THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case Nos. 2010-CP-21-00835 & -00836

RECEIVED
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SC Court of Appeals

Ann Coleman, Individually, and as Personal Representative of the Estate of Mary Brinson . . . . Respondent,

v.

Mariner Health Care, Inc. f/k/a Mariner Post-Acute Network, LLC, Mariner Health Care Management Company, Mariner Health Central, Inc., Mariner Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC MidAmerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC MidAtlantic Holding Company, Living Centers-Southeast, Inc., GranCare South Carolina, Inc., Individually and d/b/a Faith Health Care Center, SavaSeniorCare Management, LLC, SavaSeniorCare Administrative Services, LLC, SavaSeniorCare, LLC, SavaSeniorCare, Inc., National Senior Care, Inc., Palmetto Health Care, LLC, Palmetto Faith Operating, LLC, Individually and d/b/a Faith Health Care Center, Ask Holdings, LLC, Leonard Grunstein, an Individual, Murray Forman, an Individual, Boyd P. Gentry, an Individual, Abraham Shaulson a/k/a Abraham Shavlson a/k/a A. Shawson a/k/a Abraham Shawson, an Individual, Avi Klein, an Individual, SC Property Holdings, LLC, SC Faith, LLC, and John Does 1-26, Defendants,

Of whom,

Mariner Health Care, Inc. f/k/a Mariner Post-Acute Network, LLC, Mariner Health Care Management Company, Mariner Health Central, Inc., Mariner Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC MidAmerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC MidAtlantic Holding Company, Living Centers-Southeast, Inc., GranCare South Carolina, Inc., Individually and d/b/a Faith Health Care Center, SavaSeniorCare Administrative Services, LLC, SavaSeniorCare, LLC, SavaSeniorCare, Inc., National Senior Care, Inc., Leonard Grunstein, an Individual, Murray Forman, an Individual, Palmetto Faith Operating, LLC, Individually and d/b/a Faith Health Care Center are, ... Appellants.

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COUNTER-STATEMENT OF THE ISSUES ON APPEAL

I. Did the trial court err in concluding that the parties' arbitration agreement is unenforceable because Respondent Ann Coleman lacked capacity to sign the agreement on behalf of the decedent, Mary Brinson?

II. Did the trial court err in concluding the parties' arbitration agreement was unenforceable against Ms. Brinson's wrongful-death beneficiaries under South Carolina's Wrongful Death Statute?

III. Did the trial court err in concluding that the arbitration agreement was procedurally unconscionable and impossible to enforce?

IV. Did the trial court err in concluding the Defendants' delay nullified the agreement and waived any right they may have had to enforce the arbitration clause?

V. Did the trial court correctly conclude that the Mariner Entities, except for GranCare SC, Inc., took inconsistent positions with respect to the arbitration agreement?

VI. Did the trial court correctly reject Mariner's argument that Sister should be equitably estopped from denying the existence of an enforceable agreement?

VII. Did the trial court err in observing that the Defendants' prior motion to dismiss for lack of personal jurisdiction was inconsistent with the Defendants' attempt to enforce the arbitration agreement?

IX. Did the trial court err in concluding the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA") does not govern the parties' arbitration agreement because the agreement was void?

X. Did the trial court correctly conclude that even if the FAA pre-empted the voiding of the agreement, the general nature of the contract for nursing home care did not contemplate interstate commerce so that the FAA would not apply?

XI. Did the trial court err in concluding that the arbitration agreement was unenforceable because it may require certain claims to be arbitrated and others to be heard in court?

COUNTER-STATEMENT OF THE CASE

This is a wrongful death and survival case involving nursing home negligence resulting in the death of Mary Brinson ("Decedent"). Ann Coleman ("Sister") is Decedent's sister and serves as the personal representative of Decedent's estate.

Decedent died on April 30, 2007. On July 16 and August 3, 2009, Sister, in her individual and as the personal representative of Decedent's estate, filed and served two Notices of Intent to File Suit against Appellants and other defendants. Each Notice of Intent attached proposed complaints and an expert affidavit alleging the Center failed to provide adequate care to Decedent resulting in her death.

The parties engaged in mandatory pre-suit mediation in January 2010 pursuant to Section 15-79-125 of the South Carolina Code of Laws, but the mediation was unsuccessful. Sister filed the complaints for wrongful death and survival actions on March 22, 2010 and served the Defendants, including Appellants, between April 12, 2010 and July 9, 2010. Sister stated claims for negligence, negligence *per se*, negligent misrepresentation, civil conspiracy, and breach of contract based upon the care and treatment Decedent received while in the care of the Center. Sister claimed that Decedent suffered injuries caused by Defendants' negligence, and those injuries caused Decedent's death.

Appellants filed answers in May, June and July 2010, in which the Appellants asserted Sister's claims were subject to the Arbitration Agreement. On

August 25, 2010, Appellants moved to dismiss the action and compel arbitration. The parties then engaged in discovery limited to the arbitration issue.

Following extensive briefing and argument, the circuit court held a hearing on the motions on January 6, 2011. The court issued four (4) orders on March 18, 2011, denying all of the motions to dismiss and compel arbitration. Appellants requested reconsideration and on April 29, 2011, the court heard arguments on the motions. On June 6, 2011, the circuit court entered two (2) orders denying the Appellants' motions to reconsider.

Appellants served notices of appeal from the circuit court's orders. Appellants also attempted to appeal two (2) earlier orders denying their motions to dismiss for lack of personal jurisdiction or insufficiency of process. Sister moved this Court to prohibit Appellants from arguing any issues in connection with the earlier orders denying motions to dismiss since those orders are not immediately appealable. On October 13, 2011, this Court issued an order granting Sister's motion to dismiss the appeals as to those orders, but ordering the appeal to proceed regarding the orders denying Appellants' motions to compel arbitration and the corresponding orders denying reconsideration. (Court of Appeals Order of 10/13/11).

This appeal follows.

FACTS

The determination whether a claim is subject to arbitration is subject to *de novo* review. *Partain v. Upstate Automotive Group*, 386 S.C. 488, 689 S.E.2d 602 (2010). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Id.*

There is no real dispute about the relevant facts in this case. Decedent was suffering from dementia and was not competent during all relevant times. (Plaintiff's Mem. in Opp. To Motion to Dismiss, Exh. 3). Decedent was twice admitted to the Center and on each occasion Sister signed the paperwork presented by Center employees. The relevant documents to the issues on appeal are the admission documents for the June 1, 2006, admission. (Orders, p. 3).[1]

Decedent was admitted to Faith Health Care Center ("the Center") on June 2, 2006, and was discharged on September 16, 2006. The Center's licensee at the time was GranCare South Carolina, Inc., which is identified with Mariner Health Care, Inc. and its associated entities named in the complaint (the "Mariner" entities).

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[1] Because Decedent's admission to the Center spanned two (2) separate periods of time, the circuit court entered separate orders addressing the documents from the two (2) admissions and denying motions made separately by the Mariner entities and Palmetto Faith. Palmetto Faith filed and served a separate notice of appeal from the orders directed to its motions. On April 19, 2012, Palmetto Faith's counsel advised the Court that it was joining the initial brief filed by the Mariner entities and would not be filing a separate brief. (Letter of 4/19/12 to Clerk). Of course, the June 1, 2006 Agreement would not apply to Palmetto Faith; rather, the agreement applicable to Palmetto Faith was entered on December 13, 2006. Hence, any argument based upon the December 13, 2006 purported agreement is abandoned, and because Palmetto Faith may not rely upon the June 1, 2006 Agreement, its appeal is moot.

