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

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,

of whom,

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

Appellants.

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I. MS. COLEMAN HAD AUTHORITY TO SIGN THE ARBITRATION AGREEMENT ON BEHALF OF MS. BRINSON

A. Equitable Estoppel Precludes Ms. Coleman From Repudiating The Arbitration Agreement

This Court's ruling in *Pearson v. Hilton Head Hosp.*, --- S.E.2d ---, No. 5036, 2012 WL 4513599 (Ct. App. Oct. 3, 2012), definitively demonstrates that Ms. Coleman is estopped from repudiating the Arbitration Agreement. In *Pearson*, the Court followed *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000):

> In the arbitration context, the [equitable estoppel] doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause *when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.* To allow a plaintiff to claim the benefit of the contract and simultaneously avoid its burdens would both disregard and contravene the purposes underlying enactment of the [FAA].

Pearson, 2012 WL 4513599, at *4 (emphasis in original; brackets added) (quoting *Int'l Paper*, 206 F.3d at 418). As a matter of basic fairness, "[a] party may not rely on the contract when it works to its advantage and repudiate it when it works to its disadvantage." *Id.* at *8 (citation omitted). Thus, equitable estoppel requires a non-signatory to abide by an arbitration agreement when she (1) seeks to enforce a contract containing the arbitration provision or (2) otherwise "receives a direct benefit" from the contract. *See id.* at *4.

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[1] The terms defined in Defendants' Opening Brief ("Br. __") shall be applied herein. Ms. Coleman's Answer Brief shall be referred to in citations as "AB __."

Pearson involved two contracts that contained identical arbitration clauses: an agreement between a hospital and a professional placement firm (Locum), pursuant to which Locum placed physicians at the hospital to work as independent contractors ("Hospital-Locum Contract"); and an agreement between Locum and the plaintiff-physician that assigned him to a temporary position at the hospital ("Physician-Locum Contract"). After the hospital fired the physician, he sued the hospital and Locum; both moved to compel arbitration. The trial court granted Locum's motion to compel arbitration under the Physician-Locum Contract, but denied the hospital's motion to compel arbitration under the Hospital-Locum Contract because the physician did not sign that agreement. *See id.* at *1.

Reversing the trial court, this Court first explained that the physician "received a benefit due to the [Hospital-Locum] [C]ontract, in that he was able to work at the Hospital and receive payment for his work." *Id.* at *9. Having received the benefits of the Hospital-Locum Contract, the Court ruled that the physician "should not be able to disclaim the arbitration agreement contained in it." *Id.*

Next, the Court concluded that equitable estoppel required the physician to arbitrate because he had asserted a breach of contract claim against the hospital. The Court reasoned that the physician either "has to rely on his contract or the Hospital's to have a breach of contract action against the Hospital." *Id.* Either way, the Court ruled that the physician "should not be allowed to hold the Hospital to one of the contracts to allege a breach but not be subject to the arbitration provisions." *Id.*

Pearson compels the same result here. *First*, in Count III of her Complaints, Ms. Coleman asserts a claim against Defendants for breaching the Admission Contract. Ms.

Coleman's Complaints allege the existence and validity of the Admission Contract and rely upon it as the basis of her contract claims: "*Defendants had a contract with Mary Brinson and/or her representatives* which required Defendants to provide nursing home and rehabilitative care to Mary Brinson that met acceptable professional standards. Defendants *breached this contract* and failed to act in good faith and fair dealings by failing to provide such care . . . ." (Survival Compl. ¶¶ 60-61 (emphasis added); Wrongful Death Compl. ¶¶ 61-62 (emphasis added).)

Ms. Coleman also acknowledged in the "Entirety of Agreement" section of the Admission Contract that "[t]his Agreement . . . *and the Arbitration Agreement between the Facility and the Resident*, if the parties sign one, . . . *contain all of the promises and agreements between the parties.*" (Defs. Mem. in Supp., Ex. A at 7 (emphasis added)) Because Ms. Coleman seeks to enforce the Admission Contract against Defendants, she is estopped from arguing that the Arbitration Agreement, which is part of the Admission Contract, is invalid because she had no authority to sign it. *See Pearson*, 2012 WL 4513599, at *4, 9; *Int'l Paper*, 206 F.3d at 418 (explaining that plaintiff "cannot seek to enforce [] contractual rights and avoid the contract's requirement that 'any dispute arising out of' the contract be arbitrated").[2]

[2] Ms. Coleman wrongly relies on *Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581, 594-95 (Ky. 2012), where a decedent's estate was not estopped from repudiating an optional nursing-home arbitration agreement that the decedent's daughter had signed on her behalf. (AB 23-24) Unlike this case, there is no indication in *Ping* that the decedent's admission contract incorporated the arbitration agreement, nor did the nursing home argue that the two contracts merged by operation of law. Indeed, the court noted that the admission contract "was not [even] made a part of the record" on appeal. *Id.* at 596. *Ping* also is inapposite because the plaintiff in that case, unlike Ms. Coleman, did not assert that the facility breached a contract containing an arbitration clause. *See id.* at 588.

