and independent claims and were not covered by the scope of this agreement nor were parties/signatories to this agreement, the Arbitration Agreement drafted by Facility cannot reach the claims of the wrongful death statutory beneficiaries.

CONCLUSION

For the reasons set forth herein, Defendants' Motion to Stay and Compel Arbitration is hereby denied.

IT IS SO ORDERED.

Date: _____
Darlington, South Carolina

_____
The Honorable Paul M. Burch
Fourth Judicial Circuit

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Darlington Common Pleas

Case Caption: Tanya Bailey , plaintiff, et al VS Oakhaven Nursing Center Llc , defendant, et al

Case Number: 2023CP1600511

Type: Master/Order/Other

So Ordered

s/Paul M. Burch, Judge #2048

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EXHIBIT G

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STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. NO.: 2020-CP-23-01728
	)	
Debbie Stroud, Guardian ad Litem for James C. Stroud,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**ORDER**
THI of South Carolina at Greenville, LLC d/b/a Magnolia Manor - Greenville, THI of Baltimore, Inc., and THI of South Carolina, LLC,	)	
	)	
Defendants.	)	

Hearing Date:	June 29, 2021 at 2 PM
Hearing Judge:	Alex Kinlaw, Jr.
Cousel for Plaintiff:	C. Daniel Pruitt
Counsel for Defendants:	Russell G. Hines

This matter was before the Court on Tuesday, June 29, 2021 at 2 pm in Greenville, South Carolina, the Thirteenth Judicial Circuit upon Defendants' Motions to Dismiss and Compel Arbitration. Attorney C. Daniel Pruitt was present representing the interests of Plaintiff. Russell G. Hines of Young, Clement, Rivers, LLP was present representing the interests of Defendants.

Procedural Background and Facts

James C. Stroud, a Medicare recipient, was admitted to Magnolia Manor of Greenville (hereinafter Defendants' facility) on March 6, 2017. According to the allegations of the Complaint, which was filed with the Court on March 19, 2020, while a resident of Defendants' facility, Mr.

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Stroud experienced a series of falls with resulting injury and other circumstances that deviated from the accepted standard of care.

As part of the admissions process, Defendants' representative required Mrs. Debbie Stroud, Mr. Stroud's wife, to sign the Facility- Resident/Representative Arbitration Agreement on March 3, 2017. Defendants' Ex. A. Notably, the agreement is signed only by Debbie Stroud, in her representative capacity, not by James C. Stroud, the resident.

Defendants have filed Motions to Dismiss and to Compel Arbitration or in the alternative for additional time to conduct discovery on the issue of the arbitration issue. Defendants filed the Admission Agreements and the Arbitration Agreements in question. In addition, the Defendants filed the relevant Power of Attorney which Mr. Stroud executed in favor of his wife Debbie Stroud and which the Defendants were provided at the time of Mr. Stroud's admission. Defendants did not file any Affidavits or Deposition testimony in support of their Motions.

Law and Analysis

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place…If no agreement is found to exist, the court must deny any application to arbitrate." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) citing S.C. Code Ann. § 15-48-20(a) (2005). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

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Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 668 (2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause"). The courts, not arbitrators, are charged with deciding certain "gateway matters," including "whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy." Simpson, 373 S.C. at 23, 644 S.E.2d at 668; See also New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008).

I. Whether Debbie Stroud had actual or apparent authority to sign the Arbitration Agreements for James Stroud .

In deciding a motion to compel arbitration, the Court looks to contract law to determine whether a valid and enforceable contract to arbitrate has been entered by the parties. "[A]rbitration is a matter of contract, and our evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law." *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). A person possessing contractual capacity, acting as grantor, can authorize another to contract on the grantor's behalf under the specific terms of a power of attorney. *See Gaddy v. Douglass*, 359 S.C. 329, 344-45, 597 S.E.2d 12, 20 (Ct. App. 2004). "A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. The written authorization itself is the power of attorney." *Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014) (quoting *In re Thames*, 344 S.C. 564, 569, 544 S.E.2d 854, 856 (Ct. App. 2001) "Our courts have looked to contract law when reviewing actions to set aside or interpret a power of attorney." *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 577, 828 S.E.2d 82, 87 (Ct. App. 2019).

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"The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties, and, in determining that intention, the court looks to the language of the contract." *Id.* (quoting *Watson v. Underwood*, 407 S.C. 443, 454-55, 756 S.E.2d 155, 161 (Ct. App. 2014)). "When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Id.* (quoting *Watson*, 407 S.C. at 455, 756 S.E.2d at 161).

Earlier this year, our Supreme Court ruled that the specific language of a Power of Attorney determines whether the principal has authorized his attorney-in-fact to execute an agreement for binding arbitration. Arredondo v. SNH Ashley River Tenant, LLC, Op. 28011, S.C. Filed March 10, 2021. Absent the grant of such authority, the Attorney-in-Fact has no authority or legal capacity to enter the arbitration agreement in question. The arbitration agreement is invalid and unenforceable if the Attorney-in-Fact had no authority to waive the right to jury trial or enter an arbitration agreement. Arredondo at 2. In Arredondo, the Supreme Court made clear that the beginning of the inquiry is to read a relevant Power of Attorney and determine not just whether the Power of Attorney appears broad but whether the language can be read so as to conclude that it grants unto the attorney in fact the authority to enter an agreement to waive the right to jury trial and replace the resolution of disputes with binding arbitration before any actual dispute even arises. Id.

In the present case, this Court must examine the relevant Power of Attorney which the Defendants filed with the Court. Article VII of the Power of Attorney signed by Mr. Stroud in favor of his wife on November 22, 2016 contains specific restrictions on the authority granted by Mr. Stroud to his attorney-in-fact. Section (6) provides as follows:

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Reservation of Right to Trial by Jury. I reserve unto myself and do not grant unto my Attorney in Fact the power to waive my right to jury trial and enter into Arbitration Agreements. I do not favor Arbitration, and for that reason I do not grant unto my Attorney in Fact the power to enter Arbitration Agreements.

Durable Power of Attorney of James C. Stroud, Article VII, paragraph (6)(emphasis in original).

As a result of the specific restrictions in Mr. Stroud's Power of Attorney, the present case is an even stronger case for denial than the one at issue in the recent Supreme Court reviewed in Arredondo cited above. Here, the Power of Attorney document, in clear and unambiguous language, specifically states that the Principal chose **not** to grant the power to waive the right to jury trial or enter into arbitration agreements. The plain language of the Power of Attorney controls. The Arbitration Agreement is not valid or enforceable because it is expressly beyond the scope of authority granted to Mrs. Stroud by her husband. Mrs. Stroud had no authority, express or apparent, to enter the agreement for binding arbitration in question here.

The legal consequences of an agent's actions can only be attributed to the principle when the agent has actual or apparent authority. Charleston Registry v. Young Clement, 359 S.C. 635, 642, 598 S.E.2d 717 (Ct. App. 2004). Apparent authority is based on "representations made by the principal to the third party and reliance by the third party on those representations." Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). Apparent authority exists when the principal is bound by the acts of its agent after the principal has placed the agent in such a position that "a person of ordinary prudence, reasonably familiar with business usages and custom is led to believe the agent has certain authority and in turn, deals with the agent based on the assumption." Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. 137, 142, 399 S.E.2d 430, 433 (Ct. App. 1990), rev'd on other grounds, citing Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d 424 (1982); Watkins v. Mobil Oil Corp., 291 S.C. 62, 352 S.E.2d 284 (Ct. App. 1986).

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South Carolina law requires that to prove apparent authority, the Defendants must show "... (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists. Id. The present case is very similar to Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 567, 813 S.E.2d 292, 304 (Ct. App. 2018); and Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d, 679 (Ct. App. 2016). In all three of these cases, either the South Carolina Supreme Court or the South Carolina Court of Appeals found Arbitration Agreements to be unenforceable where a family member signed an Arbitration Agreement near the time of admission to a skilled nursing facility for the Decedent and did not have any actual authority to do such. In all three cases, the Courts found that no implied authority and that no estoppel applied. As the Court noted in Thompson and in Hodge, there was no evidence that the resident being admitted to the nursing home took any action to create an agency relationship for Son. See Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d, 679 (Ct. App. 2016); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 567, 813 S.E.2d 292, 304 (Ct. App. 2018). The present case is nearly identical to Hodge and Thompson.

Here, the Defendants have submitted no evidence that Mr. Stroud said or did anything other than the clear restrictive language contained in the Power of Attorney. The clear language of the

present Power of Attorney controls. Defendants' representative had an obligation of due diligence to review the Power of Attorney to determine whether in fact Mrs. Stroud had authority granted to her to sign the Arbitration Agreement. A simple review of the Power of Attorney would make clear that such authority was simply beyond the scope of authority granted to Mrs. Stroud.

II. Whether a mandatory agreement for binding arbitration is enforceable where the resident in question is a recipient of Medicare.

An illegal contract is unenforceable. Berkebile v. Outen, 311 S.C. 50,53 n.2, 426 S.E.2d 760, 762 n.2 (1993). "The general rule is that courts will not enforce a contract is violative of public policy, statutory law, or provisions of the Constitution." Id. Federal regulations require Medicare and Medicaid certified facilities to accept Medicare reimbursement rates as payment in full. See 42 C.F.R Section 489.30; 42 C.F.R. Section 447.15 Moreover, such facilities, in the case of an individual who is entitled to medical assistance, must "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the state plan...any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay at the facility." 42 U.S.C. Section 1396r(c)(5)(A)(iii).

Clearly here, it is undisputed that Mr. Stroud was a recipient of Medicare at the time of his admission and throughout his stay at Defendants' facility and the Defendants' facility was billing and accepting payment from Medicare for Mr. Stroud's care. As such, the purported agreement for binding arbitration which the facility mandated that Mrs. Stroud sign is not valid or enforceable because by its terms it violates federal law.

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III. Whether the agreement for binding arbitration was not valid or enforceable where not supported by valuable consideration.

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

The clear language of the purported arbitration agreement makes clear that the Defendants required Mrs. Stroud to sign as condition of admission to their facility. As such, this requirement was a clear violation of Federal Law. 42 U.S.C. Section 1396r(c)(5)(A)(iii) prohibits a facility such as Defendants' from soliciting or accepting "any other consideration" as a condition to admission outside of the Medicare payments when admitting a patient in Mr. Stroud's position. By requiring Mrs. Stroud to sign the document attempting to require waiver of the right to jury trial as a condition of admission, Defendants were requiring and accepting consideration in addition to Medicare payments. Therefore, the arbitration agreement in question is not valid or enforceable.

IV. Whether the Defendants are entitled to conduct discovery as to the Arbitration Agreement.

The Defendants had the burden to prove that there was an enforceable Arbitration Agreement. Defendants had the opportunity to use the South Carolina Rules of Civil Procedure to conduct discovery related to arbitration. This case was pending for a sufficient period such that Defendants' could have prepared Affidavits or taken limited Depositions on any issues related to the Arbitration issue. The Court noted in Hodge, discovery issues are within the discretion of the trial court. Hodge

v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 576, 813 S.E.2d 292, 309 (Ct. App. 2018). Further, as noted in Hodge, additional discovery would likely not change the outcome of the Court's decision as issues related to Mrs' Stroud's actions are not relevant to any implied or apparent authority. Id. It is the actions of Mr. Stroud that would be relevant; therefore, discovery is not necessary as the discoverable information would not change the outcome of the Court's decision as the discovery issues would not be dispositive. The actual language of the Power of Attorney which was submitted here is dispositive.

Conclusion

After careful consideration of the pleadings, motions, memoranda, documents filed, and arguments of counsel, I find that there is no valid Arbitration Agreement.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendants' Motions to Dismiss and Compel Arbitration are denied; and further

Defendants' Motion to Conduct additional discovery as to the Arbitration Agreement issue is denied.

IT IS SO ORDERED.

_____
Honorable Alex Kinlaw, Jr.
Resident Judge, Thirteenth Circuit

Dated:
Greenville, South Carolina

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Greenville Common Pleas

Case Caption: Debbie Stroud , plaintiff, et al vs. THI Of South Carolina At Greenville LLC , defendant, et al

Case Number: 2020CP2301728

Type: Order/Other

So Ordered

s/Alex Kinlaw, Jr., #2763

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EXHIBIT H

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C.A. No.: 2023-CP-42-04152 & 2023-CP-42-04153
	)	
Varesa Goodman, Individually and as Personal Representative of the Estate of Dennis Edwards,	)	
Plaintiff,	)	**ORDER**
v.	)	
THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg, Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, THI of Baltimore, Inc., THI of South Carolina, LLC, Hunt Valley Holdings, LLC, and Rusty Flathmann,	)	
Defendant(s).	)	

This matter came before the Court on Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg's (hereinafter "Facility") Motion to Compel Arbitration and Defendants Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, THI of Baltimore, Inc., THI of South Carolina, LLC, Hunt Valley Holdings, LLC, and Rusty Flathmann's Motions to Stay. Present for the Defendants was Matthew Riddle of Clement Rivers, LLP and Matthew W. Christian of Christian & Christian, LLC. Having listened to oral arguments from counsel and having reviewed the parties' legal memoranda with attached exhibits, and as for reasons more fully set forth below, the Court hereby denies the Defendants' Motions.

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BACKGROUND

This matter arises out of two civil actions – the survival action and a wrongful death action. Both actions involve allegations of nursing home negligence and corporate negligence resulting in the death of Dennis Edwards (hereinafter "Decedent"). Varesa Goodman (hereinafter "Daughter") was Decedent's daughter and serves as Personal Representative of Decedent's Estate. Plaintiff alleges that Decedent was admitted to Facility after being hospitalized for a brain surgery. Dennis Edwards was at significant risk of falls and at risk for pressure injuries/bedsores. Complaint, pp. 8-9. Due to weakness and partial paralysis, Decedent was at risk for falling off of the bed and required two-person assistance with bed mobility. Complaint, pp. 8-9. Additionally, Decedent was provided a protective helmet to wear on his head. Complaint, pp. 8.

On May 25, 2020, only one staff member was providing care to Decedent, and as a result, that individual rolled Decedent off the bed and onto the floor where he struck his head, as his protective helmet was also not in place. Complaint, p. 9. Decedent was emergently transported to the hospital where it was found that he also had multiple pressure injuries/bedsores, including a sacral pressure ulcer that was necrotic and infected. In addition to these injuries, Plaintiff alleges that Decedent suffered from significant nutritional compromise and weight loss, poor hygiene care, overmedication/chemical restraint, and poor tracheostomy care. Complaint, p. 10. As a result of his injuries, Decedent suffered until his death on July 28, 2020.

In addition to the clinical neglect, Plaintiff alleges corporate negligence by the Defendants including, but not limited to, underfunding the facility, understaffing the facility, having employees engage in fraudulent charting, and having nurses conduct out-

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of-scope assessments. As a result of these facts, Plaintiff has alleged corporate negligence, as well as clinical negligence, which Plaintiff alleges was directly caused the parent, management, and affiliated companies of the facility, all of which owned, controlled, directed, managed, and affected resident care at the facility.

Plaintiff filed the Notice of Intent to File Suit on May 15, 2023. The parties engaged in the mandatory pre-suit mediation which was unsuccessful. Daughter then timely filed the Summons and Complaint on October 26, 2023, and served the Defendants with same, as well as Interrogatories and Requests for Production no later than January 2024. Plaintiff then requested Discovery from the Defendants, and Defendants refused to provide same. As a result, Plaintiff filed a Motion to Compel Discovery on July 12, 2024. On that same date, Defendants finally decided to file a Motion to Compel Arbitration and Motions to Stay on July 12, 2024, some eight months after the Summons and Complaint was filed. Plaintiff contends that the arbitration agreement is unenforceable under state contract law and this Court agrees for the various reasons set forth herein below.

Legal Analysis and Conclusions

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application

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to arbitrate. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (S.C. 2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67,78,749 S.E.2d 139, 144 (Ct. App. 2013). Defendants cannot meet the burden.

Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause."). The courts, not arbitrators, are charged with deciding certain "gateway matters" including whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy. New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008). The arbitration agreement at issue in this particular case is not valid to begin with because there existed no authority for anyone to sign the Arbitration Agreement on behalf of Decedent and was not signed by the Decedent. Therefore, the inquiry should go no further. However, even if the Court finds that the parties had a valid arbitration agreement, the agreement applies only to the Survival Action and only to the "facility" Defendant.

I. Daughter Had No Authority to Sign the Arbitration Agreement for Decedent

Because Decedent did not sign the Arbitration Agreement, Daughter was required to have the authority to execute the Arbitration Agreement for the Arbitration Agreement to be enforceable. Daughter had no such authority. It is undisputed that there existed no power of attorney, guardianship, conservatorship, or any other authority to execute the Arbitration Agreement on behalf of Decedent.

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Therefore, Daughter did not have any actual authority when signing the Arbitration Agreement. As a result, the Defendants argue that Daughter had apparent and inherit authority to bind Decedent under the Arbitration Agreement and should be estopped from denying the validity of the Arbitration Agreement.

II. Daughter Had No Apparent and Inherit Authority to Bind Decedent Under the Arbitration Agreement and Decedent's Estate is Not Estopped from Denying the Validity of the Arbitration Agreement.

Defendants contend that Decedent had implied or inherent authority to act on behalf of Decedent and should be estopped from denying the existence of the Arbitration Agreement. Defendants' arguments are not in keeping with the holdings of South Carolina Courts. The legal consequences of an agent's actions can only be attributed to the principle when the agent has actual or apparent authority. Charleston Registry v. Young Clement, 598 S.E.2d 717, 359 S.C. 635, 642 (Ct. App. 2004). Apparent authority is based on "representations made by the principal to the third party and reliance by the third party on those representations". Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649, S.E.2d 488, 491 (2007). Apparent authority exists when the principal is bound by the acts of its agent after the principal has placed the agent in such a position that a person of ordinary prudence, reasonably familiar with business usages and custom is led to believe the agent has certain authority and in turn, deals with the agent based on the assumption. Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. 137, 399 S.E.2d 430 (Ct. App. 1990), *rev'd on other grounds*.

South Carolina law requires that to prove apparent authority, the Defendants must show "… (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a

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change of position to the relying party's detriment." Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance, Company, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists.

The Defendants have presented no evidence that Decedent represented, implicitly, or explicitly, to the Defendants that Daughter had the authority to enter into the Arbitration Agreement on his behalf. The Affidavit presented by Plaintiff reflects that Decedent was not present when Daughter signed the Arbitration Agreement. No evidence was presented that Decedent was ever aware that Daughter signed the Arbitration Agreement and never authorized Daughter to sign such contracts or agreements.

It should be further noted that at no point in time did Defendants ever request Decedent to sign the Arbitration Agreement personally. It should also be noted that the Arbitration Agreement does not reflect any authority which Defendants contend Daughter would have had to execute the agreement.

As the South Carolina Court of Appeals noted in Hodge v. UniHealth Post-Acute Care of Bamberg, Opinion No. 5541 (S.C. Ct. App. March 7, 2018) where it discussed a Maryland case, Dickerson v. Longoria, 95 A.2d 721, 743, 414 Md. 419 (2010), and specifically stated that " 'This limited range of acts performed on the [decedent]'s behalf

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suggest, at most, [he] may have conferred on [the personal representative] the authority to make health care and financial decisions on his behalf, but no more than that.'" *Id.* As further noted by the South Carolina Court of Appeals in Hodge, the Dickerson Court, and The Supreme Court of Nebraska which was quoted in Hodge, "…a son who had authority to sign health care documents on behalf of his mother did not have authority to sign an arbitration agreement on her behalf." Hodge citing Dickerson and Koricic v. Beverly Enterprises-Nebraska, Inc., 773 N.W.2d 145, 149-52 (Neb. 2009). More importantly, the Hodge court relied upon the Court of Appeals' decision in Thompson v. Pruitt Corp., 784 S.E.2d, 679, 416 S.C. 43, 55 (Ct. App. 2016), *cert. denied,* S.C. Sup. Ct. Order dated Dec. 2, 2016, where the Thompson court determined "'**The authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial.**'" Hodge quoting Thompson at 55, 784 S.E. 2d at 686, emphasis added.

Daughter made no representation that she had any authority to bind Decedent. Moreover, as noted in Hodge, when the arbitration agreement is separate from the admission agreement, as in the present case, the facility cannot show that it changed its position for the worse as required to prove apparent agency. Therefore, Defendants cannot argue that any apparent authority/agency existed for the Daughter to sign the Arbitration Agreement on Decedent's behalf. The present case is very similar to Coleman v. Mariner Health Care, Inc., 755 S.E.2d 450 (s.c. 2014); Hodge v. UniHealth Post-Acute Care of Bamberg, Opinion No. 5541 (S.C. Ct. App. March 7, 2018); and Thompson v. Pruitt Corp., 784 S.E.2d, 679, 416 S.C. 43, 55 (Ct. App. 2016); Solesbee v. Fundamental

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Clinical and Operational Services, LLC, 426 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023). In all of these cases, either the South Carolina Supreme Court or the South Carolina Court of Appeals found arbitration agreements to be unenforceable where a family member signed an arbitration agreement near the time of admission to a skilled nursing facility for the Decedent that did not have any actual authority to do such. In all four cases, the Court found that no implied authority and that no estoppel applied. As the Court noted in Thompson and in Hodge, there was no evidence that the resident being admitted to the nursing home took any action to create an agency relationship for Son. See Thompson v. Pruitt Corp., 784 S.E.2d, 679, 416 S.C. 43, 55 (Ct. App. 2016) and Hodge v. UniHealth Post-Acute Care of Bamberg, Opinion No. 5541 (S.C. Ct. App. March 7, 2018). The present case is nearly identical to Hodge and Thompson.

Further, applying the requirements in Hodge, there is no equitable estoppel in the present case. First, the Admissions Agreement and Arbitration Agreement did not merge. Many of the factors identified in Coleman, Hodge, Thompson, and Solesbee which demonstrate that the Arbitration Agreement and Admission Agreement did not merge exist with regard to the present situation. To further illustrate no merger, a number of factors exist including the fact that the Admission Agreement was required for admission, but the Arbitration Agreement was not required by admission by Defendants according to Defendants' own brief and argument. Further, the Admission Agreement was to be administered under state and federal law while the Arbitration Agreement was to be construed only according to federal law. Also, the Admission Agreement could be terminated at any time with written notice but the Arbitration Agreement provided that it could not be terminated and would "remain in effect for all care rendered at the facility

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and shall survive any termination or breach of this agreement or the Admission Agreement." The Admission Agreement also contained a severability provision, was assignable by the facility, had the right to be modified by the facility and contained a superseding clause representing that the Admission Agreement contained the entire agreement and superseded all other agreements. Therefore, there is significant evidence that there was no merger of the Admission Agreement and Arbitration Agreement.

Furthermore, as the Hodge Court noted, the Plaintiff is not suing under the Arbitration Agreement or attempting to invoke the Arbitration Agreement itself. In fact, Plaintiff has filed no action alleging a breach of contract under the Admission Agreement. Therefore, Plaintiff is not seeking to invoke benefit of either of the contracts executed by Daughter. See Wilson v. Willis, No. 27879, 2019 S.C. LEXIS 27. As the Wilson Court noted, a non-signatory should be compelled to arbitrate a claim only if it seeks through the claim to derive a direct benefit from the contract containing the arbitration provision. Id. at 344. The Wilson Court also noted that it is important to distinguish direct benefits from indirect benefits because when the benefits to a signatory are merely indirect, an arbitration agreement cannot be enforced. Id. at 343. The Wilson Court explicitly found that the mere fact that a claim would not exist "but for" the contract, does not invoke the theory of estoppel. Further, as the Wilson Court noted, "Equitable estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly. See Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 71 A.3d 849, 852 (N.J. 2013) (Observing equitable estoppel should be used sparingly to compel arbitration and noting it

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'is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration'); 28Am. Jur. 2d Estoppel and Waiver §29 (2011) (stating equitable estoppel should be used with restraint and only in exceptional circumstance)." Id. at 345. Therefore, because Plaintiff is not seeking benefits directly flowing from the Agreement, and further, because the Arbitration Agreement and Admission Agreement did not merge, the Defendants cannot maintain that the Plaintiff should be equitably estopped from denying the existence of the Arbitration Agreement. Further, as Plaintiff argues, this same argument for the same arbitration agreement has been rejected on a magnitude of occasions with the same Defendants by the South Carolina Court of Appeals and South Carolina Supreme Court in numerous unpublished and published decisions. Defendants set forth no basis why this case and this agreement is any different.

III. The Arbitration Agreement is not enforceable because it does not identify the proper parties to the agreement and there was no meeting of the minds.

The Arbitration Agreement is unenforceable because it lacks mutual assent and meeting of the minds. Contract formation demands the mutual assent of the proposed parties. Eden v. Laurel Hill, Inc., 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978)(citing Kitchens v. Lee, 221 S.C. 59, 59, S.E.2d 67 (1952)).

It is a basic tenet of contract law that a contract must contain a meeting of the minds in order for a valid contract to exist and be enforceable. The Arbitration Agreement has blanks requiring the Facility to identify both the resident and the name of the facility to set forth the defined parties to the agreement. The Arbitration Agreement does not identify the proper name for the facility to the agreement.

Identifying the proper parties to a contract are essential terms to the contract. The Defendants have the burden to prove who the parties were in the contract within the four

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corners of the agreement. "Vagueness of expression, indefiniteness, and uncertainty as to any of the essential terms of an agreement have often been held to prevent the creation of an enforceable contract." Reed v. Boykin, 282 S.C. 614, 327 S.E.2d 68 (S.C. App., 1984). Put simply, the language within the four corners of this Arbitration Agreement do not identify "THI of South Carolina as Spartanburg, LLC" or "Magnolia Manor Spartanburg" as a party to this agreement. "MMS" is not a facility or legal entity and is not a defined term. Therefore, the agreement is impossible to enforce because there is no mutual assent or meeting of the minds as no actual facility is identified.

The document must be construed against the Defendants as the drafting entities. Nowhere does the document identify that Dennis Edwards was entering into an Arbitration Agreement with Magnolia Manor-Spartanburg.

IV. The Arbitration Agreement is unenforceable because Defendants failed to follow regulatory requirements to enforce a valid arbitration agreement in a skilled nursing facility claim.

Federal regulations governing the operation of nursing homes have specific requirements for the creation and execution of arbitration agreements to residents and/or their families by the facility. 42 C.F.R. §483.70(n). The regulations and Guidance to Surveyors require that the facilities be able to prove the following:

(1) That the terms and conditions of the arbitration agreement are clearly explained to the resident and/or his/her representative;

(2) It is explained to the resident and his/her representative that the arbitration agreement is voluntary and not required for admission to the facility;

(3) The facility must explain the arbitration agreement to the resident and resident's representative in a manner and form which they understand, and

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the facility "must ensure there is evidence that the resident or their representative has acknowledged understanding of the agreement;"

(4) Further, when a signature is used to acknowledge understanding, additional evidence is needed to establish that the resident or their representative understood what was being signed;

(5) If the resident is cognitively impaired, such should be taken into account in determining whether or not the resident is able to understand the contents of the agreement;

(6) The facility is required to distinguish the arbitration agreement from the admission agreement, especially if the arbitration agreement is contained within the admission agreement and allow the resident or their representative to decline the arbitration agreement without declining the admission agreement;

(7) It must be clearly explained to the resident or resident's representative that there is thirty (30) days to withdraw or terminate the agreement should they change their mind;

(8) The facility must explain to the resident or their representative how the resident or their representative may withdraw from or terminate the arbitration agreement within the thirty (30) days should they desire to do so; and

(9) The facility may not require, force, or pressure the resident or his/her representative to sign the binding arbitration agreement.

42 C.F.R. §483.70(n).

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Aside from the plain language of the Arbitration Agreement, Defendants offer no evidence to rebut Daughter's Affidavit that the agreement was not explained to her in the terms required as described above. In fact, the Guidance to Surveyors established by the Federal Government for the interpretation of these regulations specifically states:

> "In some cases, the binding arbitration agreement may specify that the resident or his/her representative acknowledges understanding by signing the document. When a signature is used to acknowledge understanding, additional evidence may be needed to establish that, in fact, the resident or their representative understood what he or she was signing. It may not be sufficient that the resident or their representative signed the document."

State Operations Manual, Appendix PP – Guidance to Surveyors for Long-Term Care Facilities, Guidance Section 483.70(n)(1)(2)(i)(ii)(3)-(5). Defendants were required to meet these regulations in order for there to be a binding arbitration agreement. Any arbitration agreement that violates federal law or legal requirements is an invalid contract. An illegal contract is unenforceable. Berkebile v. Outen, 426 S.E.2d 760, 762 n. 2 (1993). "The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Id. As a result, the Arbitration Agreement is unenforceable.

V. The Arbitration Agreement is Unenforceable as to the Wrongful Death Claim and the Statutory Beneficiaries.

South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914). The alleged Arbitration Agreement by its own terms is an agreement between "MMS ('Facility') its agents, employees and servants, and Dear Sir or Madam, ('Resident') or Varesa Goodman ('Resident's Durable Power of Attorney for Health

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Care'/'Resident's Legal Guardian'/'Resident's Responsible Party' hereafter collectively 'Representative')". Therefore, any purported agreement to arbitrate any claims was (by the terms of the contract which was drafted by the Defendants) only on behalf of the Facility and Resident or Resident's Representative.

While at some point during Decedent's admission to the facility, he might have had the authority to bind himself and his claims to arbitration but was never given the chance. However, even if the agreement purported to include the statutory beneficiaries, Daughter did not have the legal authority to bind Decedent's statutory beneficiaries who are not a parties/signatories to the Arbitration Agreement. The signatory to the agreement is Daughter on behalf of Decedent and Facility. Daughter was only asked to sign the agreement on behalf of Decedent and was not even aware of the Arbitration Agreement. No other parties are parties to this agreement. The scope of the agreement does not include the statutory beneficiaries' claims.

While Defendants would like to contend that the agreement covers statutory beneficiaries' claims, which it does not, the problem with this contention is that Decedent/Daughter had no authority to waive the statutory beneficiaries' claims. While dealing with a separate arbitration issue in a nursing home case and finding the arbitration agreement to be unenforceable, the Court of Appeals in Hodge recognized the separateness of the statutory beneficiaries/estate's claims from those of the resident. In discussing the Maryland court's case of Dickerson, the Court noted that the nursing home was attempting "to use equitable estoppel against [the patient's] estate based on actions that [daughter] took *in her individual capacity*. The fact that [daughter] is *now the Personal Representative for [the patient's] [e]state* is of no moment; we will not hold

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this circumstance against [the patient's] [e]state. Simply put, [the patient's] [e]state is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] [e]state, or by [daughter] in *her capacity as Personal Representative* of [the patient's] [e]state…." Hodge quoting Dickerson v. Longoria, 995 A.2d. 721, 743 (Md. 2010). As recognized in this discussion, actions taken by Daughter in her *individual capacity* will not be held against the estate and as the Court noted, the estate may well have other beneficiaries or creditors.