Decedent was readmitted to the Center on December 13, 2006, where she resided until December 26, 2006. The licensee at that time was Palmetto Faith Operating, LLC ("Palmetto Faith"). At the time of both admissions Decedent was incompetent, no one held a power of attorney for Decedent, and no one had been appointed as Decedent's guardian.

Even though Sister did not have a power of attorney for Decedent, the Center requested that Sister sign an Arbitration Agreement during the admission process both times Decedent was admitted to the Center. The June 6, 2010 documents included an "Agreement for Arbitration" which contained the following language:

> The Resident and the Facility further acknowledge that said Admission Agreement evidences a transaction involving interstate commerce. The Resident and the Facility understand that the Admission Agreement involves interstate commerce because the Facility is affiliated with Mariner Health Care, Inc., which is a foreign corporation with a nationwide network of over 250 nursing facilities, all of which are fully engaged in interstate commerce by activity that includes, but is not limited to, execution of interstate contracts relating to services, management and interstate marketing, acceptance of federal funds as a significant source of income, regulation by federal statutes and the use of goods, services, employees and management personnel in multiple states.

(Mariner Motion, Exh. B, p. 1). The Agreement for Arbitration also stated, "Intending to be legally bound, the parties expressly agree that this Agreement will be governed by the Federal Arbitration Act, 9 U.S.C. § 1-16 ('FAA')." (Mariner Motion, Exh. B, p. 2). The agreement was signed by Sister as "legal representative." (Mariner Motion, Exh. B, p. 3).

The December 13, 2010, documents contained an "Addendum to Admission Agreement" which is an "Arbitration Agreement." (Palmetto Faith Motion, Exh. 2). The December 13, 2006 agreement did not include the language about interstate commerce or the application of the FAA.

The Circuit Court's Orders

The trial court issued four (4) separate orders addressing the motions to dismiss and compel arbitration and filed them all on the same date. The orders addressed the following:

1. An order denying Palmetto Faith's motion in the survival action;
2. An order denying Palmetto Faith's motion in the wrongful death action;
3. An order denying Mariner's motion in the survival action; and
4. An order denying Mariner's motion in the wrongful death action.

Each of the orders is essentially identical. The only difference is that the orders involving Mariner noted that Mariner relied upon the June 1, 2006 Agreement, while the orders involving Palmetto noted that Palmetto relied upon the December 13, 2006 Agreement. (See Each Order, p. 3). The orders denying the motion to dismiss and compel arbitration made the following rulings:

1. Sister lacked the capacity to contract on behalf of Decedent so that the arbitration agreement was not enforceable (Orders, pp. 3-8);
2. The arbitration agreement cannot be enforced against statutory

beneficiaries in the wrongful death claim who were not parties to the agreement (Orders pp. 8-9);

3. The arbitration agreement is procedurally and substantively unconscionable and impossible to enforce (Orders, pp. 9-12);

4. The defendants' delay effectively nullified the agreement and waived any right the defendants may have had to force arbitration (Orders, pp. 12-14);

5. All of the Mariner defendants except for GranCare SC, Inc. have taken positions that are inconsistent with parties who have standing to enforce an arbitration agreement (Orders, p. 15);

6. Mariner's argument that Decedent was a third-party beneficiary to the agreement was illogical and premised on the rights of Sister as a signatory, but those rights did not exist (Orders pp. 15-16);

7. The court rejected Mariner's argument that Sister should be equitably estopped from denying the existence of an enforceable arbitration agreement (Orders pp. 16-17).

Defendants moved for reconsideration and the trial court entered four (4) separate orders, two denying the motions as to the wrongful death claims and two denying the motions as to the survival claims. Each order is essentially identical. The court made the following rulings in denying the motions:

1. The FAA did not govern the agreement for arbitration because the agreement was void (Orders, p. 3);

2. Although the agreement to arbitrate is void, even if the FAA pre-empted voiding the agreement, the general nature of the contract for nursing home care did not contemplate interstate commerce so the FAA would not apply (Orders pp. 4-6);
3. Mariner's argument that Sister waived her argument as to the applicability of the FAA was without merit (Orders pp. 6-7).

Mariner and Palmetto Faith thereafter appealed to this Court.

ARGUMENTS

The primary issue in this appeal is whether Sister had the authority to bind Decedent's estate and the wrongful death beneficiaries to the Arbitration Agreement. The trial court ruled correctly that she did not have such authority, either actually or apparently. The court also found the Agreement substantively and procedurally unconscionable and unenforceable.

The court alternatively ruled that even if the Arbitration Agreement was not void, the Defendants waived its enforcement through their delay in asserting any right to arbitration.

Lastly, the court ruled that even if the Arbitration Agreement was not void, the subject matter of the agreement did not affect interstate commerce such that the FAA did not apply and did not govern the parties' agreement.

These rulings are correct and this Court should affirm. The issues are addressed herein in the order that the trial court addressed them.

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE PARTIES' ARBITRATION AGREEMENT WAS UNENFORCEABLE BECAUSE SISTER LACKED CAPACITY TO SIGN THE AGREEMENT ON BEHALF OF THE DECEDENT

The trial court noted that the capacity to contract relates to the status of the person rather than to circumstances surrounding the contract. (Order of 3/18/11, p. 3). This is the rule embraced by the Restatement. *General Motors v. Jackson*, 111 Nev. 1026, 900 P.2d 345 (1995) (citing *Restatement (Second) of Contracts* § 12

(1981)). The court concluded Sister did not have the authority to execute the contract for Decedent. (Order of 3/18/11, p. 3). The court added that Mariner admitted it was not aware of any Power of Attorney held by Sister on behalf of Decedent at the time that the Arbitration Agreement was signed. (Order of 3/18/11, p. 3; Response to Requests to Admit 1; Response to Interrogatory 32).

Mariner contends that Sister had the authority to sign the arbitration agreement for Decedent because (A) the South Carolina Adult Health Care Consent Act (AHCCA) empowered Sister to sign the agreement (App. Br. pp. 21-27); (B) the Arbitration Agreement "cannot be disfavored" under the AHCCA (App. Br. pp. 27-30); and (C) Sister is equitably estopped from denying her authority to sign the Arbitration Agreement (App. Br. pp. 31-32). These arguments should not be persuasive.

A. THE AHCCA DID NOT EMPOWER SISTER TO WAIVE DECEDENT'S RIGHTS

The AHCCA is found in Sections 44-66-10, *et seq.*, of the South Carolina Code. Section 44-66-30 governs "Persons who may make health care decisions for patient who is unable to consent; order of priority; exceptions," and provides:

> (A) Where a patient is unable to consent, decisions *concerning his health care* may be made by the following persons in the following order of priority:
>
> * * *
>
> (6) an adult sibling, grandparent, or adult grandchild of the patient;

S.C. Code Ann. § 44-66-30(A)(6) (2002) (emphasis added). There is no question that Decedent was unable to consent and was incompetent. There is also no question that Sister was Decedent's "adult sibling." However, the issue is whether signing a document that waives Decedent's right to access to court, including a right to a jury trial, falls within the ambit of "decisions *concerning* [her] health care." (emphasis added). The trial court correctly held it did not.

As used in the AHCCA:

> (1) "Health care" means a procedure to diagnose or treat a human disease, ailment, defect, abnormality, or complaint, whether of physical or mental origin. It also includes the provision of intermediate or skilled nursing care; services for the rehabilitation of injured, disabled, or sick persons; *and the placement in or removal from a facility that provides these forms of care.*

S.C. Code Ann. § 44-66-20(1) (2002) (emphasis added). Mariner contends the emphasized language includes the ability to enter into the agreement for arbitration. (App. Br. p. 21). Mariner contends that the phrase "concerning" should be expansively construed to include all decisions "in connection with" or "relating to" placement in or removal from a facility, whether those decisions involve health care services or not. Mariner asserts the effect of the court's ruling is a blanket prohibition against entering into *any* agreement affecting health care for an incompetent patient. (App. Br. pp. 24-27). This Court should not be persuaded by these arguments.