Second, equitable estoppel applies because Ms. Brinson directly benefited from the Admission Contract of which the Arbitration Agreement was a part. The Arbitration Agreement was not a condition of Ms. Brinson's admission to the Facility but, upon execution, it expressly was incorporated into the Admission Contract. (Defs.' Mem. in Supp., Ex. A at 7) Thereafter, the Admission Contract—to which Ms. Coleman acknowledges she had authority to bind Ms. Brinson (AB 18, 21)—made Ms. Brinson's compliance with its terms, including the Arbitration Agreement, a condition of the Facility's provision of care and treatment. (Defs.' Mem. in Supp., Ex. A at 1 ("This [Admission Contract] sets forth the terms under which the Facility will provide long term health care services to [Ms. Brinson] . . . .")) *See Cook v. GGNSC Ripley, LLC*, 786 F. Supp. 2d 1166, 1172 (N.D. Miss. 2011) (enforcing arbitration agreement against a non-signatory under a similar fact pattern). Because Ms. Brinson received the benefits of the Admission Contract, and the Facility performed in reliance on Ms. Brinson's compliance with its terms, Ms. Brinson's estate may not disavow the Arbitration Agreement contained therein. *See Pearson*, 2012 WL 4513599, at *4 ("A nonsignatory is estopped from refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing an arbitration clause." (quotation marks and citation omitted)).

Finally, Ms. Coleman proffers no good reason why equitable estoppel does not apply. Ms. Coleman points to the Admission Contract's savings clause in arguing that the two agreements "are simply not separate provisions 'in the same contract'. . ." (AB 21) To the contrary, the two agreements *do* comprise a single contract because the Admission Contract's merger clause expressly says so. *See Cook*, 786 F. Supp. 2d at 1172 ("The arbitration agreement . . . became part of the admission agreement upon

execution, as reflected by its express terms."); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001) (stressing that contracts "are enforceable in accordance with their terms").

Moreover, the savings clause comes into play only if a provision of the Admission Contract is "held to be invalid, illegal or unenforceable." (Defs.' Mem. in Supp., Ex. A at 8) But the Arbitration Agreement is not invalid, illegal, or unenforceable because it is part of the Admission Contract that Ms. Brinson's estate seeks to enforce against Defendants, and from which Ms. Brinson derived direct benefits. *See Pearson*, 2012 WL 4513599, at *9. In sum, the savings clause is irrelevant.

Ms. Coleman also argues that there is no estoppel because, even though the Adult Health Care Consent Act ("AHCCA") authorized her to bind Ms. Brinson to the Admission Contract, special rules apply to arbitration agreements and the AHCCA "did not authorize [her] to bind [Ms. Brinson] to the [A]rbitration [A]greement." (AB 21) This is precisely the internally inconsistent position that equitable estoppel (and the FAA) precludes. Ms. Coleman admits that she had authority to sign the Admission Contract (AB 18, 21); yet, the Admission Contract makes plain that the Arbitration Agreement was part of it. Ms. Coleman cannot have it both ways—if she had authority to sign the Admission Contract on Ms. Brinson's behalf, then she had authority to sign the Arbitration Agreement, too. *See id.* at *4 ("To allow a plaintiff to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the [FAA].").

In addition, Ms. Coleman fails to distinguish *THI of S.C. at Columbia, LLC v. Wiggins*, C/A No. 3:11-888-CMC, 2011 WL 4089435, at *6 (D.S.C. Sept. 13, 2011), and

McCutcheon v. THI of S.C. at Charleston, LLC, No. 2:11-CV-02861, 2011 WL 6318575, at *2-3 (D.S.C. Dec. 15, 2011), where plaintiffs were estopped from disavowing nursing-home arbitration agreements. These cases are directly on point because they correctly applied equitable estoppel principles that are universally recognized in South Carolina and elsewhere, as *Pearson* demonstrates. To the extent that, as Ms. Coleman argues, the *Wiggins* and *McCutcheon* courts merely "predicted" how South Carolina would apply equitable estoppel in this situation (AB 22), their predictions were prescient and well-grounded because, as in *Pearson*, the *Wiggins* and *McCutcheon* courts applied the Fourth Circuit's analysis in *International Paper* in reaching their decisions.

That *Wiggins* and *McCutcheon* did not address the AHCCA (AB 22) is of no moment because equitable estoppel is an independent basis to enforce an arbitration agreement. The *Wiggins* court recognized this, noting that it was unnecessary to decide whether a decedent's representative "had statutory authority" to bind the decedent to an arbitration agreement because the decedent was bound by it under equitable estoppel (and third-party beneficiary) law. 2011 WL 4089435, at *6 n.13. In short, equitable estoppel bars Ms. Coleman from claiming that the Arbitration Agreement is invalid.

B. The Adult Heath Care Consent Act Authorized Ms. Coleman To Bind Ms. Brinson To The Arbitration Agreement

In light of the *Pearson-Wiggins* line of cases, this Court need not decide whether the AHCCA authorized Ms. Coleman to sign the Arbitration Agreement on Ms. Brinson's behalf. But even if the Court were to reach this issue, it should be decided in Defendants' favor.