Defendants insist that Daughter had the power to waive the right to a jury trial on a claim that did not exist when the Arbitration Agreement was presented but never belonged to her and covered injuries suffered exclusively by other people. Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019), provides the specific times when a contract may be enforced against a non-party and the Defendants would have the burden of proving each of the elements of one of those instances where such a contract may be enforced against a non-party. Defendants cannot prove these elements existed with regards to this specific case.

The statutory beneficiaries' claim is much more akin to the claims of the non-signatory Plaintiffs in Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019), where the South Carolina Supreme Court held the non-signatories could not be bound by the arbitration agreement. Much like the non-signatories in Wilson, the statutory beneficiaries in the instant case are not attempting to exploit or receive a direct benefit from the agreement and were not even aware of the existence of the arbitration provision. Defendants confuse the benefit Decedent received from admission and attempt to argue

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the statutory beneficiaries received a benefit personally from the admission. That argument is without merit.

As the Wilson Court notes, "Equitable estoppel is ultimately a theory designed to prevent injustice, and it should be used sparingly. See Hirsch v. Amper Fin. Servs., LLC, 71 A.3d 849, 852 (N.J. 2013)(observing equitable estoppel should be used sparingly to compel arbitration and noting 'it is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration'); 28 Am.Jr.2d Estoppel and Waiver §29 (2011)(stating equitable estoppel should be used with restraint and only in exceptional circumstances)."

Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, a Federal District Court in South Carolina has analyzed this issue under the South Carolina Non-Economic Awards Act of 2005. Diane Boyle as Personal Representative of the Estate of John Francis Boyle v. United States of America, United States District Court for the District of South Carolina, Beaufort Division (2009). In Boyle, the Court concluded that the wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. Further, at least one other South Carolina court judge has come to the same conclusion. These analyses confirm that the wrongful death claimants have separate and distinct claims apart from that of the survival action. As such, the Daughter and Decedent were incapable of waiving the statutory beneficiaries' right to a trial by jury.

Many other states have come to this same conclusion, Daniels v. Sunrise Senior Living, Inc., 212 Cal.App 4th 674, 151 Cal.Rptr.3d 273 (Cal.App.4 Dist, 2013)

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(Wrongful Death claims not bound to arbitration), Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (Wrongful Death claimants not bound by arbitration agreement.) The only signatures to the Arbitration Agreement were the Daughter for Decedent (Resident) and Facility. Therefore, the only parties executing this Agreement were the Daughter purportedly on behalf of Decedent and Facility. Facility would contend that this agreement is binding on the non-signatory statutory beneficiaries simply because the Arbitration Agreement says so.

However, as the Supreme Court of Kentucky said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises. Inc.:

> [A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third-party are appropriately subjected the contract's arbitration provisions, at least where the tort and contract are significantly intertwined. See, In re Weekley Homes, L.P., 180 S.W. 3d 127 (Tex. 2005) (negligent repair claim by homeowner's daughter against contractor was subject to repair contract's arbitration clause because daughter, although a non-party, was direct and principal beneficiary under the contract). It is something else entirely, however, to say that incidental beneficiaries of a contact-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely be being mentioned in the contract as potential claimants. This is what Beverly purports to do. Arbitration is a matter of contract, however, it is

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> something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79,83, 123 S. Ct. 588, l54 L. Ed.2d 491 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit", Citation and internal quotation marks omitted.) Since Beverly's theory would allow just that, i.e., would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a "third party beneficiary" of the arbitration agreement, we reject it out of hand.

Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 599-600 (KY 2012).

Likewise, Facility's mentioning of "successors, assigns, heirs, personal representatives, guardians or any other persons deriving their claims through or on behalf of Resident", as being bound by the Arbitration Agreement does not make it so. It is no more than an *ipse elixir* which Defendants expect this Court to embrace. The law simply does not permit a party to cut off the rights of a non-signatory to an agreement who receives no benefit thereunder.

The wrongful death claims are separate claims apart from the Decedent's claims. According to South Carolina's Wrongful Death Act:

> "Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued shall be liable to an action for damages."

South Carolina Code Annotated §15-51-10 (1977)

> The wrongful death beneficiaries are as follows:
>
> "Every such action shall be for the benefit of the wife, or husband and child or children of the person whose

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> death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs or the person whose death shall have been so caused."

South Carolina Code Annotated §15-51-20 (Supp. 2001)

The general element of damages recoverable are pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of the Decedent, society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries. Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d. 713, 714 S.C. (Ct. App. 1989).

The general element of damages recoverable are pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of Decedent's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries. Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d. 713, 714 S.C. (Ct. App. 1989). Damages are paid to these beneficiaries because a wrongful death claim is directed at their losses suffered as a result of Dennis Edwards' absence. Scott v. Porter, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000)(citing F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 610 (2d ed 1997). In contrast, the legislature positions the survival statute in a completely different code chapter. The wrongful death claim is a distinct claim warranting its own designation (Chapter 51). The survival statute is classified within an existing chapter (Chapter 5) identifying the proper "parties" for pursuing legal claims.

The wrongful death claim is a separate claim than the claims a decedent might bring on his own behalf under the survival statute. In Bennett v. Spartanburg Railway

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Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914), the Supreme Court held that wrongful death and survival actions are different claims for different injuries. The Court stated "necessarily, therefore, there must be separate verdicts and separate judgments, there should be separate actions." Id. at 31. See also Strickland v. Southern Ry Co., 111 S.C. 248, 97 S.E. 695 (1918) (Supreme Court Affirmed Appeal from Circuit Court's ruling noting that survival claims are independent of wrongful death claims), Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539 (1928) (discussing the difference between survival and wrongful death claims as being independent of each other).

In Grainger v. Greenville S&A Railway Co., the South Carolina Supreme Court traced the divergent tracks that wrongful death and survival claims have taken over their development. Grainger v. Greenville S&A Railway Co., 101 S.C. 399, 85 S.E. 968 (915). In that case, the trial court had dismissed the survival action because the decedent's administrator (equivalent to the modern "Personal Representative") had previously recovered on a wrongful death claim. Id. at 968. When the legislature recognized this abnormality, it responded by creating the predecessor to the modern survival statute. Id. citing 1912 Code §3693. Grainger held this legislative history conclusively established wrongful death and survival actions are distinct and independent. Id. The claims are distinct because "the beneficiaries, the cause of action, the measure of damages, are all different." Grainger 85 S.E. at 969. Our courts have further held that judgement in a wrongful death claim does not have preclusive effect on survival claims. 229 S.C. at 611-12 93 S.E.2d at 914. Further, the law is clear that in wrongful death claims, the personal representative "functions under two separate and distinct trusteeships". Id. In other words, while it is the personal representative's name

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in the caption for the wrongful death claim, "it is clear…the real parties to the action were the beneficiaries." Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539, 541 (1928).

Further, as early as 1907, our Supreme Court recognized a wrongful death action is not the survival of an action which the deceased had in his lifetime but is a "new cause of action". Osteen v. Southern Ry., Carolina Division, 76 S.C. 368, 57 S.E. 196, 200 (1907). Claussen held a wrongful death claim is "not a continuation" of any claim the decedent had before her death. 145 S.E. at 540. A wrongful death claim is "independent" of claims the decedent had during her life and "wholly different" than any other claim available at her death. Wellman v. Bethea, 243 F. 222 (E.D.S.C. 1917). Our court continues to recognize the distinctiveness of the two actions and that the wrongful death statute created a new cause of action that did not exist at common law and only accrues at the decedent's death as the wrongful death claim is subject to its own statute of limitations. Weaver v. Lentz, 348 S.C. 672, 678, 561 S.E.2d 360, 363 (Ct. App. 2002).

It is true that our Supreme Court reaffirmed that a claim under the Wrongful Death Act lies in the decedent's estate only when the decedent possessed the right of recovery at his death. Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 699 S.E. 2d 143 (2010). This rule, however, does not dictate the conclusion that a wrongful death claim is wholly derivative of the decedent's claim. Instead, the rule provides that if the defendant has a defense that would completely bar the decedent's claim had the decedent survived, then the wrongful death beneficiaries may not bring a claim under the statute. For instance, in Stokes, the statute of limitations had run on the decedent's claim, and the wrongful death beneficiaries were accordingly totally barred from pursuing their claims under the statute. The Supreme Court cited the following from

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United States District Court case of Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. l988): "anything that would have *defeated the decedent's recovery* had he survived the accident, (such as contributory negligence, a valid release, or similar acts on his part." (Emphasis added). The Court held Quattlebaum was correctly decided and adheres to the principle that that a decedent's estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived." Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 143, 146, 699 S.E.2d (S.C. 2010) at 146.

Facility has never asserted that the claims here are completely barred or that Decedent's recovery has been "defeated" by operation of law, such as by the running of the statute of limitations or the execution of a release. Instead, what Facility asserts is that Decedent may not bring a claim in court but must pursue his remedies in arbitration. Thus, neither Stokes nor the wrongful death statute operate to cut off the statutory beneficiaries' rights, even if the claims had been subject to arbitration. See also Carter v. SSC Odin Operating Co., LLC, 2012 IL 113204, ¶57, 976 N.E.2d 344, 359 (IL 2012) (noting the defendants overstated the significance of the derivative nature of a wrongful death action, and stating "Although a wrongful-death action is dependent upon the decedent's entitlement to maintain an action for his or her injury, had death not ensued, neither the Wrongful Death Act nor this court's case law suggests that this limitation on the cause of action provides a basis for dispensing with basic principles of contract law in deciding who is bound by an arbitration agreement"). Additionally, the legal provisions holding that an individual may prevent a wrongful death claim by ignoring or settling a

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personal injury suit during his life do not mean the individual may control the manner in which the wrongful death claim will be resolved should she choose to leave it intact.

The Pennsylvania Superior Court recently in Pisano v. Extended Homes, Inc., operating under the fictitious name Belaire Health 84 Rehabilitation Center, 2013 PA Super 232, 77 A.3d 651, 662 (PA 2013) affirmed the trial court decision that the nursing home arbitration agreement did not apply to the statutory beneficiaries' wrongful death claim. The Court noted the wrongful death and survival actions are not derivative of each other but are flowing from the same underlining tortious conduct. Like the South Carolina statute, Pennsylvania's wrongful death statute provides that the right of action exists only for the benefit of the spouse, children, parents, or parents of the deceased. Id. at 656. The Pennsylvania Court further held that since the wrongful death claim is independent of the survival action and because the wrongful death statute does not characterize the wrongful death claim as that of a third-party beneficiary, that the trial court properly refused to compel arbitration to the non-signatory wrongful death beneficiaries who were not parties to the arbitration agreement.

Likewise, in Bybee v. Abdulla, M.D., 189. P.3d 40, 2008 UT 35 (Utah, 2008), the Supreme Court of Utah held that an agreement to arbitrate that was signed by the decedent cannot extend to the statutory beneficiaries of a wrongful death claim. The Utah Supreme Court noted that certain defenses from the decedent's personal injury action may be raised against the heirs of a wrongful death action such as comparative negligence and statutes of limitations as key common characteristics. However, as the Supreme Court of Utah noted, both of these defenses go to the viability of the underlying personal injury action. The Court further stated that "by contract, an agreement to bind

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heirs to arbitrate disputes does not implicate the viability of underlying claims." Id. at 47, citing Horwich v. Superior Court, 21 Cal. 4th 272, 87 Cal. Rptr. 2d 222, 980 P. 2d 927, 935 (1999). The Utah Supreme Court went on to note that "we have never intended to suggest, however, that because Decedent is the master of his claim, he may by contract expose his unwilling heirs to any imaginable defense." Bybee v. Abdulla, M.D. at 46. The Utah Supreme Court further held that the defenses against the decedent's claim which are less likely to be found enforceable against the heirs' claims in a wrongful death action "are contract provisions that purport to affect the rights of heirs that do not affect the existence of the decedent's personal injury claim during his lifetime. The arbitration agreement...falls squarely within this category and is, therefore, unenforceable against the heir." Id. at 47.

The Court of Appeals in Washington in Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn. App. 919, 231 P. 3d 1252 (Wash. App. Div. 1 2010) held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit." Id. quoting Satomi Owners Association v. Satomi. LLC, 167 Wash. 2d 781, 225 P.3d 213 (2009). The Washington Court of Appeals further noted that the wrongful death claims asserted in that case were not on behalf of the estate just as South Carolina's wrongful death claims are not on behalf of the estate. The Washington Court of Appeals further discussed the Supreme Court of Ohio's ruling in Peters v. Columbus Steel Casting Co., 115 Ohio St.3d 134, 873 N.E.2d 1258 (2007), wherein the Supreme Court of Ohio held that the wrongful death claim of a spouse who was Administrator of her husband's estate was not subject to the Decedent's arbitration agreement. The Washington Court of Appeals in discussing Peters,

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stated "In sum, the decedent's agreement was an agreement 'to arbitrate his claims against the company,' and thus the provision in the agreement binding the decedent's heirs applied to a survival action. But the decedent could not 'restrict his beneficiaries to arbitration of their wrongful death claims because he held no right to those claims." Woodall v. Avalon Care Center - Federal Way, LLC at 929. In the Washington Court of Appeals' analysis, the Court concluded that the wrongful death beneficiaries could not be bound to the arbitration agreement which they did not sign.

Because the statutory beneficiaries have separate and independent claims and were not covered by the scope of this agreement or parties to this agreement, the Arbitration Agreement drafted by Facility cannot reach the claims of the wrongful death statutory beneficiaries.

CONCLUSION

Based upon the forgoing reasons, Defendant THI of South Carolina at Spartanburg, LLC d/b/a magnolia Manor-Spartanburg's' Motion to Stay or Dismiss Action and Compel Arbitration and Stay State Court Proceedings and Defendants Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, THI of Baltimore, Inc., THI of South Carolina, LLC, Hunt Valley Holdings, LLC, and Rusty Flathmann's Motions to Stay are hereby denied.

IT IS SO ORDERED.

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_____

The Honorable J. Derham Cole
Seventh Judicial Circuit

Date: _____, 2025
Spartanburg, South Carolina

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Spartanburg Common Pleas

Case Caption: Varesa Goodman , plaintiff, et al VS Thi Of South Carolina At Spartanburg Llc , defendant, et al

Case Number: 2023CP4204152

Type: Order/Other

IT IS SO ORDERED!

s/J. Derham Cole 2053

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EXHIBIT I

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS C.A. No.: 2020-CP-42-03818 & 2020-CP-42-03819
Terry Putman, Individually and as Personal Representative of the Estate of Margaret Hensley, Plaintiff, v. White Oak Estates, Inc., White Oak Management, Inc., and White Oak Manor, Inc., Defendant(s).	)	**ORDER REGARDING DEFENDANTS' MOTION TO DISMISS, COMPEL ARBITRATION, AND FOR A PROTECTIVE ORDER OR, ALTERNATIVELY, TO STAY THE ACTION PENDING ARBITRATION**

Hearing Date:	March 17th, 2021, at 2:30 p.m.
Hearing Judge:	Grace Gilchrist Knie
Counsel for Plaintiff:	Matthew W. Christian
Counsel for Defendants:	Joshua T. Thompson
Court Reporter:	Linda D. Moffitt

This matter came before the Court on March 17th, 2021, at 2:30 p.m. on Defendants White Oak Estates, Inc., White Oak Management, Inc., and White Oak Manor, Inc.'s Motion to Dismiss, Compel Arbitration, and for a Protective Order or, Alternatively, to Stay the Action Pending Arbitration filed with the Court on February 19th, 2021. Counsel for the parties appeared virtually pursuant to the South Carolina Supreme Court's recent Order regarding COVID-19 protocol. Present representing the Defendants was Joshua T. Thompson, Esq., of Boulier Thompson & Barnes, LLC, in Spartanburg, South Carolina, and present representing the Plaintiff was Matthew W. Christian, Esq., of Christian & Christian, LLC, in Greenville, South Carolina. The Court Reporter was Linda D. Moffitt.

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Having listened to oral arguments from counsel and having reviewed the parties' legal memoranda with attached exhibits for reasons set forth more fully below, the Court hereby denies the Defendants' Motions.

BACKGROUND

This matter arises out of two civil actions, a survival action and a wrongful death action. Both actions involve allegations of nursing home negligence and corporate negligence resulting in the death of Margaret Hensley (hereinafter "Decedent"). Terry Putman (hereinafter "Daughter") was Decedent's daughter and serves as Personal Representative of Decedent's Estate. Decedent was admitted to White Oak Estates, Inc. (hereinafter "White Oak Estates") for short-term rehabilitation after undergoing a hip arthroplasty at Spartanburg Regional Medical Center. At the time of admission, Decedent had an articulating brace for her leg to help keep it immobilized as a result of her hip surgery. Plaintiff alleges that as a result of Defendants' negligence, that Decedent developed a wound near the area of the articulating brace which Plaintiff alleges to have significantly deteriorated resulting in infection, sepsis, emergency transport to the hospital, and ultimately, her death. At the time of admission, Daughter signed an admission agreement and an arbitration agreement presented to her by agents of White Oak Estates. The Arbitration Agreement was signed by Daughter as "resident/representative" and by an agent of the facility for "White Oak Estates".

Plaintiff filed the Notice of Intent to File Suit on March 25th, 2020 and subsequently served the Defendants on June 9th, 2020. The parties engaged in the mandatory pre-suit mediation which was unsuccessful. Daughter as Personal Representative then filed the Complaints on November 2nd, 2020, for wrongful death and

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survival actions and timely served the Defendants. Defendants filed their Motion to Compel Arbitration on February 19, 2021. Plaintiff contends that the arbitration agreement is unenforceable under state contract law.

LEGAL ANALYSIS

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the Court must deny any application to arbitrate. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (S.C. 2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67,78,749 S.E.2d 139, 144 (Ct. App. 2013).

Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause."). Arbitration agreements must satisfy the basic tenets and requirements of contract law. Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844, (Ct. App. 1999). Section 2 of the Federal Arbitration Act dictates that arbitration agreements are enforceable except "upon such grounds as exist at law or equity for the revocation of any contract". 9 U.S.C. §2. The courts, not arbitrators, are charged

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with deciding certain "gateway matters" including whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy. New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008). Thus, unless there is a valid, irrevocable, and enforceable contract, the Federal Arbitration Act does not apply. The purpose of the Federal Arbitration Act is "to make arbitration agreements as enforceable as other contracts, but not more so." Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967).

Further, the party seeking enforcement of the agreement bears the burden to prove a valid arbitration agreement exists that is enforceable, knowing, voluntary, and intentional. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008); Hinson-Barr, Inc. v. Pinckard, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1986). Whether the arbitration contract is valid is addressed by applying general principles of state law governing contract formation. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). Therefore, the burden is on the moving party to demonstrate the absence of any genuine dispute of material fact, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970), and that the movant is "entitled to judgment [compelling arbitration] as a matter of law." Burrell v. 911 Restoration Franchise Inc., 2017 WL 5517383, at *3 (D. Md. November 17, 2017) (citing Fed. R. Civ. P. 56(a)). The arbitration agreement at issue in this particular case with White Oak Estates is not valid and Defendants cannot meet their burden of proof.

Defendants' Motion to Dismiss, Compel Arbitration, and for a Protective Order or, Alternatively, to Stay the Action Pending Arbitration are effectively motions to enforce

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contracts. In the ordinary course, a nursing home resident who alleges injuries would bring her claim before the Court as the Plaintiff has done here and the nursing home would mount its defense in the same forum. A valid contract to arbitrate their disputes is the only way to opt out of the litigation process. The Court finds that Defendants have no such contract with Decedent. The arbitration agreement is invalid for numerous reasons as set forth hereinbelow.

I. The Admission Agreement and Arbitration Agreement are Separate and Do Not Merge.

South Carolina Appellate Courts have examined the issue of whether admission agreements and arbitration agreements have merged on at least three separate occasions and rejected the contention of merger each time. Coleman v. Mariner Healthcare, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. Appt. 2018). It should also be noted that the Court of Appeals recently rejected, for a fourth time, the argument of estoppel where the arbitration agreement was contained within the admission agreement itself. Weaver v. Brookdale Senior Living, Inc., 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020). In the end, the Defendants' pursuit of the merger argument fails for the same reasons as the nursing homes in Coleman, Thompson, and Hodge.

In the case at hand, as noted in the aforementioned cases, the Courts have traditionally recognized that arbitration agreements which are separate and distinct from the admission agreement do not merge. As the Coleman Court noted, the merger principle cannot apply unless the writings in question were executed "at the same time, by the same parties, for the same purpose, and in the course of the same transaction." Coleman, 407

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S.C. at 355, 755 S.E.2d at 455. Even then, merger does not apply if there is "*anything* indicating a contrary intention." Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). Thus, simultaneously executed writings related to the same general subject matter will not be viewed as a single or merged agreement if either the language or the circumstances even hint that the parties actually intended the writings to be distinct, separate contracts.

The Defendants cannot show that the Admission Agreement and Arbitration Agreement were executed for the same purpose. The Admission Agreement was "for the provision of nursing services for Margaret Hensley." Admission Agreement, p. 1. Therefore, the contract by its express terms sets forth the purpose of the agreement was for the provision of skilled nursing care. That purpose is born out in the nineteen (19) pages of the Admission Agreement. The facility agreed to provide services identified on pages 2-3 of the agreement in exchange for payment by the resident as outlined in pages 4-12. On the other hand, the Arbitration Agreement covers a completely different issue. It is solely devoted to directing an alternative dispute resolution method and purporting to eliminate its parties' right to relief through the courts. These two contracts cannot have the same purpose because, as Defendants admit, the Arbitration Agreement was not a pre-condition for admission.

Second, the terms and context show that the parties intended the Admission Agreement and Arbitration Agreement to be separate contracts. Also, admission and arbitration contracts cannot merge if they contain inconsistent terms, especially provisions related to how each contract may be terminated. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685. Moreover, courts look at the way the

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contracts are structured, finding it unlikely that parties intended two contracts to be treated as one if they chose separate titles, required separate signatures, and numbered each contract's pages differently. Thompson, 416 S.C. at 53 n. 1 784, S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Finally, Hodge held a nursing home cannot argue for merger when it chose to separate arbitration and admission into two agreements while taking the position that agreeing to the former was not required to obtain the benefits of the latter. Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

As present in the aforementioned cases, the Admission Agreement contains the "entire agreement" provision identifying the contract's limited scope. Second, the parties did not intend for the two contracts to be read as one because they chose to apply different substantive law to both agreements. Hodge, 422 S.C. at 562, 813 S.E.2d at 302. In the present case, state law purportedly governs the Admission Agreement and federal law purportedly governs the Arbitration Agreement. Admission Agreement p. 16; Arbitration Agreement p. 1.

Coleman, Thompson, and Hodge made special notes of inconsistent provisions in admission and arbitration contracts regarding when each contract may be canceled at the resident's urging. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 551, 813 S.E.2d at 296. The Admission Agreement provides that the resident may terminate the contract with three days advance written or oral notification. However, the Arbitration Agreement provides that the resident may terminate/opt-out of the agreement within thirty (30) days. Admission Agreement p. 12; Arbitration Agreement p. 3-4. Further, the Admission Agreement allows the facility to unilaterally modify the terms of the agreement with thirty (30) days advance written

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notice. However, the Arbitration Agreement states that the agreement may not be modified except by subsequent written agreement. Admission Agreement p. 16, ¶ 19.5; Arbitration Agreement p. 4, ¶ 22.

Finally, an arbitration contract is far less likely to merge with an admission contract if the nursing home admits arbitration is not required for admission. In Hodge, our Appellate Court cited as further evidence against merger where arbitration contract provisions state that arbitration was not a pre-condition to a resident's acceptance to the nursing home. Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302; See also Arrendondo v. SNH S.E. Ashley River Tenant, LLC, Op. No. 28011 (S.C. Sup. Ct. Filed March 10, 2021)(Shearhouse Adv. Sh. No. 8 at 40, 49-50)(finding that, since arbitration was optional, it was not a healthcare decision or "necessary" to such decisions and the son's power of attorney-based authority did not extend to arbitration matters). Similarly, in the present case, Defendants admit that executing the Arbitration Agreement was not mandatory and was not a pre-condition.

In sum, the arbitration agreement and admission agreement have the same four indicators that South Carolina Courts have cited in the past to find simultaneously executed contracts were not intended to merge into one. Further, the present arbitration and admission agreements have additional factors indicating their separateness. Any uncertainty about the four indicators must be resolved in Decedent's favor, not to her detriment. The facility must prove that all four of the indicators discussed hereinabove are absent here and the Defendants must not just oppose one of the four indicators discussed above but prove all four are absent here. Additionally, the facility drafted these form

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contracts of adhesion and any ambiguities must be construed against it. Therefore, based on all of the above factors, the two agreements do not merge.

II. The Arbitration Agreement is Unenforceable Because it is Unconscionable.

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them, and no fair and honest person would accept them. Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the agreement. S.C. Code Ann.§ 36-2-302(1) (2003). In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. See Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir.1999). It is under this general rubric that courts must determine whether a contract is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. See Carlson v. General Motors Corp., 883 F.2d 287, 295 (4th Cir.1989). In determining whether a contract was "tainted by an absence of meaningful choice," Id. at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of

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the challenged clause; and the conspicuousness of the clause. Id. at 293. See also Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17 A Am.Jur.2d Contracts§ 279 (2004))); see also Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007).

The choice of a nursing home is made in the midst of a crisis brought on by a precipitous deterioration in health status, disability level, or the loss of a care giver or spouse.[1] Frequently, the need to find placement for a loved one arises quickly and nursing home admissions are often unplanned, and there is often little time to investigate options or wait for an opening at a nursing home. Time pressure impairs the ability to seek and consider alternatives. This is further confirmed by Daughter's Affidavit. Daughter and her family had no choice or time in making such a decision as Daughter's affidavit reflects that she was required to sign the Admission Agreement under stress during her mother's hospitalization shortly before discharge to the facility. As Daughter's Affidavit further reflects, she was not explained the Arbitration Agreement and no one made her aware of the Arbitration Agreement.

Further, Daughter lacked a meaningful choice in the terms of the Arbitration Agreement which are oppressive and one-sided, and it was presented to her on a take it or leave it basis. She did not contribute to the drafting of the agreement and did not possess the bargaining power to negotiate the terms of the Arbitration Agreement. Further, there

[1] *See, e.g.*, Podolosky v. First Healthcare Corp., 58 Cal.Rptr. 2d 89, 101 (Cal. Ct. App. 1996) (*citing* Donna Ambrogi, *Legal Issues in Nursing Home Admissions*, 18 Law Med. & Health Care 254, 258 (1990)); *see also* Marshall B. Kapp, *The "Voluntary" Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications*, 24 N.E. J. on Crim. & Civ. Confinement. 1, 3 (1998) (stating that an older person's move to a nursing home also follows a period of acute hospitalization, when their care giving family is unable to adequately manage the demands of home care).

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is an inherent disparity in bargaining power between the parties in this transaction as the nursing home is a sophisticated entity well versed in arbitration agreements revolving around admissions to their facility. The alleged injuries are significant including wrongful death and serious injury.

Further, the terms of the Arbitration Agreement are unfair and no person would voluntarily agree to them. The Arbitration Agreement at issue in this case is fundamentally and substantively unfair on numerous levels. First, the Arbitration Agreement provides that three arbitrators will be on the panel to hear the case. However, two of the arbitrators do not have to be attorneys or have any education or experience in matters dealing with the subject matter or legal issues. Arbitration Agreement, pages 1-2, ¶ 4-6. Additionally, the arbitrator may be anyone that the party knows at the time with very limited exceptions. If the arbitrator chosen by Daughter and the arbitrator chosen by Defendants cannot agree to a third arbitrator, the third arbitrator will be determined by a coin toss wherein the winner of the coin toss gets to determine the third arbitrator. Arbitration Agreement, page 2, ¶ 6. The essential result is that the party prevailing on a matter of luck/coin toss is more likely to win discovery disputes, evidentiary concerns, and arbitration proceeding as the majority of the arbitrators will be anyone chosen by the winner of the coin toss. No party would agree to these fundamentally unfair principles regarding the Arbitration Agreement rendering the result to a matter of chance and luck. Further, not having two of the arbitrators being completely neutral or having any type of knowledge or education on the subject matter or legal field creates a fundamental unfairness.

Additionally, the Arbitration Agreement allows for extensive delays in the process when the entire purpose of arbitration is to promote efficiency and timeliness. The facility

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in this particular situation would have ninety (90) days/three months to name their arbitrator after the Plaintiff named the arbitrator. Arbitration Agreement, page 102, ¶ 5-6. Further, after the second arbitrator is chosen, another ninety (90) days/three months would pass before the third arbitrator is chosen. The third arbitrator would then have thirty (30) days to notify the parties as to whether or not he/she would agree to arbitrate the proceedings. Arbitration Agreement, page 2, ¶ 6. Therefore, a minimum of seven (7) months would pass before the parties could even begin the arbitration process. This is antithetical to the entire premise of arbitration and is further evidence of the unconscionability.

Third, the Arbitration Agreement provides that the decision regarding the outcome of the arbitration shall be made by the majority of the arbitrators picking an offer/demand made separately by both of the parties twenty-four (24) hours prior to the hearing. The arbitrators have no discretion to award any different decision other than one of the offers or demands given by each of the parties. Arbitration Agreement, page 3, ¶ 13. Finally, whoever the non-prevailing party is (the party whose offer/demand is not chosen by the majority of the arbitrators) will be required to pay all of the prevailing party's costs and expenses including, but not limited to, the third arbitrator's fees, costs of deposition, and any other costs associated with the hearing. Arbitration Agreement, page 2, ¶ 9; page 3, ¶ 19.

As a result, the cost of arbitration far outweighs the cost of proceeding in Court and therefore the agreement is unconscionable. Also, the costs of the arbitration must be paid by the parties including the Estate of Margaret Hensley which contains no money, income, or assets. Plaintiff's Affidavit on page 2 specifically states that the Estate has no assets and

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no income whatsoever. Plaintiff did not and does not have the financial wherewithal to pay or prepay arbitration fees or pay the opposing side's costs should the majority not pick her demand at the resolution. The amount of money that it would cost to begin and proceed through the arbitration process, including hearing, exceeds that available to the Plaintiff.

