THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Heath P. Taylor, Circuit Court Judge

Appellate Case No. 2024-000910

Beverly Calloway,
as Personal Representative of the Estate of Hattie Admore, ... Respondent,

v.

Oakbrook Healthcare, LLC d/b/a Oak Brook Health and
Rehabilitation Center and Patricia Castle, ... Appellants.

RESPONDENT'S MOTION TO DISMISS APPEAL AND FOR SANCTIONS

Respondent Beverly Calloway as Personal Representative of the Estate of Hattie Admore respectfully moves the Court pursuant to Rule 269, SCACR, for an Order imposing sanctions on Appellant Oakbrook Healthcare, LLC d/b/a Oak Brook Health and Rehabilitation Center ("Appellant") because this Appeal is frivolous, has been taken solely for the purpose of delay, and is entirely unsupported by any South Carolina precedent substantiating Appellant's arguments concerning the purported merger of Appellant's Arbitration and Admission Agreements.[1] For these and the following reasons, the Court should dismiss the Appeal, impose a fee on Appellant,

[1] Respondent does not believe that Appellant's conduct should be imputed to Appellant Patricia Castle, nor should she be sanctioned for Appellant's conduct.

and award costs and attorney's fees to Respondent as a sanction for filing this Appeal when Appellant knows that it has no likelihood of success.

FACTUAL/PROCEDURAL BACKGROUND

Appellant filed its Notice of Appeal on June 3, 2024, appealing Orders of the Circuit Court filed on November 2, 2023, and May 2, 2024. (Ex. 1, Notice of Appeal). The Orders denied Appellant's Motion to Compel Arbitration and Motion to Reconsider, which sought to dismiss and compel the arbitration of Respondent's wrongful death and survival claims arising from injuries the decedent, an 82-year old woman suffering from diabetes and severe vascular dementia, received while in Appellant's care before she passed away. (Ex. 2, Orders; Ex. 3, Compl.). Appellant is part of a constellation of entities that operate, own, and profit from scores of skilled nursing, assisted living, and rehabilitation facilities located in a number of states, including South Carolina, Indiana, Maryland, Nevada, New Mexico, Texas, and Wisconsin.[2] This Appeal, and all of the related appeals discussed below and included in Exhibit 4, essentially revolve around a single focused, dispositive issue: whether Appellant's and the other Fundamental entities' Admission Agreement and

[2] This group ("the Fundamental entities"), includes Appellant as well as Fundamental Long Term Care, Inc., Fundamental Clinical and Operational Services, LLC, Fundamental Administrative Services, LLC, THI of South Carolina, LLC, THI of South Carolina at Columbia, LLC, THI of South Carolina at Charleston, LLC, THI of South Carolina at Magnolia Manor-Inman, LLC, THI of South Carolina at Spartanburg, LLC, THI of South Carolina at Magnolia Manor-Spartanburg, LLC, THI of South Carolina at Greenville, LLC, THI of Baltimore, Inc., Lake Emory Post Acute Care, St. George Health Care, LLC, Palmetto Prince George Operating, LLC, Palmetto Health Care, LLC, Palmetto Lake City-Scranton Operating, LLC, Palmetto Hallmark Operating, LLC, Hallmark Longterm Care, LLC, and Hunt Valley Holdings, LLC, amongst others. *See Healthcare Facility Locator*, Fundamental, https://fundltc.com/Healthcare%20Facility%20Locator/Facility_Locator.aspx. The Fundamental entities are believed to own and/or operate at least 20 facilities within South Carolina. For a brief review of the Fundamental entities and their origins, see *In re Fundamental Long Term Care, Inc.*, 569 B.R. 904 (Bankr. M.D. Fla. 2016).

Arbitration Agreement, which have remained identical since at least 2019, merge such that Appellant may avail itself of an equitable estoppel argument to preclude Respondent, and other individuals representing the interests of vulnerable, elderly residents of the Fundamental entities' facilities, from denying that the subject Arbitration Agreement was signed by someone with actual or apparent authority at the time of admission.[3]

Astoundingly, at the time Appellant filed the instant Notice of Appeal, its position and argument regarding the merger of these Agreements had been previously reviewed and rejected by this Court ***fourteen times***, in thirteen unpublished decisions and one published opinion, *Estate of Solesbee by Bayne v. Fundamental Clinical and Operational Servs., LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023). (Ex. 4, Spreadsheet of Appeals). These decisions reviewed the exact same Admission Agreement and Arbitration Agreement that are currently before the Court and entailed an analysis of the exact same applicable South Carolina law and general contract principles.[4] More importantly, at the time Appellant filed the instant Notice of Appeal, the Supreme Court of South Carolina had denied petitions

[3] A review of the related appeals shows that it is not uncommon during the Fundamental entities' admissions process for the admissions paperwork and Arbitration Agreement to be signed by a family member or caregiver who is not the resident's attorney-in-fact, conservator, or guardian at the time of admission. It is a foregone legal conclusion that the authority bestowed upon a family member to act on the resident's behalf under the Adult Health Care Consent Act does not include authority to enter an arbitration agreement. *See Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014).

[4] The merger analysis solely focuses on the language of the agreements that have purportedly merged. *See Solesbee*, 438 S.C. at 648, 885 S.E.2d at 149 ("[B]y their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply.")

seeking certiorari to review those decisions four times, including a denial of certiorari to review this Court's binding decision in *Solesbee*.

All told, at the time of the filing of their Notice of Appeal in this action, the Fundamental entities had previously asked this Court and the Supreme Court to review the subject Agreements ***thirty-three times*** to determine whether they merge such that a plaintiff would be estopped from denying their validity, all without a single successful result. The Court has since filed three more unpublished decisions affirming that the subject Agreements do not merge, and the Supreme Court has denied certiorari on the exact same issue ten more times, including nine times on October 30, 2024. Previous to the date of the filing of this Motion, the Fundamental entities, on the other hand, had gone on to file three more petitions for a writ of certiorari to the Supreme Court, totaling ***thirty-seven*** requests over five years (not including petitions for rehearing) for the appellate courts of this State to review a factually identical argument. These protracted appeals, which to a legal certainty are destined for failure, typically delay the underlying litigation for multiple years, and needlessly consume the parties', the Court's, and the Supreme Court's resources and time.

ARGUMENT

Rule 269, SCACR, sets forth the Court's discretionary authority to impose sanctions for frivolous appeals:

> Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such

> sanctions as the circumstances of the case *and discouragement of like conduct in the future may require*.

Rule 269, SCACR (emphasis added). "An appeal is frivolous *if the result is obvious* or the arguments of error are wholly without merit." *Coghlan v. Starkey*, 852 F.2d 806, 811 (5th Cir. 1988) (emphasis added). The dispositive argument that is being raised to the Court in this Appeal is whether the Circuit Court erred in finding that the subject Agreements did not merge pursuant to *Solesbee* as well as the numerous other unpublished decisions of this Court affirming *Solesbee*.

Appellant is likely to take the position that until the Supreme Court publishes an opinion affirming the reasoning of *Solesbee* that any repetitive appeals of the merger issue are not frivolous and have some chance of succeeding on their merits. This ignores that by repeatedly denying certiorari to review the outcome of *Solesbee* (a binding, published Opinion), the Supreme Court has essentially conveyed that under these identical facts and Agreements, it does not see a clear legal error that necessitates reversal or an issue of sufficient importance to grant judicial review. After denying certiorari fourteen times, it is no longer reasonable or realistic to expect that things might be different with the Supreme Court on the next go-round.

Additionally, while Appellant's arguments may also incorporate the doctrine of equitable estoppel, which would generally require the Court in each appeal to weigh all the attendant circumstances and equities unique to each case, here, the threshold, dispositive issue is whether the Agreements merged in the first place. Without merger, the Fundamental entities are deprived of the ability to use the estoppel doctrine offensively as a sword against their residents, and the merger analysis in this Appeal and all twenty-one other matters that are or have been before the Courts has been identical in every respect in every appeal and is solely predicated on the contents of the same two documents. *Solesbee*, 438 S.C. at 646-48, 885 S.E.2d at 148-49.

As to the merger argument, Appellant cannot factually distinguish between the issue's presentation in this Appeal and the twenty-one others that have come before it. It should be patently obvious to Appellant, the Court, and any other observer of these matters over the past five years that the Fundamental entities' perpetual appeals of the merger issue are entirely without merit or any hope of success. The inescapable conclusion is that at this point, Appellant's efforts are not made with a good faith belief in a favorable outcome, but are only designed to delay, frustrate, and hopefully demoralize any resident who commences a tort claim against it in circuit court into submission, without any consideration for the accompanying waste of judicial resources.

Appellate courts have inherent power to dismiss appeals that are "manifestly and palpably frivolous and without merit." *Johnson v. St. Paul City Ry. Co.*, 68 Minn. 408, 409, 71 N.W. 619 (Minn. 1897); *Buckner v. Jenkins*, 122 Okla. 105, 251 P. 81 (Okla. 1926); *MacArthur v. San Juan Cnty.*, 495 F.3d 1157, 1161 (10th Cir. 2007). Rule 269, SCACR grants the Court broad and sweeping authority to impose any sanctions called for by the circumstances of the case and necessary to act as a deterrent to further frivolous appeals. *See also Walker v. Health Int'l Corp.*, 845

F.3d 1148, 1157 (Fed. Cir. 2017) ("Sanctions are awarded to compensate the victimized party for the burden of continued litigation in what long ago [was] a settled matter, as well as to discourage frivolous appeals which unnecessarily clog our docket.").

Under these circumstances, dismissal of this Appeal is clearly an appropriate sanction. There is no need for further briefing on a dispositive issue that has already been ruled upon by this Court seventeen times under factually identical circumstances. *See McKinzy v. Kansas City Power & Light Co.*, 367 Fed. App'x 912, 913 (10th Cir. 2010) ("Mr. McKinzy's appeal meets this standard. Not only have we considered and rejected his arguments on two occasions within the last six months, Mr. McKinzy never mentions these decisions, and thus, makes no attempt to distinguish them."). The Supreme Court should not be required to set aside its limited resources, grant certiorari, require the parties to further brief an issue that has already been argued dozens of times, hold oral arguments, and draft its own published opinion to put an end to Appellant's and the Fundamental entities' willful abuse of the Court and its Rules.

While dismissal is called for in this instance, Respondent expects it will not be enough to deter the Appellant's and the Fundamental entities' future conduct. All respondents in the related appeals have thus far been eligible to ask for attorney's fees and costs pursuant to Rule 222, SCACR, after remittitur. However, the looming taxing of costs against Appellant and the Fundamental entities under Rule 222 has done nothing to faze them or discourage their abuse of the appealability statutes and Appellate Court Rules, and in the meantime, the respondents impacted by Appellant's and the Fundamental entities' manipulation of the appellate process have collectively had their right to a speedy resolution of their claims delayed by dozens of years.

A stronger sanction is warranted. The Court should award attorney's fees and costs to Respondent, without the cap imposed by Rule 222, to compensate Respondent for the burden of participating in this frivolous Appeal. Additionally, the Court should treble the attorney's fees and costs to serve as a deterrent to any further, vexatious appeals that are certain to follow if Appellant and the remaining Fundamental entities are permitted to continue to appeal from every order filed by a circuit court in this State denying their motions to compel arbitration based on the merger issue, which has already been adequately addressed by *Solesbee*.

Lastly, the Court should order Appellant to pay a reasonable fine to the Court. These appeals have likely cost the Court itself hundreds of hours of unnecessary work that could have and should have been devoted to appeals that had some likelihood of success, and they surely have added considerable strain to the Court's and Supreme Court's busy appellate docket. Thus, not only has Respondent's and the Court's time and resources been wasted, but also the parties to the numerous other unrelated appeals pending before the Court have had the resolution of their cases unreasonably delayed by the burden placed on the Court by Appellant and the remaining Fundamental entities.

CONCLUSION

The Appellant and other Fundamental entities' continuous pattern of appealing the dispositive merger issue is in reality no different than if a losing party petitioned the Court for rehearing on the same legal issue, based on the same facts, over thirty times in a row. For the foregoing reasons, Respondent respectfully requests that the Court dismiss this Appeal and impose pecuniary sanctions on Appellant. Respondent also requests that the Court hold the remaining briefing deadlines in abeyance until the Court has ruled on Respondent's Motion.

Respectfully submitted,

By:______________________________

October 31, 2024
Hampton, South Carolina

Lee D. Cope
Chelci S. Avant
John E. Parker, Jr.
PARKER LAW GROUP, LLP
Post Office Box 487
Hampton, SC 29924
Phone: (803) 903-1781
lcope@parkerlawgroupsc.com
cavant@parkerlawgroupsc.com
jayparker@parkerlawgroupsc.com

AND

Margie Bright Matthews
BRIGHT MATTHEWS LAW FIRM, LLC
P.O. Box 499
Walterboro, SC 29488

ATTORNEYS FOR RESPONDENT

EXHIBIT 1

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

Heath P. Taylor, Circuit Court Judge

Case No. 2023-CP-18-00722

Beverly Calloway,
as Personal Representative of the Estate of Hattie Admore,

Respondent,

v.

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

Appellants.

NOTICE OF APPEAL

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
James D. Gandy III (SC Bar No. 11925)
T. Ashton Phillips III (SC Bar No. 104227)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
P.O. Box 993 (29402)
Charleston, South Carolina 29401
(843) 720-5488

Attorneys for Appellants

Other Counsel of Record:

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

-and-

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

Attorneys for Respondent

Defendants/Appellants, Oakbrook Healthcare, LLC d/b/a Oakbrook Health and Rehabilitation Center and Patricia Castle ("Appellants"), hereby appeal the following orders of the Honorable Heath P. Taylor, Circuit Court Judge:

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

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

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

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
James D. Gandy III (SC Bar No. 11925)
T. Ashton Phillips III (SC Bar No. 104227)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
P.O. Box 993 (29402)
Charleston, South Carolina 29401
(843) 720-5488

Attorneys for Appellants

Charleston, South Carolina

June 3, 2024

EXHIBIT 2

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2023CP1800722

Beverly Calloway et al
PLAINTIFF(S)

Oakbrook Healthcare Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

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

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

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

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

ORDER INFORMATION

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

For Clerk of Court Office Use Only

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

Hattie Admore Est
Beverly Calloway
Hattie Admore Estate

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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

Dorchester Common Pleas

Case Caption:	Beverly Calloway , plaintiff, et al VS Oakbrook Healthcare Llc , defendant, et al
Case Number:	2023CP1800722
Type:	Order/Electronic Form 4

IT IS SO ORDERED.

Heath P. Taylor

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2023CP1800722

Beverly Calloway et al
PLAINTIFF(S)

Oakbrook Healthcare Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

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

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

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

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

ORDER INFORMATION

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

For Clerk of Court Office Use Only

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

Hattie Admore Est
Beverly Calloway
Hattie Admore Estate

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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

Dorchester Common Pleas

Case Caption: Beverly Calloway , plaintiff, et al VS Oakbrook Healthcare Llc , defendant, et al

Case Number: 2023CP1800722

Type: Order/Electronic Form 4

IT IS SO ORDERED.

Heath P. Taylor

EXHIBIT 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CIVIL ACTION NO.: 2023-CP-18-
BEVERLY CALLOWAY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HATTIE ADMORE.,	))))	
	))	**Summons** *(Jury Trial Requested)*
v.	))	
OAKBROOK HEALTHCARE, LLC, d/b/a OAKBROOK HEALTH AND REHABILITATION CENTER AND PATRICIA CASTLE	)))))	

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to said Complaint on the subscribed at their office, 101 Mulberry Street East, Hampton, South Carolina, within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in this Complaint.

-Signature Page to Follow-

PARKER LAW GROUP, LLP

BY: s/Lee D. Cope

Lee D. Cope
SC Bar # 14361
Chelci Avant
SC Bar # 104067
P.O. Box 487
Hampton, SC 29924
(803) 903-1781

AND

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

ATTORNEYS FOR THE PLAINTIFF

May 8, 2023.
Hampton, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CIVIL ACTION NO.: 2023-CP-18-
BEVERLY CALLOWAY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HATTIE ADMORE.,	)))	
	)))	**Complaint** *(Jury Trial Requested)*
v.	))	
OAKBROOK HEALTHCARE, LLC, d/b/a OAKBROOK HEALTH AND REHABILITATION CENTER AND PATRICIA CASTLE	)))))	

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

1. That the Plaintiff is a citizen and resident of Colleton County State of South Carolina, and brings this action as the Personal Representative of the Estate of Hattie Admore pursuant to the S.C. Code Ann. 15-5-90, the Survival Action Act, on behalf of the statutory beneficiaries of the deceased for all damages authorized by said statute and pursuant to the S.C. Code Ann. 15-51-10, the Wrongful Death Act, and other applicable statutory and/or common law.

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

3. That upon information and belief, Defendant Patricia Castle is upon information and belief a resident of Dorchester County State of South Carolina and was the administrator of the Defendant Oakbrook Health and Rehabilitation Center.

4. That on September 3, 2020, Mrs. Admore was admitted to Oakbrook Health & Rehabilitation Center. She required total care for all daily living activities as well as monitoring her blood sugar.

5. That on admission Mrs. Admore was assessed as being at high risk for pressure injuries and had a Stage II pressure injury to her sacrum measuring .2cm x .2cm.

