

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM FAIRFIELD COUNTY

Court of Common Pleas

Brooks R. Goldsmith, Circuit Court Judge

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Case No. 2010-CP-20-474 and 475  
South Carolina Court of Appeals No. 2012-212596

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Carol Brunson, as Personal Representative of the Estate of  
Curtis Parsons ..... Respondent,

v.

Uni-Health Post Acute Care – Tanglewood, LLC, d/b/a Uni-Health Post  
Acute Care –Tanglewood f/k/n Heritage of Ridgeway, and United  
Clinical Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation. .... Appellants.

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**INITIAL BRIEF OF APPELLANTS**

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## ISSUES ON APPEAL

- I. Did the trial court err in denying the Defendants' motion to compel arbitration?
  - A. The trial court erred in concluding that the motion to compel was not governed by the Federal Arbitration Act, as the matter involved interstate commerce.
  - B. The trial court erred in concluding that the arbitration agreement mandated the AAA as the forum for arbitration and that the AAA was not available.
  - C. The trial court erred in finding that there was no "meeting of the minds" between the parties with respect to the arbitration agreement.
  - D. The trial court erred in concluding that the plaintiff lacked standing, that there was no evidence of an agency relationship, and that the plaintiff was not estopped from repudiating the arbitration agreement.
  - E. The trial court erred in finding that the Defendants waived the right to enforce the arbitration agreement.

## STATEMENT OF THE CASE

This appeal arises out of wrongful death and survival lawsuits filed by Carol Brunson, as Personal Representative of the Estate of Curtis Parsons on November 15, 2010. (Survival/Wrongful Death Complaints of Carol Brunson). Brunson sued Uni-Health Post Acute Care-- Tanglewood, LLC, D/B/A Uni-Health Post Acute Care-Tanglewood, F/K/N Heritage of Ridgeway, (hereinafter "Tanglewood"), United Clinical Services, Inc., United Rehab, Inc., and UHS-Pruitt Corporation (collectively referred to herein as "Defendants").

Parsons entered Tanglewood nursing home facility as a resident on or about June 25, 2007. (Complaints, ¶6).<sup>1</sup> Upon his admission, Parsons, by and through Carol Brunson, executed various documents related to his admission, including an admission agreement and an arbitration agreement. (Admission Agreement; Resident and Facility Arbitration Agreement). Each of these documents was executed by Carol Brunson as the representative of Parsons.<sup>2</sup>

Plaintiff Brunson, as Personal Representative of Parsons, commenced this nursing home medical liability action by filing a Notice of Intent to Sue. Brunson filed her Summonses and Complaints against the Defendants on November 15, 2010. (Complaints). On December 20, 2010, the Defendants filed answers to these complaints and raised several affirmative defenses specifically asserting arbitration as a complete bar

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<sup>1</sup> The allegations in these Complaints are identical aside from certain allegations in paragraph 10 of each Complaint. As such, reference to the Complaints will specify a single paragraph number applicable to both Complaints.

<sup>2</sup> Brunson also signed Parsons' advanced directive instructions, restraint policies, documents related to resuscitative efforts to be undertaken, and various other documents related to his day-to-day living at the Tanglewood facility. (Admission Documents).

to the court action. (Answers, ¶¶ 15-16).<sup>3</sup> On January 3, 2011, the Plaintiff filed motions to strike several affirmative defenses of the Defendants, including the defenses asserting that this case is subject to mandatory arbitration. (Plaintiff's Motions to Strike). The Parties resolved the issues related to the Motions to Strike by a consent order signed April 12, 2011. (Proposed Consent Order on Plaintiff's Motion to Strike).

Following the resolution of the Motions to Strike, the Defendants engaged in limited discovery solely related to the issue of arbitration. (Defendants' Discovery Requests). Thereafter, on October 10, 2011, the Defendants filed their Motion to Compel Arbitration in the wrongful death action. On October 21, 2011, Defendants filed their Motion to Compel Arbitration in the survival action. (Defendants' Motions to Compel Arbitration).<sup>4</sup>

On March 20, 2012, in an order drafted by the Plaintiff, the trial court denied the motions to compel arbitration for numerous reasons addressed within this appeal. (Order Denying Defendant's [sic] Motion to Compel Arbitration). Following the denial of the motions to compel, the Defendants timely filed a motion to reconsider the denial of the motions to compel arbitration. (Motion to Reconsider). On June 7, 2012, following a hearing on the motion to reconsider, the trial court denied the motion to reconsider and affirmed its denial of the motions to compel arbitration. (Order Denying Defendants' Motion for Reconsideration Pursuant to Rule 59(e), SCRCP). This appeal followed.

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<sup>3</sup> The Answers of the four Defendants were filed concurrently and are identical aside from the defendant's identity in each Answer. These have been collectively cited as "Answers," for the sake of brevity.

<sup>4</sup> Again, the substance of these motions is identical.

## STANDARD OF REVIEW

The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). This determination is subject to de novo review. Gissel v. Hart, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007).<sup>5</sup>

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<sup>5</sup> There is obviously some conflict between these two standards of review as “[d]e novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings.” Lewis v. Lewis, 392 S.C. 381, 390, 709 S.E.2d 650, 654–55 (2011).

## LAW/ARGUMENT

- I. **The trial court erred in denying the Defendants' Motion to Compel Arbitration.**
  - A. **The trial court erred in concluding that the motion to compel was not governed by the Federal Arbitration Act, as the matter involved interstate commerce.**

Because the underlying lawsuit is subject to arbitration under the Federal Arbitration Act (hereinafter "FAA" or the "Act"), the trial court erred in denying the Defendants' Motions to Compel Arbitration.

"[T]here is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes." Herron v. Century BMW, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010). In enacting the FAA, Congress established a strong federal policy in support of arbitration agreements, "requiring that [courts] 'rigorously enforce agreements to arbitrate.'" Shearson/Amer. Exp., Inc. v. McMahan, 482 U.S. 220, 226 (1987) (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

If a contract providing for arbitration involves interstate commerce, the FAA displaces the state arbitration statute. Soil Remediation Co. v. Nu-Way Env'tl., 323 S.C. 454, 459–60, 476 S.E.2d 149, 152 (1996) ("If the arbitration agreement in the instant controversy is covered by the FAA, then . . . the FAA preempts S.C. Code Ann. § 15–48–10(a). . . . For the Federal Act to apply, the commerce involved in the contact must be interstate or foreign.").

Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the

written agreement is contained within a contract involving commerce. 9 U.S.C. § 2 (2006).