> Although the costs of arbitration may be a basis for determining that an agreement to arbitrate is substantially unconscionable, since Green Tree the issue of the prohibitive costs of arbitration has developed into a separate defense to the enforcement of an arbitration agreement. See Zephyr Haven, 122 So.3d at 921–22. "[W]here 'a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.' " Id. at 921 (quoting Green Tree, 531 U.S. at 92, 121 S.Ct. 513). In determining whether the costs of arbitration in a fee splitting arrangement are so prohibitive as to render the agreement unenforceable because it denies the plaintiff access to the arbitral forum, a case-by-case analysis is appropriate. Id. at 922. The focus is on the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigating in court, and whether the cost differential is so substantial as to deter the bringing of the claims. Id. In order to invalidate the arbitration agreement, the plaintiff, at an evidentiary hearing, must show the expected cost of arbitrating the specific claim is greater than litigating it and that the cost of arbitration would be prohibitively expensive. Id.
>
> Fi-Tampa, LLC v. Kelly-Hall, 135 So.3d 563 (Fla. App., 2014)
>
> An arbitration agreement may be substantively unconscionable if the fees and costs to arbitrate are so excessive as to "deny a potential litigant the opportunity to vindicate his or her rights." [Cite omitted] Green Tree Fin. Corp. Ala. v. Randolph, 531 U.S. 79, 81, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000) (holding that excessive arbitration costs may preclude litigants from effectively vindicating their rights). The party seeking to invalidate an arbitration agreement on such grounds has the burden of proving that arbitration would be prohibitively expensive. [cites omitted] Whether arbitration is prohibitively expensive is a question of fact that depends on the unique circumstances of each case. See Harrington, 119 P.3d at 1055 (explaining that "the Supreme Court adopted a case-by-case approach to determining whether fees imposed under an arbitration agreement deny a potential litigant the opportunity to vindicate his or her rights") (citing Randolph, 531 U.S. at 92, 121 S.Ct. 513). "

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Defendants contend that Daughter had previously signed the same arbitration agreement on two prior admissions in 2012 and 2014. The circumstances surrounding the execution of the prior arbitration agreements some three to five years earlier are unknown and are not relevant to the present case. The circumstances under which Decedent was admitted on those prior occasions was never presented by the Defendants. Further, previous admissions have no bearing on either of the unconscionability prongs of lack of meaningful choice or grossly unfair terms. However, even if the prior agreements were relevant to the present admission, they differ significantly in some of the material terms. For example, the prior agreements contain deadlines for the selection of the arbitrators which are much shorter and more efficient (one-third of the time shorter) than the present arbitration agreement in this case. As a result of the deadlines in the present Arbitration Agreement, the arbitration process would potentially not be able to start until at least after seven (7) months, assuming the arbitration selection process went smoothly. The prior arbitration agreements would have provided that the arbitration process could have started much sooner. Further, in the event the two arbitrators selected by each party could not agree on the third, the prior arbitration agreements determined that the third arbitrator in the panel of three would be by appointed by the American Arbitration Association. The arbitration agreement in the present case requires that in the event that the two arbitrators selected by each party cannot agreement upon the third arbitrator, that the third arbitrator will be selected by the party who wins a coin toss. Therefore, while the circumstances of the prior arbitration agreements are unknown and irrelevant to the issues of unconscionability, they nonetheless differ significantly from the present arbitration agreement in the current case.

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Therefore, based on all of the factors hereinabove, the Arbitration Agreement should not be enforced because it is unconscionable.

III. The Arbitration Agreement is Unenforceable Because it Lacks Consideration.

Plaintiff argued the Admission Agreement is unenforceable due to lack of valid consideration. The Court agrees that it is axiomatic that every contract in South Carolina be supported by mutual consideration in order to be valid and enforceable. Defendant argued the Arbitration Agreement was not involuntary and instead made in consideration of admission and that the Arbitration Agreement states it is "for valuable consideration." However, as discussed below, this does not constitute effective consideration to make the Arbitration Agreement enforceable.

While federal law preempts state laws that would invalidate arbitration agreements on most public policy grounds, the FAA looks to state law to decide the threshold questions of contract formation. Munoz v. Green Tree Financial Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'"). Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts. Rent-A-Center, West, Inc., 561 U.S. at 63, 130 S.Ct. at 2776; Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause."). The necessary elements of a contract are an offer, acceptance, and valuable consideration. Sauner v. Public Service Authority of S.C., 354 S.C. 397, 581 S.E.2d 161, 166 (2003). "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or

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responsibility given, suffered or undertaken by the other." Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998)). Where a contract lacks valuable consideration, the contract will be deemed unenforceable.

Our courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. See Reidman Corp. v. Jarosh, 290 S.C. 252, 253, 349 S.E.2d 404, 405 (1986). However, in determining whether adequate consideration exists in a contract, or arbitration agreement under the FAA guided by principles of contract law, our courts must examine and stay within the confines of the four corners of the instrument. State Accident Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (internal citations omitted). Daughter was asked to sign the Admission paperwork prior to Decedent's presentation to the facility. Daughter was also asked to sign the separate Arbitration Agreement. Having already signed the admission paperwork, there was no additional consideration in agreeing to the Arbitration Agreement itself. Therefore, neither party gained a right, interest, profit, or benefit by agreeing to the Arbitration Agreement. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other party when agreeing to the Arbitration Agreement. Further, simply because the Arbitration Agreement states that it is for valuable consideration does not make it so. Any allegedly legal consideration is not identified. There is no more meaning to such a statement than the Agreement attempting to improperly bind non-parties and non-signatories. Therefore, after analyzing the four

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corners of the Arbitration Agreement itself, this Court finds no valuable consideration exists. As such, the Arbitration Agreement is unenforceable.

IV. The Arbitration Agreement Does Not Apply to the Wrongful Death Action

South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914). The alleged Arbitration Agreement with White Oak by its own terms is an agreement between "White Oak Estates ('The Facility'), and Margaret Hensley ('the Resident')." While at some point during Decedent's admission to the facility, she might have had the authority to bind herself and her claims to arbitration but was never given the chance. However, even if Decedent had agreed to arbitration, she did not have the legal authority to bind her statutory beneficiaries who are not a party to the Arbitration Agreement. The signatories to the agreement are Daughter on behalf of Decedent and White Oak Estates. The scope of the agreement does not include the statutory beneficiaries' claims.

While Defendants would like to contend that the agreement covers statutory beneficiaries' claims, which it does not, the problem with this contention is that Decedent/Son had no authority to waive the statutory beneficiaries' claims. While dealing with a separate arbitration issue in a nursing home case and finding the arbitration agreement to be unenforceable, the Court of Appeals in Hodge recognized the separateness of the statutory beneficiaries/estate's claims from those of the patient/resident. In discussing the Maryland court's case of Dickerson, the Court noted that the nursing home was attempting "to use equitable estoppel against [the patient's] estate based on actions

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that [daughter] took *in her individual capacity*. The fact that [daughter] is *now the Personal Representative for [the patient's] [e]state* is of no moment; we will not hold this circumstance against [the patient's] [e]state. Simply put, [the patient's] [e]state is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] [e]state, or by [daughter] in *her capacity as Personal Representative* of [the patient's] [e]state…." Hodge quoting Dickerson v. Longoria, 995 A.2d. 721, 743 (Md. 2010). As recognized in this discussion, actions taken by Daughter in her *individual capacity* will not be held against the estate and as the Court noted, the estate may well have other beneficiaries or creditors.

Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, a Federal District Court in South Carolina has analyzed this issue under the South Carolina Non-Economic Awards Act of 2005. Diane Boyle as Personal Representative of the Estate of John Francis Boyle v. United States of America, United States District Court for the District of South Carolina, Beaufort Division (2009). In Boyle, the Court concluded that the wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. These analyses confirm that the wrongful death claimants have separate and distinct claims apart from that of the survival action. As such, Daughter and Decedent were incapable of waiving the statutory beneficiaries' right to a trial by jury.

The wrongful death claims are separate claims apart from the Decedent's claims. According to South Carolina's Wrongful Death Act:

> "Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an

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> action and recover damages in respect thereof, the person who would have been liable, if death had not ensued shall be liable to an action for damages."

South Carolina Code Annotated §15-51-10 (1977)

> The wrongful death beneficiaries are as follows:
>
> "Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs or the person whose death shall have been so caused."

South Carolina Code Annotated §15-51-20 (Supp. 2001)

The general element of damages recoverable are pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of the Decedent, society, including the loss of her experience, knowledge, and judgment in managing the affairs of herself and her beneficiaries. Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d. 713, 714 S.C. (Ct. App. 1989).

The wrongful death claim is a separate claim than the claims a decedent might bring on his/her own behalf under the survival statute. In Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914), the Supreme Court held that wrongful death and survival actions are different claims for different injuries. The Court stated "necessarily, therefore, there must be separate verdicts and separate judgments, there should be separate actions." Id. at 31. See also Strickland v. Southern Ry Co., 111 S.C. 248, 97 S.E. 695 (1918) (Supreme Court Affirmed Appeal from Circuit Court's ruling noting that survival claims are independent of wrongful death claims), Claussen v.

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Brothers, 148 S.C. 1, 145 S.E. 539 (1928) (discussing the difference between survival and wrongful death claims as being independent of each other).

It is true that our Supreme Court reaffirmed that a claim under the Wrongful Death Act lies in the decedent's estate only when the decedent possessed the right of recovery at his death. Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 699 S.E. 2d 143 (2010). This rule, however, does not dictate the conclusion that a wrongful death claim is wholly derivative of the decedent's claim. Instead, the rule provides that if the defendant has a defense that would completely bar the decedent's claim had the decedent survived, then the wrongful death beneficiaries may not bring a claim under the statute. For instance, in Stokes, the statute of limitations had run on the decedent's claim, and the wrongful death beneficiaries were accordingly totally barred from pursuing their claims under the statute. The Supreme Court cited the following from United States District Court case of Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. l988): "anything that would have *defeated the decedent's recovery* had he survived the accident, (such as contributory negligence, a valid release, or similar acts on his part." (Emphasis added). The Court held Quattlebaum was correctly decided and adheres to the principle that a decedent's estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived." Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 143, 146, 699 S.E.2d (S.C. 2010) at 146.

White Oak Estates has never asserted that the claims here are completely barred or that Decedent's recovery has been "defeated" by operation of law, such as by the running of the statute of limitations or the execution of a release. Instead, what White Oak Estates asserts is that Decedent may not bring a claim in court but must pursue her remedies in

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arbitration. Thus, neither Stokes nor the wrongful death statute operate to cut off the statutory beneficiaries' rights, even if the claims had been subject to arbitration.

While dealing with a separate arbitration issue in a nursing home case and finding the arbitration agreement to be unenforceable, the Court of Appeals in Hodge v. Uni-Health Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292(Ct.App.2018), recognized the separateness of the statutory beneficiaries/estate's claims from those of the patient/resident. In discussing the Maryland court's case of Dickerson, the Court noted that the nursing home was attempting "to use equitable estoppel against [the patient's] estate based on actions that [daughter] took *in her individual capacity*. The fact that [daughter] is *now the Personal Representative for [the patient's] [e]state* is of no moment; we will not hold this circumstance against [the patient's] [e]state. Simply put, [the patient's] [e]state is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] [e]state, or by [daughter] in *her capacity as Personal Representative* of [the patient's] [e]state…." Hodge quoting Dickerson v. Longoria, 995 A.2d. 721, 743 (Md. 2010). As recognized in this discussion, actions taken by Daughter in her *individual capacity* will not be held against the estate and as the Court noted, the estate may well have other beneficiaries or creditors.

The statutory beneficiaries' claim is much more akin to the claims of the non-signatory Plaintiffs in Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019), where the South Carolina Supreme Court held the non-signatories could not be bound by the arbitration agreement. Much like the non-signatories in Wilson, the statutory beneficiaries in the instant case are not attempting to exploit or receive a direct benefit from the agreement and were not even aware of the existence of the arbitration provision.

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Defendants confuse the benefit Decedent received from admission and attempt to argue the statutory beneficiaries received a benefit personally from the admission. That argument is without merit.

As the Wilson Court notes, "Equitable estoppel is ultimately a theory designed to prevent injustice, and it should be used sparingly. See Hirsch v. Amper Fin. Servs., LLC, 71 A.3d 849, 852 (N.J. 2013)(observing equitable estoppel should be used sparingly to compel arbitration and noting 'it is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration'); 28 Am.Jr.2d Estoppel and Waiver §29 (2011)(stating equitable estoppel should be used with restraint and only in exceptional circumstances)." As further stated in Wilson, direct benefits estoppel does not apply simply because the claim relates to or arose because of the existence of the contract.

Further, Defendants' reliance on Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 at n3, is misplaced. The Dean court held that courts cannot refuse to enforce an arbitration agreement simply because a wrongful death claim is involved. However, courts may refuse to enforce an arbitration agreement on state law contract defenses such as the statutory beneficiaries not being parties and signatories to the agreement.

Because the statutory beneficiaries have separate and independent claims and were not covered by the scope of this agreement or parties to this agreement, the Arbitration Agreement drafted by White Oak Estates cannot reach the claims of the wrongful death statutory beneficiaries.

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V. The Arbitration Agreement Does not Apply to Defendants White Oak Estates, Inc. and White Oak Manor, Inc.

The Arbitration Agreement clearly states that it is between "White Oak Estates ('the Facility') and Margaret Hensley ('the Resident'). The only signatories to the Agreement were Daughter as "Resident Representative" and Karen Baker for "White Oak Estates", the facility. No other entity or individual is identified as a party to the agreement at any point in the Arbitration Agreement. Defendants White Oak Management, Inc. and White Oak Manor, Inc. are not identified as parties to the Arbitration Agreement.

South Carolina law is clear in that White Oak's Co-Defendants are not third-party beneficiaries to either of these contracts. South Carolina courts have held that third-party non-signatories should only be included in arbitration agreements in exceptionally limited circumstances. Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019). Further, "South Carolina contract law carries a presumption that an individual who is not a party to a contract lacks privity to enforce it". Trancik v. USAA Insurance Company, 354 S.C. 549, 553, 581 S.E.2d 858, 861 (Ct. App. 2003). "It is to be observed that the presumption is that the parties contract for their own benefit and not for that of others not parties to the contract." Ancrum v. Camden Water, Light and Ice Company, 82 S.C. 284, 295, 64 S.E. 151, 155 (1909). The rule of contract interpretation is to ascertain and give legal effect to the intentions of the parties as determined by the contract language. Schulmeyer v. State Farm Fire and Casualty Company, 353 S.C. 492, 495, 579 S.E.2d 132, 134 (2003). Generally, courts do not have the authority to alter a contract by construction or make new contracts for the parties and words cannot be read into a contract which give an intent not expressed within the contract. Gilstrap v. Culpepper, 283 S.C. 83, 86, 320 S.E.2d 445, 447 (1984). Only if a contract is made for the benefit of the third person and the contracting

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parties intended to create a direct, rather than incidental or consequential benefit to the third person, can the third person make a claim based on the contract. Windsor Green Owners Association v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004).

As a result, Defendants White Oak Management, Inc. and White Oak Manor, Inc. are unable to carry their burden to overcome the presumption that the contract was only intended for the benefit of the parties to the contract. Therefore, the Arbitration Agreement does not extend to these Defendants.

CONCLUSION

The Court acknowledges and appreciates the amount of research and preparation for the hearing by counsel, as well as, the professionalism of counsel in their presentations to the Court. After consideration of the record, arguments of counsel, all memoranda of counsel, and the applicable law, and for the reasons set for above,

It is ordered that Defendants White Oak Estate, Inc., White Oak Management, Inc., and White Oak Manor, Inc.'s Motion to Dismiss and Compel Arbitration filed with the Court on February 19th, 2021, is respectfully denied; and

It is further ordered that Defendants White Oak Estate, Inc., White Oak Management, Inc., and White Oak Manor, Inc.'s Motion for a Protective Order or Alternatively, to Stay the Action Pending Arbitration, filed with the Court on February 19th, 2021, are denied as those motions are now moot.

IT IS SO ORDERED.

/s/Grace Gilchrist Knie
The Honorable Grace Gilchrist Knie
Resident Judge, Seventh Judicial Circuit

Date: April 9th, 2021
Spartanburg, South Carolina

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Spartanburg Common Pleas

Case Caption: Terry Putman , plaintiff, et al VS White Oak Estates, Inc. , defendant, et al

Case Number: 2020CP4203819

Type: Order/Other

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760

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EXHIBIT J

ELECTRONICALLY FILED - 2025 Sep 17 11:36 AM - GREENVILLE - COMMON PLEAS - CASE#2025CP2301759

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS

Ann Coleman, Individually, and as Personal Represenatative of the Estate of Mary Brinson,
☒ Plaintiff

v.

Mariner Health Care, Inc. F/K/A Mariner Post-Acute Network, LLC, Mariner Health Care Management Company, Mariner Health Central, Inc., Mariner Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC Midamerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC Midatlantic Holding Company, Living Centers-Southeast, Inc., Grancare South Carolina, Inc., Individually And D/B/A Faith Health Care Center, Savaseniorcare Management, LLC, Savaseniorcare Administrative Services, LLC, Savaseniorcare, LLC, Savaseniorcare, Inc., National Senior Care, Inc., Palmetto Health Care, LLC, Palmetto Faith Operating, LLC, Individually And D/B/A Faith Health Care Center, Ask Holdings, LLC, Leonard Gruntesin, An Individual, Murray Forman, An Individual, Boyd P. Gentry, An Individual, Abraham Shaulson A/K/A Abraham Shavlson A/K/A A. Shawson, A/K/A Abraham Shawson, An Individual, Avi Klein, An Individual, SC Property Holdings, LLC, SC Faith, LLC, And John Does 1-26.
☐ Defendant.

CASE NO.

2010-CP-21-00836

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

FILED
2011 MAR 25 PM 4:00
CONNIE REEL-SHEARIN
CCP & GS
FLORENCE COUNTY, SC

Plaintiff's Attorney:	Defendant's Attorney:
Matthew Chrisitian, Bar No. 70516 Address: 1007 East Washington Street, Greenville, SC 29601 phone: 864-232-7363 fax: 864-370-3731 e-mail: mchristian@christiananddavis.com other:	, Bar No. Address: phone: fax: e-mail: other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

CERTIFIED: A TRUE COPY
Connie Reel Shearin
CLERK OF COURT C.P & G.S
FLORENCE COUNTY, S.C.

SECTION I: Hearing Information

Nature of Motion:

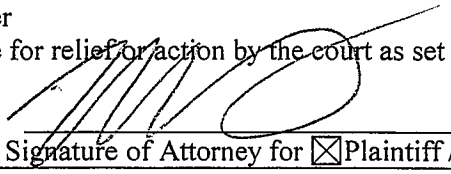
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.



Signature of Attorney for ☒ Plaintiff / ☐ Defendant

March 24, 2011
Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: 25.00

☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

- ☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED – AMOUNT DUE: _____

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

FILED
2011 MAR 25 PM 4:00
CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

COUNTY OF FLORENCE) C.A. No.: 2010-CP-21-836

Ann Coleman, Individually, and as Personal Representative of the Estate of Mary Brinson,

Plaintiff,

v.

Mariner Health Care, Inc. f/k/a Mariner Post-Acute Network, LLC, Mariner Health Care Management Company, Mariner Health Central, Inc., Mariner Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC MidAmerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC MidAtlantic Holding Company, Living Centers-Southeast, Inc., GranCare South Carolina, Inc., Individually and d/b/a Faith Health Care Center, SavaSeniorCare Management, LLC, SavaSeniorCare Administrative Services, LLC, SavaSeniorCare, LLC, SavaSeniorCare, Inc., National Senior Care, Inc., Palmetto Health Care, LLC, Palmetto Faith Operating, LLC, Individually and d/b/a Faith Health Care Center, Ask Holdings, LLC, Leonard Grunstein, an Individual, Murray Forman, an Individual, Boyd P. Gentry, an Individual, Abraham Shaulson a/k/a Abraham Shavlson a/k/a A. Shawson a/k/a Abraham Shawson, an Individual, Avi Klein, an Individual, SC Property Holdings, LLC, SC Faith, LLC, and John Does 1-26.,

Defendant(s).

ORDER DENYING DEFENDANTS MARINER HEALTH CARE MANAGEMENT COMPANY, MARINER HEALTH CENTRAL, INC., GRANCARE SOUTH CAROLINA, INC., INDIVIDUALLY AND d/b/a FAITH HEALTH CARE CENTER, MARINER HEALTH CARE, INC. f/k/a MARINER POST ACUTE NETWORK, LLC, MARINER HEALTH GROUP, INC., MHC HOLDING COMPANY, MHC FLORIDA HOLDING COMPANY, MHC GULF COAST HOLDING COMPANY, MHC MIDAMERICA HOLDING COMPANY, MHC ROCKY MOUNTAIN HOLDING COMPANY, MHC NORTHEAST HOLDING COMPANY, MHC WEST HOLDING COMPANY, MHC TEXAS HOLDING COMPANY, MHC MIDATLANTIC HOLDING COMPANY, LIVING CENTERS-SOUTHEAST, INC., SAVASENIORCARE ADMINISTRATIVE SERVICES, LLC, SAVASENIORCARE, LLC, SAVASENIORCARE INC., NATIONAL SENIOR CARE, INC., LEONARD GRUNSTEIN, BOYD P. GENTRY, AND MURRAY FORMAN MOTION TO STAY ACTION AND COMPEL ARBITRATION (SURVIVAL ACTION)

CERTIFIED: A TRUE COPY
Connie Reel Shearin
CLERK OF COURT C.P & G.S
FLORENCE COUNTY, S.C.

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PROCEDURAL

This matter came before the Court on the motion of Defendants Mariner Health Care Management Company, Mariner Health Central, Inc., Grancare South Carolina, Inc., individually and d/b/a Faith Health Care Center, Mariner Health Care, Inc. f/k/a Mariner Post Acute Network, LLC, Mariner Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC MidAmerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC MidAtlantic Holding Company, Living Centers-Southeast, Inc., SavaSeniorCare Administrative Services, LLC, SavaSeniorCare, LLC, SavaSeniorCare, Inc., National Senior Care, Inc., Leonard Grunstein, Boyd P. Gentry and Murray Forman, to stay the action and compel arbitration and was heard on January 6, 2011. All parties were represented by counsel and provided oral arguments and also submitted written memoranda and exhibits supporting their positions. The Court hereby denies Defendants' Motion to Stay Action and Compel Arbitration for the reasons set forth below.

BACKGROUND

Mary Brinson, deceased, was admitted to Faith Health Care Center on June 2, 2006 where she remained until September 16, 2006. She was then readmitted to Faith Health Care Center on December 13, 2006 and resided there until December 26, 2006. When Mary Brinson was admitted on June 2, 2006, the licensee was Grancare South Carolina, Inc., and when she was admitted on December 13, 2006, the licensee was Palmetto Faith Operating, LLC.

Ann Coleman is the Personal Representative of the estate of Mary Brinson. Ann Coleman is the sister of Mary Brinson, deceased. When Mary Brinson was admitted to Faith Health Care Center on June 2, 2006 and on December 13, 2006, no one had a Power of Attorney for Mary Brinson. Furthermore, at that time no one had a conservatorship and no one had been

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appointed guardian for Mary Brinson during these times. Despite the fact that Ann Coleman did not have a Power of Attorney for her sister, Faith Health Care Center requested that Ann Coleman sign an Arbitration Agreement during the admission process when Mary Brinson was admitted on both occasions. It is from the June 1, 2006, Arbitration Agreement which these Defendants seek to enforce.

DISCUSSION

1. The Arbitration Agreement is not enforceable because Ann Coleman lacked the capacity to contract on behalf of her sister.

The Arbitration Agreement is not enforceable because Ann Coleman lacked the capacity to contract on behalf of her sister. South Carolina law recognizes that arbitration agreements are contracts. The interpretation and enforcement of arbitration agreements are scrutinized using contract principles of law. The Defendants' own Admissions Agreement also recognizes that the Arbitration Agreement is a contract. It is a basic tenant of contract law that the parties to the contract must have the capacity to contract.

"The first element of a contract is that the parties have the capacity to contract… Further, capacity to contract relates to the status of the person rather than to circumstances surrounding the contract." (17 C.J.S. Contracts §32) Ann Coleman did not have that authority. Furthermore, Defendants admit that they are not aware of any Power of Attorney held by Ann Coleman on behalf of Mary Brinson at the time that the Arbitration Agreement was signed (Defendants Answers to Interrogatories—Mariner Interrogatory 24 and Grancare Interrogatory 32).

Defendants rely upon the South Carolina Adult Health Care Consent Act (S.C. Code Ann. §44-66-10 *et seq*) and the South Carolina Bill of Rights for Residents of Long-Term Care Facilities (S.C. Code Ann. §44-81-10 *et seq*) as granting authority to Ann Coleman to enter into the Arbitration Agreement on behalf of her sister, Mary Brinson. S.C. Code Ann. §44-66-30

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notes that "(A) Where a patient is unable to consent, decisions concerning his health care may be made by the following persons in order of priority: … (6) an adult sibling…of the patient…" S.C. Code Ann. §44-66-20(1) provides the definition of "health care" as meaning "a procedure to diagnose or treat a human disease, ailment, defect, abnormality, or complaint, whether of physical or mental origin. It also includes the provision of intermediate or skilled nursing care; services for the rehabilitation of the injured, disabled, or sick persons; and the placement in or removal from a facility that provides these forms of care." It says nothing that could be construed as conferring the ability to enter into a separate legal document waiving an individual's rights to due process under the law for another individual. Clearly, this act does not confer legal authority to enter into contracts for another person.

It is admitted by all parties that Mary Brinson did not have the capacity to contract for herself. The Defendants admit that Ms. Brinson was incompetent by virtue of their responses to Plaintiff's Request to Admit in addition to the fact that the medical director at the Faith Healthcare Center facility certified that Ms. Brinson was unable to consent to or make her own healthcare decisions.

While the South Carolina Adult Healthcare Consent Act does grant Ms. Coleman the authority to make "healthcare decisions" on behalf of her sister, consent for medical treatment for someone unable to consent is not the same as binding an incompetent person to a legally binding contract such as an arbitration agreement without the authority to do so.

Defendants also rely on S.C. Code Ann. §44-81-10 *et seq* to argue that Ms. Coleman has the legal authority to bind her sister to a contract and waive her sister's rights under the law. This Court declines to adopt this application of this Act. The Bill of Rights for long-term care facilities sets out the rights given to a long term care resident or resident's representative under the law; however, these rights are, once again, rights concerning the resident's access to

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healthcare and to be free from abuse and does not purport to grant others authority to enter into contracts for the resident. The Bill does not contemplate the resident's or the resident's representative's rights under the law for the authority or capacity to contract. The Bill defines representative as "a resident's legal guardian, committee, or next of kin or other person acting as agent of a resident who does not have a legally appointed guardian." The fact that the authors of this Bill felt it necessary to note that the resident may not have a guardian appointed under the law affirms their intentions that the Bill was designed to protect an individual's right of access to healthcare whether or not the individual has appointed a representative under the law. The Bill does not allow for an individual without any authority from the resident to be imbued with the legal authority to enter a contact waiving a resident's rights under the law.

The courts in North Carolina have recently decided an issue similar to the one at hand, finding that the authority granted by a state's Health Care Consent Act does not grant legal authority for the purpose of entering binding contracts. *Munn v. Haymount Rehabilitation & Nursing Center, Inc., et. al.*, No. COA 10-105 (NC Ct.App., Filed 21 Dec. 2010). In fact, in *Munn,* the Court specifically notes that "consent for medical care for another person who is unable to consent is a completely different issue than being an agent who has the authority to enter into a contract such as an arbitration agreement." Therefore, with similar reasoning this Court finds that Ann Coleman did not have actual authority to enter into the Arbitration Agreement on behalf of Mary Brinson.

The Defendants further argued that Ann Coleman acted as Mary Brinson's apparent agent. South Carolina case law on this issue is well established. Defendants argue that an agent's implied authority can be circumstantially provided by evidence and conduct and in doing so, rely on *Heil-Quaker v. Swindler*, 255 F.Supp. 445 (D.S.C. 1966), and *WDI Meredith & Co., v. American Telesis, Inc.*, 359 S.C. 474, 597 S.E.2d 885 (Ct.App. 2004). This reliance is

misplaced. *Heil-Quaker* and *WDI Meredith & Co.* hold that apparent agency is based upon the principal holding the agent out or allowing the agent to hold himself or herself out with the alleged authority. "Apparent authority is the authority that the principal intended the agent to have or such power that a principal holds his agent as possessing or permits him to exercise." *Heil-Quaker v. Swindler*, 255 F.Supp. 445 (D.S.C. 1966). Because Mary Brinson was incompetent, she was incapable of granting the power to Ann Coleman and incapable of making a decision to allow Ann Coleman to hold herself out as Mary Brinson's agent. Therefore, Mary Brinson as the principal did never and could never exercise such an intent. If a person does not possess the capacity to make their own healthcare decisions, they would not possess the capacity to convey their rights under the law to another individual. Furthermore, even if such an individual could convey such rights in such circumstances, there is no evidence that Mary Brinson exhibited such an intent.

The Defendants further rely on *WDI Meredith & Co., v. American Telesis, Inc.*, 359 S.C. 474, 597 S.E.2d 885 (Ct.App. 2004) for the proposition that "to establish apparent authority, either the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief". As the court also noted in *WDI Meredith*, "an agency may not, however, be established solely by the declarations and conduct of an alleged agent." (citing *Muller v. Myrtle Beach Golf & Yacht Club*, 303 S.C. 137, 142-143, 399 S.E.2d at 433 (Ct.App. 1990) overruled on other grounds by *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (2000)). An incompetent individual such as Mary Brinson would be unable to possess this intent or realize that any conduct would create such a belief.