Ms. Coleman largely ignores Defendants' points and authorities in the Opening Brief at 21-27, which demonstrate that the AHCCA's plain language—authorizing a

surrogate to make "decisions ***concerning*** . . . health care" for an incapacitated patient, S.C. Code Ann. § 44-66-30(A) (emphasis added)—includes agreements to arbitrate disputes arising out of the patient's "health care." Ms. Coleman's brief is rife with protestations to the contrary that disregard the AHCCA's text and purpose, but such protests are unsupported by analysis or authority. Apart from her conclusory averments, Ms. Coleman advances three points, none of which has merit.

First, Ms. Coleman cites *Michau v. Georgetown County ex rel. S.C. Counties Workers' Compensation Trust*, 396 S.C. 589, 723 S.E.2d 805 (2012), in arguing that Defendants' reading of the AHCCA, as including the authority to enter into arbitration agreements, gives the statute's "words a forced construction so as to expand the operation of the Act." (AB 14) On that basis, Ms. Coleman contends: "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." (AB 14-15 (emphasis in original))

This argument fails in several respects. First and foremost, the "plain meaning" of the actual language used by Section 44-66-30(A) confers more than just authority to make "health care decisions;" instead, by its terms, the statute gives surrogates broader authority to make "decisions ***concerning*** . . . health care." (Emphasis added). And given that the AHCCA defines "health care" expansively to include, *inter alia*, "the *provision of . . . 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) (emphasis added), there is no denying that an agreement to arbitrate disputes arising out of such matters—or addressing any of the

myriad of issues arising when someone is admitted to a healthcare institution—is a decision that "concerns" health care. To conclude otherwise would cabin a surrogate's authority so narrowly that it would defeat the AHCCA's important objectives (which were addressed in the Opening Brief at 24-27, but ignored by Ms. Coleman).

Moreover, *Michau* shows why Defendants are correct. *Michau* interpreted a provision of the South Carolina Workers' Compensation Law, S.C. Code Ann. § 42-1-172(C), which provides that "'medical evidence' means expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed and qualified medical physician." The Court observed that "[t]he plain reading of the statute requires that 'opinion or testimony' must be 'stated to a reasonable degree of medical certainty,'" but "[i]n contrast, 'documents, records, or other material' is not similarly modified." 396 S.C. at 595, 723 S.E.2d at 808. The Court emphasized that "words should be given their *plain and ordinary meaning* without resort to subtle or forced construction *to limit* or expand the statute's operation." *Id.* (emphasis added; citation and quotation marks omitted). Thus, the Court concluded that "[b]ecause the statute does not require that 'documents, records, or other material' be 'stated to a reasonable degree of medical certainty,' we will not expand its plain meaning or interpolate this requirement." *Id.* (citation, quotation marks and footnote omitted).

Here, the "plain and ordinary meaning" of Section 44-66-30(a)'s phrase "decisions concerning . . . health care" embraces "decisions related to the person's treatment for a physical or mental ailment," as Ms. Coleman contends (AB 14-15), but also allows the surrogate to address all of the terms of the resident's admission to the nursing facility from financial to social matters. By definition, the statute reaches

decisions "concerning" such matters—and others enumerated in the AHCCA's definition of "health care"—and is not limited to treatment decisions. *See Morley v. C.I.A.*, 508 F.3d 1108, 1116, 1118 (D.C. Cir. 2007) (interpreting "information concerning . . . the specific subject matter of an investigation" to include information that is not necessarily the subject of the investigation because "Congress chose to use the word 'concerning' . . . [as] a 'broadly inclusive term'"). The use of the term "concerning" unmistakably signals a legislative intent to confer broader authority under the Act to include all matters that touch and concern access to health care and all terms of the legal relationship between the resident and her health care provider. In short, it is *Ms. Coleman's* truncated reading of Section 44-66-30(A) that is a "forced construction" which *Michau* prohibits.

In addition, Ms. Coleman's reading of the AHCCA cannot be correct because, as noted in the Opening Brief at 24 n.9, 26, Ms. Coleman made numerous other decisions for Ms. Brinson during the admission process—*e.g.*, Ms. Brinson's room and board, laundry service, interest-bearing resident fund, and consent to photograph Ms. Brinson for identification purposes—that also do not fit within the trial court's narrow definition of "health care." Yet, Ms. Coleman does not contend that she lacked authority to make these decisions under the AHCCA. If Ms. Coleman had the power to decide these issues on Ms. Brinson's behalf, she likewise had the power to decide whether future disputes with the Facility arising from such matters should be arbitrated.