The language of the Act is not permissive, but instead mandates enforcement of arbitration agreements. Section 4 of the FAA provides, in pertinent part, as follows:

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration* in accordance with the terms of the agreement.

9 U.S.C. § 4 (2006) (emphasis added). “By its terms, the act 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.” Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985). Courts “must abide by the FAA, which is ‘the supreme Law of the Land,’ U. S. Const., Art. VI, cl. 2, and by the opinions of this Court interpreting that law. Nitro-Lift Technologies, LLC v. Howard, 568 US \_\_\_ at \_\_\_. (2012) “It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.” Id. at. \_\_\_ quoting Rivers v. Roadway Express, Inc., 511 U. S. 298, 312 (1994).

The first step in determining whether a dispute is subject to arbitration under the FAA is whether there exists a contract to arbitrate.<sup>6</sup> There is no question that an arbitration agreement exists in this case. The arbitration agreement states, in relevant part:

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<sup>6</sup> Although a court must also determine whether the factual allegations underlying the claim fall within the scope of the arbitration provision, it was not argued and the trial court did not find that the claims were not within the agreement, only that the agreement was not subject to the FAA. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001).

In is hereby understood and agreed by [the Facility and the Resident or the Resident's Authorized Representative] that . . . any and all controversies, claims, disputes, disagreements of demands of any kind [ ] arising out of or relating to the Resident's Admission Agreement with the Facility [ ] or any service or care provided to the Resident by the Facility shall be settled exclusively by binding arbitration. . . .

(Resident and Facility Arbitration Agreement).

Having determined that there is an agreement to arbitrate, the second step is to determine whether the contract involves interstate commerce, as that term is properly construed. The contract in the present case involves interstate commerce.

The FAA provides that “[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 . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity.” 9 U.S.C. § 2 (cited in Thornton v. Trident Medical Center, LLC, 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2004)). The FAA applies in federal or state court to any arbitration agreement that “in fact” involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001)<sup>7</sup> (citing Allied-Bruce Terminix Co., Inc. v. Dobson, 513 U.S. 265 (1995); Soil Remediation Co. v. Nu-Way Env'tl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996)).

The South Carolina Court of Appeals in Thornton succinctly stated:

The words ‘involving commerce’ have been interpreted by the United States Supreme Court as being the functional equivalent of ‘affecting commerce’-words signaling ‘an intent to exercise Congress’ commerce power to the full.’ Allied-Bruce Terminix

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<sup>7</sup> Munoz expressly overruled Mathews v. Fluor Corp., 312 S.C. 404, 440 S.E.2d 880 (1994), to the extent that the Mathews court considered “whether the parties contemplated interstate commerce as a factor in determining if the FAA applied.” Munoz, at n. 3.

Cos. v. Dobson, 513 U.S. 265, 277, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) . . . ‘Because the statute provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause, it is perfectly clear that the FAA encompasses a wider range of transactions than those actually in commerce—that is, within the flow of interstate commerce.’ Citizens Bank [v. Alafabco. Inc.], 539 U.S. [52,] [] 56, 123 S.Ct. [2037,] [] 2040 [2003].

Thornton, 357 S.C. at 95, 592 S.E.2d at 52 (internal citations and quotations in original).

First and foremost, the parties acknowledged that their transaction involved interstate commerce and would be governed by the FAA:

The Resident and the Facility acknowledge and agree that the Resident’s Arbitration Agreement effects a transaction involving interstate commerce, therefore the enforcement of this Arbitration Agreement shall be governed by federal law, specifically, the Federal Arbitration Act notwithstanding any contrary provision of the Admission Agreement or state law.

(Resident and Facility Arbitration Agreement). As the agreement reveals, the parties acknowledged that any disputes arising out of the Plaintiff’s residency and care at Tanglewood would be arbitrated pursuant to the FAA.

Numerous courts have held that such agreement alone is sufficient to invoke the FAA. For example, as the South Carolina Supreme Court held in Munoz, “Here, the arbitration agreement which applies to ‘this contract and the relationships which result from this contract,’ provides it shall be governed by the FAA. Arbitration agreements, like other contracts, are enforceable in accordance with their terms.” Munoz, 343 S.C. at 539, 542 S.E.2d at 363-364 (citing Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468 (1989)); see also Bales v. Arbor Manor, 2008 WL 2660366 (D. Neb. July 3, 2008) (involving stipulation in admission agreement that interstate activity was involved); Ivey v. Horton, 2008 WL 2717863 (D.S.C. July 10,

2008) (recognizing broad reach of Allied-Bruce); Thomas v. Cook, 350 S.W.3d 382 (Tex. App. 2011) (holding that when the parties expressly invoke the FAA in the arbitration agreement, the FAA governs and the parties are not required to establish that the transaction at issue affects interstate commerce); In re Choice Homes, Inc., 174 S.W.3d 408 (Tex. App. 2005) (same). Accordingly, because the parties themselves stipulate that the transaction is one that involves interstate commerce and shall be governed by the FAA, the trial court erred in holding that this matter did not involve interstate commerce. See Munoz, 343 S.C. 531, 538, 542 S.E.2d 360; Volt, 489 U.S. 468; In re Ledet, 2004 WL 2945699 (Tex. App. Dec. 22, 2004) (holding that when parties agree to arbitrate under the FAA, no independent showing of interstate commerce is necessary).

Moreover, this matter “involves interstate commerce” as that term has been defined by the courts with respect to the FAA.

First, the Complaints themselves provide a basis for concluding that the matter involves interstate commerce. The Plaintiff alleges that Defendant Tanglewood is a South Carolina skilled nursing facility organized under the laws of South Carolina with a principal place of business in Fairfield County. The Plaintiff alleges that Defendants United Clinical Services, Inc., United Rehab, Inc., and UHS-Pruitt are all Georgia corporations doing business in South Carolina. The Plaintiff alleges that the Defendant UHS-Pruitt, an out-of-state corporation, owns, operates, manages, and oversees the facility and is responsible for the level of care received by the residents at Tanglewood. The Plaintiff further alleges that the Georgia-incorporated Defendant United Clinical Services, Inc. provides clinical services to South Carolina residents at Tanglewood and

that the Georgia-incorporated Defendant United Rehab provides rehabilitation services to Tanglewood residents. (Complaint, ¶¶ 5-6). On its face, each of these allegations by the Plaintiff avers a relationship involving interstate commerce under the provisions of the FAA. See Pickering v. Urbantus, LLC, 827 F. Supp. 2d 1010 (S.D. Iowa 2011) (noting that the FAA is applicable to nursing facilities that are operated by entities from other states). Though the out-of-state Defendants deny the allegations regarding the alleged level of control over Tanglewood, these allegations assert claims that involve interstate commerce, and thus bring the matter within the purview of the FAA. Additionally, the out-of-state Defendants admit that they provided services to the facility in Fairfield County.