The Defendants also rely on *Carraway v. Beverley Enterprises Alabama, Inc.* 978 So. 2d 27 (Aa. 2007). In this Alabama case, the Plaintiff was a brother of a resident of a nursing home

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facility who executed a number of documents on his sister's behalf on her admission to the facility, including an arbitration agreement. The brother of the plaintiff did not have a Power of Attorney. Shortly after his sister's admission, a Power of Attorney was executed naming the brother as her attorney-in-fact. The fact that the sister provided a Power of Attorney shortly after her admission indicates that she was indeed competent, unlike the present case with Mary Brinson. Therefore, the sister could have allowed or exhibited the intent for her brother to be held out as her representative unlike Mary Brinson. Furthermore, in *Carraway* the sister in essence ratified the representation by the brother by shortly thereafter naming him as her power of attorney by her own decision. This court finds the reasoning of *Munn* to be on point and applicable. Therefore, since Mary Brinson, the principal, was incapable of making any decisions or demonstrating any intentions conveying any authority to Ann Coleman, Ann Coleman did not have the apparent authority to contract or to enter into a binding contractual agreement such as an arbitration agreement on behalf of Mary Brinson.

Furthermore, according to the Defendants' admission documents, they were aware that Ann Coleman did not have a Power of Attorney. The face sheet from the admissions documents as well as other documents indicate that Ann Coleman did not have any other legal oversight, durable power of attorney or healthcare proxy. The Defendants are sophisticated individuals and corporations which are accustomed to dealing with arbitration provisions and understand the implications of a Power of Attorney. (*Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 823 N.E.2d 19 at 24 {¶29}). The Defendants cannot reasonably assert that Ann Coleman was the apparent agent of Mary Brinson when they had the knowledge to understand the meaning of a Power of Attorney and the fact that Ann Coleman did not have one. The fact that the Defendants have a form which would allow for the documentation of some form of authority indicates that they knew that there are certain requirements which much be met before an

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individual can be imbued with the authority to act as an agent, and further demonstrates that they knew that none of the documents which would give Ann Coleman such authority existed at the time that Mary Brinson was admitted to their facility.

Therefore, Ann Coleman had neither actual nor apparent authority to act on behalf of Mary Brinson and to sign away her right to a jury trial by entering into the arbitration agreement. As a result, the arbitration agreement is null and void because Ann Coleman lacked the capacity and authority to ever execute it on behalf of Mary Brinson.

2. The Arbitration Agreement is not enforceable against the statutory beneficiaries.

The agreement to arbitrate explicitly specifies that it is "an agreement to arbitrate any dispute that might arise between Mary Brinson ("Resident") and/or _____ ("Legal Representative") and Faith Healthcare ("Facility")…". The agreement clearly allowed for the application of the agreement to extend to a resident's representative and, in this instance, was not so applied. Even if so applied, in the current actions, Ann Coleman has filed both a wrongful death and a survival action. While this court finds independently that Ann Coleman lacked the authority to enter into the contract on behalf of Mary Brinson and is therefore, null and void, this court also finds that the arbitration agreement cannot be enforced because it cannot apply to statutory beneficiaries who are not parties to the agreement. This principal has been specifically upheld in other jurisdictions. (*Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wash.App. 919, 231 P.3d 1252 (2010). *Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 823 N.E.2d 19).

While Ann Coleman did not have authority to waive the rights of Mary Brinson, even if she did, she did not have the authority to waive the right to statutory beneficiaries under the arbitration agreement at hand. South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries. Because the statutory beneficiaries are not parties to the contract, and

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because the statutory beneficiaries have not conveyed any power to the signatory to the agreement, their claims could not be waived and any attempt to apply the agreement to them would be null and void.

3. The Arbitration Agreement is procedurally and substantively unconscionable and impossible to enforce.

The Defendants acted in a manner inconsistent with their own policies and procedures. The facility policy in effect at the time of Mary Brinson's admission clearly required that a member of the admissions staff explain the admissions and financial documents to the person signing them. This includes the Arbitration Agreement at issue here. Specifically, the policy states its purpose as intended to "provide an informative environment that should reduce the fears and anxieties of the resident and family during the admissions process" and requires that "the Administrator, through the Admissions Staff, is responsible for ensuring that the facility and the resident follow the established admission policy, as it may apply." Additionally, the policy requires that "the Admission staff will explain and offer an Arbitration Agreement to the resident or responsible party (emphasis added)". On the basis of the Affidavit of Ann Coleman and the admission of the Defendants that the Arbitration Agreement was presented as part of a larger admissions package, the Court finds that these documents were not explained to Ms. Coleman, nor was it made clear to her that the Arbitration Agreement was voluntary and not a requirement for Mary Brinson's admission to the facility.

Additionally, it is the finding of this Court that, even were the Arbitration Agreement valid, it can not be construed to apply to all claims at issue in the case at hand. An Arbitration Agreement, or any contract, for that matter, applies only to claims arising which would be made by someone standing in the shoes of the contractor, in this case, Mary Brinson, and cannot be construed so as to apply to those claims which may be brought on behalf of others with standing

to a claim. Claims that have been made on behalf of Ann Coleman and the other statutory beneficiaries of Mary Brinson's estate are not and were not parties to the Arbitration Agreement and cannot retroactively be joined to the contract.

Moreover, not all of the Defendants to this case have moved for arbitration—specifically, there are five defendants to the case at hand who are not currently seeking to enforce arbitration. In fact, one of these defendants, Palmetto Health Care, LLC, had previously moved for enforcement and has subsequently withdrawn its petition. Parties who are not seeking arbitration cannot be forced to arbitrate a matter any more than individuals who are not party to the agreement can. As a result, this Court is faced with the possibility that, if the Arbitration Agreement is deemed valid portions of the claims along with some of the parties would be subject to arbitration while other portions of the claims and different parties to this action would be subject to trial by jury. Should this be allowed, the very real possibility of conflicting rulings on common issues of law and fact may result.

Instructive on this issue is the matter of *Birl v. Heritage Care, LLC*, 172 Cal.App.4th 1313, 91 Cal.Rptr.3d 777. In *Birl* a case was brought by the family of a deceased patient against a hospital, physicians, and a nursing facility and the nursing facility sought to compel arbitration. Of relevance, the Court here noted that "(1) the hospital and physicians with no arbitration agreement were involved in the same transaction as the nursing facility; (2) all defendants were involved in a series of related transactions with the patient; (3) there was a possibility of conflicting rulings on common issues of law or fact; and (4) patient's family members were third parties to the patient's arbitration agreement." In its ruling denying the nursing facility's motion to compel arbitration, California's Appellate Court noted that "the trial court properly noted the possibility of conflicting rulings on common issues of law or fact if defendant Heritage was not

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joined to the court action with the other defendants…Different triers of fact in different proceedings could come to different conclusions…" *Id.* at 1321.

The Court in *Birl* also took note that the Plaintiffs in that action asserted claims "not just as successors in interest, but also individually and as surviving heirs" (*Id.* at 1321), just as Ms. Coleman has done in the cases at issue now, and that such claims for "wrongful death and emotional distress were brought by plaintiffs in their individual capacities" and not as persons who had stepped into the shoes of the decedent. It was the conclusion of the *Birl* Court that the possibility of conflicting rulings on a common issue of law or fact was real and that "different triers of fact could reach different conclusions as to which party was at fault, the cause of any injuries, and the apportionment of liability—unless all the parties are jointed to one action" (*Id.* at 1322). Based on such a finding, the Court determined that it was proper to deny the nursing facility's motion to compel arbitration.

While the circumstances of the current actions differ slightly from those of *Birl*, it remains consistent that compelling arbitration of certain claims but not of others and compelling arbitration with respect to some defendants but not others will result in the conflicting rulings as contemplated in *Birl*. Furthermore, such a division of the cases would result in an unreasonable hardship for Plaintiff, as she and the other statutory beneficiaries of Ms. Brinson's estate would be effectively forced to litigate claims arising from the same or related events in two separate forums. Therefore, to uphold the Arbitration Agreement would not only pose a potential impossibility, it is also unreasonable and unconscionable to force a Plaintiff to prosecute her claims in such a fashion, especially when this issue was not explained to her. Our Courts have discussed and recognized that it is proper to deny Arbitration Agreements with impossibility of enforcement. (*Grant v. Magnolia Manor-Greenwood, Inc.*, 383 SC 125, 678 S.E.2d 435 (S.C. 2009)).

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It is the finding of this Court that the Arbitration Agreement was presented to Ms. Coleman as part of a larger admissions packet and the meaning of the Arbitration Agreement was not explained; that Ms. Coleman was not informed that her signature on the Arbitration Agreement was optional and not a prerequisite for her sister to receive care; that the current conditions are that most, but not all of the defendants are seeking to compel arbitration; and compelling arbitration of Plaintiff's claims while not compelling arbitration to some claims against other Defendants, or by statutory beneficiaries who are not seeking either arbitration or were not parties to the contract makes the Arbitration Agreement as a whole impossible, unconscionable and therefore, unenforceable.

4. The Defendants' delay has effectively nullified the agreement and waived any right the Defendants may have had to force Arbitration.

The Plaintiff's Notice of Intent was filed in July of 2009, providing the Defendants with notice of impending litigation. The Notice of Intent stage took a usual course and, in fact, was extended beyond the normal time frame due to the substantial number of defendants in the case. The parties completed the required pre-suit mediation in January of 2010 which was unsuccessful in reaching a resolution. The Plaintiff filed the Summons and Complaint in March of 2010. Defendants began filing their Answers in May of 2010, and it was at this time that Plaintiff was provided with the first notice of the existence of an Arbitration Agreement and the Defendants' allegation that the issues and incidents addressed by Plaintiff's Complaint were governed by said Arbitration Agreement only by virtue of one of the Defendants' affirmative defenses. Even in light of said notice, Defendants did not move to seek enforcement of the Arbitration Agreement until August of 2010, more than a year after they had been first placed on notice of pending litigation and had been served with the Notice of Intent to Sue. This was also well after Plaintiff had served Discovery and filed a Motion to Compel.

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The Courts in South Carolina have long recognized the act of abandonment as a valid basis for an exception to a contract's enforceability:

> Generally, no-damage-for-delay provisions are valid and enforceable so long as they meet ordinary rules governing the validity of contracts. *See* Annot., *Validity and Construction of "No Damage Clause" with Respect to Delay in Building or Construction Contract*, 74 A.L.R.3d 187 §2[a] (1976). A certain majority of jurisdictions, however, recognize certain exceptions to such clauses. *Id.* Among the recognized exceptions are (a) delay caused by fraud, misrepresentation, or other bad faith... (c) delay which has extended such an unreasonable length of time that the party delayed would have been justified in abandoning the contract... *U.S. f/u/b/a Williams Electric Company, Inc. v. Metric Constructors, Inc.* 325 S.C. 129, 480 S.E.2d 447 (1997).

The contract at issue here is, of course, the Arbitration Agreement. First, the Agreement does not contain a "no-damage-for-delay" provision, and, as such, had Defendants intended to rely upon the Agreement, they should have acted promptly upon the first notice of a civil action. Secondly, and being generous to Defendants, they waited a full nine months after Plaintiff's first filings to make any mention of an Arbitration Agreement and an additional three months more before moving to enforce said Agreement.

"[I]n South Carolina, there exists in every contract an implied obligation of good faith and fair dealing." *Id.* citing *Adams v. Creel*, 320 S.C. 274, 465 S.E.2d 84 (1995); *Parker v. Byrd*, 309 S.C. 189, 420 S.E.2d 850 (1992); *Tharpe v. G.E. Moore*, 254 S.C. 196, 174 S.E.2d 397 (1970). Continuing, "A number of courts recognize an exception to a no-damage clause where delays are so unreasonable in length or duration that they amount to an abandonment of the contract..." *U.S. f/u/b/a Williams Electric* at 134-135 citing *74 A.L.R.3d* at 226-230 §7(i). "An abandonment need not be express but may be inferred from the conduct of the parties and attendant circumstances." *Quality Concrete Products, Inc., v. Thomason,* 253 S.C. 579, 172

S.E.2d 297 (1970). "Abandonment of a contract by one party is the giving up of the right of benefit due from the other party." *Ro-Lo Enterprises v. Hicks Enterprises*, 294 S.C. 111, 362 S.E.2d 888 (Ct. App. 1987). "As with the above mentioned exceptions, an abandonment of the contract involves a breach of the implied obligation of good faith and fair dealing. Accordingly, we adopt this exception and find that if a party abandons the contract, they also abandon their right to rely on a no damage for delay clause." *U.S. f/u/b/a Williams Electric* at 135. Likewise, South Carolina Courts have previously considered and found that significant delay is tantamount to abandonment and constitutes a sufficient basis to support a finding of abandonment with respect to an arbitration agreement. (See also *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (S.C. App. 2003), *Deloitte & Touche, LLP v. Unisys Corp*, 358 S.C. 179, 594 S.E.2d 523).

As previously discussed, the Arbitration Agreement the Defendants now seek to enforce does not contain a no-damage-for-delay clause, which make the performance under the Agreement an even more time-sensitive issue. The Defendants delayed almost a year before notifying Plaintiff of such an agreement and waited more than a year before moving for the enforcement of the Agreement. During the entire length of their delay, they conducted themselves in a manner consistent with parties that intended to proceed with litigation through the confines of the judicial process. It is the ruling of this Court that, the Defendants, through their actions and delay, abandoned any rights they may have been afforded to force this matter to arbitration. To allow the Defendants to now insist on adherence to the Arbitration Agreement which was the subject of the Motion before this Court, not only amounts to an unconscionable act, but it is also in disagreement with established precedent—precedent that finds contracts far more lenient on the issue of delay than the one at hand to have been abandoned in the face of acts such as those displayed by the Defendants here.

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5. Excepting GranCare South Carolina, Inc., Mariner Health Care Management Company, and Mariner Health Central, Inc., the Defendants bringing this motion have argued in a manner inconsistent with the parties who have standing to enforce an Arbitration Agreement.

GranCare South Carolina, Inc., was the operator of Faith Healthcare Center at the time of Mary Brinson's June 2006 admission, and all of the other defendants bringing this motion have alleged elsewhere that they do not operate nursing homes, do not have any ties to Faith Healthcare Center, have never transacted business in South Carolina, do not own property in South Carolina, and have never had any influence over the operations of Faith Healthcare Center. In fact, simultaneous to the hearing of this Motion to Compel Arbitration, these same Defendants argued a Motion to Dismiss for Lack of Personal Jurisdiction. Yet despite these protestations, these Defendants have sought to enforce an Arbitration Agreement between a facility they contend they have no interest in or control over, in a state they do not transact business in, in an industry in which they do not participate, and that this Court holds no jurisdiction over them. It cannot be rationally argued that all of these Defendants are parties to this contract, while at the same time argue that they have never contracted in South Carolina, never conducted business in South Carolina or are not tied in with the operation of the nursing facility. If the Defendants' arguments were accepted as true, then they would not have standing to enforce the Arbitration Agreement and the impossibility of prosecuting the claims in two separate forums becomes even more significant as discussed hereinabove.

6. The Defendants' argument that Mary Brinson was a third party beneficiary to the contract is illogical and premised on the rights of Ann Coleman as signatory, which said rights do not exist.

Defendants' have sought to argue that Mary Brinson was the third party beneficiary to the Admissions and Arbitration Agreements. While this Court concedes that it was Ms. Brinson's admission into Faith Healthcare Center that was contemplated by the Admissions Agreement, the

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Defendants' extension of this argument that seeks to cast Ms. Brinson as a third party beneficiary of said agreements is misplaced as it assumes that Ann Coleman had the right to contract on behalf of Ms. Brinson. As this Court has already discussed at length, while Ann Coleman did have the right under the Adult Health Care Consent Act to consent to medical treatment, she did not have the right to commit her sister to a legally binding contract that agreed to the removal of Ms. Brinson's rights under the law. Because Ann Coleman did not have the right to contract on behalf of her sister, Mary Brinson cannot possibly be a third party beneficiary as the contract itself was never valid.

7. The Defendants' argument that Plaintiff should be equitably estopped from denying the existence of an enforceable Arbitration Agreement is rejected.

As with the argument concerning the third party beneficiary status of Mary Brinson, the Court finds that the Defendants' argument with respect to the Arbitration Agreement and estoppel of the Plaintiff is, once again, misguided and assumes a premise which this Court has previously rejected.

> The principle of estoppel in equity stands on the very foundation of right and fair dealing. It considers and weighs the conduct of men in their dealings with each other and gives that effect and meanings to their actions which common sense and justice dictate. The essential elements of equitable estoppel are ignorance of the party invoking the estoppel of the truth as to the facts in question and a misrepresentation or deceptive conduct of the party against whom estoppel is sought to be applied, which in fact misleads the person asserting the estoppel to rely on the misrepresentation or conduct to change his position prejudicially as a result of the reliance. *SCJur* "Estoppel" §4.

The Defendants' estoppel argument is not only misguided, it misses the true nature of estoppel. As this Court has previously discussed, it was Faith Healthcare Center's failure to explain the Arbitration Agreement in accordance with the Defendants' policies and procedures coupled with the manner in which the Arbitration Agreement was presented to Ann Coleman that

caused and contributed to Ms. Coleman not understanding the true nature of the document she was signing. The unconscionability of this process as described hereinabove serves as an additional sustaining ground for the finding that the Arbitration Agreement is not valid. The Defendants could not reasonably rely on the contract/agreement when they knew that Ann Coleman lacked the authority to enter into such a contract/agreement. The Defendants are assuming that it is the representation of the agent and not the principal that is the determinant of apparent authority and an establishment of agency when, as this Court has already discussed, it is the actions of the principal. As such, this Court rejects the Defendants' argument for equitable estoppel.

Furthermore, the Defendants have argued that Plaintiff cannot deny the validity of the Arbitration Agreement yet rely on the Admissions Agreement in alleging that the Defendants' were in breach of contract with respect to their contractual obligation to provide appropriate medical care to Mary Brinson. It is the Defendants' contention that the Arbitration Agreement and the Admissions Agreement are part of the same agreement between the parties and, as such, the Plaintiff can not disclaim the Arbitration Agreement. Defendants further argued that the Arbitration Agreement was part of the entire agreement between the parties and that the Plaintiff should not be able to argue that the Arbitration Agreement is invalid while asserting claims arising out of the relationship between the parties and that the Plaintiff should be equitably estopped form doing so. Plaintiff opposed these contentions. The errors in this argument have already been discussed. The Defendants again assume that the Arbitration Agreement and Admissions Agreement are on the same footing. As this Court has stated before, they are not. An agreement concerning the provision of health care is a far different matter than an agreement to waive legal and constitutional rights. As such, the Defendants' argument concerning estoppel is rejected.

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CONCLUSION

This Court declines to enforce the Arbitration Agreement. Ann Coleman lacked the authority to bind her sister to any contract which removed her rights under the law and the Constitution. That she has the statutory authority to assist in making decisions regarding the treatment and care on behalf of her sister is irrelevant to the determination of whether she had the authority to contract on behalf of her sister in a separate legal agreement. The determination of agency is made based upon the principal and not the agent, and the Defendants' own documents demonstrate that they were aware that Mary Brinson was incapable of demonstrating any such intention or making any such representation. The Defendants cannot now reasonably argue that they thought Ms. Coleman had "apparent" authority, as they were aware of the legal requirements governing arbitration agreements.

Likewise, the Arbitration Agreement does not apply to all parties to this suit as it governs neither the claims brought on behalf of Mary Brinson's statutory beneficiaries, nor a portion of the Defendants who have not sought to force arbitration. Such circumstances give rise to the possibility of conflicting findings based on the same facts depending on the forum in which the issues are heard. These circumstances render the Arbitration Agreement unconscionable and impossible. Adding to the Agreement's unconscionability is Faith Healthcare Center's failure to adequately and appropriately inform Ms. Coleman as to the nature of the documents she was signing. She was not advised of the meaning of the Arbitration Agreement, nor was she advised that her signature on said Agreement was voluntary and that a refusal to sign would have no affect on her sister's admission to the facility.

The Arbitration Agreement was further abandoned by the Defendants through their delay. The Defendants proceeded to engage in the litigation process with Plaintiff, allowing this case to

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more forward for more than a year after the filing of the Notice of Intent before they sought any enforcement of the Arbitration Agreement. South Carolina precedent is clear that, had the Defendants intended to seek enforcement of the Agreement, they should have done so at the outset of this matter, not more than a year after its genesis. And while it has been the finding of this Court in a separate Order that the Plaintiff has made a sufficient showing for jurisdiction over Defendants in this case, the myriad of issues discussed previously preclude any finding in favor of their Motion to Compel Arbitration, as they have argued inconsistent and irreconcilable positions.

Finally, it is the belief of this Court that the Defendants' arguments concerning the third party beneficiary status of Mary Brinson and the argument concerning equitable estoppel are misguided and are rejected by the Court.

Therefore, it is the finding of this Court that the Plaintiff did not have the legal authority to execute the Arbitration Agreement on behalf of her sister; the Arbitration Agreement does not apply to all parties to this suit, giving rise to the possibility of divergent outcomes premised on the same facts; that the Arbitration Agreement itself is impossible and unconscionable; and that the Defendants abandoned the Agreement through their delay in seeking its enforcement. As such, Defendants' Motion to Stay Action and Compel Arbitration is denied in its entirety.

IT IS SO ORDERED.

The Honorable Michael G. Nettles
Twelfth Circuit of the State of South Carolina

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CONNIE REEL-SHEARIN
CCC & GS
FLORENCE COUNTY, SC

Florence, South Carolina
Date: 3-18-11

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EXHIBIT K

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) THIRTEENTH JUDICIAL CIRCUIT

PATRICIA YOUNG, Individually and as Personal Representative of the Estate of Donald Young,

Plaintiff,

vs.

NATIONAL HEALTHCARE COPRORATION, NHC/OP, L.P., NATIONAL HEALTH CORPORATION, NHC-MAULDIN, LLC d/b/a NCH HEALTHCARE MAULDIN, CAROLINA MEDICAL REHABILITATION, LLC, BYUNG HUNG CHOE, M.D., KEITH SCHENTZEL, M.D., and GARY BARCINAS, P.A.,

Defendants.

C. A. No. 2014-CP-23-00877
C.A. No. 2014-CP-23-00878

ORDER

This matter came before the Court on Defendants National Healthcare Corporation, NHC/OP, L.P., and National Health Corporation's (collectively hereinafter as "Corporate NHC Defendants") Motion to Dismiss and to Compel Arbitration and Defendant NHC-Mauldin, LLC d/b/a NCH Healthcare Mauldin's (hereinafter "NHC-Mauldin") Motion to Dismiss and to Compel Arbitration. Having listened to oral arguments from counsel and having reviewed the parties' legal memorandums, for the reasons more fully set forth below, the Court hereby grants the Motion to Compel Arbitration as to Civil Action number 2014-CP-23-00877 ("Survival Action"), but denies the Motion to Dismiss the Corporate NHC Defendants and to Compel Arbitration as to Civil Action number 2014-CP-23-00878 ("Wrongful Death Action").

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BACKGROUND

This matter arises out of two civil actions --- a Survival Action and a Wrongful Death action. Both actions involve allegations of nursing home negligence resulting in the death of Donald Young ("Decedent"). Patricia Young ("Plaintiff") was Decedent's spouse and serves as the personal representative of Decedent's estate.

On November 5, 2012, Decedent was admitted to NHC-Mauldin, a skilled nursing facility. National Healthcare Corporation is the parent corporation of NHC-Mauldin, and NHC/OP, L.P., and National Health Corporation are affiliate corporations. Plaintiff alleges that while the Corporate Defendants did not provide direct care or services to Decedent, they are proper Defendants in this matter because their control over NHC-Mauldin directly affected the quality of care received by Decedent.

At the time of admission, Decedent entered into an Admission and Financial Contract (the "Agreement") for the provision of health care services. As part of the Agreement, Decedent also executed an Agreement to Arbitrate ("Arbitration Agreement"). The Arbitration Agreement was also executed by Plaintiff, as an "other person signing on behalf of patient."

The Arbitration Agreement provides that the parties agree to follow the dispute resolution procedure set forth in the Arbitration Agreement. This Procedure can be summarized as follows:

1. The parties agree to follow the Grievance Procedure described in the Patient Rights Booklet for any claims or disputes arising out of or in connection with the care rendered to Mr. Young;
2. Where the amount in controversy sits within the limits for submission to South Carolina Small Claims Court, then the controversy will be submitted to

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that Court;

3. Any disputes with an amount in controversy exceeding the limits for submission to small claims court shall be resolved by binding arbitration. There are no limits on the award of actual or punitive damages in the Agreement.

Plaintiff filed the instant actions on February 18, 2014. Plaintiff has not complied with the Grievance Procedure as described in the Patient Rights Booklet for claims or disputes arising out of or in connection with Decedent's care, nor, despite the fact that the amount in controversy exceeds the limits for submission to small claims court, has Plaintiff made an attempt to arbitrate this matter as Defendants contend is required under the Arbitration Agreement.

LEGAL ANALYSIS AND CONCLUSIONS

Whether the parties agreed to arbitrate is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause."). The courts, not arbitrators, are charged with deciding certain "gateway matters" including whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy. New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 629, 667 S.E. 2d 1, 5 (Ct. App. 2008). The Court finds that the parties had a valid arbitration agreement; however, the agreement applies only to the Survival Action.

I. Survival Action Subject to Arbitration

The Survival Action is clearly within the scope of the Arbitration Agreement. The pertinent language of the Arbitration Agreement states,

> "The parties shall submit to binding arbitration all disputes... arising out of or in any way related or connected to the Patient's

> stay and the care provided at the Center, including but not limited to any disputes concerning alleged personal injury to the Patient caused by improper or inadequate care, including allegations of medical malpractice; any disputes concerning whether any statutory or regulatory provisions relating to the Patient were violated; any dispute related to Center's charges to the Patient; and any other dispute under state or federal law based on contract, tort, or statute that exceeds the state's small claims court statutory limits as later defined."

The Arbitration Agreement implicitly recognizes that injuries may occur to Decedent while he was a resident of NHC-Mauldin and that personal injuries and tort claims arising therefrom are to be governed by the Arbitration Agreement. It is clear that the intent of the Arbitration Agreement is to resolve allegations of negligence and personal injury through arbitration.

It is undisputed that Decedent and Plaintiff both signed the Arbitration Agreement and that there is nothing improper about the Arbitration Agreement on its face. In opposition to the Motion to Compel Arbitration, Plaintiff argues that the Arbitration Agreement should be deemed unconscionable due to the circumstances upon which it was executed. Specifically, Plaintiff contends that the Arbitration Agreement was just one of many documents that Decedent executed in a short period of time during the admission process, so Decedent may not have had time to fully read it. However, whether the Decedent did or did not read the Arbitration Agreement is irrelevant since it is well established that a person who signs a contract cannot avoid the effect of the document by claiming he did not read it. Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) ("Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it.") In addition, Plaintiff contends that Decedent had taken narcotic medications prior to admission that may have affected his mental status and his ability to understand the document. But, mere speculation that Decedent may have been incompetent at the time is insufficient. Plaintiff had the burden of proving Decedent's incompetence, and she failed to put forth any

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evidence in support of her allegation. *See* Schmauch, 354 S.C. at 665, 582 S.E.2d at 441.

Therefore, this Court finds that Decedent knowingly entered into an agreement to arbitrate any claims that arose from his being a patient of NHC-Mauldin. As a result, this Court grants NHC-Mauldin's Motion to Dismiss the Survival Action and to Compel Arbitration pursuant to the terms of the Arbitration Agreement on all claims that were made or could have been made in the Survival Action. Further, the Court finds that the Corporate NHC Defendants were intended beneficiaries of the Arbitration Agreement; therefore, the order compelling arbitration of the Survival Action shall also apply to the Corporate NHC Defendants as the allegations against those Defendants are based on the same facts and are inherently inseparable from the claims made against NHC-Mauldin. *See* Int'l Paper Co. v. Schwabedissen Maschenen & Anlagen GMBH, 206 F.3d 411, 417 (4th Cir. 2000); *see also* Pearson v. Hilton Head Hospital, 400 S.C. 281, 733 S.E.2d 597 (S.C. Ct. App. 2012).

II. Wrongful Death Action Not Subject to Arbitration

While Decedent and NHC-Mauldin clearly intended to arbitrate any claims between them, it is less clear whether the Arbitration Agreement mandates arbitration for all claims related to Decedent's injuries and death. It appears that the question of whether a wrongful death action is subject to mandatory arbitration pursuant to the terms of a contract is one of first impression in South Carolina. Case law across many jurisdictions within the United States is split as to whether an arbitration agreement covers a wrongful death claim brought by the decedent's statutory beneficiaries who were not a party to the contract. *Compare* Carter v. SSC Odin Operating Company, *LLC,* 2012 IL 113204, 976 N.E.2d 344, 360, 364 Ill. Dec. 66 (Ill. 2012); Lawrence v. Manor, 273 S.W.3d 525, 530 (Mo. 2009); Bybee v. Abdulla, 2008 UT 35, 189 P.3d 40,47, 50 (Utah 2008); Peters v. Columbus Steel Castings Co., 115 Ohio St. 3d 134, 2007 Ohio 4787, 873

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N.E.2d 1258, 1262 (Ohio 2007); McFarren v. Emeritus at Canton, 2013 Ohio 3900, 997 N.E.2d 1254, 2013 WL 4822908 (Ohio App. 2013); Pisano v. Extendicare Homes, Inc., 2013 PA Super 232, 77 A.3d 651, 2013 WL 4046673 (Pa. Super. 2013); Woodall v. Avalon Care Center-Federal Way, *LLC*, 155 Wn. App. 919, 231 P.3d 1252, 1257-59 (Wash. App. 2010) *with* Graves v. B.P., 568 F.3d 221, 223 (5th Cir. 2009); Peltz ex rel. Estate of Peltz v. Sears, Roebuck & Co., 367 F.Supp.2d 711, 718-19 (E.D. Pa. 2005); Laizure v. Avante at Leesburg, Inc., 109 So. 3d 752, 762 (Fla. 2013); Ruiz v. Podolsky, 50 Cal. 4th 838, 114 Cal. Rptr. 3d 263, 237 P.3d 584, 591 n. 2 (Cal. 2010); In re Labatt Food Service, L.P., 279 S.W.3d 640, 647 (Tex. 2009); Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661, 665 (Ala. 2004); Allen v. Pacheco, 71 P.3d 375, 379 (Colo. 2003); Estate of Richard Heiney v. Life Care Centers of America, Inc., 2013 Ariz. App. Unpub. LEXIS 496, 2013 WL 1846599 (Ariz. App. 2013).

This Court finds persuasive the reasoning of those jurisdictions that have held that an arbitration agreement executed by a decedent cannot bind the decedent's statutory beneficiaries who were not parties to the agreement. South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries, and that such claims are distinct and separate claims from those that are brought under the survival statute. *See* Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914). The Arbitration Agreement, by its own terms, "is an agreement to arbitrate any dispute that might arise between Donald W. Young ("Patient") and NHC Healthcare Mauldin, LLC ("Center")." Decedent had the authority to bind himself and his claims to arbitration, but this Court finds he did not have the legal authority to bind his statutory beneficiaries who were not a party to the Arbitration Agreement.