6. That on September 8, 2020, Mrs. Admore's blood sugar was elevated and she was given insulin. She was rechecked an hour later and it was still elevated. The nurse gave additional units of insulin and was told to continue to monitor every hour.

7. That on September 10, 2020, Mrs. Admore was found non-responsive to verbal stimuli and she was transferred to the hospital.

8. That on September 10, 2020, Mrs. Admore was admitted to Summerville Medical Center with a Stage III pressure sore on her sacrum and hyperkalemia.

9. That on September 17, 2020, Mrs. Admore was readmitted to Oakbrook.

10. That on September 21, 2020, Mrs. Admore's wound on her sacrum was unstageable.

11. That on September 22, 2020, Mrs. Admore's blood sugar was elevated again. She began to vomit and suddenly collapsed. She was sent to Summerville Medical Center.

12. That on admission to the hospital her blood sugar was >600. Shortly after arriving at the hospital, Mrs. Admore went into cardiac arrest.

13. That on September 22, 2020, Mrs. Admore passed away.

<u>FOR A FIRST CAUSE OF ACTION</u>
(Negligence/Gross Negligence)

14. While in the Defendants care, custody and control, Ms. Admore did suffer grave and severe injuries and humiliation at the facility as a direct and proximate result of the

following negligent, reckless, willful, careless, negligent per se and grossly negligent acts of the Defendants, combining and concurring:

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

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

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

d. In failing to implement appropriate skin prevention measures;

e. In failing to accurately assess Mrs. Admore's risk for development and deterioration of pressure injuries;

f. In failing to treat Mrs. Admore's pressure sore;

g. In failing to properly monitor and treat Mrs. Admore's diabetes;

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

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

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

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

l. In failing to implement an appropriate care plan;

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

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

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

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

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

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

-Signature Page to Follow-

PARKER LAW GROUP, LLP

BY: s/Lee D. Cope__

Lee D. Cope
SC Bar # 14361
Chelci Avant
SC Bar #104067
P.O. Box 487
Hampton, SC 29924
(803) 903-1781

AND

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

ATTORNEYS FOR THE PLAINTIFF

May 8, 2023.
Hampton, South Carolina

EXHIBIT 4

Case Name	Appellate Case No.	NOA Date	COA Decision	Decision Date	Cert Petition/Extension Date	Cert Denied	P Attorney
Ladson	2019-001413	8/22/2019	2022-UP-169	4/6/2022	9/15/2022	4/18/2023	Pierce Sloan
Solesbee	2019-001731	10/14/2019	885 S.E.2d 144	1/25/2023	5/15/2023	4/16/2024	Matt Christian
Nanney	2020-000500	3/18/2020	2023-UP-299	8/23/2023	11/21/2023	9/11/2024	Ray Mullman
Daniels	2020-000501	3/18/2020	2022-UP-313	7/27/2022	10/24/2022	5/24/2023	Hughey Law Firm
Estate of Owens	2020-001107	8/12/2020	2023-UP-272	7/19/2023	10/13/2023	4/16/2024	Ray Mullman
Greene	2020-001167	8/19/2020	2023-UP-396	12/13/2023	3/5/2024	10/30/2024	Pro Se
Tisdale	2021-000586	6/2/2021	2024-UP-005	1/3/2024	4/17/2024	10/30/2024	McGowan Hood
Walker	2021-000594	6/4/2021	2023-UP-400	12/13/2023	3/5/2024	10/30/2024	McGowan Hood
White	2021-000700	7/1/2021	2023-UP-393	12/13/2023	3/5/2024	10/30/2024	Strom Law Firm
Dawkins	2021-000707	7/1/2021	2023-UP-392	12/13/2023	3/5/2024	10/30/2024	Jordan Law Center
Stroud	2022-000398	3/30/2022	2024-UP-084	3/20/2024	6/20/2024	10/30/2024	Dan Pruitt
Pace	2022-001059	7/27/2022	2024-UP-261	7/17/2024	10/17/2024	PENDING	Harbin & Burnett
Rahn	2022-001242	9/2/2022	2023-UP-397	12/13/2023	3/5/2024	10/30/2024	PLG
China	2022-001807	12/29/2022	2023-UP-394	12/13/2023	3/5/2024	10/30/2024	Strom Law Firm
Estate of Rice	2023-000432	3/14/2023	2024-UP-083	3/20/2024	6/20/2024	10/30/2024	Matt Christian
Washington	2023-001282	8/10/2023	2024-UP-319	9/25/2024	Pet. for Rehearing	N/A	PLG
McCarson	2023-001371	8/28/2023	2024-UP-320	9/25/2024	Pet. for Rehearing	N/A	PLG
Hutley	2023-001612	10/12/2023	PENDING	N/A	N/A	N/A	Dan Pruitt
Hagood	2023-001712	11/1/2023	PENDING	N/A	N/A	N/A	Kip McAlister
Kilpatrick	2024-000596	4/12/2024	PENDING	N/A	N/A	N/A	PLG
White	2024-000914	6/3/2024	PENDING	N/A	N/A	N/A	PLG
Calloway	2024-000910	6/3/2024	PENDING	N/A	N/A	N/A	PLG

The South Carolina Court of Appeals

Beverly Calloway, as Personal Representative of the Estate of Hattie Admore, Respondent,

v.

Oakbrook Healthcare, LLC, d/b/a Oakbrook Health and Rehabilitation Center and Patricia Castle, Appellants.

Appellate Case No. 2024-000910

EXHIBIT

1.1

ORDER

Respondent moved to dismiss this appeal, for sanctions, and for attorney's fees and costs. Respondent argues this appeal is frivolous, has been taken solely for the purpose of delay, and is unsupported by precedent substantiating Appellants' arguments. Appellants filed a return, opposing dismissal, the imposition of sanctions, and the awarding of costs. Appellants argue the appeal is not frivolous and has not been taken for the purpose of delay. Appellants submit the one published case cited by Respondent either was wrongly decided or does not control the instant appeal. Respondent also filed a reply. After careful consideration, we deny Respondent's motion to dismiss. Further, we deny Respondent's motion for sanctions because we do not believe this appeal is frivolous or has been taken solely for the purpose of delay. *See* Rule 269, SCACR ("Where an appeal, petition, motion[,] or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require."). To the extent Respondent requests attorney's fees and costs separate from its request for sanctions, we deny the request as premature. *See* Rule 222, SCACR ("A party desiring costs to be taxed shall, within fifteen (15) days of the issuance of the remittitur, serve and file a motion requesting that costs be assessed under this Rule.").

FOR THE COURT

Columbia, South Carolina

cc:
Lee Deer Cope, Esquire
Margie Bright Matthews, Esquire
Stephen Lynwood Brown, Esquire
Donald Jay Davis, Jr., Esquire
James D. Gandy, III, Esquire
Ted Ashton Phillips, III, Esquire
Russell Grainger Hines, Esquire
John Elliott Parker, Jr., Esquire

FILED
Mar 05 2025

RECEIVED
Oct 31 2024
SC Court of Appeals

EXHIBIT

2

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Patrick C. Fant, III, Circuit Court Judge

Appellate Case No. 2024-000596

Thomas D. Kilpatrick
As Special Administrator for the Estate of Anthony Lemon, ... Respondent,

v.

Pruitthealth-Ridgeway, LLC f/k/a Unihealth Post-Acute Care-Tanglewood, LLC, United Health Services of South Carolina, Inc., Pruitthealth Consulting Services, Inc., Pruitthealth Therapy Services, Inc. f/k/a United Rehab, Inc., Pruitthealth, Inc., Neil Pruitt, Jr., THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center, THI of South Carolina, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental Clinical Consulting, LLC, Fundamental Long Term Care Holdings, Inc., Fundamental Administrative Services, LLC, and Hunt Valley Holdings, LLC,.. Defendants,

Of which THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center, THI of South Carolina, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental Administrative Services, LLC, and Hunt Valley Holdings, LLC are the .... Appellants.

RESPONDENT'S MOTION TO DISMISS APPEAL AND FOR SANCTIONS

Respondent Thomas D. Kilpatrick as Special Administrator for the Estate of Anthony Lemon respectfully moves the Court pursuant to Rule 269, SCACR, for an Order imposing sanctions on Appellants THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center, THI of South Carolina, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental Administrative Services, LLC, and Hunt Valley Holdings, LLC because this Appeal is frivolous, has been taken solely for the purpose of delay, and is entirely unsupported by any South Carolina precedent substantiating Appellants' arguments concerning the purported merger of Appellants' Arbitration and Admission Agreements. For these and the following reasons, the Court should dismiss the Appeal, impose a fee on Appellants, and award costs and attorney's fees to Respondent as a sanction for Appellants' continued pattern of filing frivolous, vexatious appeals over a specific legal and factual issue that has already been conclusively decided by this Court numerous times.

FACTUAL/PROCEDURAL BACKGROUND

Appellants filed their Notice of Appeal on April 12, 2024, appealing an Order of the Circuit Court filed on March 14, 2024. (Ex. 1, Notice of Appeal). The Order denied Appellants' Motion to Compel Arbitration and Motions to Stay Respondent's wrongful death and survival claims arising from injuries the decedent, a 47-year old man suffering from multiple sclerosis, received while in Appellants' care before he passed away. (Ex. 2, Order; Ex. 3, Compl.). Appellants are part of a constellation of entities that operate, own, and profit from scores of skilled nursing, assisted living, and rehabilitation facilities located in a number of states, including South Carolina, Indiana, Maryland, Nevada, New Mexico, Texas, and Wisconsin.[1] This Appeal, and

[1] This group ("the Fundamental entities"), includes Appellants as well as Fundamental Long Term Care, Inc., THI of South Carolina at Charleston, LLC, THI of South Carolina at

all of the related appeals discussed below and included in Exhibit 4, essentially revolve around a single focused, dispositive issue: whether the Fundamental entities' Admission Agreement and Arbitration Agreement, which have remained identical since at least 2019, merge such that Appellants may avail themselves of an equitable estoppel argument to preclude Respondent, and other individuals representing the interests of vulnerable, elderly residents of the Fundamental entities' facilities, from denying that the subject Arbitration Agreement was signed by someone with actual or apparent authority at the time of admission.[2,3]

Astoundingly, at the time Appellants filed the instant Notice of Appeal, their position and argument regarding the merger of these Agreements had been

---

Magnolia Manor-Inman, LLC, THI of South Carolina at Spartanburg, LLC, THI of South Carolina at Magnolia Manor-Spartanburg, LLC, THI of South Carolina at Greenville, LLC, THI of Baltimore, Inc., Lake Emory Post Acute Care, Oakbrook Healthcare, LLC, St. George Healthcare, LLC, Palmetto Prince George Operating, LLC, Palmetto Health Care, LLC, Palmetto Lake City-Scranton Operating, LLC, Palmetto Hallmark Operating, LLC, and Hallmark Longterm Care, LLC, amongst others. *See Healthcare Facility Locator*, Fundamental, https://fundltc.com/Healthcare%20Facility%20Locator/Facility_Locator.aspx. Appellants are believed to own and/or operate at least 20 facilities within South Carolina. For a brief review of the Fundamental entities and their origins, see *In re Fundamental Long Term Care, Inc.*, 569 B.R. 904 (Bankr. M.D. Fla. 2016).

[2] Appellants' Initial Brief also contains an additional argument that Respondent's wrongful death claim is subject to the Arbitration Agreement; however, this argument does not need to be reached by the Court as the merger argument is dispositive of all remaining arguments encompassed by the Appeal, as has been noted by this Court in numerous prior unpublished decisions. *See, e.g. Stroud for Stroud v. THI of S.C. at Greenville, LLC*, Unpublished Op. No. 2024-UP-084, 2024 WL 1192620, at *1 n.2 (S.C. Ct. App. filed March 20, 2024). An appeal is frivolous in its entirety when an issue or argument necessary to succeed on appeal is supported solely by frivolous arguments. *Thompson v. Ouellette*, 406 Wis.2d 99, 123, 986 N.W.2d 338, 350 (Ct. App. Wis. 2023).

[3] A review of the related appeals shows that it is not uncommon during the Fundamental entities' admissions process for the admissions paperwork and Arbitration Agreement to be signed by a family member or caregiver who is not the resident's attorney-in-fact, conservator, or guardian at the time of admission. It is a foregone legal conclusion that the authority bestowed upon a family member to act on the resident's behalf under the Adult Health Care Consent Act does not include authority to enter an arbitration agreement. *See Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014).

previously reviewed and rejected by this Court ***fourteen times***, in thirteen unpublished decisions and one published opinion, *Estate of Solesbee by Bayne v. Fundamental Clinical and Operational Servs., LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023). (Ex. 4, Spreadsheet of Appeals). These decisions reviewed the exact same Admission Agreement and Arbitration Agreement that are currently before the Court and entailed an analysis of the exact same applicable South Carolina law and general contract principles.[4] More importantly, at the time Appellants filed the instant Notice of Appeal, the Supreme Court of South Carolina had twice denied their petitions seeking certiorari to review those decisions. The Supreme Court has since gone on to deny certiorari to review this Court's binding decision in *Solesbee*.

All told, at the time of the filing of their Notice of Appeal in this action, the Fundamental entities had previously asked this Court and the Supreme Court to review the subject Agreements ***thirty times*** to determine whether they merge such that a plaintiff would be estopped from denying their validity, all without a single successful result. The Court has since filed three more unpublished decisions affirming that the subject Agreements do not merge, and the Supreme Court has denied certiorari on the exact same issue twelve more times, including nine times on the date of this Motion. Previous to the date of the filing of this Motion, the Fundamental entities, on the other hand, had gone on to file two more notices of appeal to this Court, and four more petitions for a writ of certiorari to the Supreme

[4] The merger analysis solely focuses on the language of the agreements that have purportedly merged. *See Solesbee*, 438 S.C. at 648, 885 S.E.2d at 149 ("[B]y their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply.")

Court, totaling ***thirty-seven*** requests over five years (not including petitions for rehearing) for the appellate courts of this State to review a factually identical argument. These protracted appeals, which to a legal certainty are destined for failure, typically delay the underlying litigation for multiple years, and needlessly consume the parties', the Court's, and the Supreme Court's resources and time.

ARGUMENT

Rule 269, SCACR, sets forth the Court's discretionary authority to impose sanctions for frivolous appeals:

> Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case *and discouragement of like conduct in the future may require*.

Rule 269, SCACR (emphasis added). "An appeal is frivolous *if the result is obvious* or the arguments of error are wholly without merit." *Coghlan v. Starkey*, 852 F.2d 806, 811 (5th Cir. 1988) (emphasis added). The dispositive argument that is being raised to the Court in this Appeal is whether the Circuit Court erred in finding that the subject Agreements did not merge pursuant to *Solesbee* as well as the numerous other unpublished decisions of this Court affirming *Solesbee*'s conclusion that the subject Agreements do not merge.

Appellants are likely to take the position that until the Supreme Court publishes an opinion affirming the reasoning of *Solesbee* that any repetitive appeals of the merger issue are not frivolous and have some chance of succeeding on their merits. This ignores that by repeatedly denying certiorari to review the outcome of

Solesbee (a binding, published Opinion), the Supreme Court has essentially conveyed that under these identical facts and Agreements, it does not see a clear legal error that necessitates reversal or an issue of sufficient importance to grant judicial review. After denying certiorari fourteen times, it is no longer reasonable or realistic to expect that things might be different with the Supreme Court on the next go-round.

Additionally, while Appellants' arguments may also incorporate the doctrine of equitable estoppel, which would generally require the Court in each appeal to weigh all the attendant circumstances and equities unique to each case, here, the threshold, dispositive issue is whether the Agreements merged in the first place. Without merger, the Fundamental entities are deprived of the ability to use the estoppel doctrine offensively as a sword against their residents, and the merger analysis in this Appeal and all twenty-one other matters that are or have been before the Courts has been identical in every respect in every appeal and is solely predicated on the contents of the same two documents. *Solesbee*, 438 S.C. at 646-48, 885 S.E.2d at 148-49.

As to the merger argument, Appellants cannot factually distinguish between the issue's presentation in this Appeal and the nineteen others that have come before it. It should be patently obvious to Appellants, the Court, and any other observer of these matters over the past five years that the Fundamental entities' perpetual appeals of the merger issue are entirely without merit or any hope of success. The inescapable conclusion is that at this point, Appellants' efforts are not made with a good faith belief in a favorable outcome, but are only designed to delay, frustrate, and hopefully demoralize any resident who commences a tort claim against them in circuit court into submission, without any consideration for the accompanying waste of judicial resources.

Appellate courts have inherent power to dismiss appeals that are "manifestly and palpably frivolous and without merit." *Johnson v. St. Paul City Ry. Co.*, 68 Minn. 408, 409, 71 N.W. 619 (Minn. 1897); *Buckner v. Jenkins*, 122 Okla. 105, 251 P. 81 (Okla. 1926); *MacArthur v. San Juan Cnty.*, 495 F.3d 1157, 1161 (10th Cir. 2007). Rule 269, SCACR grants the Court broad and sweeping authority to impose any sanctions called for by the circumstances of the case and necessary to act as a deterrent to further frivolous appeals. *See also Walker v. Health Int'l Corp.*, 845 F.3d 1148, 1157 (Fed. Cir. 2017) ("Sanctions are awarded to compensate the victimized party for the burden of continued litigation in what long ago [was] a settled matter, as well as to discourage frivolous appeals which unnecessarily clog our docket.").