Second, Ms. Coleman cites *Ping*, 376 S.W.3d at 593, in arguing that where, as here, an agreement to arbitrate is not a condition of admission, it generally is deemed not to be a "health care" decision. (AB 13-14) *Ping* is inapposite, however, because it addressed whether an agent had authority to consent to arbitration under a *durable*

power-of-attorney—not a healthcare surrogacy statute, like the AHCCA—that covered the resident's property, financial, and medical decisions. The court made clear that its ruling that the agent lacked arbitration-agreement authority rested on case law interpreting Kentucky's Uniform Probate Code, which requires "that declaration [of authority in a durable power-of-attorney] must be express." *Id.* at 592 (citation omitted). Notably, the power-of-attorney in *Ping* did not define "medical care" as broadly as the AHCCA defines "health care," *see id.* at 587, nor did the power-of-attorney broadly permit the agent in *Ping* to make decisions "concerning" such matters.

Finally, Ms. Coleman argues that Defendants failed to distinguish *Munn v. Haymount Rehab. & Nursing Ctr., Inc.*, 704 S.E.2d 290, 296-97 (N.C. Ct. App. 2010), because Defendants' analysis focused on a 2007 version of North Carolina's surrogacy statute (which authorized surrogates "to consent to medical treatment on behalf of a patient who is comatose or otherwise lacks capacity to make or communicate health care decisions") rather than the 2005 version that the court considered, which applied to "health care treatment and procedure." (AB 12-13) Regardless of which version of the North Carolina surrogacy statute the court considered, *Munn* is inapposite because neither version granted surrogates the broader authority to make "decisions *concerning* . . . health care" that is provided under the South Carolina Act.

II. THE ARBITRATION AGREEMENT IS BINDING ON MS. BRINSON'S WRONGFUL-DEATH ESTATE

Ms. Coleman's wrongful-death arguments are devoid of merit. *First*, Ms. Coleman argues that her wrongful-death claims are not subject to the Arbitration Agreement even though its language plainly covers Ms. Brinson's heirs and personal

representative.[3] (AB 25) This is wrong because, as noted above, Ms. Brinson's estate seeks to recover damages from Defendants for breaching the Admission Contract. (Wrongful Death Compl. ¶¶ 60-63) Because the Arbitration Agreement is part of the Admission Contract, Ms. Coleman is estopped from disavowing the Arbitration Agreement that encompasses her wrongful-death claims. *See United States v. Bankers Ins. Co.*, 245 F.3d 315, 323 (4th Cir. 2001) ("[N]o party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision contained therein." (citing *Int'l Paper*)).

Second, for reasons unknown, Ms. Coleman draws a contrast between the causes of action under South Carolina's Wrongful Death Act and survival statute, S.C. Code Ann. § 15-5-90, in arguing that a wrongful-death claim is not "entirely derivative" of a decedent's rights. (AB 28) But the survival statute has nothing to do with whether the Arbitration Agreement binds Ms. Brinson's wrongful-death estate; resolution of that issue is governed solely by the Wrongful Death Act. *See Hemingway v. Shull*, 286 F. Supp. 243, 249 (D.S.C. 1968) (noting that wrongful-death suits are governed exclusively by the Act which is strictly construed). Under the plain language of the Wrongful Death Act, Ms. Brinson would have been required to arbitrate her claims for personal injury, if she had survived; accordingly, Ms. Coleman, in her capacity as Ms. Brinson's personal representative, must arbitrate those claims, too.

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[3] Defendants did not waive this argument by failing to cite supporting authority. (AB 25) In the Opening Brief at 34, Defendants were responding to the trial court's erroneous factual finding that the Arbitration Agreement, on its face, did not apply to Ms. Coleman's wrongful death claims. Addressing this discrete point thus did not require extensive discussion or call for citation to legal authority.

Finally, despite an unbroken line of cases recognizing that a right of action under the Wrongful Death Act is derivative of a decedent's rights, Ms. Coleman argues that a wrongful-death plaintiff is subject only to limitations and defenses to which the decedent was subject that "completely bar" recovery. (AB 29) In short, Ms. Coleman claims that, under the Act, a plaintiff is unaffected by limitations on the decedent's right of action that merely dictate the forum in which the plaintiff's claims must be brought.

Ms. Coleman's argument is belied by *Nix v. Mercury Motor Express, Inc.*, 270 S.C. 477, 242 S.E.2d 683 (1978), *overruled on other grounds*, *Farmer v. Monsanto Corp*, 352 S.C. 553, 579 S.E.2d 325 (2003). In *Nix*, a foreign corporation argued that, under South Carolina's "door-closing" statute, S.C. Code Ann. § 15-5-150(2), the plaintiff could not maintain his wrongful-death action against the corporation in South Carolina courts because the plaintiff's decedent was a non-resident who was killed in a vehicular accident in Virginia.[4] *See id.* at 480, 242 S.E.2d at 684. The Court agreed. Noting that the plaintiff was appointed as the personal representative under the law of Virginia (where the decedent's injury and death occurred), the Court explained:

> Under both the Virginia and South Carolina wrongful death statutes ***the test of the right of an administrator to maintain an action for wrongful death is whether the deceased could have maintained an action for the injury had he survived*** . . . . [T]he cause of action of the injured party, while alive, is the same cause of action that passes to the personal representative. It is thus seen that the right of the personal representative to recover for the death of his decedent ***stands on no higher ground*** than that occupied by the injured party while living. . . .