As the trial court held, while the AHCCA granted Sister the authority to make "healthcare decisions" for Decedent, consent for medical treatment for

someone who is unable to give her own consent is not the same as binding an incompetent person to an arbitration agreement without the authority to do so. Entering a contract to waive the right to a jury trial is not a decision that involves health care, including whether to place a person in a facility or remove the person from the facility. The Act simply does not contemplate authorizing a person to bind an incapacitated person to an agreement that waives the incapacitated person's rights to due process under the law. (Orders of 3/18/11, p. 4).

The trial court cited to *Munn v. Haymount Rehabilitation & Nursing Center, Inc.*, 704 S.E.2d 290 (N.C. App. 2010) as persuasive on the point. (Orders of 3/18/11, pp. 5-6). Mariner contends *Munn* is inapposite because the North Carolina statute is narrower than the AHCCA in that it involves only the consent to "medical treatment on behalf of a patient who is comatose or otherwise lacks capacity to make or communicate health care decisions...." (App. Br. p. 24 n. 10). *Munn*, however, is instructive on this issue.

The *Munn* court stated:

> Defendants also contend that N.C. Gen. Stat. § 90–21.13 gave Ms. Munn the authority to consent to an arbitration agreement on behalf of Ms. Murphy. Even assuming that plaintiff is incorrect in arguing that defendants did not properly preserve this issue for appeal, the portion of N.C. Gen. Stat. § 90–21.13(c) upon which defendants' argument relies did not become effective until 2007; Ms. Murphy died in 2005. See N.C. Gen. Stat. § 90–21.13 (2005), (2007). Furthermore, the 2005 version of N.C. Gen. Stat. § 90–21.13 is inapplicable to arbitration agreements. The statute is entitled "[i]nformed consent to health care treatment or procedure " and the statutory language addresses consent for health care but does not mention authority to enter into contractual arrangements such as an arbitration agreement. *See* N.C. Gen. Stat. § 90–21.13

> (2005) (emphasis added). Defendants have not presented any authority or argument that arbitration is a form of "health care treatment or procedure" or that arbitration is a necessary corollary to any "health care treatment or procedure." *Id.* The fact that an arbitration provision was included within an admission agreement which dealt almost entirely with financial responsibility for payment for "health care treatment or procedure [s]" in no way transforms the provisions of the agreement regarding arbitration into consent for "health care treatment or procedure [s]." *Id.*

Munn, 704 S.E.2d at 296-297. Thus, the version of the statute being discussed in *Munn* did not limit the consent to "medical treatment"; instead, that language was added with the 2007 amendment which rewrote the section. 2007 N.C. Laws S.L. 2007-52 (H.B. 634), Section 13 (eff. 10/1/07). Therefore the *Munn* court was dealing with a statute which used the phrase "health care treatment or procedure" and did not contain the limiting language Mariner claims distinguishes *Munn* in a meaningful way.

Even so, the analysis in *Munn* is indeed instructive on the application of South Carolina's version of the AHCCA. Granting a sibling the authority to consent to health care decisions for an incompetent person cannot stretch to the point of permitting that person to extinguish the incompetent person's right to judicial process. The legislature did not expressly provide that power, and the Court should not imply it.

The Supreme Court of Kentucky recently addressed the issue and held that a daughter who held a general power of attorney which included the power "to make any and all decisions of whatever kind, nature or type regarding my medical care, and to execute any and all documents....related to medical decisions affecting

me" did not have the power to enter into an arbitration agreement on behalf of her mother in a nursing home setting. *Ping v. Beverly Enterprises, Inc.*, Op. No. 2010–SC–000558–DG (Ky. Sup. Ct. filed Aug. 23, 2012) (2012 WL 3631399) (slip at p. 8)("where the arbitration agreement is not a condition of admission to the nursing home, but is an optional, collateral agreement, courts have held that authority to choose arbitration is not within the purview of a health-care agency, since in that circumstance agreeing to arbitrate is not a 'health care' decision.") (citations omitted).

In this case, the Agreement for Arbitration provides, in part "The execution of this Agreement is **not** a precondition to receiving medical treatment or for admission to the Facility." (Mariner Motion, Exh. B, p. 3). Under the analysis in *Ping*, the agreement to arbitrate is not a "health care" decision such that the authority permitted under the AHCCA would include the authority to enter into such an agreement.

Furthermore, reading the AHCCA in the manner Mariner advocates would require this Court to give the words a forced construction so as to expand the operation of the Act. *See, e.g., Michau v. Georgetown County ex rel. South Carolina Counties Workers' Compensation*, 396 S.C. 589, 723 S.E.2d 805 (2012) (words in a statute should be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation). The plain meaning of the AHCCA is that it permits persons enumerated by priority to make *health care* decisions for an incompetent person, that is, decisions

related to the person's treatment for a physical or mental ailment. That may include making the decision to place or remove the person from a managed care facility. To construe this Act, however, to permit a surrogate to execute an agreement that operates as a waiver of the basic right of access to justice is forcing an expansive construction upon the Act that the legislature simply did not intend.

The trial court's construction of the statute did not render the word "concerning" to be surplusage, as Mariner contends. (App. Br. pp. 23-25). Instead, the court's construction avoided the forced expansion of the statute that Mariner seeks this Court to apply. The Court should decline that invitation.

Mariner cites to the unpublished Tennessee case of *Necessary v. Life Care Cntrs. of Am., Inc.*, Op. No. E2006-00453-COA-R3-CV (Tenn. Ct. App. filed 11/16/07) (2007 WL 3446636), asserting the Tennessee Court of Appeals held "that a plaintiff who had authority to enter into an admission contract had authority to enter into an arbitration agreement, even in the absence of a power of attorney, to avoid 'legal limbo.'" (App. Br. pp. 25-26). The Court should discount the decision for several reasons.

First, it is an unpublished decision and of questionable efficacy. Second, and more importantly, *Necessary* is meaningfully distinct from this case. The plaintiff in *Necessary*, as the surviving spouse, filed a wrongful death action against a skilled nursing home facility where her husband had died. At the time of admission, the decedent was mentally competent and the plaintiff signed an admission agreement on behalf of her husband which contained an arbitration

provision. Although the plaintiff did not hold a written power of attorney, she acknowledged that she had the express authority of decedent to sign all of the admission documents and make all decisions regarding his admission to the nursing facility, except one – she did not have authority to sign an arbitration agreement. *Id.*, slip at p. 5. The Court of Appeals found such a position "untenable" and held that the plaintiff had *express authority* to sign admission documents at the healthcare facility, including the arbitration agreement as one of those admission documents. *Id.* The Court's "legal limbo" comment was a quote from *Owens v. National Health Corp.*, 263 S.W.3d 876 (Tenn. 2007), a case that involved an attorney-in-fact acting under a durable power of attorney for health care.

Here, not only do the parties admit that Sister lacked any express authority to sign the admission documents, because of Decedent's dementia no such authority could have been given. *Necessary* does not support Mariner's argument. *See also Robinson v. SSC Newport Operating Co., LLC*, Op. No. 2:10–CV–00265 (E.D. Tenn. 2011) (2011 WL 4431103) (District Court distinguished *Necessary* on this same basis in finding spouse did not have authority to bind resident to arbitration agreement).

Accordingly, the trial court appropriately declared the implied authority derived from the AHCCA did not include the power to enter into a binding arbitration agreement that waived Decedent's rights.