In addition to the allegations that out-of-state entities are providing services to an in-state corporation, providing services to in-state residents at Tanglewood, and training South Carolina residents working at Tanglewood, Tanglewood participates in both Medicare and Medicaid, both funded in whole or part by the federal government, which paid for Parson's services at Tanglewood. (Motions to Compel Arbitration; Affidavit of Wanda Fowler). Numerous courts have held that this source of federal funding alone sufficiently implicates the involvement of interstate commerce. See McCollum v. Tenet Healthcare Corp., 2006 WL 3373096 (D.S.C. Nov. 20, 2006) (recognizing payments from federal sources such as Medicaid and Medicare implicate interstate commerce); In re Nexion Health, 13 S.W.3d 67 (Tex. 2005) (noting that Medicare payments alone were sufficient to establish interstate commerce under the broad interpretation required by Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003)); Vicksburg Partners, L.P. v. Stephens, 911 So. 2d 507 (Miss. 2005) (recognizing that “[n]ursing homes through

general practice, which includes basic daily activities like receiving supplies from out-of-state vendors and payments from out-of-state insurance companies or the federal Medicare program, affect interstate commerce” and taking notice of out-of-state defendants involved in the operation of the nursing home), overruled on other grounds by Covenant Health & Rehab. of Picayune. LP v. Moulds, 14 So. 3d 695 (Miss. 2009); Triad Health Mgmt. of Ga. III. LLC v. Johnson, 679 S.E.2d 785 (Ga. Ct. App. 2009) (recognizing expansive interpretation of interstate commerce and finding interstate commerce involved where nursing home had an out-of-state office and received federal funding for patients); Briarcliff Nursing Home v. Turcotte, 894 So. 2d 661 (Ala. 2004) (holding interstate commerce was involved due to nursing home’s out-of-state management and receipt of Medicare funds); Canyon Sudar Partners. LLC. v. Cole, 2011 WL 1233320 (S.D. W. Va. March 29, 2011) (same); Owens v. Coosa Valley Health Care, Inc., 890 So. 2d 983, 987–88 (Ala. 2004) (finding testimony that majority of supplies and equipment were purchased by nursing home from out of state vendors and majority of its payments came from Medicaid and Medicare was sufficient to show interstate commerce).

In reaching its conclusion that interstate commerce was not implicated and thus the FAA was inapplicable, the trial court based its decision on Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993). Timms, however, was decided before the United States Supreme Court’s decision in Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995), which clarified the reach of the FAA as it pertained to interstate commerce and repudiated the approach taken in Timms and similar cases that only looked at whether the contract evidenced interstate commerce “on its face.” In fact, the Timms court

acknowledged that the nursing home seeking to enforce the arbitration agreement was a division of an out-of-state entity, marketed and hired employees outside of South Carolina, purchased a majority of goods and supplies outside of South Carolina, and received federal funding. Timms, 310 S.C. at 473, 427 S.E.2d at 644. The Timms court then held, “these factors *could evidence the Center’s involvement in interstate commerce*” but declined to invoke the FAA because the Court determined that the contract subject to arbitration must “evidence[] a transaction involving commerce” on its face. Id. (emphasis added). Allied-Bruce, however, explicitly rejected the analysis followed by Timms, i.e., only looking at the contract instead of the “commerce in fact” test.

In Allied-Bruce, the United States Supreme Court noted that the initial interpretive question focused upon the meaning of the words “involving commerce” as used in the statute. The Court found that “[t]hese words are broader than the often found words of art ‘in commerce.’ They therefore cover more than ‘only persons or activities within the flow of interstate commerce.’” Allied-Bruce, 513 U.S. at 273 (citing U.S. v. Am. Bldg. Maint. Indus., 422 U.S. 271, 276 (1975)). The Court went on to hold that the statute should be construed as broadly as permissible under the Commerce Clause and concluded that the word “involving” was to be the functional equivalent of “affecting.” Allied-Bruce, 513 U.S. at 273-74.

The Allied-Bruce Court went on to note that the case before it clearly involved interstate commerce because of the multistate nature of Terminix and Allied Bruce and because the termite treating and house repairing material used by Allied Bruce came from outside Alabama. 513 U.S. at 282. The Timms court has already held that a nursing home involved with an out of state entity, that markets and hires employees outside of the

state, that purchases goods and supplies out of state, and that receives federal funding is involved in interstate commerce. 310 S.C. at 473, 427 S.E.2d at 644. The Timms court merely applied the wrong standard in interpreting the FAA, a standard later clarified by the United State Supreme Court in Allied-Bruce. Were the correct standard applied to Timms post-Allied-Bruce, the Supreme Court would have necessarily concluded that the arbitration agreement was governed by the FAA because the Court had already concluded that the nursing home was involved interstate commerce. Given that the standard used by the court in Timms has been repudiated by the United States Supreme Court, the trial court erred in relying upon Timms in denying the Motion to Compel Arbitration.<sup>8</sup>

**B. The trial court erred in concluding that the arbitration agreement mandated the AAA as the forum for arbitration**

In denying the Motions to Compel Arbitration, the trial court also ruled that the claim was not subject to arbitration because the forum selected by Tanglewood in the contract was no loner available. This was error.

The trial court ruled that the language in the arbitration agreement is, in effect, a forum selection clause. The provision at issue in this case reads as follows:

Proceeding. Any arbitration proceeding that takes place under this Arbitration Agreement *shall follow the rules of the American Arbitration Association (“AAA”)* and any resulting decision shall be enforceable by a court of competent jurisdiction. The arbitration proceedings shall be conducted where the Facility is located or as close to the Facility as practical. *The arbitration proceeding shall be conducted before one neutral arbitrator selected in accordance with the rules of the AAA.* The parties agree to bear their own attorneys’ fees and costs associated with the arbitration proceeding.

(Resident and Facility Arbitration Agreement) (emphasis added).

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<sup>8</sup> See Citizens Bank v. Alfabco, Inc., 539 U.S. 52 (2003) (holding that no elaborate explanation needed to show an impact on interstate commerce upon consideration of the ‘general practice’ those transactions represent). Additionally, the Administrator at Tanglewood, Wanda Fowler, confirmed the receipt of Medicare funds by Tanglewood in her affidavit. (Affidavit of Wanda Fowler).