[4] Section 15-5-150(2) provides, in pertinent part, that "[a]n action against a corporation created by or under the laws of any other state, government or country may be brought in the circuit court: . . . [b]y a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated in this State."

> . . . ***If plaintiff's decedent had no right, at the time of death, to maintain an action for personal injuries, then the right to maintain the present action could not be transmitted to her personal representative.***

Id. at 482-83, 242 S.E.2d at 685 (emphasis added; citations omitted); *see also Estate of Stokes v. Pee Dee Family Physicians, LLP*, 389 S.C. 343, 347-48, 699 S.E.2d 143, 145 (2010) (citing with approval the same quoted text from *Nix*). The Court determined that, because the door-closing statute precluded the decedent from suing the corporation for her injuries in South Carolina, the plaintiff likewise was precluded from doing so. *See Nix*, 270 S.C. at 483, 242 S.E.2d at 685. Importantly, the *Nix* Court did ***not*** rule that the plaintiff was "completely barred" from recovery; instead, the Court determined that South Carolina was an impermissible forum for the plaintiff's lawsuit because he could not "maintain an action" here within the meaning of the Wrongful Death Act, S.C. Code Ann. § 15-51-10. Thus, contrary to Ms. Coleman's argument, *Nix* makes plain that the Act's "maintain an action" requirement refers to the forum in which the decedent could have pursued her claim for personal injuries.

In sum, the test of whether Ms. Coleman's wrongful-death action in South Carolina state court is maintainable is whether Ms. Brinson could have maintained the state-court action herself. *See id.* at 482, 242 S.E.2d at 685; *see also Stokes*, 389 S.C. at 347, 699 S.E.2d at 145 ("In all cases, the controlling question [] is whether the deceased, if he had not died, could have maintained the action." (emphasis, alterations and citation omitted)); *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 942 (D.S.C. 1988) (noting that a suit under the Act "can only be maintained if the decedent, had he lived, could have maintained such action"). Ms. Brinson was bound by the Arbitration Agreement in the Admission Contract, and therefore, she could not maintain an action in

court, but only in an arbitral forum. Accordingly, Ms. Brinson's right of action which the Wrongful Death Act transmitted to Ms. Coleman must be maintained in an arbitral forum as well.[5]

III. THE ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE

Ms. Coleman's unconscionability arguments are wrong in several respects. *First*, this Court stressed in *Lucey v. Meyer*, --- S.E.2d ---, No. 4960, 2012 WL 5305744, at *9 (Ct. App. Oct. 24, 2012), that unconscionability requires ***both*** "an absence of meaningful choice ***and*** oppressive, one-sided terms." (emphasis in original) (quoting *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007)). Here, the trial court did not find, nor does Ms. Coleman argue, that any of the Arbitration Agreement's terms is oppressive or one-sided. (Br. 41 n.15) Ms. Coleman's unconscionability defense thus fails for this reason alone.

Second, there was no "absence of a meaningful choice" here. The "beginning point" of the meaningful-choice analysis is to determine whether a contract is one of adhesion—*i.e.*, "a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Lucey*, 2012 WL 5305744, at *10 (citation omitted). If it

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[5] A New Mexico federal court recently held that, under New Mexico's wrongful-death act—which is nearly identical to South Carolina's Act—a personal representative is bound by a decedent's nursing-home arbitration agreement. *See THI of N.M. at Hobbs Ctr., LLC v. Spradlin*, --- F. Supp. 2d ---, Civ. No. 11-792 MV/LAM, 2012 WL 4466639, at *14-15 (D.N.M. Sept. 25, 2012); *THI of N.M. at Vida Encantada, LLC v. Lovato*, 848 F. Supp. 2d 1309, 1327-28 (D.N.M. 2012); *see also Entrekin v. Internal Med. Assocs. of Dothan, P.A.*, 689 F.3d 1248, 1259 (11th Cir. 2012) (same under Alabama's wrongful death statute). By contrast, Ms. Coleman cites *Carter v. SSC Odin Operating Co., LLC*, 976 N.E.2d 344 (Ill. 2012) (AB 29-30)—which held that a wrongful-death plaintiff was not bound by a decedent's arbitration agreement under Illinois' wrongful-death statute—but it is inapposite because it conflicts with our Supreme Court's interpretation of the South Carolina Act in *Nix*.

is, the next step is to apply a multi-factor analysis[6] to determine whether the contract was "tainted by an absence of meaningful choice." *Id.* at *9 (citation omitted).

Neither of these steps was satisfied here. *First*, the Arbitration Agreement was not a contract of adhesion because it was not offered to Ms. Coleman on a take-it-or-leave-it basis. The Arbitration Agreement specifically states that it was *purely voluntary* and not a precondition of Ms. Brinson's admission to the Facility. (Defs.' Mem. in Supp., Ex. B at 3) The Arbitration Agreement also granted Ms. Coleman 30 days to rescind the Agreement for any reason—which she did not do. (*See id.*) Thus, Ms. Coleman understandably does not argue, nor did the trial court find, that the Arbitration Agreement was an adhesion contract. *See Lovato*, 848 F. Supp. 2d at 1324-26 (same result under a nearly identical fact pattern).