Under these circumstances, dismissal of this Appeal is clearly an appropriate sanction. There is no need for further briefing on a dispositive issue that has already been ruled upon by this Court seventeen times under factually identical circumstances. *See McKinzy v. Kansas City Power & Light Co.*, 367 Fed. App'x 912, 913 (10th Cir. 2010) ("Mr. McKinzy's appeal meets this standard. Not only have we considered and rejected his arguments on two occasions within the last six months, Mr. McKinzy never mentions these decisions, and thus, makes no attempt to distinguish them."). The Supreme Court should not be required to set aside its limited resources, grant certiorari, require the parties to further brief an issue that has already been argued dozens of times, hold oral arguments, and draft its own published opinion to put an end to Appellants' willful abuse of the Court and its Rules.

While dismissal is called for in this instance, Respondent expects it will not be enough to deter the Fundamental entities' future conduct. All respondents in the related appeals have thus far been eligible to ask for attorney's fees and costs pursuant to Rule 222, SCACR, after remittitur. However, the looming taxing of costs against the Fundamental entities under Rule 222 has done nothing to faze them or discourage their abuse of the appealability statutes and Appellate Court Rules, and in the meantime, the respondents impacted by Appellants' and the Fundamental entities' manipulation of the appellate process have collectively had their right to a speedy resolution of their claims delayed by dozens of years.

A stronger sanction is warranted. The Court should award attorney's fees and costs to Respondent, without the cap imposed by Rule 222, to compensate Respondent for the burden of participating in this frivolous Appeal. Additionally, the Court should treble the attorney's fees and costs to serve as a deterrent to any further, vexatious appeals that are certain to follow if Appellants and the remaining Fundamental entities are permitted to continue to appeal from every order filed by a circuit court in this State denying their motions to compel arbitration based on the merger issue, which has already been adequately addressed by *Solesbee*.

Lastly, the Court should order Appellants to pay a reasonable fine to the Court. These appeals have likely cost the Court itself hundreds of hours of unnecessary work that could have and should have been devoted to appeals that had some likelihood of success, and they surely have added considerable strain to the Court's and Supreme Court's busy appellate docket. Thus, not only has Respondent's and the Court's time and resources been wasted, but also the parties to the numerous other unrelated appeals pending before the Court have had the resolution of their cases unreasonably delayed by the burden placed on the Court by Appellants and the remaining Fundamental entities.

CONCLUSION

The Appellants and other Fundamental entities' continuous pattern of appealing the dispositive merger issue is in reality no different than if a losing party petitioned the Court for rehearing on the same legal issue, based on the same facts, over thirty times in a row. For the foregoing reasons, Respondent respectfully requests that the Court dismiss this Appeal and impose pecuniary sanctions on Appellants. Respondent also requests that the Court hold the remaining briefing deadlines in abeyance until the Court has ruled on Respondent's Motion.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

By:______________________________

October 30, 2024
Ridgeland, South Carolina

Neil E. Alger
John E. Parker, Jr.
PARKER LAW GROUP, LLP
Post Office Box 2530
Ridgeland, SC 29936
Phone: (803) 943-2111
nalger@parkerlawgroupsc.com
jayparker@parkerlawgroupsc.com

ATTORNEYS FOR RESPONDENT

EXHIBIT 1

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Fairfield County
Court of Common Pleas

Patrick C. Fant, III, Circuit Court Judge

Case No. 2023-CP-20-00268

Thomas D. Kilpatrick
as Special Administrator for the Estate of Anthony Lemon,

Respondent,

v.

Pruitthealth - Ridgeway, LLC f/k/a Unihealth Post-Acute Care - Tanglewood, LLC, United Health Services of South Carolina, Inc., Pruitthealth Consulting Services, Inc., Pruitthealth Therapy Services, Inc. f/k/a United Rehab, Inc., Pruitthealth, Inc., Neil Pruitt, Jr., THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center, THI of South Carolina, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental Clinical Consulting, LLC, Fundamental Long Term Care Holdings, Inc., Fundamental Administrative Services, LLC, and Hunt Valley Holdings, LLC,

Defendants,

Of whom THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center, THI of South Carolina, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental Administrative Services, LLC, and Hunt Valley Holdings, LLC, are

Appellants.

NOTICE OF APPEAL

**Counsel identified on the next page*

CLEMENT RIVERS, LLP
D. Jay Davis, Jr. (SC Bar No. 12084)
jdavis@ycrlaw.com
Stephen L. Brown (SC Bar No. 66468)
sbrown@ycrlaw.com
Matthew O. Riddle (SC Bar No. 76650)
mriddle@ycrlaw.com
Gaillard T. Dotterer, III (SC Bar No. 103620)
gdotterer@ycrlaw.com
Russell G. Hines (SC Bar No. 72100)
rhines@ycrlaw.com
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellants

Other Counsel of Record:

PARKER LAW GROUP, LLP
Neil E. Alger (SC Bar No. 100530)
nalger@parkerlawgroupsc.com
690 N. Green Street
Ridgeland, South Carolina 29936
P.O. Box 2530
(803) 943-2111

Attorney for Respondent

SMYTH WHITLEY, LLC
Joshua S. Whitley (SC Bar No. 77826)
jwhitley@smythwhitley.com
Allie A. Maples (SC Bar No. 105526)
amaples@smythwhitley.com
126 Seven Farms Drive, Suite 260
Charleston, South Carolina 29492
(843) 606-5635

Attorneys for Defendants Pruitthealth - Ridgeway, LLC f/k/a Unihealth Post-Acute Care - Tanglewood, LLC, United Health Services of South Carolina, Inc., Pruitthealth Consulting Services, Inc., Pruitthealth Therapy Services, Inc. f/k/a United Rehab, Inc., Pruitthealth, Inc., Neil Pruitt, Jr.

Defendants/Appellants THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center, THI of South Carolina, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental Administrative Services, LLC, and Hunt Valley Holdings, LLC (collectively, "Appellants"), hereby appeal the following order of the Honorable Patrick C. Fant, III, Circuit Court Judge:

- **Order Denying Motion to Compel Arbitration & Motions to Stay,** filed March 14, 2024.

A copy of the appealed order is attached hereto and incorporated herein by reference. Appellants received written notice of entry of the order on March 14, 2024.

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines

D. Jay Davis, Jr. (SC Bar No. 12084)
jdavis@ycrlaw.com
Stephen L. Brown (SC Bar No. 66468)
sbrown@ycrlaw.com
Matthew O. Riddle (SC Bar No. 76650)
mriddle@ycrlaw.com
Gaillard T. Dotterer, III (SC Bar No. 103620)
gdotterer@ycrlaw.com
Russell G. Hines (SC Bar No. 72100)
rhines@ycrlaw.com
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellants

Charleston, South Carolina

April 12, 2024

EXHIBIT

2

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD	CIVIL ACTION NO.: 2023-CP-20-00268
THOMAS D. KILPATRICK AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ANTHONY LEMON, Plaintiff, v. PRUITTHEALTH - RIDGEWAY, LLC F/K/A UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC., PRUITTHEALTH THERAPY SERVICES, INC. F/K/A UNITED REHAB, INC., PRUITTHEALTH, INC., NEIL PRUITT, JR., THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL CLINICAL CONSULTING, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC, Defendants.	**ORDER DENYING MOTION TO COMPEL ARBITRATION & MOTIONS TO STAY**

This matter came before the Court on February 29, 2024, on a Motion to Compel Arbitration filed by Defendant THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center ("Midlands") pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA") and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure and related motions to stay this litigation pending the outcome of the arbitration that Midlands seeks to compel by Defendants THI of South Carolin, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental

Administrative Services, LLC, and Hunt Valley Holdings, LLC (collectively, the "Motions to Stay").[1] Present at the hearing and arguing on behalf of the moving parties was Russell G. Hines. Appearing and arguing on behalf of Plaintiff was Neil E. Alger. After reviewing the submissions of the parties, the pleadings, and hearing the arguments of counsel, the Court denies Midlands' Motion to Compel Arbitration for the reasons set forth herein[2] and, in turn, denies the Motions to Stay.

The Court notes that in oral argument, there was no mentionable dispute as to the facts presented by either Plaintiff or Midlands; even to the extent that Plaintiff presented facts that Midlands had not, Midlands did not present competent evidence to dispute Plaintiff's evidence. The Court adopts the following undisputed facts for its ruling. The Plaintiff in this wrongful death and survival action is Thomas D. Kilpatrick, an attorney appointed by Probate who is an unrelated and uninvolved person in the underlying dispute. Mr. Kilpatrick commenced this action by filing a Notice of Intent on April 3, 2023, followed by a Summons and Complaint on August 31, 2023, alleging wrongful death and survival claims as a result of the care and treatment provided to Mr. Lemon while he was a resident at Midlands' assisted living facility. Specifically, Mr. Lemon developed serious pressure injuries and bedsores between June and July of 2020 after being assessed as a high-risk for pressure injuries by Midlands. Mr. Lemon passed away on July 30, 2021. On January 2, 2024, Midlands filed a Motion to

[1] Midlands' Motion to Compel Arbitration and the Motions to Stay were all filed on January 2, 2024, and heard together on February 29, 2024. The Motions to Stay are based on Section 3 of the FAA. 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."); *see also Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties."). Accordingly, the success of the Motions to Stay is tied to the success of Midlands' Motion to Compel Arbitration, and the denial of Midlands' Motion to Compel Arbitration requires the denial of the Motions to Stay.

[2] Plaintiff submitted with his Memorandum in Opposition twelve unpublished opinions of the Court of Appeals. The arguments presented to the Court by Midlands' motion are in large part analogous to those presented in the unpublished opinions. The unpublished opinions denied arbitration based on well-established precedent from other published opinions of the S.C. appellate courts which are referenced herein.

Compel Arbitration, relying on an Arbitration Agreement that was signed individually by the mother of Mr. Lemon, Ms. Minnie Gamble dated January 9, 2012. As noted above, Ms. Gamble held no power of attorney for Mr. Lemon and is not a party to the present action.

The basis of Midlands' Motion is that a valid and enforceable arbitration agreement exists between the parties. The Arbitration Agreement relied upon by Midlands was signed by the decedent's mother, Minnie Gamble, at the time of his admission to Midlands' facility, and it appears that no valid power of attorney was relied on by Midlands. No power of attorney of any sort has been presented in this matter. Evidence presented by Plaintiff indicates that the decedent was suffering from multiple sclerosis which impacted him physically, but the records indicated that he had the mental capacity to sign the facility's Admission Agreement or Arbitration Agreement at the time he was admitted. While the Court recognizes the arguments offered by Midlands for presumptions in favor of arbitration, this Court's analysis begins and ends by answering the threshold inquiry that there is not a legally enforceable arbitration agreement.

At the outset, Ms. Gamble did not have any authority to enter the Admission Agreement and Arbitration Agreements on the decedent's behalf under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10 *et seq* because it is indicated that Decedent had his cognitive ability. Under the Act, an individual is only authorized to make health care decisions on behalf of an ***incapacitated*** adult. S.C. Code Ann. § 44-66-30. Therefore, based on the evidence before the Court, it appears that Ms. Gamble did not even have authority to make health care decisions on behalf of the decedent at the time of admission, much less the authority to waive his estate's right to a jury trial.

Even if Ms. Gamble had authority under the Act to enter the Admission Agreement in furtherance of the decedent's health care needs, it does not necessarily follow that she had authority to enter a separate Arbitration Agreement under the Act. Therefore, the Court must determine (1) if the

Arbitration Agreement merged with and was a part of the Admission Agreement such that Plaintiff in her capacity as personal representative would be equitably estopped from denying the Arbitration Agreement's validity, and (2) if Ms. Gamble had actual or apparent authority to enter the Arbitration Agreement on behalf of the decedent. The Court finds the answer to both inquiries is "no".

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

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

Midlands' Arbitration Agreement is admittedly optional, and separate from its Admission Agreement, and contains no provision for medical, nursing, or health care services to be provided to residents, nor does it require any financial commitment to pay for such services. The agreement is separately titled "Facility – Resident/Representative Arbitration Agreement", is paginated as "Page 1 of 1", and contains its own signature lines. The agreement is signed by Ms. Gamble as "Resident/Representative." Further, the Arbitration Agreement by its very language distinguishes between itself and the Admission Agreement, stating that the Arbitration Agreement will survive any "breach of this Agreement or the Admission Agreement." While the Admission Agreement purports to incorporate admissions materials into itself "by reference herein", when viewed alongside the other details of the agreements, it creates at best an ambiguity as to merger when taken in context of the totality of the circumstances, and "the law is clear that any ambiguity in such a clause is construed against the drafter", i.e., Midlands. *See Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

In sum, the Act provides statutory authority for family members to make an incapacitated loved one's health care decisions. Thus, the only authority to enter into agreements to arbitrate is reserved for powers of attorney or other legal instruments outlined in the probate code which are not present in this case. As previously stated, the Act is not applicable because it is apparent that Decedent maintained his cognitive ability, but even if it is determined that the Act was applicable, then it is doubtful in this case that there ever was a valid conferral of authority under the Act for executing this Arbitration Agreement. Aside from the Act, Ms. Gamble in her individual capacity had no legal authority to sign the Arbitration Agreement in a representative capacity for the Decedent as she apparently did not possess or present Midlands with documentation demonstrating power of attorney or guardianship. This lack of documentation is clearly indicative that Midlands knew or should have known that Ms. Gamble lacked authority, and there is no evidence in the record that indicates that Midlands made any effort to verify or validate the authority that Midlands is now asserting Ms. Gamble possessed. Since Ms. Gamble lacked legal authority, the Arbitration Agreement is void and unenforceable.

Further, Plaintiff cannot be equitably estopped from denying enforcement of the Arbitration Agreement. "Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements." *Kelly v. Logan, Jollev & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Without any further analysis, Midlands has not carried its burden by presenting this Court with any evidence aside from the Arbitration Agreement and Admission Agreement. Midlands has not submitted any affidavits or competent evidence that carries its burden of proof to factually satisfy this argument asserting equitable estoppel. As a legal matter, Midlands has not and cannot meet its burden to establish these elements, primarily because Midlands cannot prove it lacked the means of knowledge of the truth of the facts in question. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

In this case, Midlands had the ability to determine whether Ms. Gamble had authority to sign an arbitration agreement on Decedent's behalf. In fact, Midlands is a residential care facility that regularly engages in the admission and contract process. First, under the Adult Healthcare Consent Act, Midlands had a duty to undertake and document its efforts to ascertain whether Ms. Gamble or someone else had priority and authority under the Act to make Decedent's health care decisions, and it failed to do so. Second, Decedent had his mental capacity and according to the evidence in the record, he was capable of providing his own acquiescence to these agreements which he did not and Midlands circumvented his own authority by having Ms. Gamble act as a signatory. Midlands is a sophisticated business entity frequently interacting with residents and their families during the rehabilitation center admission process. Midlands is or should be familiar with the legal concepts of guardianship and powers-of-attorney. Midlands had the ability to ask Ms. Gamble whether she was Decedent's attorney-in-fact, to determine if Decedent had his mental capacity, to determine if some other legal authority existed, and it had the ability to request supporting documentation proving authority. No evidence is in the record that Midlands appropriately complied with these inquiries. Since Midlands has not cited or provided evidence on this element of equitable estoppel, Plaintiff is not equitably estopped from denying the Arbitration Agreement. Further, the Admission Agreement and Arbitration Agreement are separate contracts that do not merge. *See Hodge v. UniHealth Post-Acute Care of Bamberg LLC*, 422 S.C. 544, 561-63, 813 S.E.2d 292, 308 (Ct. App. 2018); *Thompson v. Pruitt Corp*, 416 S.C. 43, 50, 784 S.E.2d 679, 683 (Ct. App. 2016); *Coleman*, 407 S.C. at 352, 755 S.E.2d at 450.

Midlands' assertion that Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement seems to hinge on a direct benefits theory of estoppel, i.e., that since Decedent benefited from the terms of the Admission Agreement, the personal representative of his estate should be estopped from denying the validity of the Arbitration Agreement. *See Wilson v. Willis*, 426 S.C. 326, 340, 827 S.E.2d 167, 175 (2019). Virtually all of the Circuit Court orders filed by Midlands in support of its Motion rely in some form or another on this theory. However, as the Supreme Court explained in *Wilson*, to successfully assert direct benefits estoppel, the arbitration agreement must be a clause within the larger admissions agreement, and the plaintiff must be seeking to assert causes of action that arise from and are created by the contract. Here, as explained above and below, the Admission Agreement and optional Arbitration Agreement are separate documents that did not merge. Second, Plaintiff does not assert breach of contract, or a violation of contractual duties, and instead has brought her lawsuit under a negligence theory arising from common law duties. *See Wilson*, 426 S.C. at 342, 827 S.E.2d at 176. Incidentally, Plaintiff's claims are indirectly related to the Arbitration Agreement, as it was optional, ancillary to, and separate from the Admission Agreement. *See id.*

(stating that under direct benefits estoppel a non-signatory's claim must be directly, not just indirectly, based on the contract containing the arbitration agreement).