In 2003, the AAA issued a policy statement that stated in relevant part:

As a result of a review of its caseload in the health care area, the American Arbitration Association has announced that it will no longer accept *the administration of cases* involving individual patients without a post-dispute agreement to arbitrate. In order to provide sufficient notice to provide for an orderly transition, this change will become effective on January 1, 2003.

American Arbitration Association, Healthcare Policy Statement (eff. Jan. 1, 2003), available at [http://www.adr.org/cs/idcplg?IdcService=GET\\_FILE&dDocName=ADRSTG\\_011014&RevisionSelectionMethod=LatestReleased](http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_011014&RevisionSelectionMethod=LatestReleased) (emphasis added); see also (Order Denying Defendant's Motion to Compel Arbitration).

Relying upon the 2003 AAA Policy Statement and Grant v. Magnolia Manor, 383 S.C. 125, 678 S.E.2d 435 (2009), the trial court held that the selection of the AAA as a forum was an integral part of the agreement, that the AAA was no longer available as a forum, and therefore the arbitration agreement was unenforceable. This was error, as the trial court failed to recognize the distinction between this case and Grant.

In Grant, the arbitration agreement stated, in relevant part, as follows:

Pursuant to the Federal Arbitration Act, any action, dispute, claim, or controversy of any kind . . . shall be resolved by binding arbitration *administered* by the National Health Lawyers Association (the "NHLA").

Id. at 128, 678 S.E.2d at 436-37. The NHLA, however, had issued a rule change under which it would only arbitrate claims pursuant to post-injury arbitration agreements. Id.

Had the agreement at issue required the AAA to *administer* the arbitration, the rule enunciated in Grant v. Magnolia Manor may have controlled. However, the arbitration agreement in the present case does not require administration by the AAA, but only requires that its rules be followed in conducting the arbitration. The word

“administer” is defined as “to manage or supervise the execution, use, or conduct of.”<sup>9</sup>

There is nothing about the arbitration agreement at issue in this case that requires the AAA to manage or supervise the execution of the arbitration proceeding.

Unlike Grant, the arbitration agreement in this case only calls for the *rules of the AAA* to be applied. Additionally, the agreement only calls for a “*neutral arbitrator selected in accordance with the rules of the AAA*” and not an arbitrator associated with or employed by the AAA. (Resident and Facility Arbitration Agreement). In this case, there is no choice of forum stipulated as was the case in Grant. Id. Accordingly, this case is not controlled by Grant and the trial court erred in so ruling. Numerous courts have addressed this issue following the AAA’s Policy Statement<sup>10</sup> and have correctly recognized the distinction between an arbitration conducted according to the AAA rules and an arbitration administered by the AAA. The following cases are persuasive.

In Mathews v. Life Care Centers of America, Inc., 177 P.3d 867 (Ariz. Ct. App. 2008), the Arizona Court of Appeals reversed the trial court’s denial of the defendants’ motion to compel to arbitration. In that nursing home case, the arbitration agreement specified that any arbitration hearing would be held before “a board of three arbitrators, selected from the American Arbitration Association [AAA].” Id. at 872. The Mathews court held that the term regarding the selection of arbitrators from the AAA did not void the agreement, even following the issuance of the Healthcare Policy Statement, because

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<sup>9</sup> Webster’s Ninth New Collegiate Dictionary 57 (Frederick C. Mish et. al. eds., 1987).

<sup>10</sup> It is important to note that the AAA Policy Statement effective January 1, 2003 is not a rule under the AAA. Other cases, including Grant v. Magnolia Manor, 383 S.C. 125, 678 S.E.2d 435 (2009), have addressed a similar issue involving the National Health Lawyers’ Association (NHLA), who issued a *rule* change requiring a post-injury agreement to arbitrate before accepting arbitration. Those cases are distinguishable, in part, because of the difference in the AAA’s Policy Statement, which does not render arbitration agreements invalid, and the NHLA’s rule change, which would invalidate pre-injury arbitrations following those rules under that change.

the term simply provided the manner of selecting the arbitrator and did not require a particular forum. Id. This is similar to the arbitration agreement in the present case.

In Blue Cross Blue Shield of Alabama v. Rigas, 923 So. 2d 1077 (Ala. 2005), the Alabama Supreme Court reversed the trial court's denial of a motion to compel arbitration. The arbitration agreement specified that binding arbitration would proceed "under the Federal Arbitration Act and according to the rules and procedures" of the AAA. Id. at 1081. The Rigas court held that the AAA Policy Statement does not preclude arbitration, as the provision only provided for the arbitration to be conducted according to the AAA rules and procedure. Id. at 1092. The Rigas court also distinguished between the administration of an arbitration by the AAA, which was not required by the Rigas arbitration agreement and is not required by the arbitration agreement in this case, and the use of the AAA's rules and procedures. Id. The court concluded, "the statement of the AAA provides only that the AAA will not administer a dispute such as this one; it does not provide that Rigas' claims are not arbitrable." Id.

In Westmoreland v. High Point Healthcare, Inc., 721 S.E.2d 712 (N.C. Ct. App. 2012), the North Carolina Court of Appeals held that the AAA policy of refusing to accept healthcare arbitration based on pre-dispute arbitration agreements did not mandate the invalidation of an arbitration agreement containing provisions identical to the one at issue in the instant case. The Westmoreland court, relying on the Rigas decision, held that the arbitration agreement, which merely required that the AAA rules be utilized, "did not provide that a AAA arbitrator must be used to conduct the arbitration" and "did not render the performance of the Arbitration Agreement impossible." Id. at 719. Instead, "[i]t simply meant that the arbitration could not be conducted under the auspices of the

AAA.” Id. at 719-20. The court went on to hold that the AAA policy statement was “in direct conflict” with the state’s strong public policy in favor of arbitration, a policy shared by South Carolina. Id. at 720; see also Carolina Care Plan, Inc. v. United Healthcare Servs., Inc., 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004) (“South Carolina law generally favors arbitration”).

In Covenant Health & Rehabilitation of Picayune, LP v. Moulds, 14 So. 3d 695 (Miss. 2009), the Mississippi Supreme Court addressed an arbitration agreement that specifically required arbitration to be administered by the AAA. The Moulds court held that the arbitration could not go forward based on the AAA Policy Statement. However, the court recognized the distinction in cases between arbitration agreements requiring AAA “administration” and arbitration agreements requiring the use of AAA rules. Id. at 708-09 (citing Mathews, 177 P.3d at 867, and Rigas, 923 So. 2d at 1077) (additional citations omitted). The Moulds court recognized the distinction between following AAA rules and requiring AAA administration, namely that AAA administration is a requirement that mandates a forum while following AAA rules does not require a particular forum. 14 So. 3d at 708-09. The trial court erred in this case by failing to make the distinction between those agreements which must be administered by the AAA in that particular forum and those which must only follow the procedural rules of the AAA. Id.