Instead, Ms. Coleman claims that she had no "meaningful choice" because the Facility violated its own policy by not explaining the Arbitration Agreement to her, and thus "she was not made aware of her right to reject the [Agreement]." (AB 31) Ms. Coleman's argument is a tacit admission that she failed to read the Arbitration Agreement, but she cannot place blame for her failure at the Facility's doorstep. Ms. Coleman *never has claimed that she was aware of the Facility's policy* to explain the Arbitration Agreement to new residents and/or their representatives, *let alone that she relied on the policy* in choosing not to read the Agreement herself. In fact, Ms. Coleman disclaimed any knowledge of the Facility's admission process. (Ann Coleman Aff. ¶¶ 5-

[6] The factors are "the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Lucey*, 2012 WL 5305744, at *9.

6; Br. 8) In short, that the Facility allegedly did not review the Arbitration Agreement with Ms. Coleman, even if true, had nothing to do with her failure to read it. *See First Baptist Church of Timmonsville v. George A. Creed & Son, Inc.*, 276 S.C. 597, 599, 281 S.E.2d 121, 123 (1981) ("[I]n the absence of a showing of fraud, mistake, unfair dealing or the like, a party to a contract incorporating an arbitration provision cannot escape the obligation of such a provision by simply declaring: 'But I did not read the whole agreement.'"); *cf. McElveen v. Mike Reichenbach Ford Lincoln, Inc.*, C/A No. 4:12-874-RBH-KDW, 2012 WL 3964973, at *4 (D.S.C. Aug. 22, 2012) (enforcing conspicuous arbitration agreement despite plaintiff's claims that it was not explained to her and she did not understand it).

Third, even if the Arbitration Agreement were an adhesion contract, analysis of the "meaningful choice" factors in *Lucey* shows that there was no unconscionability. Ms. Coleman concedes this point because she does not even address the relevant factors in her brief, much less challenge Defendants' analysis of them in the Opening Brief at 41-45.

Finally, Ms. Coleman argues that the trial court correctly concluded that the Arbitration Agreement was unconscionable because, if Defendants' Motion to Compel Arbitration were granted, Ms. Coleman would have to arbitrate her claims against Defendants, and pursue her claims against other parties in court, thus posing a risk of conflicting rulings by different tribunals. (AB 31-33) This rationale is no basis for unconscionability, however, because it has nothing to do with the Arbitration Agreement *at the time it was made. See Lucey*, 2012 WL 5305744, at *9 (explaining that a court may refuse to enforce a contract clause if it was "unconscionable at the time it was made" (quoting S.C. Code Ann. § 36-2-302(1)); *see also* S.C. Code Ann. § 36-2-302 Reporter's

Comments ("It should be noted that this section only applies where the contract is found to be unconscionable at the time it was made so that even extreme disadvantage felt by one of the parties due to changed market conditions between the time of contract and the time of performance would afford no grounds for relief."). That only some of the defendants that Ms. Coleman sued moved to compel arbitration was a circumstance that arose long after she signed the Arbitration Agreement—and it is thus irrelevant to the Agreement's formation. *See Lucey*, 2012 WL 5305744, at *9 ("Absence of meaningful choice . . . generally speaks to the fundamental fairness of the *bargaining process* in the contract at issue." (emphasis added; citation omitted)).

Ms. Coleman fares no better in avoiding U.S. Supreme Court precedents mandating that, under the FAA, "if a dispute presents multiple claims, some arbitral and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation." *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011) (per curiam) (applying *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985)). Ms. Coleman claims this rule applies only where arbitral and non-arbitral claims are asserted against the *same defendant*. According to Ms. Coleman, even when claims against a defendant are subject to an arbitration agreement, a court may void the agreement as unconscionable where, as here, a plaintiff asserts the same or similar claims against *other defendants* who have no arbitration rights or otherwise decline to invoke them. (AB 32)

Ms. Coleman cites no authority for this novel proposition, *see Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[C]onclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."), which must be rejected anyway because

it defies the fundamental precept underlying *Cocchi/Dean Witter* that the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Cocchi*, 132 S. Ct. at 25-26 (emphasis in original) (quoting *Dean Witter*).

If anything, the *Cocchi/Dean Witter* rule applies with even greater force here. To accept Ms. Coleman's position would mean that an arbitration agreement's enforceability is at the mercy of a plaintiff's self-serving election to render the agreement unconscionable simply by suing other defendants in the same case with whom the plaintiff has no agreement to arbitrate. There is no such rule of law: "[A] party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint, or signatory parties in their individual capacity because this would nullify the rule requiring arbitration." *South Carolina Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993) (emphasis omitted; citation omitted). In sum, the trial court's unconscionability ruling was error.