B. THE COURT DID NOT IMPROPERLY "DISFAVOR" THE ARBITRATION AGREEMENT

The trial court stated that while Sister "did have the right under the Adult Health Care Consent Act to consent to medical treatment, she did not have the right to commit her sister to a legally binding contract that agreed to the removal of [Decedent's] rights under the law." (Orders of 3/18/11, pp. 15-16). Mariner contends this amounts to an improper "singling out" of the arbitration clause, which is impermissible under the FAA. (App. Br. pp. 27-30). The Court should not be persuaded by this argument.

The FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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).

There is no question that Decedent lacked the capacity to contract. *See, e.g., Gaddy v. Douglass*, 359 S.C. 329, 597 S.E.2d 12 (Ct. App. 2004) (contractual capacity is generally defined as a person's ability to understand in a meaningful way, at the time the contract is executed, the nature, scope and effect of the contract). Thus, she could only be bound by any agreement, including the arbitration agreement, if the person executing the agreements had some actual or

implied authority to do so. Sister had no actual authority to sign *any* contract, so the arbitration agreement is on the same footing with all other agreements in that regard.

Arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843–44 (Ct. App. 1999). "Accordingly, a party may seek revocation of the contract under 'such grounds as exist at law or in equity,' including fraud, duress, and unconscionability." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). General contract principles of state law apply to arbitration clauses, even those governed by the FAA. *Davis v. KB Home of South Carolina, Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011).

The AHCCA may have provided implied authority for Sister to enter into agreements that permitted Decedent to obtain health care treatment, including an agreement to admit or discharge Decedent from a managed care facility. However, entering into an agreement to arbitrate all disputes is not the kind of agreement for health care treatment contemplated by the AHCCA. Sister had no actual or implied authority to bind Decedent to the arbitration agreement, which is a ground available under state law to revoke the agreement to arbitrate. The FAA is not offended in this instance.

Mariner's argument here presumes Sister's authority to broadly contract on behalf of Decedent. As the trial court found, there was no power of attorney

and Decedent lacked the capacity to authorize Sister to bind her to any agreements. Although the AHCCA permitted Sister to consent to health care decisions, binding Decedent and her estate to an arbitration agreement is beyond the limits of that implied authority.

Mariner also contends that by treating the arbitration agreement differently from the Admission Contract, the court failed to apply the common law rule of "merger." (App. Br. pp. 29-30). This is simply not the case. First, the Admission Agreement stands on its own, and while it references an arbitration agreement in the merger clause (Agreement part VII, p.7), it also contains a "savings clause" which provides for its validity if any provision is severed as "invalid, illegal, or unenforceable in any respect...." (Agreement, Part VII, p. 8) As Mariner pointed out elsewhere in its brief, the Agreement to Arbitrate itself states that "execution of this Agreement is **not** a precondition to receiving medical treatment or for admission to the Facility." (App. Br. p. 43; Arbitration Agreement, Part III, p. 3). Each agreement stands on its own and is not dependent upon the other for its operation. *See, e.g., Davis v. KB Home of South Carolina, Inc.* (arbitration clauses are severable from the contracts in which they are embedded; the issue of the arbitration clause's validity is distinct from the substantive validity of the contract as a whole).

Furthermore, the merger rule only applies if the contracts were validly entered into by the signatories to the agreements. Here, there was no express or implied authority from Decedent permitting Sister to bind her to any agreement,

even the agreement for health care services. The AHCCA may have allowed Sister to consent to treatment, including the decision to admit or discharge Decedent from Mariner's facility, but the Act is not broad enough to allow Sister to bind Decedent to the separate arbitration agreement.

Finally, the trial court did not rule on this merger argument in the order denying arbitration. Although Mariner filed and served a motion pursuant to Rule 59, SCRCP, to alter or amend the judgment, Mariner did not raise this point in its motion. It is therefore not preserved for this Court's consideration. *See, e.g.*, *Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 67 n. 17, 717 S.E.2d 589, 603 n. 17 (2011) (where the trial court fails to address a nonprevailing party's argument, and the party fails to bring the omission to the court's attention in a Rule 59, SCRCP, motion, the argument is not preserved for review).

The Court should affirm the trial court's conclusion that the arbitration agreement was not valid because of the state law ground that Sister lacked the authority to bind Decedent to the agreement, even if Sister could have consented to Decedent's admission to Mariner's facility.

C. SISTER IS NOT EQUITABLY ESTOPPED FROM DENYING AUTHORITY TO SIGN THE ARBITRATION AGREEMENT

Mariner contends that because Decedent "enjoyed the benefits of care and treatment at the Facility," Sister should be equitably estopped from asserting that

she lacked authority to sign the Arbitration Agreement. (App. Br. pp. 31-32). That is, Sister should not be able to simultaneously accept the benefits of the contract while rejecting another provision in the same contract. The Court should not be persuaded by this argument.

As noted, the two agreements were severable, so that enforcement of provisions of one does not conflict with voiding the other. Furthermore, both were treated the same in that Sister lacked the actual or apparent authority to bind Decedent to either agreement. Although the AHCCA permitted Sister to consent to medical services, including admission or discharge from a managed care facility, that statute did not authorize Sister to bind Decedent to the arbitration agreement. They are simply not separate provisions "in the same contract" as Mariner supposes.

Mariner cites to two unpublished district court orders to support its argument. *THI of South Carolina at Columbia, LLC v. Wiggins*, C/A No. 3:11–888–CMC (DSC 2011) (2011 WL 4089435) and *McCutcheon v. THI of S.C. at Charleston, LLC*, C/A No. 2:11–CV–02861–DCN (DSC 2011) (2011 WL 6318575). (App. Br. pp. 31-32). In each of those cases the federal district court found the plaintiff should be estopped from denying the validity of a separately executed arbitration agreement where the plaintiff simultaneously sought to hold the facility liable for breach of the terms of the admission agreement. Neither of these cases should be persuasive.

To begin with, they are both unpublished orders from two different federal

district court judges who are attempting to predict the application of South Carolina state law. Second, neither judge analyzed the cases under the AHCCA, that is, that the signatory had the statutory authority to consent to the provision of certain health care services, but did not have the implied consent to enter into a binding arbitration agreement. This was the basis for the trial court's rejection of Mariner's estoppel argument in this case. (Orders of 3//18/11, p. 16).

Furthermore, as the trial court held, equitable estoppel does not apply. As the Supreme Court stated:

> Elements of equitable estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 531 S.E.2d 287 n. 2 (2000). Essential elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position. *Mayes v. Paxton*, 313 S.C. 109, 437 S.E.2d 66 (1993). "Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other." *Evins v. Richland County Historic Pres. Comm'n*, 341 S.C. 15, 15, 532 S.E.2d 876, 878 (2000).

Zabinski v. Bright Acres Associates, 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001) (applied in an arbitration case). Here, there is no evidence of "false representation or concealment" on Sister's part. Furthermore, as the trial court found, Mariner "could not reasonably rely on the contract/agreement when they knew that [Sister] lacked the authority to enter into such a contract/agreement." (Order of 3/18/11, p. 17). The trial court noted that the "face sheet" on the June

2006 admissions documents as well as other documents "indicate that [Sister] did not have any other legal oversight, durable power of attorney or healthcare proxy." (Order of 3/18/11, p. 7). Thus, the "lack of knowledge and of means of knowledge of truth as to facts in question" is lacking. Mariner does not assert, nor has it proven, that anything was done by Sister to mislead Mariner.