In Fellerman v. American Retirement Corp., 2010 WL 1780406 (E.D. Va. May 3, 2010), the U.S. District Court for the Eastern District of Virginia granted the defendant’s motion to compel arbitration. The arbitration agreement in Fellerman provided that the arbitrator must be a member of the AAA and that the arbitration proceedings would be

governed by the rules of the AAA. 2010 WL 1780406 at \*1. The plaintiff argued that the distinction between arbitration clauses calling for parties to be bound by AAA rules versus those calling for AAA administration was immaterial, just as this Court has held in the present case. The Fellerman court explicitly rejected this argument. 2010 WL 1780406 at \*5. In fact, it addressed Rule R-2<sup>11</sup> of the AAA and concluded that authorization to administer arbitration by using AAA rules “does not rise to the level of contractual assent to have the matter *exclusively* before that forum.” Id. The reasoning in Fellerman is sound and should be adopted by this Court, as Fellerman recognized that clear difference between AAA administration and AAA rules:

Several other jurisdictions have weighed in on whether an arbitration clause binding the parties to AAA rules is integral. As ARCIP points out, courts tend to enforce arbitration agreements whose terms specify that the parties be bound only by the rules of the AAA. Mathews v. Life Care Ctrs. of Am., Inc., 217 Ariz. 606, 177 P.3d 867, 868 (2008) (enforced agreement that required AAA arbitrators, but not AAA administration); Blue Cross Blue Shield v. Rigas, 923 So.2d 1077,1093 (Ala.2005) (enforced agreement that required AAA rules, but not AAA administration); Estate of Eckstein v. Life Care Ctrs. of Am., Inc., 623 F. Supp. 2d 1235, 1238 (E.D. Wash. 2009) (same); Oesterle v. Atria Mgmt. Co., LLC, No. 09-4010-JAR, 2009 U.S. Dist. LEXIS 60057, at \*26, 2009 WL 2492697 (D. Kan. 2009) (“[T]he appropriate way to construe the arbitration provision is to read it as simply requiring arbitration in accordance with AAA rules and not AAA policy. Thus, the AAA provision covers the rules to abide by when conducting the arbitration, while AAA policy on the types of arbitrable claims is simply just that-AAA’s policy.”). The arbitration agreement in this action, unlike that at issue in Moulds, specifies only that arbitration proceed in accordance with AAA rules (ARCIP Mem. in Supp. Mot. to Compel Arbitration, Ex. 1). This interpretation is most consistent with the strong federal presumption favoring arbitration. See Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

Id.

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<sup>11</sup> Rule R-2 states that when parties agree to arbitrate “under these rules . . . they thereby authorize the AAA to administer the arbitration.”

In Nail v. Consolidated Resources Health Care Fund I, 229 P.3d 885 (Wash. Ct. App. 2010), the Washington Court of Appeals reversed the trial court's denial of defendants' motion to compel arbitration. The arbitration agreement in Nail called for arbitrators to be selected from AAA and to apply the rules of procedure of the AAA. After determining that the AAA Policy Statement was *not* a rule of procedure, the Nail court held that the "AAA did not, and could not invalidate all pre-dispute arbitration agreements regarding individual health care claims unsupported by an additional post-dispute arbitration agreement" and noted that the AAA did not legislate its policy statement into a specified rule of procedure. Id. at 889. The Nail court also correctly noted that in specifying the method of choosing arbitrators, the agreement did not require exclusive AAA administration. Id.

In Oesterle v. Atria Mgmt. Co., LLC, 2009 WL 2043492 (D. Kan. July 14, 2009), the U.S. District Court for the District of Kansas addressed a motion to compel arbitration in which the arbitration agreement provided that the arbitration would be conducted in accordance with the rules of the AAA, but that arbitration would be held in the state where the facility was located. In many ways, the arbitration agreement at issue in Oesterle is most similar to the arbitration agreement in the present case. The Oesterle court reconciled the arbitration agreement with the AAA Policy Statement by concluding:

Guided by the Supreme Court, this Court finds that the appropriate way to construe the arbitration provision is to read it as simply requiring arbitration in accordance with AAA rules and not AAA policy. Thus, the AAA provision covers the rules to abide by when conducting the arbitration, while AAA policy on the types of arbitrable claims is simply just that-AAA's policy. And while plaintiff argues that her reading of the provision is the correct one, 'such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms.' Indeed, the parties may contractually limit the issues that they will arbitrate and may specify the rules to govern

any such arbitration. There is nothing in the FAA that prevents parties from enforcing arbitration provisions under different rules than those in the FAA. Where the parties have decided to arbitrate in accordance with AAA rules, enforcing that decision is certainly consistent with the FAA.

Id. at \*9 (internal citations omitted). The Oesterle court also noted that a consistent reading of the arbitration provision would be that the parties could pursue arbitration based on AAA rules but not administer the arbitration process through the AAA. This is the exact distinction and reading of the arbitration agreement that Defendants submit is proper in this case.

In Deeds v. Blueshield of Idaho, 141 P.3d 1079 (Idaho 2006), the Supreme Court of Idaho reversed the trial court's denial of a motion to compel arbitration. In Deeds, the arbitration agreement provided for arbitration "in accordance with the applicable rules of the AAA." 141 P.3d at 1080-81. The court in Deeds concluded that even if the AAA would not designate an AAA arbitrator to administer the dispute in light of the Policy Statement, it saw "no reason" why the arbitration could not proceed in accordance with the AAA rules using a different arbitrator.<sup>12</sup> Id. The Deeds court added that the AAA rules governing a dispute are simple procedural rules of general applicability, which can be followed by any duly appointed arbitrator. Id.; see also Trinity Mission Health & Rehab. v. Scott, 19 So. 3d 735 (Miss. Ct. App. 2008) ("While it would appear that the AAA would not administer the arbitration of this claim since there is only a pre-dispute agreement to arbitrate, it does not mean that arbitration is precluded. Arbitration pursuant to the AAA's rules and procedures would still be possible.").