IV. DEFENDANTS DID NOT WAIVE THEIR ARBITRATION RIGHTS

Ms. Coleman makes no serious effort to defend the trial court's erroneous ruling that Defendants waived their arbitration rights. *First*, Ms. Coleman does not respond to many of Defendants' points and authorities in the Opening Brief at 45-48, or address any of the factors (even though she lists them in her brief) that govern a waiver analysis. (AB 34) Instead, Ms. Coleman's waiver arguments rest on her blind assertion that, for waiver purposes, delay in demanding arbitration runs from the Notice of Intent to File Suit, not

the commencement of the action itself.[7] (AB 35-36) As the Opening Brief explains at 45-47, this is wrong. *Cf. Lovato*, 848 F. Supp. 2d at 1320 ("[The state-court defendants] could not have moved to compel arbitration until [the state-court plaintiff] first filed her claims against [the defendants], and then refused to arbitrate them.").

Second, Ms. Coleman protests that Defendants did not notify her "of the existence of the Arbitration Agreement" until they filed their Answers, beginning in May 2010 (AB 35), and that, "[h]ad [Defendants] asserted [their arbitration] rights at the first instance in this litigation process, [she] . . . may have avoided the expense and delay caused by the statutory [pre-suit mediation] procedure." (AB 36) But Ms. Coleman cannot fault Defendants for not timely "notifying" her of the Arbitration Agreement because she already knew it existed given that *she signed the Agreement herself.* Moreover, any expense or delay that Ms. Coleman incurred in pre-suit mediation and pressing her claims in court is not "prejudice" because any such "wound was self-inflicted." *See Fisher v. A.G. Becker Parabis, Inc.*, 791 F.2d 691, 698 (9th Cir. 1986) ("The [plaintiffs] were parties to an agreement making arbitration of disputes mandatory. They violated that agreement by including their arbitrable claim in this action. Any extra expense incurred

[7] For example, Ms. Coleman argues that Defendants failed to address the trial court's determination that, because the Arbitration Agreement does not contain a "no-damage-for-delay" provision, Defendants "should have acted promptly [to compel arbitration] upon the first notice of a civil action"—*i.e.*, Ms. Coleman's Notice of Intent to File Suit. (AB 36) Of course, the absence of such a provision in the Arbitration Agreement is irrelevant because there was no "undue delay" given that Defendants timely moved to compel arbitration merely five months after Ms. Coleman commenced this action—the point from which any delay is measured. *See Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007) (explaining that delay is measured between "the *commencement of the action* and the commencement of the motion to compel arbitration") (emphasis added).

as result of the [plaintiffs'] deliberate choice of an improper forum, in contravention of their contract, cannot be charged to [the defendant].").

Finally, Ms. Coleman contends that Defendants failed to address, and thereby concede, the trial court's finding that they "abandoned" the Arbitration Agreement by not moving to enforce it when Ms. Coleman filed her Notice of Intent. (AB 37-38) Ms. Coleman apparently is arguing that the trial court's abandonment rationale is distinguishable from the traditional waiver analysis that Defendants addressed in the Opening Brief. But Ms. Coleman does not explain how these two theories are different in this context, or why an abandonment theory voids the Arbitration Agreement when a waiver theory does not. In any event, abandonment and waiver are closely related, if not synonymous, concepts. *See Harris v. Harris*, 88 S.E. 276, 277 (S.C. 1916) ("The question of waiver or abandonment is one of fact, to be determined by all the circumstances of the case, including [several factors that are applicable to both]"); *see also Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 667, 521 S.E.2d 749, 754 (Ct. App. 1999) (referring to abandonment and waiver of arbitration rights interchangeably in case citations). In sum, for the same reasons that Defendants did not waive their arbitration rights, they did not abandon them either.

V. DEFENDANTS ARE NOT JUDICIALLY ESTOPPED FROM ENFORCING THE ARBITRATION AGREEMENT

Contrary to Defendants' reading of the trial court's March Orders (Br. 32), Ms. Coleman claims that the trial court did *not* conclude that Defendants were judicially estopped from enforcing the Arbitration Agreement (AB 39), and she concedes that the doctrine's elements were not met anyway. (AB 40) Ms. Coleman nevertheless argues that the "totally inconsistent positions" advanced by Defendants (except the Facility, that

did not join the motion to dismiss) in their Motion to Compel Arbitration and motion to dismiss were reason enough to deny Defendants' Motion to Compel Arbitration. (AB 39-40) This is wrong for several reasons.

First, Ms. Coleman's conclusory argument is not before this Court because, like the trial court, she cites no authority to support it. *See Glasscock*, 348 S.C. at 81, 557 S.E.2d at 691.

Second, inconsistent arguments, standing alone, is not a generally-applicable contract defense, and Ms. Coleman does not claim otherwise. *See Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 459, 476 S.E.2d 149, 152 (2001) (noting that "[g]enerally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA]." (citation omitted)). Thus, under the FAA, Ms. Coleman may not ask this Court to void the Arbitration Agreement on this ground.