Finally, as the Kentucky Supreme Court stated in *Ping*:

> [U]nder *Restatement (Third) of Agency* § 2.05 [(2006)], a principal may be estopped from disavowing an agent's unauthorized transaction with a third party only if the third party justifiably was induced to make a detrimental change in position because it believed the agent had authority and then only if "(1) the [principal] intentionally or carelessly caused such belief, or (2) having notice of such belief and that it might induce others to change their positions, the [principal] did not take reasonable steps to notify them of the facts." Ms. Ping's assumed misrepresentation of her authority is not be attributed to Mrs. Duncan, then, or her Estate, because Mrs. Duncan neither caused Beverly's mistaken belief about the scope of Ms. Ping's authority, nor failed to correct Beverly's misapprehension after having notice of it.

Op. No. 2010–SC–000558–DG (Ky. Sup. Ct. filed Aug. 23, 2012) (2012 WL 3631399(Ky.) (slip at p. 9). Here, there is no question that Decedent neither caused Sister's mistaken belief about the scope of Sister's authority, nor did Decedent fail to correct Mariner's misapprehension, for Decedent was, at all times, not competent.

The Kentucky Supreme Court provides additional guidance on the issue:

> We agree with the Court of Appeals of Maryland, furthermore, that at least where, as here, the Arbitration Agreement was not a condition of admission, the nursing home has failed to show that its mistaken belief regarding Ms. Ping's authority resulted in the sort of detriment that would support an estoppel.

> [*Dickerson v. Longoria*, 414 Md. 419, 995 A.2d 721 (Md. 2010)]. Apparently Mrs. Duncan would have been admitted to Beverly's facility even had there been no mistake, so the only detriment to Beverly is the loss of its bargain to arbitrate. As is noted in comment b. of section 2.05 of the Restatement, however, in this context " '[d]etrimental change of position' means an expenditure of money or labor, an incurrence of a loss, or subjection to legal liability, not the loss of the benefit of a bargain." *Restatement (Third) of Agency* § 2.05 comment b. Mrs. Duncan's Estate, in sum, is not estopped from disavowing the Arbitration Agreement.

Ping, slip at 19.

Accordingly, this Court should reject Mariner's contention that Sister is estopped from asserting that the arbitration agreement is not valid. The Court should affirm the circuit court's ruling on this point.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE PARTIES' ARBITRATION AGREEMENT WAS UNENFORCEABLE AGAINST DECEDENT'S WRONGFUL-DEATH BENEFICIARIES UNDER SOUTH CAROLINA'S WRONGFUL DEATH STATUTE

The trial court noted that the arbitration agreement attempted to reach statutory beneficiaries of the wrongful death claim who were not parties to the agreement. (Order of 3/18/11, p. 9). The court held that even if Sister had the ability to bind Decedent to the agreement, Sister could not bind the statutory beneficiaries of the wrongful death claim. (*Id.*)

Mariner contends that (A) the agreement on its face expressly covered the statutory beneficiaries so that it applies to them, and (B) the arbitration agreement binds those beneficiaries as a matter of law. (App. Br. pp. 34-40). These arguments should not persuade this Court to reverse the trial court's ruling.

A. THE AGREEMENT ON ITS FACE

Mariner contends that not only could Sister bind Decedent to the arbitration agreement, she could also bind the wrongful death beneficiaries, even though they were not parties to the agreement nor is there any evidence of express or implied authority to do so. (App. Br. P. 34). The Court should reject this argument.

First, Mariner's argument on this point is fairly conclusory with no citation to authority. Mariner's contention is basically that "the agreement is binding because it says it is." The Court should deem this argument abandoned. *See Transportation Ins. Co. and Flagstar Corp. v. South Carolina Second Injury Fund*, 389 S.C. 422, 699 S.E.2d 687 (2010) (deeming argument abandoned when made in half-page and cited no authority).

Furthermore, as the Supreme Court of Kentucky said in *Ping v. Beverly Enterprises, Inc.*:

> [A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third party are appropriately subjected to the contract's arbitration provisions, at least where the tort and the contract are significantly intertwined. *See, In re Weekley Homes, L.P.*, 180 S.W.3d 127 (Tex.2005) (negligent repair claim by homeowner's daughter against contractor was subject to repair contract's

> arbitration clause because daughter, although a non-party, was a direct and principal beneficiary under the contract). It is something else entirely, however, to say that incidental beneficiaries of a contract—individuals or entities with no substantive rights under the contract and no direct benefits—may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants. This is what Beverly purports to do. Arbitration is a matter of contract, however; it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed.2d 491 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Citation and internal quotation marks omitted.). Since Beverly's theory would allow just that, *i.e.*, would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a "third party beneficiary" of the arbitration agreement, we reject it out of hand.

Ping, slip at 13.

Likewise, Mariner's act of mentioning the "heirs...including the personal representative or executor of his or her estate; and the Legal Representative" as being bound by the arbitration agreement does not make it so. It is no more than an *ipse dixit* which Mariner expects this Court to embrace. While it may make life interesting, as the Kentucky Court mused, the law simply does not permit a party to cut off the rights of a non-signatory to an agreement who receives no benefit thereunder.

Accordingly, this Court should affirm the trial court's ruling that the arbitration agreement, even if valid, could not bind the statutory wrongful death beneficiaries.

B. THE ARBITRATION AGREEMENT DOES NOT BIND THE WRONGFUL DEATH BENEFICIARIES AS A MATTER OF LAW

Mariner next contends that because Decedent was bound by the Arbitration Agreement, she is barred from bringing an "action" in court and, therefore, the beneficiaries under the Wrongful Death Statute are barred as well. (App. Br. pp. 35-40). Mariner bases its argument upon its assertion that a wrongful death action in South Carolina is "entirely derivative of the decedent's rights" as construed by South Carolina's courts. (App. Br. p. 36). The Court should not be persuaded by these arguments.

According to the Wrongful Death Act:

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

S.C. Code Ann. § 15-51-10 (1977). The wrongful death beneficiaries are as follows:

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

S.C. Code Ann. § 15-51-20 (Supp. 2001). The general elements of damages recoverable are: (1) pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of

the use and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries. *Self v. Goodrich*, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App.1989).

Contrary to Mariner's claim, wrongful death actions in South Carolina are not "entirely derivative" of the decedent's rights. In fact, a wrongful death claim is a separate claim from the claims a decedent might bring on her own behalf under the survival statute. For instance, in *Bennett v. Spartanburg Railway, Gas & Electric Co.*, 97 S.C. 27, 81 S.E. 189 (1914), the supreme court held that wrongful death and survival actions are different claims for different injuries. 97 S.C. at 29–30, 81 S.E. at 189–90. The Court stated: "Necessarily, therefore, there must be separate verdicts and separate judgments, and hence there should be separate actions." 97 S.C. at 31, 81 S.E. at 190. *See also Strickland v. Southern Ry. Co.*, 111 S.C. 248, 97 S.E. 695 (1918) (supreme court affirmed appeal from circuit court's ruling noting that survival claims are independent of wrongful death claims); *Claussen v. Brothers*, 148 S.C. 1, 145 S.E. 539 (1928) (discussing the difference between survival and wrongful death claims as independent of each other).

It is true that our Supreme Court recently reaffirmed that a claim under the Wrongful Death Act lies in the decedent's estate only when the decedent possessed the right of recovery at his death. *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 699 S.E.2d 143 (2010). This rule,

however, does not dictate the conclusion that a wrongful death claim is wholly derivative of the decedent's claim. Instead, the rule provides that if the defendant has a defense that would completely bar the decedent's claim had the decedent survived, then the wrongful death beneficiaries may not bring a claim under the statute. For instance, in *Stokes*, the statute of limitations had run on the decedent's claim, and the wrongful death beneficiaries were accordingly totally barred from pursuing their claims under the statute. The Supreme Court cited the following from United States District Court case of *Quattlebaum v. Carey Canada, Inc.*, 685 F.Supp. 939 (D.S.C. 1988): "anything *that would have defeated the decedent's recovery* had he survived the accident, 'such as contributory negligence, a valid release, or similar acts on his part,' would defeat the right of recovery in behalf of his family in case of his death." (Emphasis added). The Court held *Quattlebaum* "was correctly decided and adheres to the principle that a decedent's estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived." *Stokes, Id.* at 349, 699 S.E.2d at 146.