NHC-Mauldin contends that the Arbitration Agreement expressly covers the statutory beneficiaries' claims, and that by signing the agreement, Decedent knowingly bound those

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claims to arbitration. However, this Court agrees with the Supreme Court of Kentucky which said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises, Inc.,

> "[A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third party are appropriately subjected to the contract's arbitration provisions, at least where the tort and the contract are significantly intertwined. It is something else entirely, however, to say that incidental beneficiaries of a contract—individuals or entities with no substantive rights under the contract and no direct benefits—may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants."

376 S.W.3d at 599-600.

NHC-Mauldin contends that the fact that Plaintiff signed the Arbitration Agreement distinguishes this case from Ping and the other cases cited above. While it is true that Plaintiff signed the Arbitration Agreement, by its own terms, she did so on behalf of Decedent, not on her own behalf. As a result, the Court finds Plaintiff did not knowingly agree to arbitrate her claims against NHC-Mauldin. Regardless, even if the Court were inclined to agree that Plaintiff signed the Arbitration Agreement on her own behalf, Plaintiff has represented to the Court that she is not the only statutory beneficiary seeking to recover damages via the Wrongful Death action; therefore, even if her individual claims should be subject to arbitration, she did not have the authority to bind the other statutory beneficiaries' claims. As a result, they have a right to have their claims decided by a jury of their peers should the evidence so warrant.

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III. Corporate NHC Defendants

The Court finds there are pending questions of fact as to whether the Corporate NHC Defendants had sufficient control over NHC-Mauldin and the care that was provided to Decedent so as to subject them to the jurisdiction of this Court. Questions regarding the Corporate NHC Defendants' level of involvement in the management of daily affairs including, employee scheduling and patient care, as well as the corporate involvement in the overall management of NHC-Mauldin must still be resolved through further discovery. Therefore, the Corporate NHC Defendants' Motion to Dismiss in the Wrongful Death action is denied at this time without prejudice. The Corporate NHC Defendants may raise the issue again at summary judgment as discovery warrants.

WHEREFORE, for the reasons stated herein, the Court grants the Motion to Dismiss the Survival Action and orders the parties to arbitrate the matter pursuant to the terms of the Arbitration Agreement. But, the Court denies the Motion to Compel Arbitration in the Wrongful Death action and also denies, without prejudice, the Motion to Dismiss the Corporate NHC Defendants.

IT IS SO ORDERED.

Robin B. Stilwell
Presiding Judge

June 26, 2014
Greenville, South Carolina

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EXHIBIT L

ELECTRONICALLY FILED - 2019 Oct 09 10:52 AM - GREENVILLE - COMMON PLEAS - CASE#2019CP2300473
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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS C.A. No.: 2019-CP-23-00473
Estate of Patricia Royston, by and through the appointed Personal Representative, Marianne McCoig, Individually, and on behalf of the statutory beneficiaries, Plaintiffs, vs. Hunt Valley Holdings, LLC a/k/a Fundamental Long Term Care Holdings, LLC; Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville, Defendants.	**ORDER DENYING DEFENDANTS' MOTION TO DISMISS, COMPEL ARBITRATION AND STAY COURT PROCEEDINGS**

This matter came before the Court on Defendants' Motion to Dismiss and Compel Arbitration. After reviewing the parties' submissions and arguments, the Court finds no valid arbitration contract between Ms. Royston and Defendants because: (1) the Arbitration Agreement is not signed by both parties and was produced, unsigned, by the Plaintiff during discovery, and (2) the parties on the Arbitration Agreement are not those parties specifically listed in the lawsuit. Accordingly, the Defendants' motion is **DENIED.**

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FACTUAL BACKGROUND

This matter arises out of two civil actions --- a Survival Action and a Wrongful Death action. Both actions involve allegations of corporate negligence and nursing home neglect resulting in the alleged wrongful death of Patricia Royston.

Magnolia Place-Greenville ("Facility") is owned and operated by Hunt Valley Holdings, LLC, formerly known as Fundamental Long Term Care Holdings, Inc. The claims are brought against the nursing home facility THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place – Greenville, as well as Fundamental Clinical and Operational Services, LLC, Fundamental Administrative Services, LLC, and Hunt Valley Holdings, LLC a/k/a Fundamental Long Term Care Holdings, LLC, these latter three entities being hereinafter referred to as the "Corporate Defendants."

Marianne McCoig was Patricia's daughter and now serves as the personal representative of Patricia's estate. Patricia was admitted as a short-term resident into the Facility on December 19, 2016. The Arbitration Agreement was allegedly provided to Patricia, but the facility claims they are not in possession of it, and the copy Plaintiffs produced was not signed by the facility. There is no evidence the Arbitration Agreement was signed by Patricia Royston during the admission process and provided to Defendants. Defendants acknowledge the copy at issue was not signed by any Facility representative.

Ms. McCoig initiated the current action on January 31, 2019. The Complaint alleges wrongful death and survival claims arising from Defendants' failure to monitor and supervise Patricia's safety and well-being while at the Facility. On July 26, 2019, Defendants filed a Motion to Dismiss, Compel Arbitration, and Stay Court Proceedings.

LEGAL STANDARD

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In order to compel arbitration, the Facility bears the burden to prove a valid and enforceable arbitration contract. Not all arbitration clauses are per se enforceable. Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). Courts interpret a jury trial waiver narrowly and construe contract ambiguities against the Facility as the party that drafted the Arbitration Agreement. WDI Meredith & Co. v. Am. Telesis, Inc., 359 S.C. 474, 480, 597 S.E.2d 885 (Ct. App. 2004). Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (2007). Whether the parties agreed to arbitrate is a question of substantive state law. In Chassereau v. Global Sun Pools, Inc., the Supreme Court stated:

> **Although we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis**. While actions taken in an arrangement such as the one entered into by these parties might have the potential to generate several legal claims and causes of action, we have no doubt that Chassereau did not intend to agree to arbitrate the claims she asserts in the instant case. Accordingly, we hold that these claims are not covered by the arbitration agreement at issue in the instant case.

373 S.C. 168, 644 S.E.2d 718, 720-21 (2007) (emphasis added).

While the Federal Arbitration Act ("FAA") includes a presumption favoring arbitration, it only applies *after* the court finds there is a valid, enforceable arbitration agreement. 9 U.S.C. § 4 ("The court shall make an order directing the parties to proceed to arbitration" but only "upon being satisfied that the making of the agreement…is not in issue").[1] The FAA looks to state law to decide the threshold questions of contract formation.[2] Therefore, arbitration agreements guided

[1] See also EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler's Cove Homeowners Ass'n v. Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 S.E.2d 581 (2003).

[2] Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'").

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by the FAA are subject to the same defenses applicable to all other contracts.[3] The judicial inquiry may include an examination of contractual defects such as lack of mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability.[4]

LEGAL ANALYSIS

The Facility's motion to compel arbitration is effectively a motion to enforce a contract. In the ordinary course, a nursing home resident who alleges injury would bring her claims before the Court as Plaintiff has done here and the nursing home would mount its defense in the same forum. A valid contract to arbitrate their disputes is the only way for the parties to opt out of the litigation process. The Court finds the Facility had no such contract with Ms. Royston. The "Arbitration Agreement" on which the Facility's motion relies is invalid because it is not signed by both parties, and the parties on the Arbitration Agreement are not those parties specifically listed in this lawsuit.

A. The Arbitration Agreement is not a valid and enforceable agreement because it was not signed by the party seeking its enforcement.

The Arbitration Agreement is a separate document from the Admission Agreement with the Facility. At the bottom of the Arbitration Agreement there were lines provided for the resident and an agent of Facility to sign, date, and print their names. While not dated, Ms. Royston allegedly signed at the signature line reserved for "Resident/Representative Signature". A signature line existed for Facility to execute the agreement as well. A blank was provided for the facility to sign as "Authorized Agent of Facility", and a separate blank for the agent to print his/her

[3] Rent-A-Center, West. Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

[4] See Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir.2001).

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name and title. At no time did anyone from Facility ever sign and execute the agreement on behalf of Facility. It is also interesting to note that the only agreement in the record, or known to exist, was found in her personal effects and produced by the Plaintiff in discovery. The Defendant did not have a copy in its possession. That leaves outstanding the question of whether the Plaintiff ever delivered to the Defendant her signed copy. As previously noted, the Facility bears the burden of proving that a valid arbitration agreement exists and was executed.

Because the facility did not sign the agreement, there is no indicia of mutual assent as required for a valid enforceable arbitration agreement. See Rodarte v. Univ. of S.C., 419 S.C. 592, 603, 799 S.E.2d 912, 917-18 (2017) (quoting Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009) (noting South Carolina law requires court to consider only "objective manifestations of the parties' assent at the time the contract was made")). The alleged agreement by its express terms, "**THE PARTIES CONFIRM THAT EACH OF THEM UNDERSTANDS THAT EACH HAS WAIVED THE RIGHT TO TRIAL BEFORE A JUDGE OR JURY AND THAT EACH CONSENTS TO ALL OF THE TERMS OF THE VOLUNTARY AGREEMENT.,"** requires both parties to sign and confirm in writing that they are waiving their right to a jury trial and consenting to the terms of the agreement by affixing their signatures. The Arbitration Agreement itself references the parties' intention to select arbitration, however, there is no party signature on behalf of Facility and its affiliates. The fact that there is a signature line for "Authorized Agent of Facility" and that it is left blank further indicates that there was no mutual assent. See Baier v. Darden Restaurants, 420 S.W.3d 733, 739 (Mo. Ct. App. 2014).

B. The parties on the Arbitration Agreement are not those parties specifically listed in this lawsuit.

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All Defendants are all related entities[5] of the nursing home and have a significant relationship in the ownership, operation, and management of the nursing home, and derive significant economic benefits from its revenue.

In Hawthorne v. Fundamental et al., these same Defendants moved to compel arbitration on behalf of the Corporate Defendants stating that "The arbitration agreement contractually ***is enforceable by each of the moving defendants as either a parent company, agent or as an employee of the facility and legally is enforceable by these defendants under the circumstances*** and Pennsylvania law in any event. In addition, Defendants argued that Patricia and his estate equitably are estopped from arguing that the arbitration agreement is not binding and enforceable ***by each of the defendants***." Hawthorne v. Fundamental et al., No. 2:12cv1826 (2013).

Furthermore, Plaintiff's claims against Defendants are based on a theory of unified operation and control. Each is alleged to have participated in exactly the same wrongful conduct. Agency law extends the right to enforce an arbitration award against agents, sister corporations, subsidiaries, and parent/ownership entities of a contracting party "where the interests of such parties are directly related to, if not congruent with, those of a signatory." Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1112 (3d Cir. 1993) (citing Isidor Paiwonsky Associates, Inc. v. Sharp Properties, 998 F.2d 145, 155 (3d Cir. 1993)). Plaintiff alleges each Corporate Defendant is a parent entity, agent or employee of the Facility that shares a congruent interest. Plaintiff thus presumptively would be able to enforce any judgment from the proceeding against the Corporate Defendant and, in turn, each can rely on the principles of agency law and the broad scope of the FAA to compel and participate in the Arbitration Agreement. Id. ("Where the parties to such a clause unmistakably intend to arbitrate all controversies, which might arise

[5] Related entity is an industry term that means the entities are have common ownership, management, and control.

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between them, their agreement should be applied to claims against agents or entities related to the signatories."); Sharp Properties, 998 F.2d at 155 ("Applying Barrowclough [v. Kidder, Peabody & Co., 752 F.2d 923 (3d Cir. 1985)]' s logic here, because Bared's and ARI's interests are directly related, if not in fact congruent, it can fairly be assumed that within the arbitration proceedings ARI advanced arguments protective of Bared's interests. There is, therefore, no reason to conclude that the Federal Arbitration Act's overarching policy favoring the enforcement of arbitration awards does not apply to this case.").

It is also worth noting that at the beginning of the Arbitration Agreement in question where the parties are identified the Facility has listed itself as "Magnolia Place *of* Greenville." (Emphasis added). In actuality the Facility's correct title would be Magnolia Place – Greenville which is the name THI of South Carolina at Magnolia Place at Greenville, LLC is doing business as. It is up to the drafter of the Arbitration Agreement to be able to sufficiently and correctly identify themselves as a party of the Arbitration Agreement. Failure to do so must be construed against the drafting the party.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss and Compel Arbitration or Alternatively, to Compel Arbitration and Stay Proceedings, is DENIED.

AND IT IS SO ORDERED

Signature to Follow

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Greenville Common Pleas

Case Caption: Patricia Royston , plaintiff, et al vs. Hunt Valley Holdings LLC , defendant, et al

Case Number: 2019CP2300473

Type: Order/Other

So Ordered

s/ Robin B. Stilwell 2158

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EXHIBIT M

ELECTRONICALLY FILED - 2019 Aug 28 3:57 PM - GREENVILLE - COMMON PLEAS - CASE#2019CP2302185
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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF GREENVILLE)	C.A. No.: 2019-CP-23-02184 & 2019-CP-23-02185
)	
Jack A. Joyner, Individually and as Personal Representative of the Estate of Dollie Alice Joyner,)	
)	
Plaintiff,)	**ORDER**
)	
v.)	
)	
NHC Healthcare/Greenville, LLC, National Healthcare Corporation, NHC/OP, L.P.,)	
)	
Defendant(s).)	
)	

This matter came before the Court in Greenville County on July 26, 2019, on Defendants' Motion to Dismiss and Motion to Compel Arbitration in regard to Plaintiff's Complaints. Present for hearing were Matthew W. Christian, Esq. of Greenville, S.C. for the Plaintiff and Andrew M. Rawl, Esq. and F. Matlock Elliott, Esq. of Greenville, S.C. for the Defendants.

This matter arises out of two civil actions involving allegations of nursing home abuse and neglect and corporate negligence with claims of underfunding, understaffing, and undertraining. Both parties submitted briefs/memoranda as well as exhibits in support of their positions. Having listened to oral arguments from counsel and having reviewed the parties' legal memoranda for the reasons more fully set forth below, the Court hereby denies the Defendants' Motion to Dismiss and Motion to Compel Arbitration.

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BACKGROUND

Plaintiff Jack A. Joyner (hereinafter "Son") was the son and is the Personal Representative of the Estate of Dollie Alice Joyner (hereinafter "Decedent"), a resident/patient at Defendants' skilled nursing facility. The skilled nursing facility was NHC Healthcare/Greenville, LLC (hereinafter "Facility"), an entity Plaintiff contends was owned, controlled, and operated by Defendants National Healthcare Corporation and NHC/OP, L.P. Decedent was admitted to the Facility on April 27, 2016, for short-term rehabilitation after a brief hospitalization for a urinary tract infection. Plaintiff alleges that Decedent suffered from multiple preventable pressure ulcers/bedsores and inadequate care regarding nutrition and hydration resulting in infected pressure ulcers/bedsores, dehydration, and nutritional compromise, all of which Plaintiff alleges resulted in Decedent's death. Defendants vehemently deny these allegations.

At the time of admission, Decedent and Son signed an agreement to arbitrate and waive jury trial ("Arbitration Agreement"). Plaintiff argued that the Arbitration Agreement was unenforceable in its entirety and in the alternative, if it was enforceable, that it was unenforceable as to the wrongful death actions and statutory beneficiaries. Plaintiff further argued that Defendants' Motion to Dismiss National Healthcare Corporation and NHC/OP, L.P. should be denied because there is significant evidence that these Defendants were involved in the management, operation, oversight, budget, staffing, training, and policies and procedures at the facility.

LEGAL ANALYSIS AND CONCLUSIONS

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance

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Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application to arbitrate." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (S.C. 2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67,78,749 S.E.2d 139, 144 (Ct. App. 2013). Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

I. The Arbitration Agreement is Unenforceable Because There was no Meeting of the Minds and Mutual Assent by the Parties

The purported agreement to arbitrate is between "Alice Joyner ('Patient')" and "National Healthcare, LLC" as "('Center')". It is undisputed that the Facility's name and licensee of the skilled nursing facility where Plaintiff was admitted was "National Healthcare/Greenville, LLC".

Plaintiff argued that the Defendants operate under a complex corporate structure. Within that corporate structure, Plaintiff produced a corporate flowchart for the Defendants. Nowhere within the corporate flowchart is there an entity named "National Healthcare, LLC". The entity which whom Defendants contend Decedent/Son agreed to arbitrate does not exist.

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Courts have held that mutual assent and a meeting of the minds is necessary for an enforceable arbitration agreement. South Carolina law requires that in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009) citing Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). Parties cannot be said to have had a meeting of the minds on matters which are indefinite, vague, uncertain, and even incomprehensible. "Vagueness of expression, indefiniteness, and uncertainty as to any of the essential terms of an agreement have often been held to prevent the creation of an enforceable contract." Reed v. Boykin, 282 S.C. 614, 320, S.E.2d 68 (S.C. App. 1984) *quoting* 1 CORBIN ON CONTRACTS, § 95 (1963).

The Arbitration Agreement states that "this is an agreement to arbitrate any dispute that might arise between Alice Joyner ('Patient') and National Healthcare, LLC ('Center')". The document must be construed against the Defendants as the drafting entities. Nowhere does the document identify that the Plaintiff was entering into an arbitration agreement with "National Healthcare/Greenville, LLC", "National Healthcare Corporation", or "NHC/OP, L.P." within the four corners of this agreement.

The identification of the parties to the agreement are essential and integral terms to which courts may not re-write for the parties. The issue is "whether there was a meeting of the minds, that is, whether the parties agreed in clear and unmistakable manner to arbitrate their disputes". Bair v. Manor Care of Elizabethton PA, LLC, et al., No. 435 MDA 2014, 108 A3d 94 (2015). Absent mutual assent at the time of the creation of the agreement, there can be no enforceable agreement to arbitrate. The identification

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of the parties with whom the parties agreed to purportedly arbitrate is an essential and integral part/term of the purported agreement. Failure on the part of the Defendants to have the valid correct name of an existing entity results in indefinite, vague, uncertain, and even incomprehensible terms which are essential to the agreement. Therefore, Plaintiff cannot be compelled to arbitrate his claims with an entity that neither exists nor is the entity with whom the current lawsuit involves and as such, the Arbitration Agreement is unenforceable in its entirety.

B. In the Alternative, if the Arbitration Agreement was Enforceable as to the Survival Action Claim, it is Unenforceable Against Decedent's Wrongful Death Statutory Beneficiaries.

It is the conclusion and order of this Court that the Arbitration Agreement is unenforceable for the above-stated reasons. However, even if Son had actual or apparent authority/agency to sign the Arbitration Agreement on behalf of Decedent, the Arbitration Agreement is unenforceable against the Decedent's wrongful death statutory beneficiaries under South Carolina contract law defenses. The Arbitration Agreement neither covers the wrongful death statutory beneficiaries' claims within the scope of the agreement nor was the Arbitration Agreement signed by an individual who had authority to bind the statutory beneficiaries.

South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914). The alleged Arbitration Agreement by its own terms is an agreement between "Alice Joyner ('Patient')" and "NHC Healthcare, LLC ('Center')". Even if Decedent had agreed to arbitration, she did not have the legal authority to bind her

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statutory beneficiaries who are not parties to the Arbitration Agreement. The signatories to the agreement are Decedent, Son on behalf of Decedent, and NHC Healthcare, LLC. No other persons are parties to this agreement. The scope of the agreement does not include the statutory beneficiaries' claims.

However, even if the Arbitration Agreement did contemplate the wrongful death statutory beneficiaries' claims, Decedent and/or Son had no authority to waive the statutory beneficiaries' claims. Son signed the Arbitration Agreement in his *individual capacity*. However, as the Hodge court noted, actions taken by Son in his *individual capacity* will not be held against the estate as the estate has other beneficiaries and may have other creditors. Moreover, the wrongful death claim is not based on the contract or agreement to arbitrate with the facility. The statutory beneficiaries received no benefit from any contract which Decedent may have entered into with the Defendants. See Wilson v. Willis, No. 27879, 2019 S.C. LEXIS 27.

Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, a Federal District Court in South Carolina has analyzed this issue under the South Carolina Non-Economic Awards Act of 2005. Diane Boyle as Personal Representative of the Estate of John Francis Boyle v. United States of America, 944 F.Supp.2d 577 (D.S.C. 2012). In Boyle, the Court concluded that the wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. This analysis supports the contention that the wrongful death claimants have separate and distinct claims apart from that of the survival action.

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Many other states have come to this same conclusion, Daniels v. Sunrise Senior Living, Inc., 212 Cal.App 4th 674, 151 Cal.Rptr.3d 273 (Cal.App.4 Dist, 2013) (Wrongful Death claims not bound to arbitration), Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (Wrongful Death claimants not bound by arbitration agreement.) As previously discussed, the only parties executing this Agreement were Decedent, Son purportedly on behalf of Decedent, and an employee as an agent for NHC Healthcare, LLC. Defendants would contend that this agreement is binding on the non-signatory statutory beneficiaries simply because it contends the Arbitration Agreement says so.

However, as the Supreme Court of Kentucky said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises. Inc.:

> [A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third-party are appropriately subjected the contract's arbitration provisions, at least where the tort and contract are significantly intertwined. See, In re Weekley Homes, L.P., 180 S.W. 3d 127 (Tex. 2005) (negligent repair claim by homeowner's Son against contractor was subject to repair contract's arbitration clause because Son, although a non-party, was direct and principal beneficiary under the contract). It is something else entirely, however, to say that incidental beneficiaries of a contact-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely be being mentioned in the contract as potential

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> claimants. This is what Beverly purports to do. Arbitration is a matter of contract, however, it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79,83, 123 S. Ct. 588, l54 L. Ed.2d 491 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit", Citation and internal quotation marks omitted.) Since Beverly's theory would allow just that, i.e., would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a "third party beneficiary" of the arbitration agreement, we reject it out of hand.

Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 599-600 (KY 2012).

Likewise, Defendants' mentioning of "agents, representatives, affiliates, fiduciaries…third party beneficiaries, heirs, executors, administrators, or any of them, and all persons, entities or corporations with whom any of the former have been, are now, or may be affiliated, arising out of or in any way related or connected to the Patient's stay and the care provided at the Center, including but not limited to any disputes concerning alleged personal injury to the Patient caused by improper or inadequate care, including allegations of medical malpractice; any disputes concerning whether any statutory or regulatory provisions relating to the Patient were violated…", as being bound by the Arbitration Agreement does not make it so. It is no more than an *ipse elixir* which Defendants expect this Court to embrace. The law simply does not permit a party to cut off the rights of a non-signatory to an agreement who receives no benefit thereunder.

The wrongful death claims are separate claims apart from the Decedent's claims. According to South Carolina's Wrongful Death Act:

> "Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the

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> act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued shall be liable to an action for damages."

South Carolina Code Annotated §15-51-10 (1977)

> The wrongful death beneficiaries are as follows:
>
> "Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs or the person whose death shall have been so caused."

South Carolina Code Annotated §15-51-20 (Supp. 2001)

The general element of damages recoverable are pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of the Decedent, society, including the loss of her experience, knowledge, and judgment in managing the affairs of herself and her beneficiaries. Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d. 713, 714 S.C. (Ct. App. 1989).

The wrongful death claim is a separate claim from the claims a decedent might bring on his own behalf under the survival statute. In Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914), the Supreme Court held that wrongful death and survival actions are different claims for different injuries. The Court stated "necessarily, therefore, there must be separate verdicts and separate judgments, there should be separate actions." Id. at 31. See also Strickland v. Southern Ry Co., 111 S.C. 248, 97 S.E. 695 (1918) (Supreme Court Affirmed Appeal from Circuit Court's ruling noting that survival claims are independent of wrongful death claims), Claussen v.

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Brothers, 148 S.C. 1, 145 S.E. 539 (1928) (discussing the difference between survival and wrongful death claims as being independent of each other).

The Pennsylvania Superior Court in Pisano v. Extended Homes, Inc., operating under the fictitious name Belaire Health 84 Rehabilitation Center, 2013 PA Super 232, 77 A.3d 651, 662 (PA 2013) affirmed the trial court decision that the nursing home arbitration agreement did not apply to the statutory beneficiaries' wrongful death claim. The Court noted the wrongful death and survival actions are not derivative of each other but are flowing from the same underlining tortious conduct. Like the South Carolina statute, Pennsylvania's wrongful death statute provides that the right of action exists only for the benefit of the spouse, children, parents, or parents of the deceased. Id. at 656. The Pennsylvania Court further held that since the wrongful death claim is independent of the survival action and because the wrongful death statute does not characterize the wrongful death claim as that of a third-party beneficiary, that the trial court properly refused to compel arbitration to the non-signatory wrongful death beneficiaries who were not parties to the arbitration agreement.

Likewise, in Bybee v. Abdulla, M.D., 189. P.3d 40, 2008 UT 35 (Utah, 2008), the Supreme Court of Utah held that an agreement to arbitrate that was signed by the decedent cannot extend to the statutory beneficiaries of a wrongful death claim. The Utah Supreme Court noted that certain defenses from the decedent's personal injury action may be raised against the heirs of a wrongful death action such as comparative negligence and statutes of limitations as key common characteristics. However, as the Supreme Court of Utah noted, both of these defenses go to the viability of the underlying personal injury action. The Court further stated that "by contract, an agreement to bind

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heirs to arbitrate disputes does not implicate the viability of underlying claims." Id. at 47, citing Horwich v. Superior Court, 21 Cal. 4th 272, 87 Cal. Rptr. 2d 222, 980 P. 2d 927, 935 (1999). The Utah Supreme Court went on to note that "we have never intended to suggest, however, that because Decedent is the master of his claim he may by contract expose his unwilling heirs to any imaginable defense." Bybee v. Abdulla, M.D. at 46. The Utah Supreme Court further held that the defenses against the decedent's claim which are less likely to be found enforceable against the heirs' claims in a wrongful death action "are contract provisions that purport to affect the rights of heirs that do not affect the existence of the decedent's personal injury claim during his lifetime. The arbitration agreement...falls squarely within this category and is, therefore, unenforceable against the heir." Id. at 47.

The Court of Appeals in Washington in Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn. App. 919, 231 P. 3d 1252 (Wash. App. Div. 1 2010) held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit." Id. quoting Satomi Owners Association v. Satomi. LLC, 167 Wash. 2d 781, 225 P.3d 213 (2009). The Washington Court of Appeals further noted that the wrongful death claims asserted in that case were not on behalf of the estate just as South Carolina's wrongful death claims are not on behalf of the estate. The Washington Court of Appeals further discussed the Supreme Court of Ohio's ruling in Peters v. Columbus Steel Casting Co., 115 Ohio St.3d 134, 873 N.E.2d 1258 (2007), wherein the Supreme Court of Ohio held that the wrongful death claim of a spouse who was Administrator of her husband's estate was not subject to the Decedent's arbitration agreement. The Washington Court of Appeals in discussing Peters,

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stated "In sum, the decedent's agreement was an agreement 'to arbitrate his claims against the company,' and thus the provision in the agreement binding the decedent's heirs applied to a survival action. But the decedent could not 'restrict his beneficiaries to arbitration of their wrongful death claims because he held no right to those claims." Woodall v. Avalon Care Center - Federal Way, LLC at 929. In the Washington Court of Appeals' analysis, the Court concluded that the wrongful death beneficiaries could not be bound to the arbitration agreement which they did not sign.

Therefore, even if Son had actual or apparent authority/agency to execute the Arbitration Agreement, the Arbitration Agreement did not include the wrongful death statutory beneficiaries' claims within the scope of the Arbitration Agreement, nor did Decedent and/or Son have authority to bind the wrongful death statutory beneficiaries' claims to the Arbitration Agreement. As a result, the Arbitration Agreement cannot reach the claims of the wrongful death statutory beneficiaries.

II. National Healthcare Corporation and NHC/OP, L.P.'s Motion to Dismiss

Defendants National Healthcare Corporation and NHC/OP, L.P. also moved independently to be dismissed from the actions pursuant to Rules 12(b)(1), (2), and (6), S.C.R.C.P. on the grounds that:

a) These Defendants are separate and distinct legal entities from NHC Healthcare/ Greenville, LLC;

b) The Complaint also fails to state a claim against these Defendants in that:

i. These Defendants do not provide care and treatment to patients at NHC Healthcare/Greenville, LLC, such as Ms. Joyner, and,

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in particular, had no involvement with the allegations involving Ms. Joyner;

ii. No act or omission of these Defendants were proximate cause of any injuries or damages to Ms. Joyner;

iii. At no point have these Defendants exerted sufficient control over NHC Healthcare/Greenville, LLC to create a principal-agent relationship, and at no point have these Defendants expressly authorized or insisted upon any act or omission of NHC Healthcare/Greenville, LLC related to this present litigation; and

iv. These Defendants are not liable for the tortuous acts of NHC Healthcare/Greenville, LLC.

The Court hereby denies Defendants National Healthcare Corporation and NHC/OP, L.P.'s Motions to Dismiss. Plaintiff argued and submitted significant evidence through the course of argument, brief, and exhibits that warrant the denial of these Defendants' Motion at this stage. The Court's decision is that Plaintiff has made a sufficient showing to overcome Defendants' Rule 12(b) Motions to Dismiss; however, the Court's ruling is not a dispositive determination of the Defendants' liability in this action.

CONCLUSION

Because Plaintiff has met the threshold of requirements to overcome Defendants' Rule 12(b)(1), (2), and (6) Motions to Dismiss, the Motions to Dismiss by Defendants National Healthcare Corporation and NHC/OP, L.P. are hereby denied.

Because there was no mutual assent and meeting of the minds and for the other reasons set forth hereinabove, Defendants' Motions to Compel Arbitration are denied. For the foregoing reasons and above-stated reasons, Defendants' Motion to Dismiss and Motion to Compel Arbitration ARE HEREBY DENIED.

IT IS SO ORDERED.