Additionally, Plaintiff did not have any authority to enter the Arbitration Agreement. The legal consequences of an agent's actions can only be attributed to the principal when the agent has actual or apparent authority. *Charleston Registry v. Young Clement*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). South Carolina law requires that to prove apparent authority, the defendant must show that the purported principal consciously or impliedly represented another to be his agent. *Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). Once again, Midlands has not provided this Court with any competent evidence that is persuasive for establishing common law agency. The simple fact that Ms. Gamble signed the agreements so that her son could be admitted to Midlands' facility and receive health care in no way indicates a manifestation of authority by Decedent to waive his right to a jury trial or agree to arbitration. Neither the Admission Agreement, nor the Arbitration Agreement, offer any probative evidence indicating Decedent's intention. Midlands has not come forward with any evidence that Decedent ever manifested any form of assent establishing Ms. Gamble as his agent and accordingly, Midlands has failed to meet its burden of proof.

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

Based on the tenants of contract law, this Court is not convinced that this agreement is enforceable. The necessary elements of a contract are an offer, acceptance, and valuable consideration. *Sauner v. Pub. Serv. Auth. Of S.C.*, 354 S.C. 397, 406 (2003). 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. This Arbitration Agreement has no direct mention of consideration. Midlands has argued that the arbitration agreement is a bilateral contract and consideration is provided through the exchanging of promises to enter into arbitration. The S.C. Supreme Court held long ago:

> A promise may constitute the consideration for another promise. But a promise is not a good consideration for a promise unless there is absolutely ***mutuality of the engagement***, so that each party has the right to hold the other to a positive agreement. ***In case the promise of one of the parties impose no legal duty upon the party making it, such promise furnishes no consideration for a promise.***

Int'l Shoe Co. v. Herndon, 135 S.E. 202, 205 (1926) (emphasis added) (*citing* Elliott on Contracts, vol. 1, § 231). Although Midlands has argued that both parties are forfeiting their right to trial by jury for binding arbitration, the reality is that the obligation and detriment falls almost exclusively on the resident. *Id.* The reality is that no duty is owed by the resident to the nursing home facility other than to pay one's bills which happens to be exclusively related to the admission agreement, not the arbitration agreement; the two agreements do not merge. Midlands is unable to articulate or provide this court with any evidence of consideration for the Arbitration Agreement, and therefore, the arbitration agreement fails as a matter of law.

Lastly, it is doubtful that the scope of the Arbitration Agreement, even if it was valid, would cover wrongful death claims asserted on behalf of a decedent's statutory beneficiaries. That is because the wrongful death claim belongs solely to the wrongful death beneficiaries, and is brought only on their behalf by the personal representative of the estate. S.C. Code Ann. §§ 15-51-10 and -20; *Self v. Goodrich*, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App. 1989). The statutory beneficiaries are non-signatories to the Arbitration and Admission Agreements, regardless of whether the Arbitration Agreement purports to include "any alleged tort, personal injury, negligence, or other claim" "arising out of or relating to Facility's Admission Agreement." Therefore, if the Arbitration Agreement were valid, which it is not, the wrongful death beneficiaries would only be bound to its terms as third-party beneficiaries.

A third-party beneficiary may only be bound by an arbitration agreement if it is attempting to enforce the contract containing the arbitration agreement. *Thompson*, 426 S.C. at 57, 784 S.E.2d at 687. Here, the Arbitration Agreement is a standalone document not contained within the Admission Agreement, and the wrongful death beneficiaries are not attempting to enforce the Admission Agreement or Arbitration Agreement. Instead, they are seeking to recover under the wrongful death scheme for Midlands' breach of common law duties arising from its care for Decedent. Thus, even if the Arbitration Agreement is valid and enforceable, it would only reach the survival claim of the estate, and not any wrongful death claims brought on behalf of the statutory beneficiaries. This conclusion comports with the law of other state jurisdictions. *See FutureCare NorthPoint, LLC v. Peeler*, 143 A.3d 191, 209-10, 213 (Md. App. 2016); *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 494 n. 1 (Pa. 2016) (citing *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 660 (Pa. Super. 2013)); *Boler v. Sec. Health Care, LLC*, 336 P.3d 468, 477 (Okla. 2014); *Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc.*, 316 P.3d 607, 614 (Ariz. Ct. App. 2014); *Daniels v. Sunrise Sr. Living, Inc.*, 212 Cal. App. 4th 674, 151 Cal. Rptr. 3d 273 (2013); *Carter v. SSC Odin Operating Co, LLC*, 976 N.E.2d 344, 355-58 (Ill. 2012); *Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581 (Ky. 2012); *Woodall v. Avalon Care Center-Federal Way, LLC*, 231 P.3d 1252 (Wash. App. 2010); *Lawrence v.*

Beverly Manor, 273 S.W.3d 525 (Mo. 2009); *Bybee v. Abdulla*, 189 P.3d 40 (Utah 2008); *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258, 1262 (Ohio 2007); *Chapman v. Cardiac Pacemakers, Inc.*, 673 P.2d 385 (Idaho 1983); *see also Strickholm v. Evangelical Lutheran Good Samaritan Soc'y*, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011). However, since it is not valid, this Court will not compel arbitration of the wrongful death or survival claims in this action.

Based on the foregoing authorities and findings, the Court denies Midlands' Motion to Compel Arbitration. This Court's denial of Midlands' motion is based entirely on South Carolina law and the failure of Midlands to meet its burden of persuasion for the enforceability of the contract that has been presented to this Court. In recognition of its contractual origins and limitations, Section 2 of the FAA dictates that arbitration agreements "shall be valid, irrevocable, and enforceable, ***save upon such grounds as exist at law or in equity for the revocation of any contract***." 9 U.S.C. § 2. (emphasis added). This Court's ruling in no way relies on or contravenes any presumption or the auspices of the FAA, but rather, as the FAA directs on the basis of law and equity, the Court finds that this Arbitration Agreement is not valid or enforceable.

And having thus determined that Midlands' Motion to Compel Arbitration should be denied, the Motions to Stay must be denied, too.

THEREFORE, IT IS ORDERED that the Midlands' Motion to Compel Arbitration and the Motions to Stay are DENIED.

IT IS SO ORDERED.

3/14/24

The Honorable Patrick C. Fant, III
Presiding Court Judge

Fairfield Common Pleas

Case Caption: Thomas D Kilpatrick , plaintiff, et al VS Pruitthealth Ridgeway L L C , defendant, et al

Case Number: 2023CP2000268

Type: Order/Other

So Ordered

Patrick C. Fant, III

EXHIBIT 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD	)	CIVIL ACTION NO.: 2023-CP-20-
THOMAS D. KILPATRICK AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ANTHONY LEMON,	)	
Plaintiff,	)	**SUMMONS** (Jury Trial Requested)
v.	)	
PRUITTHEALTH - RIDGEWAY, LLC F/K/A UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC., PRUITTHEALTH THERAPY SERVICES, INC. F/K/A UNITED REHAB, INC., PRUITTHEALTH, INC., NEIL PRUITT, JR., THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL CLINICAL CONSULTING, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC,	)	
Defendants.	)	

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at 690 North Green Street, Post Office Box 2530, Ridgeland, SC 29936, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

PARKER LAW GROUP, LLP

BY: *s/Neil E. Alger*
Neil E. Alger, Esquire
Bar # 100530
P.O. Box 2530
Ridgeland, SC 29936

ATTORNEY FOR PLAINTIFF

August 31, 2023
Ridgeland, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF FAIRFIELD THOMAS D. KILPATRICK AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ANTHONY LEMON, Plaintiff, v. PRUITTHEALTH - RIDGEWAY, LLC F/K/A UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC., PRUITTHEALTH THERAPY SERVICES, INC. F/K/A UNITED REHAB, INC., PRUITTHEALTH, INC., NEIL PRUITT, JR., THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL CLINICAL CONSULTING, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC, Defendants.	)	IN THE COURT OF COMMON PLEAS CIVIL ACTION NO.: 2023-CP-20- **<u>COMPLAINT</u>** *(Jury Trial Demanded)*

The Plaintiff alleges:

1. That the Decedent, Anthony Lemon, was a citizen and resident of the County of Richland, State of South Carolina.

2. That Thomas D. Kilpatrick, an estate planning attorney, has been appointed the Special Administrator of the Estate of Anthony Lemon and brings this action pursuant to the S.C. Code Ann. 15-51-10, the Wrongful Death Act, and other applicable statutory and/or common law.

3. That upon information and belief, Defendant, Pruitthealth – Ridgeway, LLC f/k/a Unihealth Post-Acute Care – Tanglewood, LLC, is a limited liability corporation organized and existing pursuant to the laws of the State of South Carolina with its principal place of business in the County of Fairfield, South Carolina.

4. That upon information and belief, Defendant, United Health Services of South Carolina, Inc., is a limited liability corporation organized and existing pursuant to the laws of the State of South Carolina and provides services in the County of Fairfield, South Carolina.

5. That upon information and belief, Defendant, Pruitthealth Consulting Services, Inc., is a foreign corporation believed to be organized under the laws of the State of Georgia and provides services in the County of Fairfield, South Carolina.

6. That upon information and belief, Defendant, Pruitthealth Therapy Services, Inc. f/k/a United Rehab, Inc., is a foreign corporation believed to be organized under the laws of the State of Georgia and provides services in the County of Fairfield, South Carolina.

7. That upon information and belief, Defendant, Pruitthealth, Inc., is a foreign corporation believed to be organized under the laws of the State of Georgia and provides services in the County of Fairfield, South Carolina.

8. That upon information and belief, Defendant, Neil Pruitt, Jr., is a resident of Georgia and is the licensee responsible for the overall management and operation of the Pruitthealth – Ridgeway facility.

9. That collectively, the Defendants named in numbers 3 through 8, own, control, operate, and manage the Defendants' business and facilities including Pruitthealth - Ridgeway (hereinafter referred to as "Pruitt") where some of the allegations contained herein occurred; that these Defendants

controlled the care and treatment services that were provided, and were responsible for the operational outcomes that occurred

10. That upon information and belief, Defendant THI of South Carolina at Columbia, LLC, is a foreign corporation believed to be organized under the laws of the State of Delaware and doing business as Midlands Health and Rehabilitation Center with its principal place of business in the County of Richland, South Carolina.

11. That upon information and belief, Defendant THI of South Carolina, LLC, is a foreign corporation believed to be organized under the laws of the State of Delaware and provides services in the County of Richland, South Carolina.

12. That upon information and belief, Defendant, Fundamental Clinical and Operational Services, LLC, is a foreign corporation believed to be organized under the laws of the State of Delaware and provides services in the County of Richland, South Carolina.

13. That upon information and belief, Defendant, Fundamental Clinical Consulting, LLC, is a foreign corporation believed to be organized under the laws of the State of Delaware and provides services in the County of Richland, South Carolina.

14. That upon information and belief, Defendant, Fundamental Long Term Care Holdings, Inc., is a foreign corporation believed to be organized under the laws of the State of Delaware and provides services in the County of Richland, South Carolina.

15. That upon information and belief, Defendant, Fundamental Administrative Services, LLC, is a foreign corporation believed to be organized under the laws of the State of Delaware and provides services in the County of Richland, South Carolina.

16. That upon information and belief, Defendant, Hunt Valley Holdings, LLC, is a foreign corporation believed to be organized under the laws of the State of Delaware and provides services in the County of Richland, South Carolina.

17. That collectively, the Defendants named in numbers 10 through 16, own, control, operate, and manage the Defendants' business and facilities including Midlands Health and Rehabilitation Center (hereinafter referred to as "Midlands") where some of the allegations contained herein occurred; that these Defendants controlled the care and treatment services that were provided, and were responsible for the operational outcomes that occurred.

FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS, THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL CLINICAL CONSULTING, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC
(Negligence/Gross Negligence)

18. That Mr. Lemon was admitted into Defendants' facility, Midlands, on or around May 8, 2017; that Mr. Lemon was 47 years old and had a diagnosis of Multiple Sclerosis.

19. That while a resident at the Defendants' facility, Mr. Lemon required skilled nursing care from the staff at the nursing home as well as assistance with daily living activities, including assistance with eating.

20. That Mr. Lemon was at risk for falls, skin breakdown and aspiration.

21. That upon entry into the Defendants' facility, Mr. Lemon was without compromise to his skin or tissue; that during his stay he was supposed to have been cared for by the Defendants, yet Mr. Lemon developed avoidable pressure sores.

22. That between the months of July and September 2017, Mr. Lemon developed two unstageable pressure sores to his right and left heels. These sores eventually healed.

23. That Defendants knew or should have known that Mr. Lemon was high risk for pressure sores.

24. That Defendants knew or should have known that skin assessments for Mr. Lemon were required by the standard of care.

25. That according to the skin assessments contained within the chart, staff of Midlands stopped performing skin assessments on or around July 2020.

26. That on multiple occasions, Mr. Lemon was noted to choke on his food; however, staff of Midlands failed to assess his lungs, failed to update his care plan and failed to alert his physician.

27. That on or around July 31, 2020, Mr. Lemon's temperature was elevated and was given Tylenol by the staff of Midlands.

28. That on or around July 31, 2020, Mr. Lemon was admitted into Providence Hospital in Columbia, located in the County of Richland, South Carolina, presenting hypotension, tachycardia and dehydration.

29. Upon his admittance into the hospital, the staff at Providence Hospital discovered that Mr. Lemon had developed sepsis due to a sacral wound infection.

30. That on or around August 3, 2020, Mr. Lemon was discharged from Providence Hospital and admitted into Pruitthealth – Ridgeway.

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

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

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

c. In failing to properly document changes in Mr. Lemon's condition;

d. In failing to implement appropriate skin prevention measures;

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

f. In failing to properly monitor Mr. Lemon;

g. In failing to complete a timely assessment;

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

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

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

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

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

FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANTS, PRUITTHEALTH - RIDGEWAY, LLC F/K/A UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC., PRUITTHEALTH THERAPY SERVICES, INC. F/K/A UNITED REHAB, INC., PRUITTHEALTH, INC., AND NEIL PRUITT, JR.
(Negligence/Gross Negligence)

32. Upon his admittance to Pruitt, staff treated Mr. Lemon's sacral wound.

33. That on or around September 1, 2020, Mr. Lemon's sacral wound resolved.

34. That Mr. Lemon remained a resident of PruittHealth – Ridgeway; that as a result of repeated neglect, he was transferred to Prisma Health Richland hospital.

35. That on or around July 30, 2021, Mr. Lemon died while a patient at Prisma Health Richland in Columbia, located in the County of Richland, South Carolina.

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

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

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

c. In failing to properly document changes in Mr. Lemon's condition;

d. In failing to implement appropriate skin prevention measures;

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

f. In failing to properly monitor Mr. Lemon;

g. In failing to complete a timely assessment;

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

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

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

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

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

37. That by reason and in consequence of the aforesaid negligent, careless, reckless, willful, wanton and grossly negligent conduct of the Defendants, Mr. Lemon sustained serious and severe injuries; that the above injuries were of such a nature as to require him to spend money for hospitalization, doctor's care and other medical necessities; that Mr. Lemon suffered great pain, humiliation and mental anguish.

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

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

PARKER LAW GROUP, LLP

BY: *s/Neil E. Alger*
Neil E. Alger, Esquire
Bar # 100530
P.O. Box 2530
Ridgeland, SC 29936

ATTORNEY FOR PLAINTIFF

August 31, 2023
Ridgeland, South Carolina

EXHIBIT 4

Case Name	Appellate Case No.	NOA Date	COA Decision	Decision Date	Cert Petition/Extension Date	Cert Denied	P Attorney
Ladson	2019-001413	8/22/2019	2022-UP-169	4/6/2022	9/15/2022	4/18/2023	Pierce Sloan
Solesbee	2019-001731	10/14/2019	885 S.E.2d 144	1/25/2023	5/15/2023	4/16/2024	Matt Christian
Nanney	2020-000500	3/18/2020	2023-UP-299	8/23/2023	11/21/2023	9/11/2024	Ray Mullman
Daniels	2020-000501	3/18/2020	2022-UP-313	7/27/2022	10/24/2022	5/24/2023	Hughey Law Firm
Estate of Owens	2020-001107	8/12/2020	2023-UP-272	7/19/2023	10/13/2023	4/16/2024	Ray Mullman
Greene	2020-001167	8/19/2020	2023-UP-396	12/13/2023	3/5/2024	10/30/2024	Pro Se
Tisdale	2021-000586	6/2/2021	2024-UP-005	1/3/2024	4/17/2024	10/30/2024	McGowan Hood
Walker	2021-000594	6/4/2021	2023-UP-400	12/13/2023	3/5/2024	10/30/2024	McGowan Hood
White	2021-000700	7/1/2021	2023-UP-393	12/13/2023	3/5/2024	10/30/2024	Strom Law Firm
Dawkins	2021-000707	7/1/2021	2023-UP-392	12/13/2023	3/5/2024	10/30/2024	Jordan Law Center
Stroud	2022-000398	3/30/2022	2024-UP-084	3/20/2024	6/20/2024	10/30/2024	Dan Pruitt
Pace	2022-001059	7/27/2022	2024-UP-261	7/17/2024	10/17/2024	PENDING	Harbin & Burnett
Rahn	2022-001242	9/2/2022	2023-UP-397	12/13/2023	3/5/2024	10/30/2024	PLG
China	2022-001807	12/29/2022	2023-UP-394	12/13/2023	3/5/2024	10/30/2024	Strom Law Firm
Estate of Rice	2023-000432	3/14/2023	2024-UP-083	3/20/2024	6/20/2024	10/30/2024	Matt Christian
Washington	2023-001282	8/10/2023	2024-UP-319	9/25/2024	Pet. for Rehearing	N/A	PLG
McCarson	2023-001371	8/28/2023	2024-UP-320	9/25/2024	Pet. for Rehearing	N/A	PLG
Hutley	2023-001612	10/12/2023	PENDING	N/A	N/A	N/A	Dan Pruitt
Hagood	2023-001712	11/1/2023	PENDING	N/A	N/A	N/A	Kip McAlister
Kilpatrick	2024-000596	4/12/2024	PENDING	N/A	N/A	N/A	PLG
White	2024-000914	6/3/2024	PENDING	N/A	N/A	N/A	PLG
Calloway	2024-000910	6/3/2024	PENDING	N/A	N/A	N/A	PLG

The South Carolina Court of Appeals

Thomas D. Kilpatrick as Special Administrator for the Estate of Anthony Lemon, Respondent,

v.