Finally, in Meskill v. GGNSC Stillwater Greeley, LLC, 862 F. Supp. 2d 966 (D. Minn. 2012), the district court held that an arbitration agreement which required

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<sup>12</sup> In the present case, the arbitration agreement only calls for a "neutral arbitrator" selected in accordance with AAA rules and *not* an AAA arbitrator.

arbitration “in accordance with the National Arbitration Forum Code of Procedure” did not mandate that the National Arbitration Forum conduct the arbitration, even where NAF rules provided that arbitrations using its rules and procedures could only be administered by the NAF. In that case, the NAF had ceased to arbitrate any claims. Based upon that, the plaintiff attempted to avoid arbitration based upon the unavailability of the NAF. As the court recognized, however, “if the parties had contemplated the NAF would be their exclusive arbitral forum, they could have easily said so – there would be no need for them to do so obliquely by specifying that the arbitration must be conducted by the NAF’s rules.” Id. at 973. The court, instead, held that the arbitration could still proceed in accordance with the NAF’s rules, without the participation of the NAF.

The arbitration agreement in this case does not require the arbitrator to be a member of the AAA. The only requirement is that the arbitrator is “neutral” and selected in accordance with the rules of the AAA. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Towels v. United HealthCare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (1999) (citations omitted). The arbitration agreement in this case does not mandate that the AAA serve as the forum for this arbitration. Rather, it merely requires the use of the AAA rules and a neutral arbitrator. Thus, the arbitration agreement is not impacted by the AAA Policy Statement, which only involves the *administration* of arbitrations, and which courts across the country have correctly distinguished from the use of the AAA’s rules and procedures.

Secondly, the trial court’s conclusion that the provisions relating to the AAA rules were integral parts of the agreement is simply conclusory and not supported by any evidence. The plaintiff has presented no evidence that the choice of the AAA as a forum

was an integral part of the arbitration agreement because it is clear from the plain language of the agreement that no forum was dictated at all. Even if the agreement had required that the parties use an AAA arbitrator, which it did not, it still would not affect the enforceability of the agreement. See, e.g., New Port Richey Med. Investors, LLC v. Stern, 14 So.3d 1084 (Fl. Ct. App. 2009) (substitute arbitrator provisions proper where plaintiff did not present any evidence that the choice of the AAA as the forum was an integral part of the agreement to arbitrate); Deeds, 141 P.3d 1079 (substitute provisions of FAA proper because there was no evidence that AAA provisions were central to the agreement to arbitrate because “the AAA simply provides a list of potential arbitrators from which the parties can choose, as well as procedural rules for conducting the arbitration”); Mathews, 177 P.3d 867 (“Moreover, the record contains no evidence that an AAA arbitration panel was a significant or material term to [plaintiff] when she executed the Agreement.”); Estate of Eckstein v. Life Care Ctrs. of Am., Inc., 623 F. Supp. 2d 1235, 1238 (E.D. Wash. 2009) (“Plaintiff has not convinced the Court that the designation of AAA as arbitrator was a material term.”); THI of S.C. at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. Sept. 13, 2011) (holding that no evidence was presented that plaintiff was aware of the existence of the AHLA rules or possible conflict).

Finally, the trial court’s ruling on this issue overlooks the two main principles of arbitration. First, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) (citations omitted). Second, a motion to compel arbitration should only be denied where the clause is not susceptible to *any* interpretation which would cover the

asserted dispute. Id. This case is easily distinguishable from Grant and can be interpreted using only the plain language of the arbitration agreement in favor of arbitration.

**C. The trial court erred in finding that there was no “meeting of the minds” between the parties regarding the arbitration agreement.**

The trial court also ruled that there was no meeting of the minds as to the essential parts of the contract, citing Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989). Because there is no evidence that was a failure of the parties to agree to the contractual terms, the trial court erred in refusing to enforce the arbitration agreement on the basis of a lack of a meeting of the minds.

It is well established in South Carolina that courts must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994); Jordan v. Sec. Grp., Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). “It is elementary that, if the contracting party is in position to learn the contents of a written contract and thereby protect himself by reading it or having it read, one who is unable to read is bound to have the instrument read to him before signing it, just as one who can read is bound to read it before signing. So, also, if one signs a contract before it is completely filled out, he is bound thereby, in the absence of fraud.” White v. S. Ry. Co., 208 S.C. 319, 343-44, 38 S.E.2d 111, 123 (1946).

The trial court failed to cite any factual basis for the conclusion that there was no meeting of the minds. However, there is no evidence of fraud in this case. Additionally, there is no evidence that Brunson or Parsons was unable to learn the contents of the

contract had either of them read it. Accordingly, under South Carolina law, the contract is binding upon them, and there is no absence of a meeting of the minds.

Player v. Chandler is inapposite to the facts of this case. In that case, the Players brought an action against the Chandlers, seeking specific performance of *alleged oral modifications* to a lease contract that occurred during negotiations over the sale/lease of property. The court noted in that case that contracts for extension or renewal of lease must specify conditions of renewal with certainty, citing Anderson v. Hall, 155 S.C. 320, 152 S.E. 521 (1930). The Court further noted that any modification of written contract must satisfy all requisites of valid contract including a “meeting of the minds” *as to the essential and material terms of the agreement*. Player, 299 S.C. at 104-05, 382 S.E.2d at 893 (citations omitted). The court noted that essential terms and conditions of a lease agreement include a definite agreement as to the extent and boundary of the property to be leased, the term of the lease, the rental as well as the time and manner of payment. Id. at 105, 382 S.E.2d at 893-94. In that case, the court recognized that there was no indication that the essential terms of the lease were discussed. Accordingly, there was no meeting of the minds as to the terms of the contract. Id. at 105, S.E.2d at 894.

In the present case, the contract in question is not an oral modification to a contract. The contract sets forth in clear, unambiguous terms what each party agrees to do under the admission contract and under the arbitration agreement. There were no essential terms missing from the contract as there were in Player. Simply put, the Player case is not relevant in any way to the current case. Parsons was granted admission to the facility and stayed there for a period of time in accordance with the admission requirements. The admission agreement and the arbitration agreement were never

repudiated or questioned after Parsons was admitted and no oral modification of either contract was attempted or has been alleged. Moreover, by signing the arbitration agreement, Ms. Brunson acknowledged that she read and understood the agreement. Any argument that there was no meeting of the minds is simply untenable.

**D. The trial court erred in concluding that the plaintiff lacked standing, that there was no evidence of an agency relationship, and that the plaintiff was not estopped from repudiating the arbitration agreement.<sup>13</sup>**

The trial court also found that Brunson “lacked standing” to enter into the arbitration agreement. This was error.