Finally, Defendants did not take inconsistent positions. Ms. Coleman claims that Defendants' contention in their motion to dismiss, that they "had not entered into a contract to be performed at least in part in South Carolina," was at odds with their argument in their Motion to Compel Arbitration that they "had entered [into] a binding [] Arbitration Agreement with [Ms. Coleman]." (AB 40) But Defendants never argued in their Motion to Compel Arbitration that they were actual parties (*i.e.*, signatories) to the Arbitration Agreement. Rather, Defendants moved to enforce the Arbitration Agreement on the basis of equitable estoppel given that Ms. Coleman seeks to enforce the Admission Contract (which includes the Arbitration Agreement) against them. (Defs.' Memo. in Supp. at 8-9) Moreover, some of the Defendants also are entitled to enforce the

Arbitration Agreement as third-party beneficiaries given the Agreement's express language that it "shall inure to the benefit of . . . the Facility, *its parents, affiliates, . . . owners, officers, representatives, directors, medical directors, employees [and] . . . agents . . . .*" (*Id.* Ex. B at 2 (emphasis added)) In sum, Defendants did not advance inconsistent positions and the trial court erred in denying their Motion to Compel Arbitration on that basis.

VI. THE FAA GOVERNS THE ARBITRATION AGREEMENT

Ms. Coleman wrongly contends that FAA does not apply to the Arbitration Agreement. *First*, Ms. Coleman argues that the trial court correctly ruled that "there was no basis [to apply] the FAA" given that "it had already determined that the Agreement was void because [Ms. Coleman] lacked authority to bind [Ms. Brinson under South Carolina law]." (AB 41; June Orders at 3-4) Like the trial court, Ms. Coleman mistakenly puts the cart before the horse.

A court must determine whether the FAA applies before assessing an arbitration agreement's validity because the FAA creates "a body of federal substantive law establishing and regulating" the application of state law under which the agreement's validity will be determined. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). When the FAA governs, "[s]tate contract law will thus generally apply so long as the state law does not construe an arbitration agreement in a manner different from any other contract; in such a case, the state law will be preempted by the FAA." *THI of N.M. at Hobbs Ctr., LLC v. Patton*, 851 F. Supp. 2d 1281, 1291 (D.N.M. 2011); *Soil Remediation Co.*, 323 S.C. at 459, 476 S.E.2d at 152 (employing the same

analysis: "[i]f the arbitration agreement in the instant controversy is covered by the FAA, then . . . the FAA preempts S.C. Code Ann. § 15-48-10(a)").

As explained in the Opening Brief at 27-30, 40, the trial court disfavored the Arbitration Agreement by voiding it under special state-law rules and restrictions inapplicable to the Admission Contract's other provisions and other contracts generally. The court could not have been clearer: "The Defendants again assume that the Arbitration Agreement and Admission[] [Contract] are on the same footing. As this Court has stated before, they are not." (March Orders at 17) This is exactly what the FAA forbids—and it illustrates why the FAA's applicability must be determined before deciding whether the Arbitration Agreement is valid. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) ("[Under the FAA], courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." (citations omitted)).

Second, Ms. Coleman argues that the Arbitration Agreement's choice-of-law provision, stating that it is "governed by the [FAA]" (Defs.' Mem. in Supp., Ex. B at 2), is meaningless because the FAA applies only if its "interstate commerce" requirement is met. (AB 41) Ms. Coleman ignores, however, numerous contrary authorities cited in the Opening Brief at 14-15, recognizing that such a choice-of-law provision in an arbitration agreement must be respected.

Third, Ms. Coleman claims that "providing managed care in a nursing facility is not the kind of activity that Congress intended to regulate across state lines." (AB 43-44) To the contrary, numerous cases cited in the Opening Brief at 16-17, 20 n.4, which Ms. Coleman fails to address, recognize that a healthcare facility unquestionably engages in

interstate commerce and, thus, is subject to federal regulation and control. *See, e.g.*, *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 327, 329-30 (1991) (holding that a medical facility's purchases of out-of-state supplies, obtaining revenues from out-of-state insurance companies, and receiving reimbursement through Medicare involve interstate commerce). Below, Defendants adduced evidence, unchallenged by Ms. Coleman, that the Facility regularly engages in the types of interstate commerce identified in *Pinhas* and other cases. (Br. 18) Ms. Coleman's argument therefore must be rejected.

Finally, there is no merit to Ms. Coleman's contention that, under *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993), even though the Facility engages in interstate commerce generally, "there is simply nothing about the purported [Arbitration] [A]greement in this case that affects interstate commerce." (AB 44) This rationale—that the FAA applies only if an arbitration agreement *itself* affects interstate commerce—is precisely what the United States Supreme Court rejected in *Citizens Bank v. Alfabco, Inc.*, 539 U.S. 52, 55-57 (2003) (per curiam). In any event, as explained in the Opening Brief at 20-21 (but ignored by Ms. Coleman), this case is distinguishable from *Timms* because the Facility's activities in interstate commerce were directly tied to Ms. Brinson's care. In sum, the trial court erred in finding that the FAA was inapplicable.

CONCLUSION

Defendants respectfully request that this Court reverse the Orders below and remand the matter, directing that it be referred to arbitration in accordance with the Arbitration Agreement.

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Respectfully Submitted,

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