Pruitthealth-Ridgeway, LLC f/k/a Unihealth Post-Acute Care-Tanglewood, LLC, United Health Services of South Carolina, Inc., Pruitthealth Consulting Services, Inc., Pruitthealth Therapy Services, Inc. f/k/a United Rehab, Inc., Pruitthealth, Inc., Neil Pruitt, Jr., THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center, THI of South Carolina, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental Clinical Consulting, LLC, Fundamental Long Term Care Holdings, Inc., Fundamental Administrative Services, LLC, and Hunt Valley Holdings, LLC, Defendants,

Of which THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center, THI of South Carolina, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental Administrative Services, LLC, and Hunt Valley Holdings, LLC are the Appellants.

Appellate Case No. 2024-000596

EXHIBIT

2.1

ORDER

Respondent moved to dismiss this appeal, for sanctions, and for attorney's fees and costs. Respondent argues this appeal is frivolous, has been taken solely for the purpose of delay, and is unsupported by precedent substantiating Appellants' arguments. Appellants filed a return, opposing dismissal, the imposition of sanctions, and the awarding of costs. Appellants argue the appeal is not frivolous and has not been taken for the purpose of delay. Appellants submit the one published case cited by Respondent either was wrongly decided or does not control the instant appeal. After careful consideration, we deny Respondent's motion to dismiss. Further, we deny Respondent's motion for sanctions because we do not believe this appeal is frivolous or has been taken solely for the purpose of delay. *See* Rule 269, SCACR ("Where an appeal, petition, motion[,] or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require."). To the extent Respondent requests attorney's fees and costs separate from its request for sanctions, we deny the request as premature. *See* Rule 222, SCACR ("A party desiring costs to be taxed shall, within fifteen (15) days of the issuance of the remittitur, serve and file a motion requesting that costs be assessed under this Rule.").

FOR THE COURT

Columbia, South Carolina

FILED
Jan 24 2025

cc:
Neil Edward Alger, Esquire
Russell Grainger Hines, Esquire
Donald Jay Davis, Jr., Esquire
Stephen Lynwood Brown, Esquire
Matthew Oliver Riddle, Esquire
John Elliott Parker, Jr., Esquire
Gaillard Townsend Dotterer, III, Esquire

RECEIVED
Oct 31 2024
SC Court of Appeals

EXHIBIT

3

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Heath P. Taylor, Circuit Court Judge

Appellate Case No. 2024-000914

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

v.

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

RESPONDENT'S MOTION TO DISMISS APPEAL AND FOR SANCTIONS

Respondent Kevin White as Personal Representative of the Estate of Mary Brisbon respectfully moves the Court pursuant to Rule 269, SCACR, for an Order imposing sanctions on Appellant St. George Health Care, LLC, d/b/a St. George Healthcare Center ("Appellant") because this Appeal is frivolous, has been taken solely for the purpose of delay, and is entirely unsupported by any South Carolina precedent substantiating Appellant's arguments concerning the purported merger of Appellant's Arbitration and Admission Agreements.[1] For these and the following reasons, the Court should dismiss the Appeal, impose a fee on Appellant, and award

[1] Respondent does not believe that Appellant's conduct should be imputed to Appellant Vicki Sides, nor should she be sanctioned for Appellant's conduct.

costs and attorney's fees to Respondent as a sanction for Appellant's continued pattern of filing frivolous, vexatious appeals over a specific legal and factual issue that has already been conclusively decided by this Court numerous times.

FACTUAL/PROCEDURAL BACKGROUND

Appellant filed its Notice of Appeal on June 3, 2024, appealing Orders of the Circuit Court filed on November 2, 2023, and May 2, 2024. (Ex. 1, Notice of Appeal). The Orders denied Appellant's Motion to Compel Arbitration and Motion to Reconsider, which sought to dismiss and compel the arbitration of Respondent's wrongful death and survival claims arising from injuries the decedent, a 60-year old woman suffering from multiple unstageable pressure ulcers, received while in Appellant's care before she passed away. (Ex. 2, Orders; Ex. 3, Compl.). Appellant is part of a constellation of entities that operate, own, and profit from scores of skilled nursing, assisted living, and rehabilitation facilities located in a number of states, including South Carolina, Indiana, Maryland, Nevada, New Mexico, Texas, and Wisconsin.[2] This Appeal, and all of the related appeals discussed below and included in Exhibit 4, essentially revolve around a single focused, dispositive issue:

---

[2] This group ("the Fundamental entities"), includes Appellant as well as Fundamental Long Term Care, Inc., Fundamental Clinical and Operational Services, LLC, Fundamental Administrative Services, LLC, THI of South Carolina, LLC, THI of South Carolina at Columbia, LLC, THI of South Carolina at Charleston, LLC, THI of South Carolina at Magnolia Manor-Inman, LLC, THI of South Carolina at Spartanburg, LLC, THI of South Carolina at Magnolia Manor-Spartanburg, LLC, THI of South Carolina at Greenville, LLC, THI of Baltimore, Inc., Lake Emory Post Acute Care, Oakbrook Healthcare, LLC, Palmetto Prince George Operating, LLC, Palmetto Health Care, LLC, Palmetto Lake City-Scranton Operating, LLC, Palmetto Hallmark Operating, LLC, Hallmark Longterm Care, LLC, and Hunt Valley Holdings, LLC, amongst others. *See Healthcare Facility Locator*, Fundamental, https://fundltc.com/Healthcare%20Facility%20Locator/Facility_Locator.aspx. The Fundamental entities are believed to own and/or operate at least 20 facilities within South Carolina. For a brief review of the Fundamental entities and their origins, see *In re Fundamental Long Term Care, Inc.*, 569 B.R. 904 (Bankr. M.D. Fla. 2016).

whether Appellant's and the other Fundamental entities' Admission Agreement and Arbitration Agreement, which have remained identical since at least 2019, merge such that Appellant may avail itself of an equitable estoppel argument to preclude Respondent, and other individuals representing the interests of vulnerable, elderly residents of the Fundamental entities' facilities, from denying that the subject Arbitration Agreement was signed by someone with actual or apparent authority at the time of admission.[3]

Astoundingly, at the time Appellant filed the instant Notice of Appeal, its position and argument regarding the merger of these Agreements had been previously reviewed and rejected by this Court ***fourteen times***, in thirteen unpublished decisions and one published opinion, *Estate of Solesbee by Bayne v. Fundamental Clinical and Operational Servs., LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023). (Ex. 4, Spreadsheet of Appeals). These decisions reviewed the exact same Admission Agreement and Arbitration Agreement that are currently before the Court and entailed an analysis of the exact same applicable South Carolina law and general contract principles.[4] More importantly, at the time Appellant filed the instant Notice of Appeal, the Supreme Court of South Carolina had denied petitions

[3] A review of the related appeals shows that it is not uncommon during the Fundamental entities' admissions process for the admissions paperwork and Arbitration Agreement to be signed by a family member or caregiver who is not the resident's attorney-in-fact, conservator, or guardian at the time of admission. It is a foregone legal conclusion that the authority bestowed upon a family member to act on the resident's behalf under the Adult Health Care Consent Act does not include authority to enter an arbitration agreement. *See Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014).

[4] The merger analysis solely focuses on the language of the agreements that have purportedly merged. *See Solesbee*, 438 S.C. at 648, 885 S.E.2d at 149 ("[B]y their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply.")

seeking certiorari to review those decisions four times, including a denial of certiorari to review this Court's binding decision in *Solesbee*.

All told, at the time of the filing of their Notice of Appeal in this action, the Fundamental entities had previously asked this Court and the Supreme Court to review the subject Agreements ***thirty-three times*** to determine whether they merge such that a plaintiff would be estopped from denying their validity, all without a single successful result.[5] The Court has since filed three more unpublished decisions affirming that the subject Agreements do not merge, and the Supreme Court has denied certiorari on the exact same issue ten more times, including nine times on October 30, 2024. Previous to the date of the filing of this Motion, the Fundamental entities, on the other hand, had gone on to file three more petitions for a writ of certiorari to the Supreme Court, totaling ***thirty-seven*** requests over five years (not including petitions for rehearing) for the appellate courts of this State to review a factually identical argument. These protracted appeals, which to a legal certainty are destined for failure, typically delay the underlying litigation for multiple years, and needlessly consume the parties', the Court's, and the Supreme Court's resources and time.

ARGUMENT

Rule 269, SCACR, sets forth the Court's discretionary authority to impose sanctions for frivolous appeals:

> Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten

[5] Appellant itself has been responsible for three of these appeals.

> (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case *and discouragement of like conduct in the future may require*.

Rule 269, SCACR (emphasis added). "An appeal is frivolous *if the result is obvious* or the arguments of error are wholly without merit." *Coghlan v. Starkey*, 852 F.2d 806, 811 (5th Cir. 1988) (emphasis added). The dispositive argument that is being raised to the Court in this Appeal is whether the Circuit Court erred in finding that the subject Agreements did not merge pursuant to *Solesbee* as well as the numerous other unpublished decisions of this Court affirming *Solesbee*.

Appellant is likely to take the position that until the Supreme Court publishes an opinion affirming the reasoning of *Solesbee* that any repetitive appeals of the merger issue are not frivolous and have some chance of succeeding on their merits. This ignores that by repeatedly denying certiorari to review the outcome of *Solesbee* (a binding, published Opinion), the Supreme Court has essentially conveyed that under these identical facts and Agreements, it does not see a clear legal error that necessitates reversal or an issue of sufficient importance to grant judicial review. After denying certiorari fourteen times, it is no longer reasonable or realistic to expect that things might be different with the Supreme Court on the next go-round.

Additionally, while Appellant's arguments may also incorporate the doctrine of equitable estoppel, which would generally require the Court in each appeal to weigh all the attendant circumstances and equities unique to each case, here, the threshold, dispositive issue is whether the Agreements merged in the first place.

Without merger, the Fundamental entities are deprived of the ability to use the estoppel doctrine offensively as a sword against their residents, and the merger analysis in this Appeal and all twenty-one other matters that are or have been before the Courts has been identical in every respect in every appeal and is solely predicated on the contents of the same two documents. *Solesbee*, 438 S.C. at 646-48, 885 S.E.2d at 148-49.

As to the merger argument, Appellant cannot factually distinguish between the issue's presentation in this Appeal and the twenty-one others that have come before it. It should be patently obvious to Appellant, the Court, and any other observer of these matters over the past five years that the Fundamental entities' perpetual appeals of the merger issue are entirely without merit or any hope of success. The inescapable conclusion is that at this point, Appellant's efforts are not made with a good faith belief in a favorable outcome, but are only designed to delay, frustrate, and hopefully demoralize any resident who commences a tort claim against it in circuit court into submission, without any consideration for the accompanying waste of judicial resources.

Appellate courts have inherent power to dismiss appeals that are "manifestly and palpably frivolous and without merit." *Johnson v. St. Paul City Ry. Co.*, 68 Minn. 408, 409, 71 N.W. 619 (Minn. 1897); *Buckner v. Jenkins*, 122 Okla. 105, 251 P. 81 (Okla. 1926); *MacArthur v. San Juan Cnty.*, 495 F.3d 1157, 1161 (10th Cir. 2007). Rule 269, SCACR grants the Court broad and sweeping authority to impose any sanctions called for by the circumstances of the case and necessary to act as a deterrent to further frivolous appeals. *See also Walker v. Health Int'l Corp.*, 845 F.3d 1148, 1157 (Fed. Cir. 2017) ("Sanctions are awarded to compensate the victimized party for the burden of continued litigation in what long ago [was] a settled matter, as well as to discourage frivolous appeals which unnecessarily clog our docket.").

Under these circumstances, dismissal of this Appeal is clearly an appropriate sanction. There is no need for further briefing on a dispositive issue that has already been ruled upon by this Court seventeen times under factually identical circumstances. *See McKinzy v. Kansas City Power & Light Co.*, 367 Fed. App'x 912, 913 (10th Cir. 2010) ("Mr. McKinzy's appeal meets this standard. Not only have we considered and rejected his arguments on two occasions within the last six months, Mr. McKinzy never mentions these decisions, and thus, makes no attempt to distinguish them."). The Supreme Court should not be required to set aside its limited resources, grant certiorari, require the parties to further brief an issue that has already been argued dozens of times, hold oral arguments, and draft its own published opinion to put an end to Appellant's and the Fundamental entities' willful abuse of the Court and its Rules.

While dismissal is called for in this instance, Respondent expects it will not be enough to deter the Appellant's and Fundamental entities' future conduct. All respondents in the related appeals have thus far been eligible to ask for attorney's fees and costs pursuant to Rule 222, SCACR, after remittitur. However, the looming taxing of costs against Appellant and the Fundamental entities under Rule 222 has done nothing to faze them or discourage their abuse of the appealability statutes and Appellate Court Rules, and in the meantime, the respondents impacted by Appellant's and the Fundamental entities' manipulation of the appellate process have collectively had their right to a speedy resolution of their claims delayed by dozens of years.

A stronger sanction is warranted. The Court should award attorney's fees and costs to Respondent, without the cap imposed by Rule 222, to compensate Respondent for the burden of participating in this frivolous Appeal. Additionally, the Court should treble the attorney's fees and costs to serve as a deterrent to any further, vexatious appeals that are certain to follow if Appellant and the remaining Fundamental entities are permitted to continue to appeal from every order filed by a circuit court in this State denying their motions to compel arbitration based on the merger issue, which has already been adequately addressed by *Solesbee*.

Lastly, the Court should order Appellant to pay a reasonable fine to the Court. These appeals have likely cost the Court itself hundreds of hours of unnecessary work that could have and should have been devoted to appeals that had some likelihood of success, and they surely have added considerable strain to the Court's and Supreme Court's busy appellate docket. Thus, not only has Respondent's and the Court's time and resources been wasted, but also the parties to the numerous other unrelated appeals pending before the Court have had the resolution of their cases unreasonably delayed by the burden placed on the Court by Appellant and the remaining Fundamental entities.

CONCLUSION

The Appellant and other Fundamental entities' continuous pattern of appealing the dispositive merger issue is in reality no different than if a losing party petitioned the Court for rehearing on the same legal issue, based on the same facts, over thirty times in a row. For the foregoing reasons, Respondent respectfully requests that the Court dismiss this Appeal and impose pecuniary sanctions on Appellant. Respondent also requests that the Court hold the remaining briefing deadlines in abeyance until the Court has ruled on Respondent's Motion.

Respectfully submitted,

By:____________________________

October 31, 2024
Hampton, South Carolina

Lee D. Cope
John E. Parker, Jr.
PARKER LAW GROUP, LLP
Post Office Box 487
Hampton, SC 29924
Phone: (803) 903-1781
lcope@parkerlawgroupsc.com
jayparker@parkerlawgroupsc.com

ATTORNEYS FOR RESPONDENT

EXHIBIT
1

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

Heath P. Taylor, Circuit Court Judge

Case No. 2023-CP-18-01775

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

Respondent,

v.

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

Appellants.

NOTICE OF APPEAL

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

Attorneys for Appellants

Other Counsel of Record:

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

-and-

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

Attorneys for Respondent

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

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

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

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

Respectfully submitted,

CLEMENT RIVERS, LLP

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

Attorneys for Appellants

Charleston, South Carolina

June 3, 2024

EXHIBIT 2

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP1801775

Kevin White et al
PLAINTIFF(S)

St George Health Care Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

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

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

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

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

ORDER INFORMATION

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

For Clerk of Court Office Use Only

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

Kevin White Personal Representative
Mary Brisbon Estate

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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

Dorchester Common Pleas

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

IT IS SO ORDERED.

Heath P. Taylor

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP1801775

Kevin White et al
PLAINTIFF(S)

St George Health Care Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

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

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

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

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

ORDER INFORMATION

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

For Clerk of Court Office Use Only

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

Kevin White Personal Representative
Mary Brisbon Estate

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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

Dorchester Common Pleas

Case Caption: Kevin White , plaintiff, et al VS St George Health Care Llc , defendant, et al

Case Number: 2022CP1801775

Type: Order/Electronic Form 4

IT IS SO ORDERED.