Upon review of the trial court’s order, it appears that the real issue was one of agency, as the court found that Brunson lacked the authority (i.e., standing) to enter into the agreement on behalf of Parsons. The validity of the arbitration agreement in this case must be determined in accordance with the general principles of contract law and agency law that would apply to any other contract. Herron v. Century BMW, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010). By allowing Brunson to procure his admission to Tanglewood and accepting the benefits of the contracts entered into in connection with that admission, Parsons represented that Brunson was his authorized representative to act on her behalf in connection with her admission. See R&G Constr., Inc. v. Lowcountry Reg’l Transp. Auth., 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000) (“When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances.”).

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<sup>13</sup> Given the entwinement of ideas in these arguments, they have been addressed in the same section on appeal.

In the present case, the evidence is undisputed that Parsons authorized Brunson to negotiate her admission to Tanglewood. (Defendants' Supplemental Brief in Support of Motion to Compel Arbitration, Exhibit D, pp. 13-14). This fact has been admitted by the plaintiff herself. Id. The trial court found that Parsons was competent, and therefore competent to appoint Brunson to act as his agent for purposes of admitting him into Tanglewood. (See Order Denying Defendant's [sic] Motion to Compel Arbitration). The Plaintiff has testified that Brunson knew she was signing the admission paperwork for him. (Id. at pp. 14-15). In fact, Mr. Parsons was incapable of completing the paperwork himself, as he was paralyzed from the chest down and was unable to write. (Id. at pp. 17-18). There is no evidence that Mr. Parsons, who was competent, ever attempted to repudiate the Plaintiff's actions. In the face of Brunson's representation that she was allowed to execute the admission paperwork, including the arbitration agreement, and Mr. Parsons's acquiescence, Tanglewood reasonably relied upon the representations in allowing Brunson to execute the paperwork and admit Parsons into the facility. It is disingenuous for Brunson to now claim Parsons should not be bound by a contract he entered into via his appointment of her as his agent when Parsons himself instructed the Tanglewood staff to deal with Brunson on this very issue.

Additionally, as argued before the trial court, Parsons accepted the benefits of these contracts with Tanglewood, and as such he ratified them through his conduct, i.e. remaining at Tanglewood. His representative who signed the paperwork, and his Estate, should be estopped from denying their validity. The Court noted that Parsons was mentally competent at the time of his admission, which is even greater evidence that Brunson was authorized to act on Parson's behalf. If Brunson was not authorized to act

on his behalf in admitting him to Tanglewood, and Parsons was competent, certainly Parsons would have not stayed at Tanglewood. One cannot ratify that part of the contract under which he has accepted the benefits and avoid that part which he later deems to be disadvantageous. See Southern Bell Telephone & Telegraph Co. v. WRNO, Inc., 216 S.C. 533, 535-36, 59 S.E.2d 146, 147 (1950).

Agency is the fiduciary relationship resulting from the manifestation of consent by one person to another that the other shall act on behalf of and subject to the control of the first, and of consent by the other so to act. Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 425 S.E.2d 764 (Ct. App. 1992) In order for agency to exist, therefore, one person (the "principal") must intend that another (the "agent") act on his behalf, the agent must intend to accept the authority of the principal and act on it, and the intention of each must be manifest either in words or conduct between them. Courtney v. Remler, 566 F. Supp. 1225, 1230 (D. S. C. 1983). See also S. B. McMaster, Inc. v. Chevrolet Motor Co., 3 F. 2d 469, 474 (4th Cir. 1925) (stating "[t]he agent must have assumed to represent the principal and to have performed the acts in his name and on his behalf").

In the present case, Parsons represented to Tanglewood that Brunson was authorized to execute his admission paperwork at Tanglewood. Parsons appointed Brunson to act on his behalf. This intention was carried out when Brunson performed the acts in Parsons' name and on Parsons' behalf.

Even if Brunson was not Parsons actual agent for purposes of admitting him to the facility and signing his paperwork, there is an apparent agency relationship. An apparent agency is established when the purported principal has represented another to be

his agent by either affirmative conduct or conscious and voluntary inaction and there is reliance upon the agency representation with a corresponding change in position as a result. Watkins v. Mobil Oil Corp., 291 S.C. 62, 67, 352 S.E.2d 284, 287 (Ct. App. 1986); ZIV Television Programs, Inc. v. Associated Grocers, Inc. of South Carolina, 236 S.C. 448, 453, 114 S.E.2d 826, 828 (1960). Tanglewood relied upon Parsons' representations that Brunson was authorized to sign the paperwork to admit him into the facility. Parsons was admitted into the facility based upon this representation and Brunson's signing of the admission paperwork. The trial court erroneously focused on whether Parson's knew Brunson was specifically signing an arbitration agreement instead of focusing upon the fact that Parson's authorized Brunson to handle *all* of the paperwork related to his admission in the facility. Based upon this representation, Tanglewood allowed Brunson to sign all of the documents executed at the time of admission. See Pee Dee Nursing Home v. Florence Gen. Hosp., 309 S.C. 80, 419 S.E.2d 834 (Ct. App. 1992) (the doctrine of apparent authority provides that the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption; the concept of apparent authority depends upon manifestations by the principal to a third party and the reasonable belief by the third party that the agent is authorized to bind the principal).

Moreover, Parsons is bound by the contract executed by Ms. Brunson as a third-party beneficiary. Under South Carolina law, "[a] third-party beneficiary is a party that the contracting parties intend to directly benefit." Helms Realty, Inc. v. Gibson-Wall

Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005); see also Touchberry v. Florence, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988) (“[t]he presumption that [a] contract is not enforceable by an individual may be overcome by showing that he was intended to be the direct beneficiary of the contract”). Again, Mr. Parsons did not sign the contract, but he clearly is the resident to be admitted to the facility and thus the direct beneficiary. Mr. Parsons’ care was the essential purpose of the admission agreement, and as a third-party beneficiary, he (and his estate) are bound by the arbitration agreement. See THI of S.C. at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. Sept. 13, 2011) (rejecting argument that family member did not have authority to bind resident to arbitration); Cook v. GGNSC Ripley, LLC, 786 F. Supp. 2d 1166, 1171-72 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care was enforceable against third-party beneficiary and her estate under third-party beneficiary principles); Owens v. Coosa Valley Health Care, Inc., 890 So. 2d 983 (Ala. 2004) (same); Trinity Mission Health & Rehab. v. Scott, 19 So. 3d 735 (Miss. Ct. App. 2008) (same).