Mariner has never asserted that the claims here are completely barred or that Decedent's recovery has been "defeated" by operation of law, such as by the running of the statute of limitations or the execution of a release. Instead, what Mariner asserts is that the Decedent may not bring the claim in court but must pursue her remedies in arbitration. Thus, neither *Stokes* nor the wrongful death statute operate to cut off the statutory beneficiaries' rights, even if the claims had been subject to arbitration. *See also Carter v. SSC Odin Operating Co., LLC*, Op.

No. 113204 (Ill. S. Ct. filed Sept. 20, 2012) (slip at 12) (noting the Defendant overstated the significance of the derivative nature of a wrongful-death action, and stating "Although a wrongful-death action is dependent upon the decedent's entitlement to maintain an action for his or her injury, had death not ensued, neither the Wrongful Death Act nor this court's case law suggests that this limitation on the cause of action provides a basis for dispensing with basic principles of contract law in deciding who is bound by an arbitration agreement").

This Court should affirm the trial court's ruling that even if the Arbitration Agreement is valid against the estate (which it is not), the Agreement cannot require the statutory wrongful death beneficiaries to place their claims in arbitration.

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE ARBITRATION AGREEMENT WAS PROCEDURALLY UNCONSCIONABLE AND IMPOSSIBLE TO ENFORCE

Mariner contends the trial court erred in ruling the agreement was procedurally unconscionable as a basis for refusing to enforce the agreement. (App. Br. pp. 41-45). Mariner contends the court erred in finding unconscionability based upon (1) the Center's failure to abide by its internal policies by not explaining the Arbitration Agreement to Sister, and (2) the danger of conflicting rulings on common issues because not all of the defendants moved to compel arbitration. This Court should affirm.

First, the trial court noted the Center's policies required a staff member to

explain and offer the admissions and financial documents to the person signing them, including the Arbitration Agreement. (Order of 3/18/11, p. 9). The court found that on the basis of Sister's affidavit and Mariner's admission that the Arbitration Agreement was presented as part of a larger admissions package, the documents were not explained to Sister, nor was it made clear to her that the Arbitration Agreement was voluntary and not a requirement for Decedent's admission to the Center. (Order of 3/18/11, pp. 9-10). The trial court also found that, even if valid, the Arbitration Agreement could not apply to the claims that have been made on behalf of the statutory beneficiaries who were not parties to the agreement. (Order of 3/18/11, p. 10).

In South Carolina, unconscionability in the contractual context is defined as the absence of *meaningful* choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007). In this case, the trial court held that Mariner's failure to follow its own procedures by not explaining and offering the Arbitration Agreement to Sister amounted to unconscionability because she was not made aware of her right to reject the clause, that is, she lacked a meaningful choice with regard to the Arbitration Agreement.

Second, the trial court found that the fact that Sister risked having to pursue the same claims in different forums against different defendants bolstered

the unconscionability ruling. Mariner misstates the trial court's ruling here in an attempt to bring it under the "intertwining doctrine" rejected in *Dean Witter Reynolds v. Byrd*, 470 U.S. 213 (1985), cited in *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 620 S.E.2d 86 (Ct. App. 2005). The Court should reject Mariner's contention.

Under the "intertwining" doctrine, when arbitrable and nonarbitrable claims arise out of the same transaction, and are sufficiently intertwined factually and legally, the trial court, under this view, may in its discretion deny arbitration as to the arbitrable claims and try all the claims together in federal court. *Dean Witter*. The Supreme Court held the Arbitration Act requires trial courts to compel arbitration of "pendent arbitrable claims" when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums. What the Court was concerned about was piecemeal litigation between the same parties of various claims in the same suit, some of which were covered by the arbitration agreement (called the "arbitral pendent claims" in the district court) and some that were not.

The concern in this case is different. As the circuit court noted, at least five (5) of the defendants did not move to compel arbitration of the claims against them. (Order of 3/18/11, p. 10). In fact, one defendant, Palmetto Health Care, LLC, had previously moved for enforcement of the Arbitration Agreement but subsequently withdrew its petition. (*Id.*) The circuit court noted that parties who are not seeking arbitration cannot be forced to arbitrate a matter any more than

individuals who are not parties to the agreement. (*Id.*) Thus, if the court upheld the arbitration agreement, some of the claims and some of the parties would be subject to arbitration while some of the claims with different parties would be subject to trial by jury. This would create the "very real possibility of conflicting rulings on common issues of law and fact[.]" (*Id.*).

This is not the "intertwining" doctrine rejected in *Dean Witter*. Instead, the result of forcing arbitration with some parties while leaving Sister to pursue the same claims in court against other defendants would be "unreasonable and unconscionable" as they would be forced to litigate the same claims in two separate forums with different defendants. (Order of 3/18/11, p. 12). As the trial court held, this could result in conflicting rulings and would be an unreasonable hardship for Sister. (*Id.*)

Accordingly, this Court should affirm the trial court's ruling that even if the Arbitration Agreement was not invalid, enforcing it in this case would result in unconscionability for Sister.

IV. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE DEFENDANTS' DELAY NULLIFIED THE AGREEMENT AND WAIVED ANY RIGHT THEY MAY HAVE HAD TO ENFORCE THE ARBITRATION CLAUSE

Mariner contends the trial court erred in concluding Mariner's delay in asserting its purported right to arbitration resulted in a waiver of that right. (App. Br. p. 45-48). Mariner contends (A) a Notice of Intent to File Suit under Section

15-79-125 of the South Carolina Code of Laws does not "commence" a legal action for purposes of waiver; (B) the parties engaged in no discovery prior to Mariner's assertion of the right; and (C) Sister has not demonstrated prejudice by the delay in this case. This Court should affirm.

The right to enforce an arbitration clause may be waived. *Davis v. KB Home of South Carolina*, Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011). A court generally considers the following factors when determining whether a party has waived its right to compel arbitration: (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. *Davis v. KB Home of South Carolina.*

In this case, counsel for Decedent and Sister first contacted Mariner's counsel regarding this matter in the latter part of 2008. (Plaintiff's Memo in Opp to Mariner Motion, pp. 3-4). In December 2008, Plaintiffs' counsel requested Decedent's medical records from several health care providers, including the Center. (*Id.*) The records were not forthcoming so counsel requested records again in January and March 2009. (*Id.*) Each request sought production of Decedents:

> entire medical record, including but not limited to: New patient information, Office Notes, Immunization Records, Consultation Reports and Referrals, Telephone Communications, Rx Copies, Labs, Pathology, Surgical and Radiology Reports, and any other documents or communications, including electronic information, in

your files or on this patient.