Heath P. Taylor

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

TO THE ABOVE-NAMED:

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

-Signature Page to Follow-

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

BY: s/Lee D. Cope

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

AND

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

ATTORNEYS FOR THE PLAINTIFF

November 18, 2022.
Hampton, South Carolina

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

h. In failing to monitor for and prevent infection;

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

j. In failing to implement appropriate pressure sore preventions;

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

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

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

n. In failing to implement an appropriate care plan;

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

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

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

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

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

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

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

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

BY: s/Lee D. Cope

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

AND

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

ATTORNEYS FOR THE PLAINTIFF

November 18, 2022.
Hampton, South Carolina

EXHIBIT 4

Case Name	Appellate Case No.	NOA Date	COA Decision	Decision Date	Cert Petition/Extension Date	Cert Denied	P Attorney
Ladson	2019-001413	8/22/2019	2022-UP-169	4/6/2022	9/15/2022	4/18/2023	Pierce Sloan
Solesbee	2019-001731	10/14/2019	885 S.E.2d 144	1/25/2023	5/15/2023	4/16/2024	Matt Christian
Nanney	2020-000500	3/18/2020	2023-UP-299	8/23/2023	11/21/2023	9/11/2024	Ray Mullman
Daniels	2020-000501	3/18/2020	2022-UP-313	7/27/2022	10/24/2022	5/24/2023	Hughey Law Firm
Estate of Owens	2020-001107	8/12/2020	2023-UP-272	7/19/2023	10/13/2023	4/16/2024	Ray Mullman
Greene	2020-001167	8/19/2020	2023-UP-396	12/13/2023	3/5/2024	10/30/2024	Pro Se
Tisdale	2021-000586	6/2/2021	2024-UP-005	1/3/2024	4/17/2024	10/30/2024	McGowan Hood
Walker	2021-000594	6/4/2021	2023-UP-400	12/13/2023	3/5/2024	10/30/2024	McGowan Hood
White	2021-000700	7/1/2021	2023-UP-393	12/13/2023	3/5/2024	10/30/2024	Strom Law Firm
Dawkins	2021-000707	7/1/2021	2023-UP-392	12/13/2023	3/5/2024	10/30/2024	Jordan Law Center
Stroud	2022-000398	3/30/2022	2024-UP-084	3/20/2024	6/20/2024	10/30/2024	Dan Pruitt
Pace	2022-001059	7/27/2022	2024-UP-261	7/17/2024	10/17/2024	PENDING	Harbin & Burnett
Rahn	2022-001242	9/2/2022	2023-UP-397	12/13/2023	3/5/2024	10/30/2024	PLG
China	2022-001807	12/29/2022	2023-UP-394	12/13/2023	3/5/2024	10/30/2024	Strom Law Firm
Estate of Rice	2023-000432	3/14/2023	2024-UP-083	3/20/2024	6/20/2024	10/30/2024	Matt Christian
Washington	2023-001282	8/10/2023	2024-UP-319	9/25/2024	Pet. for Rehearing	N/A	PLG
McCarson	2023-001371	8/28/2023	2024-UP-320	9/25/2024	Pet. for Rehearing	N/A	PLG
Hutley	2023-001612	10/12/2023	PENDING	N/A	N/A	N/A	Dan Pruitt
Hagood	2023-001712	11/1/2023	PENDING	N/A	N/A	N/A	Kip McAlister
Kilpatrick	2024-000596	4/12/2024	PENDING	N/A	N/A	N/A	PLG
White	2024-000914	6/3/2024	PENDING	N/A	N/A	N/A	PLG
Calloway	2024-000910	6/3/2024	PENDING	N/A	N/A	N/A	PLG

The South Carolina Court of Appeals

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

v.

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

Appellate Case No. 2024-000914

EXHIBIT

3.1

ORDER

Respondent moved to dismiss this appeal, for sanctions, and for attorney's fees and costs. Respondent argues this appeal is frivolous, has been taken solely for the purpose of delay, and is unsupported by precedent substantiating Appellants' arguments. Appellants filed a return, opposing dismissal, the imposition of sanctions, and the awarding of costs. Appellants argue the appeal is not frivolous and has not been taken for the purpose of delay. Appellants submit the one published case cited by Respondent either was wrongly decided or does not control the instant appeal. Respondent also filed a reply. After careful consideration, we deny Respondent's motion to dismiss. Further, we deny Respondent's motion for sanctions because we do not believe this appeal is frivolous or has been taken solely for the purpose of delay. *See* Rule 269, SCACR ("Where an appeal, petition, motion[,] or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require."). To the extent Respondent requests attorney's fees and costs separate from its request for sanctions, we deny the request as premature. *See* Rule 222, SCACR ("A party desiring costs to be taxed shall, within fifteen (15) days of the issuance of the remittitur, serve and file a motion requesting that costs be assessed under this Rule.").

FOR THE COURT

Columbia, South Carolina

cc:
Lee Deer Cope, Esquire
Margie Bright Matthews, Esquire
Stephen Lynwood Brown, Esquire
Donald Jay Davis, Jr., Esquire
Matthew Oliver Riddle, Esquire
Ted Ashton Phillips, III, Esquire
Russell Grainger Hines, Esquire
John Elliott Parker, Jr., Esquire

FILED
Feb 04 2025

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2025-000237

Joe Bryan, Respondent,

v.

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

RESPONDENT'S MOTION TO DISMISS APPEAL

Respondent hereby moves the Court for an Order dismissing this appeal on the grounds that the issues raised therein are barred by the doctrine of collateral estoppel and that the appeal is frivolous in nature, such that the Court should impose sanctions, including dismissal. Pursuant to Rule 240(c)(2), SCACR, Respondent is filing a Memorandum in Support herewith.

Respondent reserves all other arguments in opposition to this appeal.

CLAWSON FARGNOLI UTSEY, LLC

/s/ Laura Wilkes-D'Amato
Samuel R. Clawson, Jr. (SC# 76065)
Christy R. Fargnoli (SC# 77528)
Bert G. Utsey, III (SC# 10093)
Laura Wilkes-D'Amato (SC# 104294)
The Presqu'ile House
2 Amherst Street
Charleston, South Carolina 29403
843.970.2700

Attorneys for Respondent

July 7, 2025
Charleston, South Carolina

RECEIVED
Jul 07 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2025-000237

Joe Bryan, Respondent,

v.

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

MEMORANDUM IN SUPPORT
OF RESPONDENT'S MOTION TO DISMISS APPEAL

Pursuant to Rule 240(c)(2), SCACR, Respondent submits this memorandum in support of his Motion to Dismiss filed herewith.

BACKGROUND AND PROCEDURAL HISTORY

This is a medical malpractice action arising from Respondent's treatment at Appellant's rehabilitation facility ("Facility") following Respondent's hospitalization for a stroke in the summer of 2021. While a resident at the Facility, Respondent developed a pressure wound that resulted in an additional hospitalization and further treatment, including a surgical procedure.

Based on the content of an agreement purportedly signed by Respondent's son, Appellant moved to stay or dismiss this action and for an order compelling arbitration, claiming that "[Respondent] entered into an Arbitration agreement with the Facility."

On November 13, 2024, the circuit court held a hearing on Appellant's Motion to Dismiss and Motion to Compel Arbitration. It denied the motions in a Form 4 Order issued on December

4, 2024, and issued a formal Order denying the motions on December 13, 2024. Appellant filed a Motion to Alter, Amend, and/or Reconsider on December 23, 2024. The circuit court denied that motion on January 9, 2025. Appellant filed its Notice of Appeal on February 7, 2025, and submitted its Initial Brief on June 6, 2025, after receiving two 30-day extensions from the Court.

ARGUMENT

Despite having a total of 119 days to submit its Initial Brief specific to this appeal, Appellant has submitted a brief that is substantially identical to its Initial Brief in another case where Appellant sought to compel arbitration but lost, *Hutley v. THI of S.C. at Magnolia Manor Inman, LLC*, Appellate Case No. 2023-001612.[1] Ironically, the *Hutley* appeal appears to have been primarily used as an attempt to relitigate another matter – *Solesbee v. Fundamental Clinical & Op. Servs.*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023), *cert. denied* (April 16, 2024),[2] which involved one of Appellant's "sister facilities," an identical Admission and Arbitration Agreement, and the same defense firm as both *Hutley* and the instant matter. As discussed below, Appellant is also trying to relitigate *Solesbee* in the instant appeal, dedicating ten pages of its Initial Brief to discussing that case and the circuit court's "reliance" on it, despite no indication from the circuit court that it considered the *Solesbee* case at all.[3]

---

[1] "A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records." *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984). A text comparison of the Argument sections in Appellant's brief in *Hutley* and the Initial Brief in this matter reveals that 84% of the text is identical. Most of the remaining 16% is due to differences in party names and Appellant's lack of discussion of the Motion to Stay in this appeal. Appellant and its counsel also make what appear to be identical arguments in *Fernesha Mazyck v. THI of South Carolina at Charleston, LLC*, Appellate Case No. 2025-000070, which is currently before this Court. The *Mazyck* matter appears to have been recently delayed by multiple extension requests by Appellant.

[2] Although the *Solesbee* case involved a different facility than that involved here, upon information and belief, Appellant is a part of the same corporate structure.

[3] The practice of recycling briefs on the same issues does not appear to be a new tactic employed

The present appeal is the latest in a series of redundant appellate filings by Appellant and its counsel. It presents only issues that have been rejected by this Court or the South Carolina Supreme Court.[4] It does not address the arguments made by Respondent's counsel at the circuit court level; nor does it actually address that court's ruling. It attempts to relitigate identical issues – which it lost – from cases with identical subject matter (*i.e.*, identical Admission and Arbitration Agreements, which are at the heart of this appeal). It does not serve judicial economy.

This appeal serves only Appellant's interest in further delaying this case. In so doing, it perpetuates a denial of justice for an aging Plaintiff, who is apparently one of many litigants to experience the same dilatory conduct on behalf of the Appellant, its sister facilities, and its counsel.[5] Because Appellant has failed to present appealable issues to this Court, the Court should dismiss this Appeal based on the application of the doctrine of issue preclusion. Additionally, this Court should impose the sanction of dismissal (and, possibly other sanctions) on Appellant and its counsel to discourage their practice of filing repetitive, frivolous appeals.

I. <u>The Issues Raised in Appellant's Initial Brief are Barred by the Doctrine of Issue Preclusion.</u>

---

by Appellant and its counsel, nor is it limited to this Court. As noted in the Respondent's Return to Petition for Writ of Certiorari in *Solesbee*, the Supreme Court denied multiple identical petitions for certiorari filed by Appellant's "sister facilities" in the three months preceding that brief.

[4] Appellant has sought certiorari in the *Hutley* case, on which the Supreme Court has yet to rule.

[5] A records search on www.sccourts.org for THI of South Carolina shows it has been listed as a defendant in 63 Charleston County Court of Common Pleas cases (excluding Notice of Intent filings) since 2004 and as a party in 25 appeals in the Court of Appeals and/or the Supreme Court since 2012. *See State v. Little*, 227 S.C. 60, 86 S.E.2d 875 (1955) (court may take judicial notice of public records); *Sloan v. Greenville Cnty.*, 380 S.C. 528, 670 S.E.2d 663 (Ct. App. 2009) (court may take judicial notice of its docket); *see also* Caitlan Bell, *North Charleston nursing home again subject of lawsuit, amongst over a dozen pending*, THE POST & COURIER, June 26, 2025 (https://www.postandcourier.com/news/crime/riverside-health-lawsuit-north-charleston/article%20%202d86b8a5-184e-4388-a482-93a71b4e6333.html).

In its Initial Brief, Appellant raises basically three arguments in support of its claim that the circuit court erred in denying its motion to compel arbitration:

A. Did the circuit court err in rejecting the Facility's merger/equitable estoppel argument? More specifically, should the circuit court have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Bryan effectively embraced and directly benefitted from the Admission Agreement, he is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith—and, thus, granted the Facility's motion?

1. Is the circuit court's merger analysis erroneous?

(a) Did the circuit court err in relying on *Solesbee v. Fundamental Clinical and Operational Services, LLC*—indeed, is the *Solesbee* Court's merger analysis itself erroneous—and should *Solesbee* control the disposition of this case?

2. Should the circuit court have found that equitable estoppel applies to prohibit Mr. Bryan from denying the enforceability of the Arbitration Agreement?

3. Did the circuit court err in stating that the Facility "had" Michael sign the Admission Agreement and/or the Arbitration Agreement?

The first argument's reference to the circuit court's "reliance" on *Solesbee* is misleading at best. The *Solesbee* case was not referenced in the circuit court's orders, nor, to the best of the undersigned's recollection, did the Court indicate at the hearing on this matter that its decision was informed by *Solesbee*. Rather, Appellant has simply copied this argument verbatim from its brief in *Hutley*, despite the fact it does not apply here. (*Hutley*, Br. of Appellant, pp. 1-2).

In light of the lack of reliance by the circuit court, the only questions properly raised in argument A.1. are: 1) Is the *Solesbee* court's merger analysis itself erroneous? and 2) Should *Solesbee* control the disposition of this case? Given that the Supreme Court denied certiorari in *Solesbee* – rejecting almost identical arguments regarding an identical purported arbitration agreement – and that this Court in *Hutley* rejected Appellant's argument regarding *Solesbee,* the answers are: 1) No; and 2) Yes. The Court should summarily dismiss argument A.1.

As the Court is aware, it need not reach argument A.2. if affirms the circuit court on the first argument.

As for argument A.3., Appellant states in its Initial Brief that "the circuit court did not actually state that [the word choice 'had'] is material to its reasoning," and admits it only raised the issue "out of an abundance of caution, to the extent that it might potentially be prejudicial" to Appellant. (Init. Br. of Appellant, p. 32). Appellant made a similar semantic argument in its brief in *Hutley*, even using the same wording as indicated in quotes above. (*Hutley*, Br. of Appellant, p. 6 n.12). Because the Court rejected this argument by Appellant in *Hutley*, it should summarily dismiss it here.

Because the Supreme Court and this Court in *Solesbee*, and this Court again in *Hutley*, have addressed and rejected Appellant's substantive arguments, this Court should apply the doctrine of issue preclusion to prevent Appellant from rehashing those arguments in the present appeal. That doctrine not only prevents a party from relitigating an issue with an opposing party but can also be applied to litigation with another party. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982 & Supp. 2012) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."); *id.,* § 29 ("A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue.").

In addition to being a blatant attempt to relitigate *Solesbee*, Appellant's arguments are also essentially identical to those asserted in its brief in *Hutley.* The *Hutley* matter was another appellate case lost by one of Appellant's "sister facilities." Like *Solesbee*, the *Hutley* matter concerned a purported Arbitration Agreement that was identical to the one at issue in this case. On November 27, 2024, this Court held in an unpublished decision that the Admission and Arbitration Agreements at issue in *Hutley* did not merge and that it need not reach Appellant's equitable estoppel argument. As discussed below, Appellant's Initial Brief in this matter is nearly identical to its brief in *Hutley*, emphasizing the simple fact that this appeal is yet another attempt by Appellant to relitigate *Solesbee*.

The identity of the Respondents is the only relevant distinction that can be made between *Solesbee*, *Hutley*, and the instant matter; Appellant has failed to raise any legal arguments distinct from those that have already been raised and ruled upon. Therefore, the doctrine of issue preclusion should bar the current appeal.

II. The Court Should Dismiss Appellant's Appeal Because it is Frivolous and Undertaken for Delay.

In addition to dismissal on the grounds of collateral estoppel, Respondent respectfully submits that this Court should consider dismissal as a sanction to Appellant and/or its counsel. This Court has authority to do so under Rule 269, SCACR, which provides that when an appeal is frivolous or taken only for delay, a party may move to impose sanctions on offending attorneys or parties such that "the circumstances of the case and discouragement of like conduct in the future may require." This Court may also impose sanctions via its own inherent ability, the South Carolina Frivolous Civil Proceedings Sanction Action, S.C. CODE ANN. § 15-36-10 (Supp. 2012) ("FCPSA"), and/or Rule 11, SCRCP.

As previously discussed, the argument section of Appellant's Initial Brief is substantively identical to the one it filed in the *Hutley* appeal. It also contains material misrepresentations to the Court. It repeatedly asserts that the circuit court "relied on" a case that it did not even cite.

Appellant's briefing (both in the underlying matter and in its Initial Brief before this Court) is consumed in no small part by discussion of *Solesbee.* Indeed, Appellant's Initial Brief in this matter spends over ten pages discussing the circuit court's "erroneous reliance" on *Solesbee*. (Init. Br. of Appellant, pp. 19-28). However, as discussed herein, there were no references to the *Solesbee* decision in the circuit court's rulings, and the circuit court did not indicate a reliance on that decision during the hearing of this matter that took place on November 13, 2024.

It appears that, since the *Solesbee* decision, Appellant and its counsel have been on a mission to relitigate a matter that has already been decided. Although that is problematic for legal reasons (as discussed *supra*), it also demonstrates a frivolous approach that should not be tolerated by this Court. Appellant's practices put increased strain on judicial resources as well as those of opposing litigants, wasting countless hours of attorney and judicial time. Their efforts also wrongly and foreseeably prejudice litigants like Respondent – a 72-year-old patient of Appellant's skilled nursing facility who has been forced to wait for his day in court while Appellant tries for a third or fourth (or maybe fifth) bite at the apple. As previously noted, in this appeal alone, Appellant requested and received two thirty-day extensions to submit its Initial Brief, resulting in an additional sixty days of delay.