Greenville, South Carolina
Date: _____

_____
The Honorable Edward W. Miller
Judge, Thirteenth Judicial Circuit
State of South Carolina

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Greenville Common Pleas

Case Caption: Jack A Joyner , plaintiff, et al vs. Nhc Healthcare Greenville, Llc , defendant, et al

Case Number: 2019CP2302185

Type: Order/Other

So Ordered

s/ Edward W. Miller

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EXHIBIT N

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Troy Testerman, Individually and as Personal Representative of the Estate of Donald Testerman, Plaintiff, v. Emeritus Corporation d/b/a Brookdale Greenville, Emericare, Inc., Emerical, Inc., Brookdale Senior Living, Inc., HCP MA3 South Carolina, LP, Bre Knight SH SC Owner, LLC, Inpatient Consultants of North Carolina, P.C., Adam L. Schendel, MSN, ACNP-BC, Jaspreet Pestana, M.D., Defendant(s).	IN THE COURT OF COMMON PLEAS C.A. No.: 2019-CP-23-7282 & 2019-CP-23-7283 **ORDER**

This matter came before the Court on April 14, 2020 on Defendants' Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration and Stay Proceedings.

This matter rises out of wrongful death and survival actions involving allegations of nursing home negligence and corporate negligence and allegations of understaffing, underfunding, undertraining, and corporate mismanagement. Both parties submitted briefs/memoranda as well as exhibits in support of their motions. The hearing was conducted via telephone conference with consent of all parties and pursuant to the South Carolina Supreme Court's recent Order regarding such hearings in light of the COVID-19 pandemic. Present for the Defendants were C. Stuart Mauney for Defendants Emeritus Corporation d/b/a Brookdale Greenville, Emericare, Inc., Emerical, Inc., Brookdale Senior Living, Inc., HCP MA3 South Carolina, LP, and Bre Knight SH SC Owner, LLC

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and Mark Wilby for Defendants Inpatient Consultants of North Carolina, P.C., Adam L. Schendel, MSN, ACNP-BC, and Jaspreet Pestana, M.D. and Matthew Christian for the Plaintiff. Having listened to oral arguments from counsel and from having reviewed the parties' legal memoranda and exhibits, for the reasons set forth more fully below, the Court hereby grants Defendants' Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration and Stay Proceedings as to the survival action as to all Defendants. The Court denies Defendants' Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration and Stay Proceedings as to the wrongful death action as to all Defendants.

BACKGROUND

Troy Testerman (hereinafter "Son") was the son and is the Personal Representative of the Estate of Donald Testerman (hereinafter "Decedent"), a resident/patient at Defendants' skilled nursing facility and where Defendants Inpatient Consultants of North Carolina, P.C., Adam L. Schendel, MSN, ACNP-BC, and Jaspreet Pestana, M.D. treated Decedent.

The skilled nursing facility was Emeritus Corporation d/b/a Brookdale Greenville (hereinafter "Brookdale Greenville") which Plaintiff contends was owned, controlled, and operated by Emericare, Inc., Emerical, Inc., Brookdale Senior Living, Inc., HCP MA3 South Carolina, LP, and Bre Knight SH SC Owner, LLC.

Decedent was admitted to Brookdale Greenville on January 17, 2018 for long-term care. Plaintiff alleges that during this admission, Defendants failed to properly prevent and/or treat skin breakdown/pressure ulcers/bedsores resulting in multiple pressure ulcers/bedsores, some of which became infected and malodorous and were very

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significant in size. Plaintiff further alleges Defendants failed to timely prevent and treat falls, weight loss, and infection. Additionally, Plaintiff alleges claims of understaffing and underfunding in conjunction with the corporate negligence claims. Plaintiff also alleges that as a result of these injuries, Defendants caused Decedent's death on May 8, 2018. All Defendants vehemently deny all of Plaintiff's allegations.

Defendants filed this Motion to Dismiss and Compel Arbitration on March 3, 2020 arising out of an arbitration agreement signed by Son on January 17, 2018 at Brookdale Greenville's facility in conjunction with Decedent's admission to Brookdale Greenville's facility. It is undisputed that Son held both a guardianship and a general durable power of attorney for Decedent. For the reasons stated hereinbelow, Defendants motion is denied as to the wrongful death causes of action and granted as to the survival action claims.

LEGAL ANALYSIS

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application to arbitrate." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (S.C. 2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C.

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67,78,749 S.E.2d 139, 144 (Ct. App. 2013). Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

Because Son had authority under the language of the General Durable Power of Attorney to execute the agreement for arbitration, the arbitration agreement is enforceable as to Decedent's claims in the Survival Action, However, the Arbitration Agreement is unenforceable against the Decedent's wrongful death statutory beneficiaries under South Carolina contract law defenses. The Arbitration Agreement neither covers the wrongful death statutory beneficiaries' claims within the scope of the agreement nor was the Arbitration Agreement signed by an individual who had authority to bind the statutory beneficiaries.

South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914). The alleged admission agreement/arbitration agreement with Brookdale Greenville by its own terms is an agreement between "Emericare, Inc. d/b/a Brookdale Greenville AL/MC/SNF (SC) a licensed Nursing Care Institution located at 1306 Pelham Road, Greenville SC 29615 (the 'Provider', 'us', 'we', or 'our')" and "Donald Testerman (the 'Resident', 'you', or 'your') and/or (Name of 'Resident Representative') on behalf of Resident". Even if Decedent had agreed to arbitration, he did not have the legal authority to bind his statutory beneficiaries who are not parties to the Arbitration Agreement. The signatories to the agreement are Son as representative of Decedent and the agent for

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Brookdale Greenville. No other persons are parties to these agreements. The scope of the agreement does not include the statutory beneficiaries' claims.

However, even if the Arbitration Agreement did contemplate the wrongful death statutory beneficiaries' claims, Decedent and/or Son had no authority to waive the statutory beneficiaries' claims. Son signed the Arbitration Agreement in his *individual capacity* in a representative capacity of Decedent only. As the Hodge court noted, actions taken by Son in his *individual capacity* will not be held against the estate as the estate has other beneficiaries and may have other creditors. Moreover, the wrongful death claim is not based on the contract or agreement to arbitrate with the facility. The statutory beneficiaries received no benefit from any contract which Decedent may have entered into with the Defendants. See Wilson v. Willis, No. 27879, 2019 S.C. LEXIS 27.

Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, a Federal District Court in South Carolina has analyzed this issue under the South Carolina Non-Economic Awards Act of 2005. Diane Boyle as Personal Representative of the Estate of John Francis Boyle v. United States of America, 944 F.Supp.2d 577 (D.S.C. 2012). In Boyle, the Court concluded that the wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. This analysis supports the contention that the wrongful death claimants have separate and distinct claims apart from that of the survival action.

Many other states have come to this same conclusion, Daniels v. Sunrise Senior Living, Inc., 212 Cal.App 4th 674, 151 Cal.Rptr.3d 273 (Cal.App.4 Dist, 2013) (Wrongful Death claims not bound to arbitration), Lawrence v. Beverly Manor, 273

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S.W.3d 525 (Mo. 2009) (Wrongful Death claimants not bound by arbitration agreement.) As previously discussed, the only parties executing these agreements were Son purportedly on behalf of Decedent and an employee as an agent for Brookdale Greenville. Defendants would contend that this agreement is binding on the non-signatory statutory beneficiaries simply because it contends the Arbitration Agreement says so.

However, as the Supreme Court of Kentucky said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises. Inc.:

> [A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third-party are appropriately subjected the contract's arbitration provisions, at least where the tort and contract are significantly intertwined. See, In re Weekley Homes, L.P., 180 S.W. 3d 127 (Tex. 2005) (negligent repair claim by homeowner's Son against contractor was subject to repair contract's arbitration clause because Son, although a non-party, was direct and principal beneficiary under the contract). It is something else entirely, however, to say that incidental beneficiaries of a contact-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely be being mentioned in the contract as potential claimants. This is what Beverly purports to do. Arbitration is a matter of contract, however, it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply

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> impose upon another. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79,83, 123 S. Ct. 588, l54 L. Ed.2d 491 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit", Citation and internal quotation marks omitted.) Since Beverly's theory would allow just that, i.e., would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a "third party beneficiary" of the arbitration agreement, we reject it out of hand.

Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 599-600 (KY 2012).

Likewise, Brookdale Greenville's mentioning of "any spouse, children, heir, representatives, agents, executors, administrators, successors, family members, or other persons claiming through the Resident, or other person claiming through the Resident's estate, whether such third parties make a claim in a resident representative capacity or in a personal capacity. Any claims or grievances against the Community or the Community's corporate parent, subsidiaries, affiliates, employees, officers, or directors" as being bound by the Arbitration Agreement does not make it so. It is no more than an *ipse elixir* which Defendants expect this Court to embrace. The law simply does not permit a party to cut off the rights of a non-signatory to an agreement who receives no benefit thereunder.

The wrongful death claims are separate claims apart from the Decedent's claims. According to South Carolina's Wrongful Death Act:

> "Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued shall be liable to an action for damages."

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South Carolina Code Annotated §15-51-10 (1977)

> The wrongful death beneficiaries are as follows:
>
> "Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs or the person whose death shall have been so caused."

South Carolina Code Annotated §15-51-20 (Supp. 2001)

The general element of damages recoverable are pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of the Decedent, society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries. Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d. 713, 714 S.C. (Ct. App. 1989).

The wrongful death claim is a separate claim from the claims a decedent might bring on his own behalf under the survival statute. In Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914), the Supreme Court held that wrongful death and survival actions are different claims for different injuries. The Court stated "necessarily, therefore, there must be separate verdicts and separate judgments, there should be separate actions." Id. at 31. See also Strickland v. Southern Ry Co., 111 S.C. 248, 97 S.E. 695 (1918) (Supreme Court Affirmed Appeal from Circuit Court's ruling noting that survival claims are independent of wrongful death claims), Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539 (1928) (discussing the difference between survival and wrongful death claims as being independent of each other).

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The Pennsylvania Superior Court in Pisano v. Extended Homes, Inc., operating under the fictitious name Belaire Health 84 Rehabilitation Center, 2013 PA Super 232, 77 A.3d 651, 662 (PA 2013) affirmed the trial court decision that the nursing home arbitration agreement did not apply to the statutory beneficiaries' wrongful death claim. The Court noted the wrongful death and survival actions are not derivative of each other but are flowing from the same underlining tortious conduct. Like the South Carolina statute, Pennsylvania's wrongful death statute provides that the right of action exists only for the benefit of the spouse, children, parents, or parents of the deceased. Id. at 656. The Pennsylvania Court further held that since the wrongful death claim is independent of the survival action and because the wrongful death statute does not characterize the wrongful death claim as that of a third-party beneficiary, that the trial court properly refused to compel arbitration to the non-signatory wrongful death beneficiaries who were not parties to the arbitration agreement.

Likewise, in Bybee v. Abdulla, M.D., 189. P.3d 40, 2008 UT 35 (Utah, 2008), the Supreme Court of Utah held that an agreement to arbitrate that was signed by the decedent cannot extend to the statutory beneficiaries of a wrongful death claim. The Utah Supreme Court noted that certain defenses from the decedent's personal injury action may be raised against the heirs of a wrongful death action such as comparative negligence and statutes of limitations as key common characteristics. However, as the Supreme Court of Utah noted, both of these defenses go to the viability of the underlying personal injury action. The Court further stated that "by contract, an agreement to bind heirs to arbitrate disputes does not implicate the viability of underlying claims." Id. at 47, citing Horwich v. Superior Court, 21 Cal. 4th 272, 87 Cal. Rptr. 2d 222, 980 P. 2d 927,

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935 (1999). The Utah Supreme Court went on to note that "we have never intended to suggest, however, that because Decedent is the master of his claim he may by contract expose his unwilling heirs to any imaginable defense." Bybee v. Abdulla, M.D. at 46. The Utah Supreme Court further held that the defenses against the decedent's claim which are less likely to be found enforceable against the heirs' claims in a wrongful death action "are contract provisions that purport to affect the rights of heirs that do not affect the existence of the decedent's personal injury claim during his lifetime. The arbitration agreement...falls squarely within this category and is, therefore, unenforceable against the heir." Id. at 47.

The Court of Appeals in Washington in Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn. App. 919, 231 P. 3d 1252 (Wash. App. Div. 1 2010) held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit." Id. quoting Satomi Owners Association v. Satomi. LLC, 167 Wash. 2d 781, 225 P.3d 213 (2009). The Washington Court of Appeals further noted that the wrongful death claims asserted in that case were not on behalf of the estate just as South Carolina's wrongful death claims are not on behalf of the estate. The Washington Court of Appeals further discussed the Supreme Court of Ohio's ruling in Peters v. Columbus Steel Casting Co., 115 Ohio St.3d 134, 873 N.E.2d 1258 (2007), wherein the Supreme Court of Ohio held that the wrongful death claim of a spouse who was Administrator of her husband's estate was not subject to the Decedent's arbitration agreement. The Washington Court of Appeals in discussing Peters, stated "In sum, the decedent's agreement was an agreement 'to arbitrate his claims against the company,' and thus the provision in the agreement binding the decedent's

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heirs applied to a survival action. But the decedent could not 'restrict his beneficiaries to arbitration of their wrongful death claims because he held no right to those claims." Woodall v. Avalon Care Center - Federal Way, LLC at 929. In the Washington Court of Appeals' analysis, the Court concluded that the wrongful death beneficiaries could not be bound to the arbitration agreement which they did not sign.

Therefore, even if Son had actual or apparent authority/agency to execute the Arbitration Agreement, the Arbitration Agreement did not include the wrongful death statutory beneficiaries' claims within the scope of the Arbitration Agreement, nor did Decedent and/or Son have authority to bind the wrongful death statutory beneficiaries' claims to the Arbitration Agreement. As a result, the Arbitration Agreement cannot reach the claims of the wrongful death statutory beneficiaries.

CONCLUSION

Therefore, based upon the foregoing reasons, the Defendants' Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration and Stay Proceedings as to the Survival Action claims against the Defendants are granted. Further, the Defendants' Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration and Stay Proceedings as to all of the wrongful death causes of action and claims are denied.

IT IS SO ORDERED.

_____
The Honorable Robin B. Stilwell
Judge, Thirteenth Judicial Circuit

Greenville, South Carolina
Date: _____

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Greenville Common Pleas

Case Caption: Troy Testerman , plaintiff, et al vs. Emeritus Corporation , defendant, et al

Case Number: 2019CP2307283

Type: Order/Other

So Ordered

s/ Robin B. Stilwell 2158

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EXHIBIT O

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF GREENVILLE)	C.A. No.: 2018-CP-23-00119 & 2018-CP-23-00120
)	
Marlene Wilson, Individually and as Personal Representative of the Estate of Kenneth Wilson,)	
)	
Plaintiff,)	**ORDER**
)	
v.)	
)	
NHC Healthcare/Mauldin, LLC, National Healthcare Corporation, NHC/OP, LP, Bon Secours St. Francis Health System, Inc., Bon Secours Health System, Inc.,)	
)	
Defendant(s).)	

This matter came before the Court on Defendants National Healthcare Corporation' and NHC/OP, LP's (hereinafter "Nursing Home Defendants") Motion to Dismiss and to Compel Arbitration. Having listened to oral arguments from counsel and having reviewed the parties' legal memoranda for the reasons more fully set forth below, the Court hereby denies the Defendants' Motion to Dismiss and to Compel Arbitration.

BACKGROUND

This matter arises out of two civil actions – a survival action and a wrongful death action. Both actions involve allegations of nursing home negligence and corporate negligence resulting in the death of Kenneth Wilson (hereinafter "Decedent"). Marlene Wilson (hereinafter "Daughter") was Decedent's daughter and serves as Personal Representative of Decedent's estate. On April 6, 2015, Decedent was admitted to NHC Mauldin for short-term rehabilitation after undergoing a hip arthroplasty at St. Francis

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Hospital. Plaintiff alleges that as a result of Nursing Home Defendants' negligence, Decedent developed necrotic and infected bedsores, became dehydrated, suffered from nutritional compromise, and developed multiple infections which went untreated, all of which Plaintiff alleges caused Decedent's injuries and death.

At the time of admission, Daughter signed an Agreement to Arbitrate and Waive Jury Trial ("Arbitration Agreement"). The Arbitration Agreement was signed by Jennifer Balon for "The Center" and by Daughter for "The Patient". The Arbitration Agreement provides that the parties agree to follow the dispute resolution procedures set forth in the Arbitration Agreement which include the waiver of a jury trial and the requirement that the parties submit to binding arbitration all disputes against each other which exceed an amount in controversy over $7,500.00.

Plaintiff filed the Notice of Intent to File Suit on September 14, 2017. The parties engaged in the mandatory pre-suit mediation on December 28, 2017. Plaintiff then filed the Summons and Complaint on January 5, 2018 and served same. Nursing Home Defendants filed this Motion to Dismiss and to Compel Arbitration on February 28, 2018. Nursing Home Defendants contend that this Arbitration Agreement requires that this Court order that this case be dismissed and that the claims be submitted to binding arbitration in accordance with the Arbitration Agreement. Plaintiff contends that the Arbitration Agreement is unenforceable under state contract law and this Court agrees for the various reasons set forth hereinbelow.

LEGAL ANALYSIS AND CONCLUSIONS

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance

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Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application to arbitrate. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (S.C. 2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67,78,749 S.E.2d 139, 144 (Ct. App. 2013). Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

I. Daughter had No Authority to Sign the Arbitration Agreement for Decedent

Because Decedent did not sign the Arbitration Agreement, Daughter was required to have authority to execute the Arbitration Agreement for the Arbitration Agreement to be enforceable. Daughter had no such authority. The legal consequences of an agent's actions can only be attributed to the principal when the agent has actual or apparent authority. Charleston Registry v. Young Clement, 598 S.E.2d 717, 359 S.C. 635, 642 (Ct. App. 2004). In the present case, neither actual or apparent authority exists for Daughter.

A. No Actual Agency/Authority

While it is true that Daughter held a "Power of Attorney" on behalf of Decedent, this Power of Attorney did not confer the necessary authority to execute an arbitration agreement on Decedent's behalf. This document is titled "Power of Attorney" and is not

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identified a "General Durable Power of Attorney." More importantly, the document does not confer sufficient authority to enter into contracts generally, to enter into releases on behalf of Decedent, to waive the constitutional right to a jury trial, nor does it include the "catch all provision giving the attorney-in-fact the authority 'to sign any and all releases or consent required.'" Sovereign Healthcare of Tampa v. Schmitt, 195 So. 3d, 1175 (Fla. Dist. Ct. App. 2016).

The powers and authorities which Daughter held were specifically delineated in the Power of Attorney. These powers granted to Daughter the authority to make decisions regarding financial matters and decisions regarding healthcare.

This analysis is akin to that in Hodge v. UniHealth Post-Acute Care of Bamberg, 2018 S.C. App. LEXIS 13. As noted in Hodge, "'This limited range of acts performed on the [decedent]'s behalf suggest, at most, [he] may have conferred on [the personal representative] the authority to make health care and financial decisions on his behalf, but no more than that.'" Id at 29 quoting Dickerson v. Longoria, 95 A.2d 721, 743, 414 Md. 419 (2010). The Hodge court further noted that the authority to sign healthcare documents does not include the authority to sign an arbitration agreement. Hodge at 40. Our courts have held a healthcare power of attorney does not provide authority to sign an arbitration agreement. Hodge v. UniHealth Post-Acute Care of Bamberg, 2018 S.C. App. LEXIS 13; Thompson v. Pruitt Corp., 784 S.E.2d, 679, 416 S.C. 43, 55 (Ct. App. 2016), *cert. denied*, S.C. Sup. Ct. Order dated Dec. 2, 2016.

Furthermore, the South Carolina Supreme Court has held that "The authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby

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waiving the principal's right of access to the courts and to a jury trial." Hodge at 37 quoting Thompson at 55, 784 S.E.2d at 686. As previously indicated, this Power of Attorney did not have the "catch all" language of many general powers of attorney and does not encompass the executing of an agreement to resolve legal claims by arbitration and waiving a jury trial, but rather, deals with the limited circumstances enumerated therein of making financial or healthcare decisions for Decedent. Therefore, no actual authority existed for Daughter to sign the Arbitration Agreement.

B. No Apparent Agency/Authority NAAA

Daughter did not have apparent authority/agency to execute the Arbitration Agreement on behalf of the Decedent. Apparent authority is based on "representations made by the principal to the third party and reliance by the third party on those representations". Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649, S.E.2d 488, 491 (2007). Apparent authority exists when the principal is bound by the acts of its agent after the principal has placed the agent in such a position that a person of ordinary prudence, reasonably familiar with business usages and custom is led to believe the agent has certain authority and in turn, deals with the agent based on the assumption. Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. 137, 399 S.E.2d 430 (Ct. App. 1990), *rev'd on other grounds*.

South Carolina law requires that to prove apparent authority, the Defendants must show "… (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made

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by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance, Company, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists.

Nursing Home Defendants have presented no evidence that Decedent represented, implicitly or explicitly, to the Nursing Home Defendants that Daughter had the authority to enter into the Arbitration Agreement on his behalf. The Affidavit presented by Plaintiff reflects that Decedent was not present when Daughter signed the Arbitration Agreement as he was still in the hospital. The Affidavit further reflects that Decedent was never aware that Daughter had signed the Arbitration Agreement and never authorized Daughter to sign such contracts or agreements. Further, based upon the Affidavit of Daughter and the records submitted as exhibits at the hearing, Decedent was confused from the effects of the anesthesia and had "moderate" mental impairment.

It should further be noted that despite the fact that Decedent's mental impairment improved to "cognitively intact", according to Nursing Home Defendants' own records during his admission, Defendants never requested that Decedent sign the Arbitration Agreement personally. Further, the Arbitration Agreement does not reflect any authority which Daughter had to execute such agreement despite the Arbitration Agreement's own requirement that any such authority be delineated.

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Nursing Home Defendants must also show a detrimental change of position. It should also be noted that the Arbitration Agreement is separate from the Admissions Agreement. The facility cannot show that it changed its position for the worse as required to prove any apparent authority/agency as reflected in Hodge.

Because Decedent did not consciously or impliedly represent that Daughter was his agent and because there was no change of position by the Nursing Home Defendants, Nursing Home Defendants cannot show that Daughter had apparent authority/agency to execute the Arbitration Agreement on behalf of Decedent.

II. The Arbitration Agreement is Unenforceable Against the Decedent's Wrongful Death Statutory Beneficiaries

It is the conclusion and order of this Court that the Arbitration Agreement is unenforceable for the above-stated reasons. However, even if Daughter had actual or apparent authority/agency to sign the Arbitration Agreement on behalf of Decedent, the Arbitration Agreement is unenforceable against the Decedent's wrongful death statutory beneficiaries under South Carolina contract law defenses. The Arbitration Agreement neither covers the wrongful death statutory beneficiaries' claims within the scope of the agreement nor was the Arbitration Agreement signed by an individual who had authority to bind the statutory beneficiaries.

South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914). The alleged Arbitration Agreement by its own terms is an agreement between "Kenneth Wilson ('patient')" and "NHC Healthcare/Mauldin, LLC ('center')". While at some point during Decedent's admission to the facility, he might have had the authority to

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bind himself and his claims to arbitration but was never given the chance. However, even if Decedent had agreed to arbitration, he did not have the legal authority to bind his statutory beneficiaries who are not parties to the Arbitration Agreement. The signatories to the agreement are Daughter on behalf of Decedent and NHC Healthcare/Mauldin, LLC. No other persons are parties to this agreement. The scope of the agreement does not include the statutory beneficiaries' claims.

However, even if the Arbitration Agreement did contemplate the wrongful death statutory beneficiaries' claims, Decedent and/or Daughter had no authority to waive the statutory beneficiaries' claims. Daughter signed the Arbitration Agreement in her *individual capacity*. However, as the Hodge court noted, actions taken by Daughter in her *individual capacity* will not be held against the estate as the estate has other beneficiaries and may have other creditors. Daughter's Affidavit reflects that other statutory beneficiaries exist in this case.

Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, a Federal District Court in South Carolina has analyzed this issue under the South Carolina Non-Economic Awards Act of 2005. Diane Boyle as Personal Representative of the Estate of John Francis Boyle v. United States of America, 944 F.Supp.2d 577 (D.S.C. 2012). In Boyle, the Court concluded that the wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. This analysis supports the contention that the wrongful death claimants have separate and distinct claims apart from that of the survival action.

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Many other states have come to this same conclusion, Daniels v. Sunrise Senior Living, Inc., 212 Cal.App 4th 674, 151 Cal.Rptr.3d 273 (Cal.App.4 Dist, 2013) (Wrongful Death claims not bound to arbitration), Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (Wrongful Death claimants not bound by arbitration agreement.) As previously discussed, the only parties executing this Agreement were Daughter purportedly on behalf of Decedent and employee as an Agent for NHC Mauldin. NHC Mauldin would contend that this agreement is binding on the non-signatory statutory beneficiaries simply because it contends the Arbitration Agreement says so.

However, as the Supreme Court of Kentucky said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises. Inc.:

> [A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third-party are appropriately subjected the contract's arbitration provisions, at least where the tort and contract are significantly intertwined. See, In re Weekley Homes, L.P., 180 S.W. 3d 127 (Tex. 2005) (negligent repair claim by homeowner's daughter against contractor was subject to repair contract's arbitration clause because daughter, although a non-party, was direct and principal beneficiary under the contract). It is something else entirely, however, to say that incidental beneficiaries of a contact-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely be being mentioned in the contract as potential claimants. This is

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> what Beverly purports to do. Arbitration is a matter of contract, however, it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79,83, 123 S. Ct. 588, l54 L. Ed.2d 491 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit", Citation and internal quotation marks omitted.) Since Beverly's theory would allow just that, i.e., would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a "third party beneficiary" of the arbitration agreement, we reject it out of hand.

Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 599-600 (KY 2012).

Likewise, NHC-Mauldin's mentioning of "employees, agents, representatives, affiliates, fiduciaries, medical directors, officers, directors, governing bodies, management companies, insurers, attorneys, predecessors, successors, assigns, third party beneficiaries, heirs, executors, administrators, or any of them, and all persons, entities or corporations with whom any of the former have been, are now, or may be affiliated, arising out of or in any way related or connected to the patient's stay and the care provided at the Center", as being bound by the Arbitration Agreement does not make it so. It is no more than an *ipse elixir* which Defendants expect this Court to embrace. The law simply does not permit a party to cut off the rights of a non-signatory to an agreement who receives no benefit thereunder.

The wrongful death claims are separate claims apart from the Decedent's claims. According to South Carolina's Wrongful Death Act:

> "Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person

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> who would have been liable, if death had not ensued shall be liable to an action for damages."

South Carolina Code Annotated §15-51-10 (1977)

> The wrongful death beneficiaries are as follows:
>
> "Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs or the person whose death shall have been so caused."

South Carolina Code Annotated §15-51-20 (Supp. 2001)

The general element of damages recoverable are pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of the Decedent, society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries. Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d. 713, 714 S.C. (Ct. App. 1989).

The wrongful death claim is a separate claim from the claims a decedent might bring on his own behalf under the survival statute. In Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914), the Supreme Court held that wrongful death and survival actions are different claims for different injuries. The Court stated "necessarily, therefore, there must be separate verdicts and separate judgments, there should be separate actions." Id. at 31. See also Strickland v. Southern Ry Co., 111 S.C. 248, 97 S.E. 695 (1918) (Supreme Court Affirmed Appeal from Circuit Court's ruling noting that survival claims are independent of wrongful death claims), Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539 (1928) (discussing the difference between survival and wrongful death claims as being independent of each other).

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The Pennsylvania Superior Court in Pisano v. Extended Homes, Inc., operating under the fictitious name Belaire Health 84 Rehabilitation Center, 2013 PA Super 232, 77 A.3d 651, 662 (PA 2013) affirmed the trial court decision that the nursing home arbitration agreement did not apply to the statutory beneficiaries' wrongful death claim. The Court noted the wrongful death and survival actions are not derivative of each other but are flowing from the same underlining tortious conduct. Like the South Carolina statute, Pennsylvania's wrongful death statute provides that the right of action exists only for the benefit of the spouse, children, parents, or parents of the deceased. Id. at 656. The Pennsylvania Court further held that since the wrongful death claim is independent of the survival action and because the wrongful death statute does not characterize the wrongful death claim as that of a third-party beneficiary, that the trial court properly refused to compel arbitration to the non-signatory wrongful death beneficiaries who were not parties to the arbitration agreement.

Likewise, in Bybee v. Abdulla, M.D., 189. P.3d 40, 2008 UT 35 (Utah, 2008), the Supreme Court of Utah held that an agreement to arbitrate that was signed by the decedent cannot extend to the statutory beneficiaries of a wrongful death claim. The Utah Supreme Court noted that certain defenses from the decedent's personal injury action may be raised against the heirs of a wrongful death action such as comparative negligence and statutes of limitations as key common characteristics. However, as the Supreme Court of Utah noted, both of these defenses go to the viability of the underlying personal injury action. The Court further stated that "by contract, an agreement to bind heirs to arbitrate disputes does not implicate the viability of underlying claims." Id. at 47, citing Horwich v. Superior Court, 21 Cal. 4th 272, 87 Cal. Rptr. 2d 222, 980 P. 2d 927, 935 (1999). The Utah Supreme Court

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went on to note that "we have never intended to suggest, however, that because Decedent is the master of his claim he may by contract expose his unwilling heirs to any imaginable defense." Bybee v. Abdulla, M.D. at 46. The Utah Supreme Court further held that the defenses against the decedent's claim which are less likely to be found enforceable against the heirs' claims in a wrongful death action "are contract provisions that purport to affect the rights of heirs that do not affect the existence of the decedent's personal injury claim during his lifetime. The arbitration agreement...falls squarely within this category and is, therefore, unenforceable against the heir." Id. at 47.

The Court of Appeals in Washington in Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn. App. 919, 231 P. 3d 1252 (Wash. App. Div. 1 2010) held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit." Id. quoting Satomi Owners Association v. Satomi. LLC, 167 Wash. 2d 781, 225 P.3d 213 (2009). The Washington Court of Appeals further noted that the wrongful death claims asserted in that case were not on behalf of the estate just as South Carolina's wrongful death claims are not on behalf of the estate. The Washington Court of Appeals further discussed the Supreme Court of Ohio's ruling in Peters v. Columbus Steel Casting Co., 115 Ohio St.3d 134, 873 N.E.2d 1258 (2007), wherein the Supreme Court of Ohio held that the wrongful death claim of a spouse who was Administrator of her husband's estate was not subject to the Decedent's arbitration agreement. The Washington Court of Appeals in discussing Peters, stated "In sum, the decedent's agreement was an agreement 'to arbitrate his claims against the company,' and thus the provision in the agreement binding the decedent's heirs applied to a survival action. But the decedent could not 'restrict his beneficiaries to arbitration of their

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wrongful death claims because he held no right to those claims." Woodall v. Avalon Care Center - Federal Way, LLC at 929. In the Washington Court of Appeals' analysis, the Court concluded that the wrongful death beneficiaries could not be bound to the arbitration agreement which they did not sign.