(*Id.*) The Center ultimately provided the records in April 2009, but the materials provided did not contain the Admissions Agreement or the Arbitration Clause. (*Id.*)

The trial court noted Sister filed her Notice of Intent in July 2009. (Order of 3/18/11, p. 12) These notices were served upon Mariner by the end of August 2009 and appearances were made for each defendant. (Plaintiff's Memo in Opp to Mariner Motion, p. 4) The parties completed the required pre-suit mediation in January 2010 which was unsuccessful. In March 2010, Sister filed the Summons and Complaint. Mariner filed its Answer on May 19, 2010, and for the first time gave Sister notice of the existence of the Arbitration Agreement and the claim that the Agreement governed Sister's complaint. (Order of 3/18/11, p. 13). Mariner then did not seek enforcement of the Arbitration Agreement until August 2010, more than a year after being first put on official notice of the claim (the court noted Sister had been gathering medical records from Mariner for months prior to filing the Notice of Intent), and well after Sister had served discovery in the lawsuit. (Order of 3/18/11, p. 13). The trial court concluded Mariner delayed almost a year before moving to enforce the Arbitration Agreement, and "[d]uring the entire length of its delay, it conducted itself in a manner consistent with a party that intended to proceed with litigation through the confines of the judicial process." (Order of 3/18/11, p. 15).

This Court should reject Mariner's contention that it did not engage in

undue delay in asserting its rights under the Arbitration Agreement because the parties were engaging in a statutorily mandated procedure in a professional negligence case. Cf. *Ranucci v. Crain*, 397 S.C. 168, 176, 723 S.E.2d 242, 246 (Ct. App. 2012) (noting that "[e]ach statute governs a distinct time period *during the litigation process*") (emphasis added). Had Mariner asserted its rights at the first instance in the litigation process, Sister would have been put on notice and may have avoided the expense and delay caused by the statutory procedure. Contrary to Mariner's argument, none of the factors listed in *Davis* is dispositive; rather, the court must make the determination of waiver based upon a general consideration of those factors. Here, the circuit court engaged in that analysis and concluded the delay, coupled with a lack of good faith and fair dealing, resulted in a waiver by Mariner of any right to assert arbitration. This Court should affirm.

The circuit court also noted the contract did not contain a "no-damage-for-delay" provision, adding "as such, had Defendant intended to rely upon the Agreement, it should have acted promptly upon the first notice of a civil action." (Order of 3/18/11, p. 13). Mariner has not challenged this separate basis for finding waiver of the arbitration agreement, and it is now the law of this case. *See, e.g.*, *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 714 S.E.2d 869 (2011) (stating an unchallenged ruling, right or wrong, becomes the law of the case); *Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000) (observing where the appealing party does not challenge a ruling, it becomes the law of the case and will not be considered by this Court); *see also* Rule 208(b)(1)(B), SCACR

("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

The trial court added that South Carolina recognizes abandonment as a basis for an exception to a contract's enforceability. (Order of 3/18/11, p. 13, 14). Again, Mariner has not challenged this separate basis the trial court used in concluding the Agreement had been "nullified." This ruling is also the law of this case and may serve as a basis to affirm. *See Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance.").

Furthermore, abandonment of a contract by one party is the giving up of the right to a benefit due from the other party. *Ro-Lo Enters. v. Hicks Enters.*, 294 S.C. 111, 362 S.E.2d 888 (Ct. App.1987). A party to a contract abandons it by undertaking a positive and unequivocal act which is inconsistent with the existence of the contract. *Id.* "The abandonment of a contract is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted." *Quality Concrete Prods., Inc. v. Thomason*, 253 S.C. 579, 589, 172 S.E.2d 297, 302 (1970).

The trial court concluded that Mariner, "through its actions and delay, abandoned any rights it may have been afforded to force this matter to arbitration." (Order of 3/18/11, p. 15). This ruling is correct. By delaying and engaging in the statutory Notice of Intent procedure, Mariner took positive and

unequivocal acts which were inconsistent with the existence of an Arbitration Agreement. Accordingly, Mariner abandoned any rights it may have had under that Agreement.

This Court should affirm the trial court's order and remand the matter for a jury trial on the merits.

V. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE MARINER ENTITIES, EXCEPT FOR GRANCARE SC, INC., TOOK INCONSISTENT POSITIONS WITH RESPECT TO THE ARBITRATION AGREEMENT

The trial court noted that GranCare operated the Center at the time of Decedent's June 2006 admission. (Order of 3/18/11, p. 15). The court also observed:

> all of the other defendants bringing this motion have alleged elsewhere that they do not operate nursing homes, do not have any ties to [the Center], have never transacted business in South Carolina, do not own property in South Carolina, and have never had any influence over the operations of [the Center]. In fact, simultaneous to the hearing of this Motion to Compel Arbitration, these same Defendants argued a motion to Dismiss for Lack of Personal Jurisdiction. Yet despite these protestations, these Defendants have sought to enforce an Arbitration Agreement between a facility they contend they have no interest in or control over, in a state they do not transact business in, in an industry in which they do not participate, and that this Court holds no jurisdiction over them. It cannot rationally be argued that all of these Defendants are parties to this contract, while at the same time argue that they have never contracted in South Carolina, never conducted business in South Carolina or are not tied in with the operation of the nursing facility. If the Defendants' arguments were accepted as true, then they would not have standing to enforce the Arbitration Agreement and the impossibility of prosecuting the claims in two separate forums becomes even more significant as discussed hereinabove.

(Mariner Orders of 3/18/11, p. 15) (emphasis by the court).

Mariner asserts the trial court erroneously concluded Mariner was judicially estopped from asserting the validity of the Arbitration Agreement because Mariner had moved to dismiss for lack of personal jurisdiction in South Carolina. (App. Br. pp. 32-34) Mariner contends these were not "inconsistent and irreconcilable positions" as the trial court found. This Court should not be persuaded by these arguments.

First, the trial court did not conclude Mariner was judicially estopped from enforcing the agreement in this motion where Mariner had denied it had entered an agreement to be performed at least in part in South Carolina when it moved to dismiss for lack of personal jurisdiction. The trial court was simply observing the incredibly inconsistent positions Mariner had taken in two different motions.

Second, the trial court's observation on this point does not require reversal. It is true that judicial estoppel is an equitable concept that prevents a litigant from asserting position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding. The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary. *City of North Myrtle Beach v. East Cherry Grove Realty Co., LLC*, 397 S.C. 497, 725 S.E.2d 676 (2012). The following elements are necessary for the doctrine to apply: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings

involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004).

Even though Mariner took two totally inconsistent positions in the same or related proceedings, and the circuit court apparently believed this was part of an intentional effort to deceive the court, Mariner is correct that it was not successful in asserting the position that it had not entered into a contract to be performed at least in part in South Carolina. Accordingly, while all of the elements of judicial estoppel may not have been met, the behavior most certainly demonstrated a certain level of dishonesty on Mariner's part. Fortunately, Mariner did not prevail on its earlier position, and this Court should not permit Mariner to prevail on its inconsistent position that Mariner had entered a binding the Arbitration Agreement with Sister.

VI. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE FEDERAL ARBITRATION ACT, 9 U.S.C. §§ 1-16 ("FAA") DID NOT GOVERN THE PARTIES' ARBITRATION AGREEMENT

On motion for reconsideration, Mariner contended the trial court failed to address whether the FAA applied to the Arbitration Agreement, and sought a ruling that: (1) the Agreement provided the parties expressly agreed to be governed by the FAA; (2) the Defendants argued the applicability of the FAA but

the trial court did not address that argument; (3) Sister did not deny the FAA applies to the Agreement; and (4) the orders failed to specifically acknowledge the FAA's applicability to the Agreement. (Mariner Motion for Reconsideration, p. 3). The trial court denied the motion for reconsideration on several grounds. This Court should affirm.

A. THE COURT CORRECTLY FOUND THE FAA DID NOT APPLY BECAUSE THE AGREEMENT WAS VOID

The trial court ruled that because it had already determined that the Agreement was void because Sister lacked authority to bind Decedent, then there was no basis for application of the FAA. (Order of 6/6/11, p. 3).