Despite receiving this additional time, Appellant has utterly failed to raise any legal arguments not barred by collateral estoppel. In fact, it barely managed to change the content of its previous unsuccessful briefs, necessarily prompting the question of why any extension was necessary in the first place. This dilatory conduct is clearly designed to harm those like Respondent by forcing them to wait through the appellate process, all while withholding (and earning interest on) compensation that rightfully belongs to them as injured parties and accusing them of "have-your-cake-and-eat-it-too inequity." (Init. Br. of Appellant, p. 30).

The Court should not tolerate or allow Appellant to perpetuate this pattern of conduct. Respondent respectfully requests that the Court impose the sanction of dismissal (as well as any other sanctions it deems appropriate) on Appellant and/or its counsel.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the Court dispense with further briefing and dismiss this appeal.

Respectfully submitted,

CLAWSON FARGNOLI UTSEY, LLC

/s/ Laura Wilkes-D'Amato

Samuel R. Clawson, Jr. (SC# 76065)
Christy R. Fargnoli (SC# 77528)
Bert G. Utsey, III (SC# 10093)
Laura Wilkes-D'Amato (SC# 104294)
The Presqu'ile House
2 Amherst Street
Charleston, South Carolina 29403
843.970.2700

Attorneys for Respondent

July 7, 2025
Charleston, South Carolina

The South Carolina Court of Appeals

Joe Bryan, Respondent,

v.

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

Appellate Case No. 2025-000237

EXHIBIT

4.1

ORDER

Respondent moved to dismiss this appeal and for sanctions. Respondent argues this appeal is frivolous, barred by the doctrine of collateral estoppel, has been taken solely for the purpose of delay, and is unsupported by precedent substantiating Appellant's arguments. Appellant filed a return, opposing dismissal. Appellant argues the appeal is not frivolous and has not been taken for the purpose of delay. Appellant submits a particular published case was wrongly decided or does not control the instant appeal. Respondent also filed a reply, contending the circuit court did not rely on that particular case, among other assertions. After careful consideration, we deny Respondent's motion to dismiss. Further, we deny Respondent's motion for sanctions because we do not believe this appeal is frivolous or has been taken solely for the purpose of delay. *See* Rule 269, SCACR ("Where an appeal, petition, motion[,] or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.").

_______________________________ J.
FOR THE COURT

Columbia, South Carolina

FILED
Sep 08 2025

cc:
Donald Jay Davis, Jr., Esquire
James D. Gandy, III, Esquire
Russell Grainger Hines, Esquire
Ted Ashton Phillips, III, Esquire
Samuel Richard Clawson, Jr., Esquire
Christina Rae Fargnoli, Esquire
Laura Kell Wilkes-D'Amato, Esquire
Stephen Lynwood Brown, Esquire
Bert Glenn Utsey, III, Esquire

STATE OF SOUTH CAROLINA: COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT: FAIRFIELD COUNTY

Thomas D. Kilpatrick as Special Administrator for the Estate of Anthony Lemon)
)
Plaintiff,)
v.)
)
Pruitthealth-Ridgeway,LLC, et al.)
)
Defendant.)

) Docket No. 2023-CP-20-00268

) **Motion to Compel**

February 29, 2024
Fairfield, South Carolina

B-E-F-O-R-E:

THE HONORABLE PATRICK C. FANT, II

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

Neil E. Alger, ESQ.
Attorney for the Plaintiff

Russell G. Hines, ESQ.
Attorney's for the Defendant's

EXHIBIT

5

Maria DiScioscia, RPR
Official Court Reporter

THE COURT: I guess we're here, this is a Motion to Compel.

MR. HINES: Thank you, your Honor. May it please the Court.

Russ Hines for all the moving parties.

And this Motion to Compel is a Motion to Compel Arbitration, so it's not a Discovery Motion. I realized that on your roster, you don't have -- you don't have but so much information.

If I could just, as a housekeeping --

THE COURT: -- I do have this.

MR. HINES: Very good. Just as a housekeeping matter, I wanted to make sure I've got to identify -- because there are, I think, five total motions. But really, it's one motion and four motions that are all identical that tag along with the lead dog, so to speak.

THE COURT: Okay.

MR. HINES: The Motion to Compel is made by the defendant called THI of South Carolina Columbia, LLC, d/b/a Midlands Health and Rehabilitation Center. Then we have four motions that are identical in substance. They're all Motions to Stay. And defendant who've made those are THI of South Carolina, LLC; Fundamental Clinical Operations Services, LLC; Fundamental Administrative Services, LLC; and Hunt

Valley Holdings, LLC.

And if I could, just to get that out of the way, to say that those motions, the Motion to Stay that is. What they do is, they recognized that this THI, I'll call them, is just a facility. Because what it is, is a skilled nursing facility.

I guess I should probably give your Honor a little bit of a background on the facts. It's a medical malpractice case -- it's a malpractice case in the context of a skilled nursing facility. So the parties moving to Compel Arbitration is the facility itself. These others are the defendants. And what the other defendant's Motion to Stay say:

Is that, we're asking for the case against us to be stayed pending the outcome of the Motion to Compel Arbitration and any arbitration that is, in fact, compelled. So the case should be stayed as to these other parties. And the basis for that stay is the same in every case. And it comes from Section 3 of the Federal Arbitration Act. And the FAA definitely applies here, your Honor, because we're talking about a situation where the -- it has to do with the transaction involving interstate commerce. And we can get into some of the specifics in our briefing.

But to explain, the FAA always applies when talking about a transaction or regarding a transaction, an agreement regarding a transaction involving interstate commerce.

And in particular, there's a case called *Dean versus Heritage Health Care* and has other parties, we've cited it in our brief. Where our supreme court recognized in the context of skilled nursing care, you're dealing with interstate commerce. So an Arbitration Agreement in that context would attribute FAA.

My point of that is to say, that under Section 3 of the FAA, it provides that -- if the Court will indulge a little bit of reading.

"If any suit or proceeding be brought in any of the Court's of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the Court in which, such suit is pending, upon being satisfied with the issue involved in such suit or proceeding is referable to arbitration under such agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had."

We've cited another case called *Stokes versus Metro Life.* The cite on that is 351 S.C. 606, a Court of Appeals case from 2002.

"The FAA clearly requires the Court to stay any suit or proceeding pending the arbitration of any issue referable to arbitration under agreement in writing for such arbitration."

I realize that's a mouthful. And the reason I wanted to say that at the outset, your Honor, is simply to say:

As goes the motion -- or arbitration, go the Motions to Stay, as the argument. Our argument is, if the Court will agree with the facility, that arbitration should be compelled, the FAA requires the stay as to the rest of the case. And that's what these other defendant's have moved for a stay have asked for. It's a stay against them.

If the Court doesn't agree with us, doesn't agree with the facility, that arbitration should be compelled, then their motions for a stay are effectively mooted, because there would be no reason for the stay absent arbitration being brought.

So with that, I'll move to the Motion to Compel Arbitration, your Honor. And as I mentioned, it is a motion -- the context of the case is a skilled nursing care facility. And I will admit at the outset that -- well, my argument, just to give a little bit of a roadmap here, it's a little bit cumbersome to make it candidally. And that's one of the reasons why our memo in support is a bit long, because there's some steps that need to be explained. But the basic idea that I'm arguing to you your Honor, is not about -- I should also say that we filed a rather extensive memo. And I realize that our time here is limited, so I do rely on that.

THE COURT: I'm here to listen to you.

MR. HINES: Thank you, your Honor. But I'm gonna try and hit the high points and certainly answer any questions that your Honor my have. And if your Honor will allow me to respond to opposing counsel's argument at the appropriate time, I'll do that. But I do want to say that that memo is there in the background and we do rely on it.

But the -- it's sort of a one-two punch you might say, as far as my argument. There is -- the Arbitration Agreement that we are seeking the Court to enforce was not signed by the resident in this case. The resident who was admitted to the facility, Anthony Lemon, was admitted with the help of a family member named Minnie Gamble. And it was Ms. Gamble who signed an Admission Agreement and Arbitration Agreement on behalf of the resident, Mr. Lemon, back when he was admitted to the facility. And I wanted to say that at the outset. I'm not able to make an argument to your Honor today based upon Ms. Gamble having power of attorney to act for Mr. Lemon or an argument based on the agency.

The argument that I'm making, comes a concept of merger, coupled with equitable estoppel.

In the case of merger, what we're talking about and there's a case called *Coleman versus Mariner Health Care* that we've cited in our brief. And it recognizes and it recognizes specifically in the context of an admission to a nursing facility.

"An Arbitration Agreement signed at the time of admission along with an Admission Agreement, where you have multiple instruments signed at the same time, by the same parties, for the same purpose, and of course, the same transaction, the law will deem those instruments to be merged and that they should be treated together as a single instrument and construed in that fashion."

The point here, is my argument starts with that proposition of merger. Merger with the Arbitration Agreement and Admission Agreement. If the Court will go along with me to that point, there's another concept that comes into play, which is equitable estoppel. And in particular, a concept of direct benefits estoppel.

And that concept is recognized in a case called *Wilson versus Willis* cited in our brief. That's a supreme court case I think in 2019, South Carolina Supreme Court, that is. And the idea of *Wilson versus Willis*, was a direct benefits estoppel that it recognizes is that essentially, you can't have your cake and eat it too. And you cannot directly benefit from the provision of a contract that contains Arbitration Agreement and then accept those benefits under the provisions of that contract and then deny the enforceability of an Arbitration Agreement in the same contract. You can't pick and choose the parts of the contracts you like if you directly benefited from certain provisions of that. And that's why I call it a one-two punch. The reason for the first part is the merger is, if you will agree your Honor, that Admission Agreement and Arbitration Agreement should be merged so they're altogether as one contract. On the benefit side of that, there's no question that Mr. Lemon was admitted pursuant to the Admission Agreement and received various services during his stay at the facility, various treatments, care... There's no question that he received benefits based upon that Admission Agreement. With which, I'm arguing under the merger side of this, that we wished an Arbitration Agreement should be construed as being part of.

That's the rough outline of this. Merger of the Admission Agreement, Arbitration Agreement. And then equitable estoppel based upon the direct benefits Mr. Lemon received under that merge and agreement.

And to put a little more meat on those bones, your Honor. I also need to bring to the Court's attention. We've cited this and we've distinguished this, a case called *Solesbee. Solesbee versus Fundamental.* That's a case that the Court of Appeals decided back in 2023. And we were counsel in that case as well, and the Court decided against us.

In that case, the Court decided against us on the basis of, it's rejection of our merger argument. And I do have to acknowledge that the Admission Agreement in this case and the Arbitration Agreement in this case, are the same four documents that were at issue in the *Solesbee case*. The reason why I believe it's appropriate nonetheless for us to argue to your Honor today, the merger of Admission Agreement and Arbitration Agreement, notwithstanding *Solesbee,* and again, we've dedicated a number of pages to this, is because the *Solesbee* Court, although, it rejected our arguments for merger in that case, it did not do so in a way that actually refuted or recognized all of those arguments. And it also, like in that case and the

Arbitration Agreement and the Admissions Agreement to some other authorities, namely a case called the *Coleman case* that I mentioned and another case called *Hodge*. And those cases were very different and their differences between the facts of the case that we have here and it was also the facts in *Solesbee* in terms of what these documents said and those other cases, *Coleman* and *Hodge* and what they said. And again, I realize it's a lot of ground to cover here. But if your Honor will remember, I mentioned that in the *Coleman case*, the Court said, "the same parties, time, purpose, transaction." If you've got all those boxes checked with multiple instruments the doctrine of merger says, "they should be deemed to be construed together, unless, there is evidence of a contrary intention." Meaning, intention to have them not merged. So *Coleman* actually gives us the backbone -- the bedrock upon which to build this argument by recognizing, "yes, in the context of Admission Agreement and Arbitration Agreement, upon entry into a nursing facility, if you check all these boxes, parties, purpose, time, and transaction, they're all the same and merger does apply." *Coleman* flat out says, "yes, the proponents of arbitration in that case, they're right," every one of those is present here. So *Coleman* not only recognizes the validity that propositioned, but it also recognizes our ability to merge Admission Agreements, Arbitration Agreements. It recognized that everyone of those boxes were checked. What it ended up finding was, we find there actually is evidence of an intention to contrary to merger. And the reason it found that was because it looked at the Admission Agreement and it had an entire agreement clause in it, a merger clause in it and that merger clause made a reference to the Arbitration Agreement.

And it said: Well, this a textual basis here where these documents are treating these things as separate. It used the word "separatedness" the *Coleman Court* said. It also said, we looked at the Arbitration Agreement. There is a provision in it that says, "this can be disclaimed within 30 days." And it's essentially treated as if it never existed.

Well, so -- and the Court looks at that and says: That's an indication of intention contrary to merger, because the document itself can essentially vanish and not even be apart of this thing, in which it's supposed to have been merged. We don't have that here. And the *Solesbee Court*, respectfully, never addressed that even though it ruled against us. It did not at all look at these differences between the cases. And in again, in *Solesbee* there's currently a cert pending. We remain with some hope that the supreme court will take a look at it. But whether or not the supreme court does, I believe there's daylight between the Court's actual decision in *Solesbee* and the arguments that I'm making now. Which are, that the *Solesbee Court* didn't address the arguments I'm making now. I feel like if the *Solesbee Court* had addressed the arguments I'm making now, and flat out -- and shot them down, that would be a different situation. The *Solesbee Court* didn't do that. And I would also add that the *Solesbee Courts* arguments, for the ones it did address, it's reasoning is mistaken respectfully. And I do believe it's appropriate to continue to argue that point.

As I've mentioned, we don't have a revocation provision in this Arbitration Argument, that doesn't even exist. Moreover, what we do have is the Admission Agreement. There is an entire agreement provision. Unlike what happened in the case in *Coleman*, the entire agreement provision specifically references other admissions materials being incorporated by reference therein. So unlike in *Coleman*, we you have this notion with a "separatedness" there was evidence there. Ours is explicitly contemplating something that's not separated. It negates referencing other admissions materials. We cite in our brief a case called, *Stock versus White Oak Manner* and another case, the *Hodge* case. Where the court of appeals, just in setting forth the background in those cases, recognized the Admission Agreements and Arbitration Agreements as being documents that were signed in conjunction with admission.

I should be clear, that issue wasn't put to those court's, they didn't hold that. My point is, when you're talking about the construction of the plain language of the document it says:

"Other Admission materials are included."

And the *Stock Court* and the *Hodge Court*, they're both explaining the background of the facts for those two cases. They say things -- paraphrasing like, "relative of the resident signed arbitration agreement, other admissions documentation upon admission." Then they go on to analyze the case. It underscores the point that just in the plain ordinary meaning of "admissions documents" those are the documents you sign at the time of the admissions. Which, in this case, was obviously the Arbitration Agreement. That's a basis for distinguishing obviously this case from *Coleman*. Also, it get's back to the, respectfully, the error of the *Solesbee Courts* ways in ruling against us and the client we represented in that case.

And I can make that point a little bit further if I look, for instance, directly at *Solesbee*. If I'll go over that with your Honor, I'll do that briefly.

The *Solesbee Court* made a few points citing -- well, the *Hodge case* in particular, and I guess in *Coleman* as well. But it said:

"Here the Admission Agreement provides it's governed by South Carolina law and the Arbitration Agreement provides it's governed by federal law."

So the Court's thinking was that that means there's some indication there of separatedness between the two, because you have two different bodies of law to govern. Well, there's two reasons why that's incorrect and doesn't actually address the arguments that we've made.

One, it's incorrect factually. This is what the -- it's not the case that the Admission Agreement says is governed by South Carolina Law and the Arbitration Agreement says it's governed by the FAA, federal law. What the Admission Agreement actually says is: "This agreement will be governed by and construed in accordance with the applicable federal regulations and those of the State in which the facility is located."

What the Arbitration Agreement says: "The parties acknowledge that interstate commerce is involved and this is governed by the FAA."

Well, I mentioned "factually" the idea that these agreements express the idea that they're governed by different bodies of law is simply correct. I just read the Admissions Agreement. It actually says it's gonna be construed in accordance with state law too.

Essentially, what it says is it's gonna be incorporated in accordance with state law except for where it's displaced by federal regulations that would preempt state law. That's exactly the same thing as saying, the FAA applies to the Arbitration Agreement. The FAA preempts South Carolina law. One of the things it does, in fact historically, the reason it was passed was because it was to -- because congress wanted to stop state courts, and this all goes back the maybe the 40s, that were sort of antagonistic to the idea of arbitration agreements and were not enforcing them. And said: We're gonna pass the FAA. But all the FAA really does is, it prevents state's from applying state specific law that treats Arbitration Agreements different than other contracts.

Arbitration Agreements ^ Check court says: "You have to place Arbitration Agreements on equal footing with all the contracts under state law." The point of that here is to say, sort of the irony of *Solesbee Court* thinking that two different bodies of law applies. The FAA just holds South Carolina to applying South Carolina Law evenhandedly. If you're determining whether or not an Arbitration Agreement is to be enforced even under the FAA, you apply South Carolina contract principals, you just apply them in a way that it doesn't single out Arbitration Agreements with this favor of treatment.