Therefore, even if Daughter had actual or apparent authority/agency to execute the Arbitration Agreement, the Arbitration Agreement did not include the wrongful death statutory beneficiaries' claims within the scope of the Arbitration Agreement, nor did Decedent and/or Daughter have authority to bind the wrongful death statutory beneficiaries' claims to the Arbitration Agreement. As a result, the Arbitration Agreement cannot reach the claims of the wrongful death statutory beneficiaries.

WHEREFORE, for the reasons stated herein, the Court denies Defendants' Motion to Dismiss and Motion to Compel Arbitration.

IT IS SO ORDERED.

_____
The Honorable Michael G. Nettles
Presiding Judge

Greenville, South Carolina
Date: _____

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Greenville Common Pleas

Case Caption: Marlene Wilson , plaintiff, et al vs. NHC Healthcare/Mauldin LLC , defendant, et al

Case Number: 2018CP2300120

Type: Order/Other

So Ordered

s/ Michael Nettles

Electronically signed on 2018-06-21 09:47:02 page 15 of 15

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EXHIBIT P

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Estate of Mozana Clinkscales, by and through the appointed Personal Representative Charlie E. Clinkscales, Individually, and on behalf of Statutory Beneficiaries, Plaintiffs, v. Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville, Defendants.	IN THE COURT OF COMMON PLEAS C.A. No: 2018-CP-23-05088 **ORDER DENYING MOTION TO COMPEL ARBITRATION**

This matter came before the Court on December 18, 2018 for Defendant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville's Motion to Dismiss and to Compel Arbitration. Having listened to oral arguments from counsel and reviewed the parties' legal memoranda, for the reasons more fully set forth below, the Court hereby denies the Motion to Compel Arbitration as to "Survival Action" and the "Wrongful Death Action".

I. BACKGROUND

This matter arises out of two civil actions --- a Survival Action and a Wrongful Death action. Both actions involve allegations of nursing home neglect and corporate negligence resulting in the wrongful death of Mozana Clinkscales ("Decedent"). Charlie Clinkscales was Decedent's son and serves as the personal representative of Decedent's estate. The claims are brought against the nursing home facility THI of South Carolina at Magnolia Place at Greenville, LLC (d/b/a Magnolia Place – Greenville), as well as Fundamental Clinical and Operational Services, LLC (which Defendants assert provided "clinical services" to the facility), and

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Fundamental Administrative Services, LLC (which Defendants assert provided "administrative services" to the facility), these latter two entities being hereinafter referred to as the "Corporate Defendants."

Plaintiffs allege that while the Corporate Defendants did not provide direct care or services to Decedent, they are indispensable parties and proper Defendants in this matter because their control over the Facility directly affected the quality of care received by Decedent. Plaintiffs allege the Corporate Defendants are related entities[1] of the nursing home and have a significant relationship in the operation and management of the nursing home, and derive significant economic benefits from its revenue.[2] Agency law extends the right to enforce an arbitration award against agents, sister corporations, subsidiaries, and parent/ownership entities of a contracting party "where the interests of such parties are directly related to, if not congruent with, those of a signatory."[3] Plaintiffs allege the Corporate Defendants should be included in the arbitration proceedings if the Court compels arbitration because the Court finds the Corporate Defendants were intended beneficiaries of the Arbitration Agreement as the allegations against them are based on the same facts and are inherently inseparable from the claims made against the Facility.[4]

Decedent was admitted to Magnolia Place-Greenville ("Facility") on January 15, 2011 according to the original Admission Agreement. The Admission Agreement governed the type of care Decedent would receive at the Facility and Decedent's financial obligation to pay for those

[1] Related entity is an industry term that means the entities are have common ownership, management, and control.
[2] A parent company has been forced to arbitrate under a theory of equitable estoppel even though the parent company was not a party to the agreement when the subsidiary was a party to the agreement. Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416 (4th Cir. 2000) quoting J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988)) (citing Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993). Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597 (Ct. App., 2012).
[3] Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1112 (1993) (citing Isidor Paiwonsky Associates, Inc. v. Sharp Properties, 998 F.2d 145, 155 (3d Cir. 1993)).
[4] Int'l Paper Co. v. Schwabedissen Maschenen & Anlagen GMBH, 206 F.3d 411, 417 (4th Cir. 2000); see also Pearson v. Hilton Head Hospital, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012).

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services. On the Admission Agreement's final page, labeled as "Page 12 of 12," there was an "Entire Agreement"[5] provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Decedent's admission to the Facility. The date on this document is January 15, 2011.

A contract called "Arbitration Agreement" was signed on August 30, 2013. This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate entity (labeled "Page 1 of 1") with its own signature blocks. The Arbitration Agreement, purportedly a contract between the Facility and Decedent, provides for alternative dispute resolution to any claim a party may bring against another arising out of Decedent's care at the Facility. Defendant has admitted agreeing to arbitrate was not a prerequisite to admission at the Facility or a condition of admission. The Arbitration Agreement was allegedly signed by Charlie Clinkscales on **August 30, 2013**—more than 30 months after the original Admission Agreement was signed.

II. BURDEN OF PROOF

The party seeking to force arbitration has the burden of establishing the existence of a valid arbitration agreement.[6] Of those courts that have decided this question, most have held the proponent of the waiver bears the burden, reasoning that the jury trial right is fundamental, and should not be waived absent clear evidence.[7] A party seeking judicial enforcement of a contract

[5] "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."

[6] See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008).

[7] See e.g., Leasing Serv. Corp. v. Crane, 804 F.2d 828, 833 (4th Cir. 1986) ("Where waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed."); Nat'l Equip. Rental Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977) (implying that party defending waiver bears burden of proof); Luis Acosta, Inc. v. Citibank, N.A., 920 F. Supp. 15, 18 (D.P.R. 1996) (rejecting a waiver, after concluding that "the burden of proving the waiver of such a fundamental right properly rests upon the party seeking to enforce such a waiver"); Phoenix Leasing Inc. v. Sure Broadcasting, Inc., 843 F. Supp. 1379, 1384 (D. Nev. 1994) ("An informal survey indicates the majority of courts having considered this question followed the approach in Leasing Service [and placed

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bears the burden of persuasion.[8] Defendant carries the burden to prove a valid and enforceable arbitration agreement was signed in a "knowing, voluntary and intentional" capacity. In interpreting a jury trial waiver narrowly, some courts have also emphasized "the basic principle that ambiguities in a contract are construed against the drafting party."[9] When faced with a motion to compel arbitration that is opposed based on whether an agreement to arbitrate has been made between the parties, the court must give to the opposing party the benefit of all reasonable doubts and inferences that may arise.[10] Pro-arbitration policy does not validate a contract that lacks the building blocks of a binding contract. Whether the parties agreed to arbitrate is a question of substantive state law.[11] In Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718 (2007), the Supreme Court stated: "Although we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis."

The parties agree the FAA applies and that it represents pro-arbitration federal policy. "Congress's purpose in enacting the FAA was "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."[12] However, the policy only applies in instances where a valid arbitration agreement has been established. See 9 U.S.C. § 4. ("The court shall make an order directing the parties to proceed to arbitration" but only "upon being satisfied that the making of the agreement…is not in issue."). When the parties dispute the existence of a valid arbitration agreement, the presumption in favor of arbitration

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burden of proof on proponent of waiver]."); Smyly v. Hyundai Motor Am., 762 F. Supp. 428, 429 (D. Mass. 1991) (concluding that "since it is a waiver of a constitutional right," proponent of waiver bears burden of showing agreement was made knowingly and intentionally).

[8] Hinson-Barr, Inc. v. Pinckard, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1986).

[9] Nat'l Acceptance Co., 381 F. Supp. at 271).

[10] See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51, 54 (3d Cir. 1980).

[11] Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

[12] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

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disappears.[13] The FAA requires state courts enforce arbitration agreements unless the agreement is otherwise revocable under existing legal or equitable principles. 9 U.S.C. § 2. Moreover, while it is true the U.S. Supreme Court has held that the FAA "leaves no place for the exercise of discretion," the Court also cited the FAA's savings provision that denies enforcement of agreements susceptible to the general contract defenses of fraud, duress, and unconscionability.[14] The FAA requires the Court to look to South Carolina law to decide the threshold questions of contract formation.[15] The judicial inquiry may include an examination of contractual defects such as lack of mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability.[16] Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts.[17] Arbitration agreements may thus be invalidated by generally applicable contract defenses, such as vagueness, indefiniteness, lack of consideration, fraud, duress, or unconscionability. Id. A court should only decide as a matter of law whether the parties entered into an agreement to arbitrate when there is no genuine issue of material fact concerning the formation of the agreement.[18] In determining whether adequate consideration exists in a contract or arbitration agreement under the FAA guided by principles of contract law, we must examine and stay within the confines of the four corners of the instrument.[19]

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[13] Dumais v. American Golf Corp., 299 F.3d 1216, 1220 (10th Cir. 2002).
[14] Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985).
[15] Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'").
[16] See Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir. 2001).
[17] Rent-A-Center, West. Inc., 130 S. Ct at 2776; Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").
[18] See Avedon Engineering, Inc. v. Seatex, 126 F.3d 1279, 1283 (10th Cir. 1997).
[19] State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)).

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III. LEGAL REASONING

A. *The Arbitration Agreement is not a valid and enforceable agreement because a lack of consideration and mutuality exists under the circumstances.*

The necessary elements of a contract are an offer, acceptance, and valuable consideration.[20] To be legally enforceable, a contract must have an offer, acceptance, consideration, and mutual assent or meeting of the minds on all material terms. It is well settled that to be valid and enforceable, a contract must be supported by valuable consideration.[21] "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."[22] Consideration is a promise to do something that a party has no legal obligation to do or to forbear from doing something it has a legal right to do. A valid contract requires that both sides provide consideration. The Arbitration Agreement is only enforceable if it contains bargained for consideration and a mutuality of obligations between its parties. The Court finds these essential contract formation requirements are not met here. Many of the arguments Defendant raises in support of the Arbitration Agreement are misguided because they conflate the Arbitration Agreement and the Admission Agreement which, for the reasons discussed above, are distinct documents that do not merge.

The Arbitration Agreement was signed on August 30, 2013, but the Admission Agreement was signed on January 15, 2011.[23] Thus, the Admission Agreement and Arbitration Agreement

[20] Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003).
[21] Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984).
[22] Plantation A.O., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)).
[23] No family member had Power of Attorney when Mozana was admitted on January 15, 2011.

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are separate contracts that do not merge.[24] Our Supreme Court in Coleman refused to apply the merger doctrine when language in the contracts "recognized the 'separateness' of the admission and arbitration agreements."[25] Our Supreme Court went further in Thompson and Hodge applying Coleman and providing further examples of factors demonstrating "separateness" and preventing merger including the fact that the Arbitration Agreement was not necessary for admission and that *there was no bargain for exchange nor consideration to the Arbitration Agreement*.[26]

An admission contract with an "Entirety of Agreement" provision is separate "on its face" from an arbitration contract especially where the provision identifies the two contracts distinctly—i.e. "this Admission Agreement *or* in the Arbitration Agreement."[27] In fact, when the arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has "Arbitration Agreement" atop its first page, these factors further "indicate the parties' intent for it to stand by itself as an independent contract."[28] Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home.[29]

The "Admission Agreement" in this case contains an "Entire Agreement" provision stating that "this Agreement represents the entire agreement" related to admission to the Facility. Thus, "Agreement" is a defined term in this contract and, as stated in the contract's opening paragraph, is limited to the "Admission Agreement," not the separate Arbitration Agreement. Like in Hodge, the separate contracts have separate signature pages and separate pagination—i.e. the Admission

[24] See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert. denied Aug. 21, 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014).
[25] 407 S.C. at 355, 755 S.E.2d at 455.
[26] 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.
[27] Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).
[28] Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.
[29] Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

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Agreement ends with "Page 12 of 12" while the Arbitration Agreement is "Page 1 of 1." As in Thompson, the arbitration agreement states its independence with its "Arbitration Agreement" title. To the extent there are any ambiguities in this contract language, they must be resolved against merger.[30] The Facility was in sole control of the language chosen for these form contracts of adhesion and it was their responsibility to make merger clear if they so desired. In sum, the Facility cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit. Where a contract lacks valuable consideration, the contract will be deemed unenforceable. No valuable consideration exists in this case. There was no consideration given for Charlie Clinkscales to sign the Arbitration Agreement, because Mozana Clinkscales had already been admitted and received care.

In its most elemental sense, the doctrine of mutuality of obligation means that unless both parties to a contract are bound by its terms, neither is bound. Mutuality of obligation in bilateral contracts is but another way of stating that consideration is essential. 25 Richard Lord, Williston on Contracts § 67:42 at 332 (4th ed.2002)). Mutuality becomes a nonissue when consideration has otherwise been conferred upon one of the parties. There exists a lack of mutuality that makes the Arbitration Agreement unenforceable. The mutuality requirement is satisfied if each party has given sufficient consideration for the other's promise—something of value. Valuable consideration for a contract consists of some right, interest, profit or benefit accruing to one party or undertaken by the other. Where there is a mutual promise to arbitrate, there must be additional consideration. The mutual promise to arbitrate is illusory and of no benefit to Decedent or Plaintiff. The agreement provides that claims primarily brought by patients, such as those for medical malpractice, claims arising from the provision of services by defendant, and

[30] Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685 (citing Coleman).

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elder abuse claims are to be arbitrated. Defendants argue the Arbitration Agreement meets the mutuality requirement because both sides are forced to arbitrate. However, while the Arbitration Agreement purports to require arbitration for any "dispute over care," the reality is that this obligation falls almost exclusively on the patient. It is virtually inconceivable that Defendants would sue its patient regarding a dispute over care. Since admission is unavailable as a "direct benefit" to support estoppel, Defendants would be required to point to some benefit Mrs. Clinkscales received from the Arbitration Agreement alone. Any such attempt to find a benefit would have been futile given the Court of Appeals' unambiguous ruling in Thompson which held that "any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement's] requirement that [resident] waive her right to access the courts and her right to a jury trial."[31] The contract is also silent as to any consideration exchanged between the parties. The Arbitration Agreement itself contains insufficient consideration in the form of a mutual exchange of promises to arbitrate. There is no direct benefit to nursing home residents from a pre-admission arbitration contract separate from the Admission Agreement. Admission can be the "direct benefit" that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same contract.

In sum, Defendants have not met their burden to prove merger, consideration, or any other benefit for the Arbitration Agreement. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a single contract. If the jury waiver was not a precondition to admission, then it fails for lack of consideration. The Court finds it would

[31] 416 S.C. at 60, 784 S.E.2d at 688 (emphasis added).

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be inconsistent for Defendants to argue that agreeing to arbitrate was not consideration for the admission but, on the other, argue that the admission was valuable consideration to support arbitration. For the proposed arbitration contract to be enforceable as a non-pre-condition to admission, it must be supported by some other valuable consideration, which it is not. Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement. Neither party gained a right, interest, profit or benefit by agreeing to the Arbitration Agreement. Plantation, 386 S.C. at 206, 687 S.E.2d at 718. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered or undertaken by the other the party, when agreeing to the Arbitration Agreement. Id. Finally, viewing the Arbitration Agreement itself there is no mention of consideration. The court is required to make its assessment by viewing only the four-corners of the Arbitration Agreement, and cannot go beyond the confines of the Arbitration Agreement itself.

The Arbitration Agreement was not part of the Admission Agreement and thus, separate consideration was required for the Arbitration Agreement to be valid. See Thompson v. THI of N.M. at Casa Arena Blanca, LLC, No. CIV 05-1331 JB/LCS, 2006 WL 4061187, at *12 (D.N.M. Sept. 12, 2006); THI of N.M. at Vida Encantada, LLC v. Archuleta, No. CIV 11-399 LH/ACT, 2013 WL 2387752 (D.N.M., 2013).

Plaintiffs also rely upon the fact that the federal government at the time prohibited a nursing home from requiring a current resident to sign an arbitration agreement as a condition of continued residency, relying on a policy set forth by the Center for Medicaid and State Operations ("CMS") on January 9, 2003. The memorandum states: "A current resident is not obligated to sign a new admission agreement that contains binding arbitration. Federal regulations, at 42 C.F.R. § 483.12(a)(2) limit the circumstances under which a facility may discharge or transfer a resident."

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The Court is further persuaded by Plaintiff's argument that to construe admission as valid consideration to support the Arbitration Agreement would be inconsistent with federal law. The parties agree Decedent was a Medicare and Medicaid beneficiary while residing at Defendants' facility and that the facility was billing and accepting payment from Medicare and Medicaid for Decedent's care. Federal regulations require Medicare and Medicaid certified facilities to accept Medicare/Medicaid reimbursement rates as payment in full and *expressly forbid* acceptance of additional consideration for nursing home services. See 42 C.F.R. § 489.30; 42 C.F.R. § 447.15. Such facilities must "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the state plan…any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay at the facility." 42 U.S.C. § 1396r(c)(5)(A)(iii).

It is undisputed that this Federal Medicare and State Medicaid law applies to the Defendants' nursing home in this case. The fact is if a facility were to charge an additional five dollar fee to Medicaid beneficiaries as a condition for any reason, this would be strictly prohibited. Therefore, a facility should not be able to demand a waiver of a constitutional right as the price of admission. See Berkebile v. Outen, 311 S.C. 50, 53 n. 2, 426 S.E.2d 760, 762 n. 2 (1993) (noting general rule that courts will not enforce a contract which is "violative of public policy, statutory law, or provisions of the Constitution").

B. ***The Arbitration Agreement does not govern the wrongful death claim***

The Court further finds the Arbitration Agreement should not include the wrongful death cause of action because no one with legal authority could enter an agreement that waives the right to a jury trial on behalf of Decedent's statutory beneficiaries. Only the court-appointed personal representative can waive the beneficiaries' rights.

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A wrongful death claim is separate from a Decedent's personal injury/survival claim and an individual's wrongful death beneficiaries are defined by statute. S.C. Code Ann. § 15-51-20 (1977). South Carolina law provides that a wrongful death claim exists for the statutory beneficiaries, and that such claims are distinct and separate claims from those that are brought under the survival statute.[32] It appears the question of whether a wrongful death action is subject to mandatory arbitration pursuant to the terms of a contract is one of first impression in South Carolina, and there is a split in authority in other jurisdictions. This Court finds persuasive the reasoning of those jurisdictions that have held that an arbitration agreement executed by a decedent cannot bind the decedent's statutory beneficiaries who were not parties to the agreement.[33]

For example, in Ping v. Beverly Enterprises, the Supreme Court of Kentucky held:

> [W]e are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third party are appropriately subjected to the contract's arbitration provisions, at least where the tort and the contract are significantly intertwined. It is something else entirely, however, to say that incidental beneficiaries of a contract-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants.

376 S.W.3d 581, 599-600 (Ky. 2012).

In line with these principles, the Court finds the Arbitration Agreement neither covers the wrongful death statutory beneficiaries' claims within the scope of the agreement nor was the

[32] See Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914).
[33] See e.g., Woodall v. Avalon Core Ctr.-Fed. Way, LLC, 231 P.3d 1252, 1258 (Wash. App. Div. 1 2010) (refusing to compel arbitration of wrongful claim because wrongful death claim never belonged to decedent); Lawrence v. Beverly Manor, 273 S.W.3d 525, 528-29 (Mo. 2009) (en banc); Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007) (concluding decedent "could not restrict his beneficiaries to arbitration of their wrongful death claims, because he held no right to those claims"); Bybee v. Abdulla, 189 P.3d 40, 43 (Utah 2003) ("a decedent does not have the power to contract away the wrongful death action of his heirs").

Arbitration Agreement signed by an individual who had authority to bind the statutory beneficiaries. Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, South Carolina's federal district court has analyzed this issue in the damages context.[34] Boyle concluded wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. This analysis supports the contention that the wrongful death claimants have separate and distinct claims from that of the survival action.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss and Compel Arbitration, or Alternatively, to Compel Arbitration and Stay Proceedings, is DENIED.

AND IT IS SO ORDERED.

Signature to Follow

[34] Boyle v. U.S., 944 F.Supp.2d 577 (D.S.C. 2012).

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Greenville Common Pleas

Case Caption: Mozana Clinkscales , plaintiff, et al vs. Fundamental Clinical And Operational Services LLC , defendant, et al

Case Number: 2018CP2305088

Type: Order/Other

So Ordered

s/ Robin B. Stilwell 2158

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EXHIBIT Q

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

DIANE S. BOYLE, as Personal Representative of the Estate of John Francis Boyle, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 9:09-939-SB **FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO DAMAGES**

This matter came before the Court for a non-jury trial on the Plaintiff's action brought against the United States of America pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671-80 (hereinafter referred to as "the FTCA").[1] Carl Jacobson and Jonathan Krell represented the Plaintiff at trial, and Lee Berlinsky represented the Defendant. On March 9, 2012, the Court issued its findings of fact and conclusions of law as to liability, and the Court incorporates herein those findings of fact and conclusions of law. On March 20, 2012, the Court held a hearing on the issue of damages.

In its March 9th findings of fact and conclusions of law, the Court found that the Plaintiff met her burden of proof to establish the Defendant's liability. Specifically, the Court found it more likely than not that the Beaufort Naval Hospital mis-filled John Francis Boyle's (hereinafter referred to as "Mr. Boyle" or "the decedent") 0.5-milligram Prograf[2]

[1] The Plaintiff filed her amended complaint on April 13, 2009, alleging that her husband died of Tacrolimus toxicity and kidney failure due to the negligent, careless, and reckless filling and dispensing of her husband's medication by employees at the Beaufort Naval Hospital Pharmacy. (Entry 1 at 2.)

[2] Following his transplant, Mr. Boyle was prescribed Tacrolimus (available under the brand name "Prograf"), which is an immunosuppressant medication that helps prevent

PLAINTIFF'S EXHIBIT 6

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prescription in December of 2005, and that instead of dispensing 180 0.5-milligram Prograf capsules, the Beaufort Naval Hospital negligently dispensed 180 5-milligram capsules of Prograf. (Entry 59 at 3, ¶ 11.) The Court also found from what it deemed to be the more credible evidence that Mr. Boyle's hospitalizations on February 2, 2006, February 19, 2006, and March 19, 2006, more likely than not occurred at least in part because Mr. Boyle was taking an improper daily dose of Prograf due to the December 2005 mis-fill. (Id. at 4, ¶ 13.) Therefore, the Court found that the Defendant breached the standard of care and that the breach proximately caused Mr. Boyle's Prograf toxicity, thereby contributing to his death. (Id. at 8, ¶9.)

Despite the foregoing, the Court also found that at some point between the December 2005 mis-fill and his final hospitalization, Mr. Boyle should have recognized that the bottle of 0.5-milligram Prograf capsules actually contained 5-milligram capsules, based on factors such as his familiarity with the medication and the differing characteristics of the dosages, including size, color, and markings. (Id. at 9, ¶11, 12.) Thus, in addition to finding that the Defendant was negligent, the Court also found that Mr. Boyle was negligent by failing to recognize the mis-fill at some point between December 2005 and his subsequent hospitalizations. (Id., ¶13.) Ultimately, the Court attributed twenty-five percent of the fault to Mr. Boyle. (Id.)

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a person's immune system from rejecting a transplanted organ. Prograf is available for oral administration as capsules in the following dosages: 0.5 milligram, 1 milligram, or 5 milligrams. The colors and sizes of 0.5-milligram capsules, 1-milligram capsules, and 5-milligram capsules are different, and they are distinguishable by sight. In addition, each capsule contains a marking identifying the dosage. Prograf is considered a narrow therapeutic index medication, which means there is a small margin of error in dosing and significant toxicity can result from a minor overdose.

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FINDINGS OF FACT[3]

1. Mr. Boyle was born on July 3, 1934, and he was seventy-one years old at the time of his death on April 28, 2006.

2. In the mid-nineties, Mr. Boyle began suffering from renal disease secondary to autosomal dominant polycystic kidney disease.

3. In November of 2000, Mr. Boyle received a kidney transplant, and his medical records indicate that he was mostly stable from the time of his transplant until February of 2006.

4. Mr. Boyle graduated from college in 1956 and went to work in the New York City Police Department, where he worked for thirty years. In addition, Mr. Boyle was in the New York National Guard and Army Reserve for thirty years.

5. Diane S. Boyle ("Diane") was born on December 17, 1935, and she met Mr. Boyle when she was eighteen or nineteen years old. They married when she was twenty-three years old, and together they had two children, Julie Boyle Mecca ("Julie") and John C. Boyle ("John").

#3

6. At the time of Mr. Boyle's death, Diane and Mr. Boyle had been married for forty-seven years, and from the evidence presented, it appears that they had a very loving and happy relationship. Diane testified that Mr. Boyle was a great husband, the love of her life, her best friend, and her spiritual partner.

7. When Mr. Boyle was twenty-seven years old, Diane gave birth to a daughter,

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[3] To the extent that the Court has made "findings of fact" that would be better expressed as "conclusions of law," and vice versa, each category is expressly incorporated into the other.

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Julie. According to Julie, it was a "great family." Julie lived under the same roof with her parents until she got married at age twenty-six. In addition, her father's line of work influenced her to go work for the Department of Probation and for the District Attorney's Office. Julie particularly enjoyed it when her father spent time with her and her three children. In all, it appears from the evidence presented that Julie had a close, loving relationship with her father.

8. When Mr. Boyle was thirty years old, Diane gave birth to a son, John. In addition to being his father's namesake, John followed his father's footsteps into the police academy and the national guard. From all accounts John and his father had a close relationship; they participated in joint athletic activities and enjoyed family vacations and outings. John lived at home until he entered the police academy at age twenty-one, and even after he moved out of the house, he continued to see his father at least twice a week. John had plans to eventually move to Hilton Head to spend more time with his parents. As with Julie, it appears from the evidence that John had a close, loving relationship with his father.

9. Mr. Boyle and his family lived in one home in New York until 1995 when he and his wife moved to Hilton Head, South Carolina.

10. Mr. Boyle was an active member of both his family and his community. He was involved with his church and he served as the financial secretary and chief recruiter for the Knights of Columbus.

11. At the time of his death, Mr. Boyle was receiving police retirement income from his employment with the New York City Police Department, military retirement income, and Social Security benefits. In 2005, the last full year before his death, Mr. Boyle received

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approximately $44,050.00 in police retirement income, approximately $16,096.00 in military retirement income, and $17,054.00 in Social Security benefits.

CONCLUSIONS OF LAW

1. This case involves claims based on the South Carolina statutes for a "survival right of action," S.C. Code Ann. § 15-5-90, and for "wrongful act causing death," S.C. Code Ann. § 15-51-10.

2. Section 15-5-90 of the South Carolina Code (sometimes referred to as the "survival statute") provides in pertinent part: "Causes of action for and in respect to . . . any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person . . . , any law or rule to the contrary not withstanding." S.C. Code Ann. § 15-5-90.

3. Thus, the "survival statute provides that a cause of action for injuries to a person shall survive the person's death, with damages recoverable by the legal representative of the deceased." Smalls v. South Carolina Dept. of Educ., 339 S.C. 208, 216, 528 S.E.2d 682, 686 (Ct. App. 2000).

4. In a survival action, the legal representative of the deceased may recover damages for the deceased's conscious pain and suffering and medical expenses. See Baker v. Sanders, 301 S.C. 170, 391 S.E.2d 229 (1990) (finding that the South Carolina Tort Claims Act does not preclude a survival action for conscious pain and suffering and medical expenses when an injured person later dies as a result of the tortious conduct).

5. In addition, pursuant to section 15-5-100 of the South Carolina Code, funeral expenses are recoverable in a survival action. S.C. Code Ann. § 15-5-100.

6. Next, section 15-51-10 (sometimes referred to as the "wrongful death

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statute") provides:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as made the killing in law a felony. . . .

S.C. Code Ann. § 15-51-10.

7. Section 15-51-20 outlines the beneficiaries of a wrongful death action, stating:

> Every such action shall be for the benefit of the wife or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child, or children, then for the benefit of the parent or parents, and if there be none such, then for the benefit of the heirs of the person whose death shall have been so caused. Every such action shall be brought by or in the name of the executor or administrator of such person.

Id. at § 15-51-20.

8. In a wrongful death action in South Carolina, the damages recoverable by the statutory beneficiaries of the decedent include (1) pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of the use and comfort of the intestate's society. Knoke v. South Carolina Dept. of Parks, Recreation & Tourism, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996). "In a wrongful death case, the question of damages is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death." Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App. 1989).

9. This case also involves application of the South Carolina Noneconomic Damage Awards Act of 2005. Specifically, section 15-32-220 provides:

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> (A) In an action on a medical malpractice claim when final judgment is rendered against a single health care provider, the limit of civil liability for noneconomic damages of the health care provider **is limited to an amount not to exceed three hundred fifty thousand dollars as for each claimant, regardless of the number of separate causes of action on which the claim is based**, except as provided in subsection (E).[4]

S.C. Code Ann. § 15-32-220(A) (emphasis added).

10. Here, the parties dispute how the Court should construe the term "claimant" in section 15-32-220(A). Specifically, the Plaintiff urges the Court to find four claimants in this case: (1) the estate of Mr. Boyle in the survival action; (2) Diane Boyle in the wrongful death action; (3) Julie Boyle Mecca in the wrongful death action; and (4) John C. Boyle in the wrongful death action. In contrast, the government argues that there is only one claimant in this case: the patient, Mr. Boyle.

11. Section 15-32-210(2) of the South Carolina Code (titled "Definitions") states that "**'[c]laimant' means the person suffering personal injury.**" Id. at § 15-32-210(2) (emphasis added).

12. Subsection (11) then defines "[p]ersonal injury" as the following: "injuries to the person **including, but not limited to, bodily injuries, mental distress or suffering, loss of wages, loss of service, loss of consortium, wrongful death, survival, and other noneconomic damages and actual economic damages.**" Id. at § 15-32-210(11) (emphasis added).

13. "Personal injury action" is defined as "an action for personal injury, including a wrongful death action pursuant to Sections 15-51-10 through 15-51-60 and a survival

[4] Subsection (F) includes a built-in inflation valve tied to the Consumer Price Index. See S.C. Code Ann. § 15-5-220(F). Taking into consideration this built-in inflation valve, the current maximum amount recoverable is $415,055.00.

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action pursuant to Section 15-5-90(12)." Id. at § 15-5-90(12).