Mariner contends that the FAA applies because "the parties stipulated that the FAA governs the Arbitration Agreement." (App. Br. pp. 14-15). Of course, this argument is premised on the validity *vel non* of the Agreement. There is no evidence Sister had actual or implied authority to bind Decedent or her estate to an Arbitration Agreement. Accordingly, the trial court correctly rejected this argument.

Secondly, saying something "evidences a transaction involving interstate commerce" does not make it so. Assuming the validity of the Agreement, the Court must still analyze whether the agreement itself involves interstate commerce despite any labels the parties may give it.

This Court should reject Mariner's contention that the FAA governs because the parties stipulated to such in the Agreement to Arbitration.

B. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE GENERAL NATURE OF THE CONTRACT FOR NURSING HOME CARE DID NOT CONTEMPLATE INTERSTATE COMMERCE SO THAT THE FAA WOULD NOT APPLY

Mariner contends that the Arbitration Agreement "unquestionably affected interstate commere" so that the FAA governed the agreement. (App. Br. pp. 15-19). Mariner points to numerous factors it contends evidences a contract "involving commerce." (App. Br. p. 18). This argument should not be persuasive.

As the Supreme Court of the United States recently stated, "We have interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'- words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). The Court added, "[t]o be sure, the power to regulate commerce, though broad indeed, has its limits." *Citizens Bank*, at 58.

In finding the transaction in *Citizens Bank* fell within the ambit of the FAA, the Court looked at the general practice at issue – debt-restructuring – to find the activity "affected commerce." The Court stated:

> This case is well within our previous pronouncements on the extent of Congress' Commerce Clause power. Although the debt-restructuring agreements were executed in Alabama by Alabama residents, they nonetheless satisfy the FAA's "involving commerce" test for at least three reasons. <u>First, Alafabco engaged in business throughout the southeastern United States using substantial loans from the bank that were renegotiated and redocumented in the debt-restructuring agreements</u>. Indeed, the gravamen of Alafabco's state-court suit was that it had incurred " `massive debt' " to the bank in order to keep its business afloat,

> and the bank submitted affidavits of bank officers establishing that its loans to Alafabco had been used in part to finance large construction projects in North Carolina, Tennessee, and Alabama.
>
> Second, the restructured debt was secured by all of Alafabco's business assets, including its inventory of goods assembled from out-of-state parts and raw materials. If the Commerce Clause gives Congress the power to regulate local business establishments purchasing substantial quantities of goods that have moved in interstate commerce, *Katzenbach v. McClung*, 379 U.S. 294, 304-305, 85 S. Ct. 377, 13 L. Ed.2d 290 (1964), it necessarily reaches substantial commercial loan transactions secured by such goods.
>
> Third, were there any residual doubt about the magnitude of the impact on interstate commerce caused by the particular economic transactions in which the parties were engaged, that doubt would dissipate upon consideration of the "general practice" those transactions represent. *Mandeville Island Farms*, [334 U.S. 219, 236 (1948)]. No elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress' power to regulate that activity pursuant to the Commerce Clause. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38-39, 100 S. Ct. 2009, 64 L. Ed.2d 702 (1980) ("[B]anking and related financial activities are of profound local concern.... Nonetheless, it does not follow that these same activities lack important interstate attributes"); *Perez [v. United States*, 402 U.S. 146, 154-155 (1971)] ("Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce").

Citizens Bank, at 57-58. Hence, the Supreme Court looked at the particular economic transactions as well as the nature of the general practice at issue in finding those activities involved commerce or "affected" commerce.

The agreement in this case involved a contract between a nursing home in South Carolina and a resident, also a South Carolinian. Unlike the commercial lending and debt-refinancing transactions in *Citizens Bank*, providing managed

care in a nursing facility is not the kind of activity that Congress intended to regulate across state lines. Although Mariner outlines various activities the may involve people from outside of South Carolina, and its involvement in the State's Medicaid program, there is simply nothing about the purported agreement in this case that affects interstate commerce. *See also Flexon v. PHC-Jasper, Inc.*, ___ S.C. ___, ___, 731 S.E.2d 1, 4 (Ct. App. 2012) (noting that under the facts surrounding the agreement, Flexon was a South Carolina resident, and Coastal hired him to provide medical services "at the medical practice office located at 1010 Medical Center Drive, Hardeeville, South Carolina ... and such other practice sites in Beaufort and Jasper counties as may be reasonably designated by [PHC] from time to time...."; Court held the agreement and the surrounding facts in that case did not implicate interstate commerce).

The Supreme Court of South Carolina addressed this activity in *Timms v. Greene*, in which the Court reasoned that the performance of the contract, the provision of patient-resident services in South Carolina, did not require any activities in interstate commerce. 310 S.C. 469, 427 S.E.2d 642 (1993). *Timms* is still good law, as discussed below.

Accordingly, if this Court finds the Agreement is not void for the reasons stated above, the Court should affirm the trial court's ruling that the transaction in this case does not affect interstate commerce such that the FAA governs.

C. THE TRIAL COURT CORRECTLY APPLIED *TIMMS V. GREENE*

Mariner contends that *Timms v. Greene* is no longer good law in light of *Citizens Bank.* (App. Br. Pp. 19-20). Further, Mariner asserts that even under *Timms*, the FAA governs the transaction. These arguments should not be persuasive.

As noted above, our supreme court found the agreement in *Timms v. Greene* did not involve interstate commerce. 310 S.C. at 473, 427 S.E.2d at 644. The *Timms* contract was between a nursing home and one of the nursing home's residents and included an arbitration clause. *Id.* at 470–71, 427 S.E.2d at 643. In support of its decision, the supreme court found the only evidence raised to show interstate commerce was that the nursing home: (1) was a division of National HealthCorp, L.P., a Delaware Limited Partnership; (2) marketed its services to persons residing outside this State; (3) hired employees from outside the State; (4) purchased a majority of its goods, equipment and supplies outside the state for use at the home; and (5) contemplated payment in part by Medicare or Medicaid. *Id.* at 473, 427 S.E.2d 642, 427 S.E.2d at 644. The Court stated although the listed factors could show the nursing home's involvement in interstate commerce, their relationship to the agreement between the nursing home and the resident was "insufficient to form the basis of the contract between the parties ." *Id.*

Contrary to Mariner's argument, *Timms* remains good law. It has been cited with approval in a number of cases since 2003, the year the Supreme Court of the United States filed *Citizens Bank. See, e.g., McElveen v. Mike Reichenbach*

Ford Lincoln, Inc., C/A No. 4:12–874–RBH–KDW (D.S.C. filed Aug. 12, 2012) (2012 WL 3964973) (citing to *Timms* but distinguishing it); *Lucey v. Meyer*, Op. No. 4960 (S.C. Ct. App. filed March 28, 2012) (Shearouse Adv. Sh. No. 11 at 75) (citing to *Timms* in ruling on whether the agreement in that case involved interstate commerce); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008) (citing to *Timms* when making determination of whether agreement involved interstate commerce).

As for Mariner's argument that even under a *Timms*-based analysis Mariner established the necessary nexus with interstate commerce, the activities Mariner points to – payment from Medicaid, purchase of out-of-state supplies, activity was part of a national business – were of the same character as the activities proffered in *Timms*. Yet the Supreme Court still held the activity in that case – provision of nursing home managed care to a South Carolina resident – did not affect interstate commerce for purposes of the FAA.

This Court should affirm the trial court's ruling that *Timms* controls this case, and should hold that *Timms* is still good law. The Court should reject Mariner's argument to the contrary.

CONCLUSION

For the reasons stated the Court should affirm the circuit court's order in its entirety and remand this matter for trial by jury.

Respectfully submitted,

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