In fact, the FAA is really providing it's South Carolina substantive law will apply. That's all off-base, that reasoning in *Solesbee,* and the *Solesbee Court* never explained or addressed that and we made these arguments to it.

Furthermore, under something called *Prima Paint Doctrine,* arbitration clauses are always supposed to be looked at in a way in terms of their contract, the validity and clause. They are looked at in a way, at least a certain sense, as being separate from the agreements that they're in, the contracts that they're in. And that applies whether -- so my point is, the FAA would apply -- let's imagine you had a situation that this Admission Agreement just had an arbitration clause in it. One document, without questions. No question of merger. The FAA would always apply to that Arbitration

Agreement. It doesn't have to be separate, because it involves interstate commerce. In the *Dean case* that I mentioned, it holds that that's the case and it wouldn't take *Dean* to do it. It's obvious that it does, because of the was the services are provided in the context of these skilled nursing facilities.

My whole point is, your Honor, that no intention contrary to merger there. There are formal basis that *Solesbee* got into and we do address each one of them in some detail. And your Honor's been very indulgent of the time, other wise this has been one heck of a monolog. And I have some sympathy for your Honor and everyone else in the Court to hear it.

But if you have any questions, I'd be delighted to do my best to answer them. Other wise, I'll wait for opposing counsel to rebut this and I'd ask for time to reply.

THE COURT: Okay. Thank you.

Yes, sir?

MR. ALGER: Your Honor, Neil Alger here for the plaintiff's.

Thanks Russ.

Anybody need a break?

THE COURT: (Court laughs.)

MR. ALGER: Where do we dive-in.

I should say: Russ, myself, and many of us who practice in the realm of nursing home, I think we have all argued these motions and issues until we're almost blue in the face.

Russ and his partners have been up through the appellate courts numerous times, as myself, and my partners. And we're we are at here today, sitting here today is, with a lot of precedent guiding the way. We also have some other issues that I want to discus before we even get into the precedential aspect of the law in this. Is the context of this particular case, which we didn't hear anything about.

Mr. Lemon was admitted to this facility in 2012 due to symptoms related to a diagnoses of MS and he was physically deteriorating. But he still had his mental faculties. In fact, we attached the medical records to our brief in order to provide the Court with some evidence. But he had his mental capacity. They found he was alert, oriented, place, time, self. And there were numerous instances in the record -- in fact, all the way up from 2012 until 2019, where he would have had the requisite capacity to do any contracting he needed to do on his own.

Now, as you did hear, this agreement, as well as, Admission Agreement were not signed by Mr. Lemon.

We know from the basic tenets of contract law, that that's an exception to the normal course of business under contract, right. And that there are only a few instances where somebody can enforce a contract where you have not actually signed it yourself. And in the context of this case, and the arguments presented by opposing counsel, the only way in which that could derive would be through a power of attorney. A legal enforceable power of attorney, which we don't have or through apparent authority. And in order for the apparent authority argument to have been successful, the defense would have to come forward, the burden of proof is on them. And without even getting into the law here, I'll say, I've read through their brief. I looked at their exhibits. I looked for affidavits and I see no evidence that's been submitted to this Court in order to establish an kind of apparent authority, there's none.

So unequivocally, this Court can say that they have failed to meet the evidentiary burden, proof of burden for them to establish that aspect of their arguments. There's other portions of their brief where similar burdens of proof can be applied and can, quite frankly, negate their arguments because they have failed to meet that part. And I will say, the Court, between them and my own brief, I think you have about 100 pages of reading material for you to review and that's exclusive of all exhibits. So rather than me going through and sort of checking off the sections, I'll just simply say: Keep that in mind as you review the arguments for the requisite burdens of proof to be met, because it hasn't been. It just hasn't. The only burden of proof that has been met is if they want to actually argue the terms of the contract itself, which false back on the arguments you didn't hear regarding merger and equitable estoppel.

In this case the precedent is out there. It is established through *Coleman*, through *Thompson*, through *Hodge*. And then, most recently, in the last six months those precedents -- *Solesbee* -- those precedents have all been reaffirmed through unpublished opinions. So I'm not arguing the precedential value of those opinions, but I did attach them to my brief. Because, your Honor, can simply say: I can rely in comfort on those precedents knowing that the appellant courts themselves have withheld them, turned them down, and sent them home.

There are, I believe, I attached 10 unpublished opinions that all came out within the last four months that have firmly rejected the arguments that have been presented here by opposing counsel.

So it seems to me, that while the defense is attempting to essentially thread the needling here with their equitable estoppel argument, as well as, the discussions of theory and construing of the *Wilson case* in order to make it align itself and counter to *Solesbee*. Our court's have consider this. And while they haven't maybe touched on the exact arguments of counsel, they have said that precedent establishes that:

One, these agreements do not merger. And these agreements have been reviewed by our court's in the appellant process. And no court has yet found that these agreement merge.

And two, that in order for the equitable estoppel argument to be successful, you must find that the agreements come together and they don't.

My understanding is that the *Solesbee case* was a published opinion from the court of appeals. So there is precedential value there. The rehearing was denied and I believe it's currently pending up at our supreme court. That doesn't negate the precedential value that it has from our court of appeals.

Just as in *Thompson* and just as in *Hodge*, I wouldn't be surprised if our supreme court were to deny cert and simply leave the precedential value that it has in court of appeals right now.

Both of those cases were attempted to be elevated up to our supreme court and both the certs were denied. So those precedents remain in place.

But I will say the *Thompson* case is clear. It's unequivocal. That when there are standalone agreements such as this, where you have an Admission Agreement and you have an Arbitration Agreement and they're separately paginated. They're two completely separate documents. In fact, the Arbitration Agreement itself notes it's exclusivity in it's own terms.

And I don't have it in front of me because I didn't want to waste the paper and print off the voluminous exhibits we have. But it says right in the last paragraph of the agreement that: "It is a standalone agreement." That it is, "exclusive of all other contracts." So based on that, based on the basic obvious difference that the two separate agreements, the Court found that merger is not applicable.

There was some mention in opposing counsel's arguments about the *Prima Paint Doctrine* in *Dean*. I'll simply say that as an initial inquiry, this Court can take the concepts that were articulated by defense counsel about presumption and the favor arbitrability and set them aside. Because *Dean* in it's footnote *Prima Paint* -- pretty much every case that has come out in the last 10 to 15 years has recognized that a threshold matter for this court in conjunction with Section 2 of the FAA: "That the Court sitting in law and equity must first determine that there is in fact a contact." And that, is for the Court to decide based on state law principals, on a basic fundamental contract terms.

And going full circle, your Honor. In this instance, we don't have a contract. There is no way that Mr. Hines or the facts of this case can honestly stand in front of you and say that, Ms. Gamble, Ms. Minnie Gamble, had some kind of authority to bind Mr. Lemon, because Mr. Lemon had capacity. He could have signed the agreement on his own. Ms. Gamble had no legal authority over what she could have signed on his behalf.

With that, I'll take a break and hear if Mr. Hines has anything in rebut.

THE COURT: Thank you.

Yes, sir?

MR. HINES: Your Honor, I'll move through this as briefly as possible.

In fact, I'll be very brief. And this is a bit unusual for me to start by asking this. It's just occurred to me when Mr. Alger mentioned a brief. I realized it wasn't because it filed something way in advance. I thank you. I hadn't had a chance to see their brief. I just wanted to flip through it.

I would imagine we would at least, in our counter points to what's in here. But in particular, because this is a wrongful death case, I thought that -- and it occurred to me to look and see if they're making the argument that specifically, you can't have an arbitration of a wrongful death, even if you have -- it's argued sometimes, your Honor, that when it comes to wrongful death, to enforce arbitration or compel a claim under that arbitration, you have to have an arbitration agreement that's enforceable against all of the wrongful death beneficiaries. And that's a different argument then what I've addressed so far and I'll address it in just one moment. But to be clear, the logic of that argument is, even if there's no question that -- in fact, the logic of that argument is even if Mr. Lemon with full contractual capacity signed that Arbitration Agreement, that you still couldn't compel the wrongful death claim in arbitration. That's the logic of it. The logic of it is, that's it's own independent in pattern talk Judge.

I will argue against that by saying the *Dean case* does not go, so far as, to hold specifically that -- it doesn't specifically refute their argument, but it does give us a pretty good way of starting to do it. Which is saying that, it recognizes that it would be contrary to the FAA to exclude a certain type of claim from arbituability. Because the FAA requires, obviously, the Arbitration Agreement to be placed on equal footing with all the contracts. And you can't come up with a state law rule that says, you can't arbitrate wrongful death claims. That much is for sure. The FAA says, you can't do that.

Now, *Dean* doesn't go further in talking about the logical implications of that. The logical implications of that, as a practical matter, are that if the rule is, all of the wrongful death beneficiaries in the case have to agree on arbitration, you're going to throw a whole bunch of cold water on the idea of arbitrating wrongful death claims based upon any sort of agreement to arbitrate like this one. Where you're talking about the people entering into a relationship and they have agreements that address that relationship and the claims that might arise out of it. I'm not saying that you couldn't conceivably get wrongful beneficiaries to all agree after the claim has risen, but I find it to be highly unlikely.

If that is the case, I do think *Dean* certainly suggest that you would have a problem with the FAA to do that. But more than that, it's a nonstarter argument to begin with under our law, because any agreement or any sort of contractual provision that would be enforceable against the wrongful death, the decedent, would also be effective to defeat the wrongful death beneficiaries claim. Keep in mind, it is not in fact their claim. They're simply the beneficiary of the claim that has to be brought by the personal representative of the decedents estate. That claim does derive from the claim. It has -- for the claim to even exist the decedent themselves, statutorily would have to have had a claim against whoever the tort feasor is, it's being sued for wrongful death. The decedent would have to have a claim. In as much as you can enforce the arbitration against the decedent, you can enforce it against the wrongful death beneficiaries.

Similarly, let's imagine that you have a situation where somebody was hurt in an accident and they're not yet deceased, they're in a hospital. And somehow, they start settlement negotiations with that decedent when they're in the hospital. And they come up with some agreement to resolve any and all claims arising our of the accident that put them there to include any and all claims, obviously and they sign a release and the decedent passes away after that.

Obviously, the wrongful death claim based upon that accident wouldn't even accrue until the decedent passed away. Nonetheless, the release the decedent signed waiving any and all claims would bar a wrongful death suit.

Again, I'm talking about -- we're not hairsplitting the language of the release. But image that the release does indeed cover any and all ground, known, unknown, now and future, anything arising out of that accident. In the same way that such a release would be enforceable against a wrongful death beneficiary, against the claim to defeat the claim, the wrongful death. So does an arbitration operate, not to defeat it, but to require it to be arbitrated. So I just want to make sure I wasn't silent on that point, your Honor.

Back to what Mr. Alger did argue. He mentioned that I'm trying to thread the needle. Well, he's right about that. I'll certainly give him that. I just would say that we are indeed threading it. There's room in there to get the thread, that's my point. Not that this might be an attempt. But surely, that's exactly what we're doing. We recognized that there are eventually head-wins, but we're nonetheless, trying to chart that course past them. And he did mention a number of -- I don't even blame him. I can understand the point. But no precedential value means no precedential value. You can stack to the roof opinions with -- that have no precedential value. And say to the Court: I'm not asking you to rely on them. Well, again, I get --

THE COURT: -- he does have a published opinion.

MR. HINES: He has one, that's right. And that's what I believe all you need in terms -- if we were on all fours. I'm not trying to tarnish the one he's got. But I am trying to distinguish to the Court, that it's really not addressed all facts. And the fact that he even seemed to give me a little bit of a nod when he says: "Even the Court had to address exactly what they're arguing." That's my point, the Court has not knocked out from underneath us what we're arguing.

And the whole point about having to say: There's no power of attorney, no agency they commissioned.

My equitable estoppel argument, merger, and estoppel argument, doesn't align with either of those principals. It's completely independent of that.

In fact, the was estoppel works is, I'm not having to prove we had a valid agreement per se. I'm just establishing that the plaintiff is estopped to try to argue it's not enforceable. I have more that one way to skin this cat. In fact, *Wilson versus Willis* recognizes that there are recognized theory under South Carolina Law in which you can enforce an Arbitration Agreement against a non-signatory, among them estoppel.

So the legal framework, your Honor, is there and I suggest to the Court that the factual building on that framework is there in this case, with all due respect to the *Solesbee Court*, which I have to acknowledge is there. And have to acknowledge, it did deal with these same four documents. It just did not deal and refute with these same arguments.

Thank you, your Honor.

THE COURT: Thank you.

MR. ALGER: Your Honor, and I will be brief 'cause I know there's other individuals waiting now.

Back to the equitable estoppel argument. In order for that to be successful, the defendant would have had to come forward and show that the party to be estopped, which in this instance is the estate of Mr. Lemon.

That he acted in a way of having to a false representation.

That he intended that such conduct be acted on by the other party.

That he had actual constructive knowledge of the real facts.

It's almost -- it is a kin to saying he acted fraudulently. With that notion, back to the basic burden of proof in this instance, nothing has been presented to this Court showing that Mr. Lemon acted in any of those ways. You don't have any testimony here, unfortunately, Mr. Lemon is deceased. His family members can't attest to this. There is no medical record, or doctor, or nurse, no admission assistant. Nobody can come forward and establish those facts and they haven't been presented to this Court.

So simply, based on the burden of proof, the Court can't find equitable estoppel as even a viable reason to compel this in arbitration, because those requisite elements haven't been met.

Lastly, not to open another avenue. As a fundamental issue as well, the Arbitration Agreement itself is flawed, in that, it lacks consideration. Our courts as you have heard over and over again, they find that these two agreements do not merge. And however the defendant wants to put it, there is that element lacking in a contract. You've got to have neutrality of promises. You've got to have the contract itself and you have to have consideration. And there is no consideration in this instance, no real consideration in this instance. And the reason is, because the promise that is exchanged is that neither party will bring suit against them and if they do, it will be by arbitration. But that, what we know from our simple tort law is:

What does it mean to bring suit, right?

In order to have suit, you have to have a duty.

I have to be responsible to you for acting in some way. And in this instance, there is no duty of Mr. Lemon back to the nursing home. He can't make a promise that is an impossibility. The nursing home has a duty to provide care and treatment for him. They have a duty to make sure that he is not neglected, that he's feed, that he's taken care of. The list goes on and on of the duties that the nursing home has to Mr. Lemon. Mr. Lemon, the only duty he has back to the nursing home is to pay his bill and be present, but that's under the Admission Agreement. They don't merge. So what consideration is there that's left for Mr. Lemon back to the nursing home? There is none. He has no other duty. And so there can't be that neutrality of promises in order to establish the consideration of the contract. And with that, I'm done.

THE COURT: Thank you.

MR. HINES: If you will, your Honor, like 30 seconds.

THE COURT: Sure.

MR. HINES: That argument, the last argument, about the lack of consideration is:

One, it's beside the point. And because as I've just mentioned, one, it goes by counsel's own argument that it was premised on the idea that he was isolating the Arbitration Agreement as not merged. So obviously, my point is, it is merged. And I'll acknowledge to the Court that my argument flows from the proposition that we're talking merger of admission and arbitration and so really it does not under-mind my merger, estoppel argument at all.

It also doesn't under-mind it because, I'm again, not arguing for a contract to be enforceable per se. I'm arguing on the basis of estoppel, which is a different way of getting there.

The other point is, you mentioned the idea of not -- and I would also say, there is consideration to the extent it could matter for the Admission Agreement mutual promise to arbitrate. I understood counsel to say: There was no duty to flow from Mr. Lemon back toward the facility, but the duty to pay them. Well, that's a duty. We've got mutual promise to arbitrate any claims that arise including the claim that he might -- the facility might have against him for nonpayment or any other conceivable claim that could arise from that relationship. And it's beyond me, in a moment to think about all the different things that could possibly arise. But anyway, it's really not -- it really doesn't matter, because again, it's not material to my argument, which goes through merger.

And the final point, maybe the most important one, your Honor. Opposing counsel talked about the burden of proof about representations that were made by Mr. Lemon and so forth. Essentially, something analogized as fraudulent conduct. That's just the wrong test, your Honor, for equitable estoppel. The *Wilson versus Willis* case is about direct benefits estoppel, not -- *Wilson versus Wilson* even makes a footnote of this. Is that because of the traditional six part test for estoppel. It looks about like three parts about the party to be estopped. And three parts about the party asserting estoppel and that's just not the right test.

So I can will conceded that's I've not passed that test. It's just that it's not a test that I have to take to make my argument. My argument is based on direct benefits. Thank you, your Honor.

THE COURT: Okay. Thank you. I will take this under advisement and be back with you.

(Whereupon, the above-captioned motion
was concluded.)

C E R T I F I C A T E

I, the undersigned Maria DiScioscia, Official Court Reporter for the Sixth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the record of all the proceedings in the captioned case, in the Circuit Court for Fairfield, South Carolina, on the 29th day of February, 2024.

I do further certify that I am not related, either by blood or marriage, to any of the parties in this action; and that I am in no way interested in the outcome of this matter.

Maria DiScioscia
Official Court Reporter