14. Subsection (9) provides that "[n]oneconomic damages" means "nonpecuniary damages arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, other nonpecuniary damages, and any other theory of damages including, but not limited to, fear of loss, illness, or injury." Id. at § 15-32-210(9).

15. Although there is little guidance on how to construe the term "claimant" other than the statutory language itself, the Plaintiff provided the Court with a copy of an order issued on March 25, 2009, by South Carolina Circuit Court Judge John C. Hayes, III.[5] In his order, Judge Hayes discusses the Noneconomic Damages Awards Act of 2005 and states:

> The phrase "for each claimant" makes clear that the caps apply separately to each claimant. Therefore, if the caps apply separately for each claimant, it becomes necessary for a jury to award damages separately to each claimant.
>
> In addition, it is conceivable that a jury could determine that one claimant deserves a larger damage award than another claimant. For example, in a case where a mother and father are suing for the wrongful death of their child, a jury could award more damages to the mother than the father because the mother was more directly involved in the caring and support of each child.

Wilson v. Amisub of South Carolina, Inc., et al., Civil Action No. 06-CP-46-2891, Order dated March 25, 2009, Exhibit A at 4.

16. Ultimately, after a great deal of consideration, the Court agrees with the

[5] Because it is not entirely clear from the docket whether a copy of this order was formally filed with one of the Plaintiff's briefs or memoranda, the Court attaches a copy of the order hereto as Exhibit A.

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Plaintiff that this case involves four claimants rather than just one. Stated simply, the Court believes that the statutory language, including the definitions set forth above, requires such a finding. First, the statute makes clear that the number of causes of action is irrelevant. See S.C. Code Ann. § 15-32-220(A). Moreover, the statute caps damages for "each claimant" and not "the claimant." Id. Although claimant means "*the* person suffering personal injury," id. at § 15-32-210(2) (emphasis added), the definition of personal injury makes clear that not only does Mr. Boyle (or more accurately, his estate) qualify as a claimant pursuant to the survival statute, but also, Diane, Julie, and John each qualify as claimants pursuant to the wrongful death statute, as they each suffered personal injury, which is defined to include (and not limited to) "mental distress or suffering, loss of wages, loss of service, loss of consortium, wrongful death, survival, and other noneconomic damages and actual economic damages." Id. at § 15-32-210(11).

17. Having resolved the foregoing issue, the Court next determines the decedent's life expectancy. According to South Carolina Code Section 19-1-500, Mr. Boyle's life expectancy was an additional twelve years (12.01 years, in fact, which would have carried Mr. Boyle to age 83.82).

18. However, Dr. Michael P. Mayes, who personally treated Mr. Boyle from September 23, 2004, until January of 2006, testified that based on his medical history Mr. Boyle likely would have lived another eight to ten years if not for the apparent Prograf overdose.

19. In contrast, the government's expert witness in the field of nephrology and transplant medicine, Dr. Anil Chandraker, who did not treat Mr. Boyle, testified that Mr. Boyle likely would have lived another five years.

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20. After thoroughly considering the evidence and testimony presented, the Court finds itself more persuaded by Dr. Mayes' testimony than by Dr. Chandraker's, particularly in light of the fact that Dr. Mayes actually treated Mr. Boyle over a period of time. However, the Court notes that Dr. Chandraker presented compelling testimony regarding life expectancy studies of individuals with kidney transplants, and based in part on that information, the Court accepts the lower end of Dr. Mayes' suggested life expectancy rather than the middle or higher end. Therefore, the Court finds that Mr. Boyle had a life expectancy of eight years.

Damages in the Survival Action

21. After consideration, the Court finds that **Diane Boyle, the duly-appointed personal representative of the estate of Mr. Boyle, is entitled to $319,412.17 in economic damages in the survival action**, which consists of the following:

a. $3,952.10 for Mr. Boyle's hospitalization at the Hilton Head Regional Medical Center on February 2, 2006;

b. $37,410.83 for Mr. Boyle's hospitalization at the Hilton Head Regional Medical Center on February 19, 2006;

c. $22,305.40 for Mr. Boyle's hospitalization at the Hilton Head Regional Medical Center on March 19, 2006;

d. $202,131.34 for Mr. Boyle's hospitalization at Emory University Hospital;

e. $49,259.00 for Mr. Boyle's treatment at the Emory Clinic; and

f. $4,353.50 in funeral expenses;

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22. The estate of Mr. Boyle is entitled to recover for the non-economic damages suffered by Mr. Boyle between the time of the mis-fill on December 6, 2005, until the date of his death on April 28, 2006, to the extent that those non-economic damages are attributable to the mis-fill.

23. The Plaintiff presented evidence showing that, towards the end of Mr. Boyle's life, he suffered from diarrhea, acute renal failure, respiratory failure, volume overload, difficulty moving, and cellulitis, among other things. At one point, in a matter of three weeks, Mr. Boyle gained twenty-five to thirty pounds due to fluid retention. Mr. Boyle was hospitalized for a total of thirty-nine days between December 6, 2005, and April 28, 2006, and he was intubated and on a respirator for three weeks. Even after being taken off the intubator and put into hospice care, Mr. Boyle was on a morphine drip for twelve days. In all, the Court has no doubt that Mr. Boyle experienced a great deal of pain and suffering, for which the Court believes **the estate of Mr. Boyle is entitled to recover $250,000.00 in noneconomic damages in the survival action.**

Damages in the Wrongful Death Action

24. Diane Boyle, as a surviving spouse, and Julie and John, as surviving children, are the beneficiaries in the wrongful death action. The Court has carefully considered evidence in the record, including the testimony of the beneficiaries, and it is clear that they suffered a difficult loss.

25. With respect to the economic damages suffered by Diane Boyle, the Plaintiff presented the testimony and expert report of Dr. Oliver G. Wood, Jr., dated February 7, 2011. In this report, Dr. Wood used a life expectancy of nine years (the average of the

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eight-to-ten-year range testified to by Dr. Mayes) and came up with a total amount of economic loss of $501,148.00.

26. The Court has great respect for Dr. Wood's calculations; however, the Court is not fully convinced by these calculations for various reasons including the following. First, Dr. Wood relied on a life expectancy of nine years whereas this Court has found Mr. Boyle's life expectancy to be eight years. Second, Dr. Wood included a $12,000 variable supplement to Mr. Boyle's police retirement income as a yearly supplement without knowing whether the supplement was tied to market conditions or whether the supplement was to continue every year of Mr. Boyle's retirement. (See Entry 57 at 74-75.) Third, it is not clear whether the surviving spouse benefit that Diane Boyle receives ($11,076 per year as of the time of trial) comes from a collateral or a noncollateral source because the evidence does not indicate with any certainty whether or not Mr. Boyle's military pension was reduced actuarially to provide for the benefit.

I. **The Surviving Spouse's Damages**

27. Ultimately, having started by considering Dr. Wood's computation of $501,148.00, and having considered certain factors that negatively affect that computation (such as the Court's finding of a reduced life expectancy as well as the other concerns outlined in paragraph 25), the Court finds, based on all of the evidence presented, that **Diane Boyle is entitled to recover $375,000.00 in economic damages in the wrongful death action.**

28. Next, the Court finds that Diane, who has undoubtedly suffered a great loss, is entitled to **recover $400,000.00 in noneconomic damages in the wrongful death**

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action.

II. **The Surviving Children's Damages**

29. Next, the Court finds that Julie and John, the surviving children of Mr. Boyle who also have suffered from the loss of their father, are **each entitled to $200,000.00 in noneconomic damages in the wrongful death action.**

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that

(1) Diane Boyle, as the duly-appointed personal representative of the estate of Mr. Boyle, is entitled to $319,412.17 in economic damages and $250,000.00 in noneconomic damages in the survival action, to be reduced by twenty-five percent, which amounts to $239,559.13 in economic damages and $187,500.00 in noneconomic damages, together totaling **$427,059.13.**

(2) Diane Boyle, as the surviving spouse of Mr. Boyle, is entitled to$375,000.00 in economic damages and $400,000.00 in noneconomic damages in the wrongful death action, to be reduced by twenty-five percent, which amounts to $281,250.00 in economic damages and $300,000.00 in noneconomic damages, together totaling **$581,250.00.**

(3) Julie Boyle, as a surviving child of Mr. Boyle, is entitled to $200,000.00 in noneconomic damages in the wrongful death action, to be reduced by twenty-five percent, for a total of **$150,000.00.**

(4) John Boyle, as a surviving child of Mr. Boyle, is entitled to $200,000.00 in noneconomic damages in the wrongful death action, to be reduced by twenty-five percent,

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for a total of **$150,000.00.**

Altogether the total judgment in this case amounts to **$1,308,309.13.**

IT IS FURTHER ORDERED that the judgment shall bear the current statutory legal rate of interest from the date of the judgment until it is satisfied.

IT IS SO ORDERED.

The Honorable Sol Blatt, Jr.
Senior United States District Judge

August 6, 2012
Charleston, South Carolina

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EXHIBIT A

"Exhibit A"

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) C.A. No.: 06-CP-46-2891

Robin R. Wilson and Brice R. Wilson Individually and as Personal Representatives for the Estate of Sierra R. Wilson,

Plaintiffs,

vs.

Amisub of South Carolina, Inc., d/b/a Piedmont Healthcare System and Piedmont Medical Center, and James R. Granger, III, M.D.,

Defendants.

ORDER

FILED-RECEIVED
2009 MAR 25 PM 4:32
C.C.P.&G.S.
YORK COUNTY, SC

This matter comes before the Court on five post-trial motions made by Defendant Amisub of South Carolina, Inc., d/b/a Piedmont Healthcare System and Piedmont Medical Center ("the Hospital"). This medical malpractice case was tried to verdict in front of the undersigned in York, South Carolina, during the February 9, 2009, Term of Common Pleas Court. Plaintiffs were awarded a total verdict in the amount of $4,405,000.00.[1] Plaintiffs were represented by Kenneth Suggs, Esq. and Gerald Jowers, Esq. Defendant Hospital was represented by William Gunn, Esq., and Defendant James R. Granger, III, M.D. ("Dr. Granger") was represented by Ashby Davis, Esq. and Collie Lehn, Esq. A hearing was heard on the motions in Union, South Carolina, by the undersigned on March 16, 2009. Plaintiff was represented by Kenneth Suggs, Esq., the Hospital was represented by William Gunn, Esq., and Ashby Davis, Esq. represented Dr. Granger. For the below reasons, the Court denies the Hospital's motions.

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[1] The jury found Dr. Granger not liable. The Plaintiffs have moved this Court to declare the statutory cap on noneconomic damages unconstitutional. That motion is not addressed in this Order.

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Motion for New Trial Based on the Thirteenth Juror Doctrine

In Youmans ex rel. Elmore v. S.C. Dept. of Transp., 380 S.C. 263, 272, 670 S.E.2d 1, 5 (Ct. App. 2008), the Court of Appeals recently explained the purposes of the thirteenth juror doctrine:

> The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts. The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror "hangs" the jury. (citing Folkens v. Hunt, 300 S.C. 251, 254-55, 387 S.E.2d 265, 267 (1990)).

The Youmans Court also made clear that "[t]he 'thirteenth juror' doctrine is not used when the trial judge has found the verdict was inadequate or unduly liberal and, therefore, is not a vehicle to grant a new trial *nisi additur*." Bailey v. Peacock, 318 S.C. 13, 14-15, 455 S.E.2d 690, 692 (1995). Youmans at 273.

This Court finds that the evidence presented at trial justifies the verdict and that the verdict is neither inconsistent nor a reflection of confusion by the jury. The interpretation and reporting of both the fetal monitor strips and the complete blood count (CBC) test formed the basis for Plaintiffs' theory of negligence. Plaintiffs' expert, Dr. Jeffery King, testified that the fetal monitor strips showed recurrent late decelerations, a sign, according to him, indicating placental insufficiency. While Defendants' witnesses and expert witnesses offered a different interpretation of the fetal monitor strips, it was for the jury to decide the weight and credibility to give to the differing testimony.

Similarly, it was for the jury to decide the weight and credibility to give to the testimony regarding the CBC test. Dr. Granger testified that he could not remember whether he had the CBC test results on November 16, 2003, but that this did not impact his treatment of Mrs. Wilson. Moreover, Dr. Granger's expert, Dr. Robert Arnett, testified that obstetricians may rely

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on the information given to them by nurses—in this case, the results from the fetal monitor and CBC tests—and that to do so is not a deviation from the standard of care. Based on this and other evidence and testimony offered at trial, the jury had enough evidence to reach a verdict against the Hospital but not against Dr. Granger and such a verdict is justified by the evidence and is not inconsistent or illogical.

Motion for New Trial Based on the Verdict Form

Under Rule 59(a), SCRCP, a "new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State. . .". The Hospital bases its first motion for new trial on the grounds that the Court erred in providing separate lines on the verdict form for Robin Wilson and Brice Wilson in the wrongful death cause of action. Instead, the Hospital argues the Court should have submitted a form with one line letting the probate court divide any verdict between the co-personal representatives.

Using separate lines on the verdict form complies with the South Carolina wrongful death statute and the statute regarding caps on noneconomic damages.[2] Section 15-51-40 of the wrongful death statute says that "the jury may give damages . . . as they may think proportioned to the injury resulting from the death to the parties respectively for whom and for whose benefit such action shall be brought." S.C. Code Ann. § 15-51-40 (Rev. 2005) (emphasis added). That the legislature chose to use the word "respectively" indicates its desire to separate the amount of damages according to each claimant. See Matter of Decker, 322 S.C. 215, 219, 471 S.E.2d 462,

[2] The statute regarding noneconomic damages, section 15-32-220, was enacted by 2005 Act No. 32, which says "this act takes effect July 1, 2005, for causes of action arising after July 1, 2005." Therefore, the caps do not apply to the damages awarded in Sierra Wilson's survival action because that action arose on November 18, 2003. Assuming for the moment that they are constitutional, the caps do apply to the wrongful death claim, which arose in February 2008; therefore, this Court must comply with the language in that section.

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463 (1995) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous....") (citation omitted).

In addition, the statute dealing with caps on noneconomic damages, section 15-32-220(a), says

> [i]n an action on a medical malpractice claim when final judgment is rendered against a single health care provider, the limit of civil liability for noneconomic damages of the health care provider is limited to an amount not to exceed three hundred fifty thousand dollars for each claimant, regardless of the number of separate causes of action on which the claim is based, except as provided in subsection (E).

S.C. Code Ann. § 15-32-220(a) (Supp. 2008) (emphasis added). The phrase "for each claimant" makes clear that the caps apply separately to each claimant. Therefore, if the caps apply separately for each claimant, it becomes necessary for a jury to award damages separately to each claimant.

In addition, it is conceivable that a jury could determine that one claimant deserves a larger damage award than another claimant. For example, in a case where a mother and father are suing for the wrongful death of their child, a jury could decide to award more damages to the mother than the father because the mother was more directly involved in the caring and support of the child. Such a possibility makes separate lines on a verdict form for each claimant appropriate and necessary.

Motion for New Trial Based on the Court's Note to the Jury

The Hospital also argues the Court should grant a new trial because the Court erred in its response to a request from the jury to rehear the testimony of Nurse Lisa Reynolds and, instead, wrote a note to the jury answering its question.[3] In support of its argument, the Hospital cites

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[3] The jury's question was "[m]ay we hear Ms. Reynolds' testimony of what she reported to the doctor about the NST/CST results?" The Court's response was "[w]e have examined the testimony of Ms. Reynolds and she testified that she could not recall what she reported to Dr. Granger."

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Article V, § 21 of the South Carolina Constitution, which says that "[j]udges shall not charge juries in respect to matters of fact, but shall declare the law."

This Court does not believe its handling of the jury's question regarding Nurse Reynolds' testimony constitutes grounds for a new trial. The Court gave a completely accurate response to the question asked and only responded to the question asked. More importantly, the Court's response did not comment on the facts but, rather, simply stated what Nurse Reynolds had said. It would have been unfair to the Plaintiff to direct the jury to other testimony because such an emphasis from the Court might have been misconstrued by the jury.

Article V, § 21 of the Constitution deals with jury charges not responses to jury questions. If this Court were to apply Article V, § 21 as narrowly as the Hospital seems to want, then a judge would not be allowed to comment on a question from the jury requesting pens and paper because such a comment would not deal with the law. Such a result is neither required nor contemplated under our Constitution.

The undersigned has adopted the philosophy/practice of responding to jury questions with specificity. That is, the jury poses a question, the Court answers that question. For the Court to broaden the jury's inquiry would, in the undersigned's opinion, interject the trial judge into the jury's analysis and deliberations. The Court would in essence be saying "well, you asked this, but don't you think you should consider this other thing also?" The undersigned believes to broaden the answer to a question beyond the question itself places the judge in the jury room as a thirteenth juror.

#20

Finally, this Court's ruling on the jury's note must be considered in light of Rule 61, SCRCP. Rule 61 says that ". . . no error or defect in any ruling or order or anything done or omitted by the court . . . is ground for granting a new trial . . . unless refusal to take such action

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appears to the court inconsistent with substantial justice." Rule 61, SCRCP. Writing a completely accurate response to a jury's question is not inconsistent with substantial justice and did not prejudice the Hospital.

Motion for New Trial or in the Alternative New Trial *Nisi*
(Excessive Verdict)

The Hospital makes its last motion for new trial on the grounds that the total verdict of $4,405,000.00 was excessive and based upon arbitrariness, capriciousness, passion, prejudice, or other considerations not found in the evidence. The Court disagrees.

"A new trial absolute should be granted only if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motive" Knoke v. S.C. Dept. of Parks, Recreation, and Tourism, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996) (citations omitted). "[T]he circuit court alone has the power to grant a new trial *nisi* when it finds the amount of the verdict to be merely inadequate or excessive. McCourt by and Through McCourt v. Abernathy, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995). "Compelling reasons, however, must be given to justify invading the jury's province in this manner." Bailey v. Peacock, 318 S.C. 13, 14, 455 S.E.2d 690, 691, (1995)." RRR, Inc. v. Toggas, 378 S.C. 174, 183, 662 S.E.2d 438, 442-43 (Ct. App. 2008).

The verdict in this case does not shock the conscience of the Court, and the verdict is not excessive. The decedent, Sierra Wilson, lived with substantial pain and suffering that supports a verdict in her survival action of $2,405,000.00 for her medical expenses and pain and suffering. Part of her pain and suffering included the seizures she experienced when she was only six hours old; kidney failure; the numerous operations she had; and the fact that she suffered from cerebral palsy. While the Defendants may disagree as to the cause and culpability of these problems, the

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jury returned a verdict against the Hospital and the Court must analyze the reasonableness and excessiveness of the verdict in light of the jury's determination of negligence.

Similarly, the jury's award of $1,000,000.00 each to Robin and Brice Wilson in their wrongful death action is not excessive and does not shock the conscience of the court. The jury's award was reasonable based on the evidence and testimony presented at trial regarding Robin and Brice's pain and suffering, including the fact that Sierra is the only child that Robin and Brice will be capable of having together since Robin was sterilized when Sierra was born.

Motion to Alter or Amend the Judgment by Reducing the Verdict

Pursuant to Rule 59(e), SCRCP, the Hospital moves the court to alter or amend the judgment by reducing the verdict. This issue is affected by the Court's ruling on Plaintiffs' motion regarding the constitutionality of the statutory caps on non-economic damages in medical malpractice causes of action. Based on the Order issued by this Court this date, the Court finds the statutory caps constitutional and reduces the verdict in accordance with § 15-32-220(A)-(F).

The caps require reducing each of the Wilson's award to $350,000.00 and then increasing or decreasing that amount based on the Consumer Price Index formula set forth in § 15-32-220(F). The Chief Economist at the State of South Carolina Board of Economic Advisors has informed the parties that applying subsection (F) increases the caps to $386,650.00. Therefore, Robin Wilson's wrongful death verdict is reduced to $386,650.00 and Brice Wilson's wrongful death verdict is reduced to $386,650.00.

Wherefore, the Hospital's Motion for New Trial Based on the Thirteenth Juror Doctrine is DENIED; the Hospital's Motions for New Trial Based on the Verdict Form and the Court's Note to the Jury are DENIED; the Hospital's Motion for New Trial or in the Alternative New

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#7

Trial *Nisi* is DENIED; and the Hospital's Motion to Alter or Amend the Judgment by Reducing the Verdict is GRANTED.

IT IS SO ORDERED.

John C. Hayes, III
Presiding Judge

#8

March 25th, 2009
York, South Carolina

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EXHIBIT R

ELECTRONICALLY FILED - 2025 Sep 17 11:36 AM - GREENVILLE - COMMON PLEAS - CASE#2025CP2301759

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) C.A. No.: 06-CP-46-2891

Robin R. Wilson and Brice R. Wilson Individually and as Personal Representatives for the Estate of Sierra R. Wilson,

Plaintiffs,

vs.

Amisub of South Carolina, Inc., d/b/a Piedmont Healthcare System and Piedmont Medical Center, and James R. Granger, III, M.D.,

Defendants.

ORDER

FILED-RECEIVED
2009 MAR 26 PM 4: 32
CLERK OF COURT
C.C.C.P. & G.S.
YORK COUNTY, SC

This matter comes before the Court on five post-trial motions made by Defendant Amisub of South Carolina, Inc., d/b/a Piedmont Healthcare System and Piedmont Medical Center ("the Hospital"). This medical malpractice case was tried to verdict in front of the undersigned in York, South Carolina, during the February 9, 2009, Term of Common Pleas Court. Plaintiffs were awarded a total verdict in the amount of $4,405,000.00.[1] Plaintiffs were represented by Kenneth Suggs, Esq. and Gerald Jowers, Esq. Defendant Hospital was represented by William Gunn, Esq., and Defendant James R. Granger, III, M.D. ("Dr. Granger") was represented by Ashby Davis, Esq. and Collie Lehn, Esq. A hearing was heard on the motions in Union, South Carolina, by the undersigned on March 16, 2009. Plaintiff was represented by Kenneth Suggs, Esq., the Hospital was represented by William Gunn, Esq., and Ashby Davis, Esq. represented Dr. Granger. For the below reasons, the Court denies the Hospital's motions.

[1] The jury found Dr. Granger not liable. The Plaintiffs have moved this Court to declare the statutory cap on noneconomic damages unconstitutional. That motion is not addressed in this Order.

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This Court finds that the evidence presented at trial justifies the verdict and that the verdict is neither inconsistent nor a reflection of confusion by the jury. The interpretation and reporting of both the fetal monitor strips and the complete blood count (CBC) test formed the basis for Plaintiffs' theory of negligence. Plaintiffs' expert, Dr. Jeffery King, testified that the fetal monitor strips showed recurrent late decelerations, a sign, according to him, indicating placental insufficiency. While Defendants' witnesses and expert witnesses offered a different interpretation of the fetal monitor strips, it was for the jury to decide the weight and credibility to give to the differing testimony.

Similarly, it was for the jury to decide the weight and credibility to give to the testimony regarding the CBC test. Dr. Granger testified that he could not remember whether he had the CBC test results on November 16, 2003, but that this did not impact his treatment of Mrs. Wilson. Moreover, Dr. Granger's expert, Dr. Robert Arnett, testified that obstetricians may rely

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Motion for New Trial Based on the Verdict Form

Under Rule 59(a), SCRCP, a "new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State. . .". The Hospital bases its first motion for new trial on the grounds that the Court erred in providing separate lines on the verdict form for Robin Wilson and Brice Wilson in the wrongful death cause of action. Instead, the Hospital argues the Court should have submitted a form with one line letting the probate court divide any verdict between the co-personal representatives.

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[2] The statute regarding noneconomic damages, section 15-32-220, was enacted by 2005 Act No. 32, which says "this act takes effect July 1, 2005, for causes of action arising after July 1, 2005." Therefore, the caps do not apply to the damages awarded in Sierra Wilson's survival action because that action arose on November 18, 2003. Assuming for the moment that they are constitutional, the caps do apply to the wrongful death claim, which arose in February 2008; therefore, this Court must comply with the language in that section.

463 (1995) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous....") (citation omitted).

In addition, the statute dealing with caps on noneconomic damages, section 15-32-220(a), says

> [i]n an action on a medical malpractice claim when final judgment is rendered against a single health care provider, the limit of civil liability for noneconomic damages of the health care provider is limited to an amount not to exceed three hundred fifty thousand dollars for each claimant, regardless of the number of separate causes of action on which the claim is based, except as provided in subsection (E).

S.C. Code Ann. § 15-32-220(a) (Supp. 2008) (emphasis added). The phrase "for each claimant" makes clear that the caps apply separately to each claimant. Therefore, if the caps apply separately for each claimant, it becomes necessary for a jury to award damages separately to each claimant.

In addition, it is conceivable that a jury could determine that one claimant deserves a larger damage award than another claimant. For example, in a case where a mother and father are suing for the wrongful death of their child, a jury could decide to award more damages to the mother than the father because the mother was more directly involved in the caring and support of the child. Such a possibility makes separate lines on a verdict form for each claimant appropriate and necessary.

Motion for New Trial Based on the Court's Note to the Jury

The Hospital also argues the Court should grant a new trial because the Court erred in its response to a request from the jury to rehear the testimony of Nurse Lisa Reynolds and, instead, wrote a note to the jury answering its question.[3] In support of its argument, the Hospital cites

[3] The jury's question was "[m]ay we hear Ms. Reynolds' testimony of what she reported to the doctor about the NST/CST results?" The Court's response was "[w]e have examined the testimony of Ms. Reynolds and she testified that she could not recall what she reported to Dr. Granger."

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Article V, § 21 of the South Carolina Constitution, which says that "[j]udges shall not charge juries in respect to matters of fact, but shall declare the law."

This Court does not believe its handling of the jury's question regarding Nurse Reynolds' testimony constitutes grounds for a new trial. The Court gave a completely accurate response to the question asked and only responded to the question asked. More importantly, the Court's response did not comment on the facts but, rather, simply stated what Nurse Reynolds had said. It would have been unfair to the Plaintiff to direct the jury to other testimony because such an emphasis from the Court might have been misconstrued by the jury.

Article V, § 21 of the Constitution deals with jury charges not responses to jury questions. If this Court were to apply Article V, § 21 as narrowly as the Hospital seems to want, then a judge would not be allowed to comment on a question from the jury requesting pens and paper because such a comment would not deal with the law. Such a result is neither required nor contemplated under our Constitution.

The undersigned has adopted the philosophy/practice of responding to jury questions with specificity. That is, the jury poses a question, the Court answers that question. For the Court to broaden the jury's inquiry would, in the undersigned's opinion, interject the trial judge into the jury's analysis and deliberations. The Court would in essence be saying "well, you asked this, but don't you think you should consider this other thing also?" The undersigned believes to broaden the answer to a question beyond the question itself places the judge in the jury room as a thirteenth juror.

Finally, this Court's ruling on the jury's note must be considered in light of Rule 61, SCRCP. Rule 61 says that ". . . no error or defect in any ruling or order or anything done or omitted by the court . . . is ground for granting a new trial . . . unless refusal to take such action

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appears to the court inconsistent with substantial justice." Rule 61, SCRCP. Writing a completely accurate response to a jury's question is not inconsistent with substantial justice and did not prejudice the Hospital.

Motion for New Trial or in the Alternative New Trial *Nisi*
(Excessive Verdict)

The Hospital makes its last motion for new trial on the grounds that the total verdict of $4,405,000.00 was excessive and based upon arbitrariness, capriciousness, passion, prejudice, or other considerations not found in the evidence. The Court disagrees.

"A new trial absolute should be granted only if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motive" Knoke v. S.C. Dept. of Parks, Recreation, and Tourism, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996) (citations omitted). "[T]he circuit court alone has the power to grant a new trial *nisi* when it finds the amount of the verdict to be merely inadequate or excessive. McCourt by and Through McCourt v. Abernathy, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995). "Compelling reasons, however, must be given to justify invading the jury's province in this manner." Bailey v. Peacock, 318 S.C. 13, 14, 455 S.E.2d 690, 691, (1995)." RRR, Inc. v. Toggas, 378 S.C. 174, 183, 662 S.E.2d 438, 442-43 (Ct. App. 2008).

The verdict in this case does not shock the conscience of the Court, and the verdict is not excessive. The decedent, Sierra Wilson, lived with substantial pain and suffering that supports a verdict in her survival action of $2,405,000.00 for her medical expenses and pain and suffering. Part of her pain and suffering included the seizures she experienced when she was only six hours old; kidney failure; the numerous operations she had; and the fact that she suffered from cerebral palsy. While the Defendants may disagree as to the cause and culpability of these problems, the

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jury returned a verdict against the Hospital and the Court must analyze the reasonableness and excessiveness of the verdict in light of the jury's determination of negligence.

Similarly, the jury's award of $1,000,000.00 each to Robin and Brice Wilson in their wrongful death action is not excessive and does not shock the conscience of the court. The jury's award was reasonable based on the evidence and testimony presented at trial regarding Robin and Brice's pain and suffering, including the fact that Sierra is the only child that Robin and Brice will be capable of having together since Robin was sterilized when Sierra was born.

Motion to Alter or Amend the Judgment by Reducing the Verdict

Pursuant to Rule 59(e), SCRCP, the Hospital moves the court to alter or amend the judgment by reducing the verdict. This issue is affected by the Court's ruling on Plaintiffs' motion regarding the constitutionality of the statutory caps on non-economic damages in medical malpractice causes of action. Based on the Order issued by this Court this date, the Court finds the statutory caps constitutional and reduces the verdict in accordance with § 15-32-220(A)-(F).

The caps require reducing each of the Wilson's award to $350,000.00 and then increasing or decreasing that amount based on the Consumer Price Index formula set forth in § 15-32-220(F). The Chief Economist at the State of South Carolina Board of Economic Advisors has informed the parties that applying subsection (F) increases the caps to $386,650.00. Therefore, Robin Wilson's wrongful death verdict is reduced to $386,650.00 and Brice Wilson's wrongful death verdict is reduced to $386,650.00.

Wherefore, the Hospital's Motion for New Trial Based on the Thirteenth Juror Doctrine is DENIED; the Hospital's Motions for New Trial Based on the Verdict Form and the Court's Note to the Jury are DENIED; the Hospital's Motion for New Trial or in the Alternative New

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Trial *Nisi* is DENIED; and the Hospital's Motion to Alter or Amend the Judgment by Reducing the Verdict is GRANTED.

IT IS SO ORDERED.

John C. Hayes, III
Presiding Judge

March 25th, 2009
York, South Carolina

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