Finally, the trial court erred in holding the Plaintiff was not estopped from repudiating the arbitration agreement. In October 2012, the South Carolina Court of Appeals held that a nonsignatory could be bound by an arbitration provision within a contract executed by other parties. Pearson v. Hilton Head Hosp., \_\_ S.C. \_\_, \_\_, 733 S.E.2d 597, 600-01 (Ct. App. 2012) (“Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.”) (citing Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-17 (4th Cir. 2000)). These common

law principles of contract and agency law include agency and estoppel, at issue here, among others. Pearson at \_\_, 733 S.E.2d at 601.

“Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.” Int'l Paper, 206 F.3d at 417-18 (citation and internal quotation marks omitted). “A nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause.’” Id. (quoting Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999)).

“Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.” E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates. S.A.S., 269 F.3d 187, 200 (3d Cir. 2001) (citing Tencara Shipyard, 170 F.3d at 353 (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)). As noted by the Federal District Court in Jackson v. Iris.com:

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

524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007) (citing Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp., 659 F.2d 836, 839 (7th Cir. 1981); Int'l Paper, 206 F.3d at 418; Am. Bankers Ins. Grp. v. Long, 453 F.3d 623, 628 (4th Cir. 2006); R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, 384 F.3d 157, 162 (4th Cir. 2004); Tencara

Shipyard, 170 F.3d at 353 (holding nonsignatory was estopped from denying applicability of arbitration clause when nonsignatory received "direct benefits" from contract including lowered insurance rates and the ability to sail under the French flag)).

In the present case, the trial court erred in holding that the Plaintiff was not estopped. The mere fact that Parsons did not sign the contract is not dispositive, as the trial court held. Rather, as is cited above, numerous courts hold that where a plaintiff receives the benefits of the contract, which Parsons certainly did, a plaintiff is estopped to deny an arbitration agreement merely because he did not sign the contract under which he received all of the benefits. Parsons' Estate is not now free to pick and choose those portions of Parsons' agreements it wants to enforce and those it does not and should be estopped from doing just that.

**E. The trial court erred in finding that the Defendants waived the right to enforce the arbitration agreement**

At the outset, the Defendants submit that once it has been determined that a valid arbitration agreement has been entered, the matter must be sent to arbitration. The arbitrator would then have the authority to rule on any defenses, such as waiver, that may be raised by the Plaintiff. Thus, the issue of waiver is not properly before this Court. Nonetheless, the Defendants will address the trial court's Order, which held that the Defendants had waived their right to enforce the arbitration clause. This determination was in error.

A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Sanford v. South Carolina State Ethics Com'n, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (2009) (citing Eason v. Eason, 384 S.C. 473, 682 S.E.2d 804 (2009)).

Waiver requires a party to have known of a right and known that right was being abandoned. Sanford, 385 S.C. at 496-97, 685 S.E.2d at 607.

The three factors generally considered to determine if a party has waived its right to enforce arbitration include: (1) the time between commencement of the action and moving for arbitration; (2) whether the party seeking arbitration engaged in extensive discovery; and (3) prejudice to the non-moving party which must be more than mere inconvenience. Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007).

The trial court cited no dates in its order and gave no reason as to why it found that too much time had lapsed in this case so as to constitute a waiver. Even after reconsideration, the court did not identify the factors used to in reaching its conclusion. Nonetheless, the trial court overlooked several important facts with respect to its analysis of the time between commencement of the action and the motion to compel arbitration.

First, the Complaint was filed on November 15, 2010. Although a Notice of Intent was required before the Complaint was filed, the Defendants' contractual right to arbitrate was not breached until the Complaint was filed. Given the courts' policy to encourage settlement of disputes through mediation,<sup>14</sup> participating in pre-suit mediation should not be held against the Defendants for purposes of calculating the purported time lapse between notice of a dispute and moving for arbitration. Participation in mediation in an attempt to expeditiously resolve a dispute is entirely consistent with the concept of

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<sup>14</sup> See, e.g., Cox & Floyd Grading, Inc., 356 S.C. 512, 516, 589 S.E.2d 789, 792 n.2 (Ct. App. 2003) (noting "the state's policy favoring alternative dispute resolution"); Chester v. S.C. Dep't of Pub. Safety, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010) (noting state's "strong public policy favoring the settlement of disputes").

arbitration as a fair and inexpensive means of resolving disputes. Indeed, it is not unusual for ADR agreements to require mediation prior to the filing of a demand for arbitration.

Moreover, the Notice of Intent does not invest in the Defendant any rights to remove a case to federal court, an arbitration forum, or any other forum for relief. In fact, there is no obligation for a party to file a lawsuit merely because he or she files a Notice of Intent. Accordingly, the only relevant date is the filing of the Complaint, which was the first time that agreement to arbitrate was breached.

Furthermore, *two weeks* after the Defendants answered the Complaint, the Plaintiff moved to strike the portions of the Defendants' Answers that raised arbitration as a defense. (Plaintiffs' Motions to Strike). At that point, the Defendants were not required to file a Motion to Compel Arbitration, as the arbitration issue was immediately raised by the Plaintiff. The court did not rule on the motion regarding arbitration until March 17, 2011. (Order Denying Defendants' Motion Compel Arbitration). After the court denied the Plaintiff's Motion to Strike the arbitration defenses, the Defendants conducted limited discovery *solely* on the issue of arbitration.<sup>15</sup> The Defendants then moved to compel arbitration on October 10, 2011. (Defendants' Motions to Compel Arbitration). Therefore, the lapse of time was less than ten months from the filing of the Complaint, and the justification for the passage of time was reasonable given the fact that the arbitration issue was immediately raised *by the Plaintiff* who sought to strike the arbitration defense from the Answer.

As to the issue of engaging in discovery, the Defendants only requested limited discovery on the issue of arbitration. Any argument that the Defendants decided to

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<sup>15</sup> Certainly, if the Defendants had immediately moved to compel arbitration, the Plaintiff's first argument would be that she is, at least, entitled to discovery on the issue of arbitration, such as on the issue of meeting of the minds, standing, agency, etc.

participate in procedural and discovery hearings and avail themselves of the court system, is erroneous, as the Defendants appeared in court to defend motions *filed by the Plaintiff*. As to the Defendants' production of documents, the trial court improperly punished the Defendants for cooperating by responding to the Plaintiff's discovery requests. In other words, the Defendants were in a no-win situation because (a) if they refused to answer discovery unrelated to arbitration, they would have to defend a motion to compel and thus avail themselves of the court system, (b) if they attempted to cooperate with Plaintiff's discovery requests, they were "participating" in discovery, and (c) if they refused to answer discovery and refused to defend a motion to compel discovery, they would have waived any right to contest discovery abuses. Because the Defendants limited their discovery to issues related to enforceability of arbitration, the trial court erred in ruling that the defendants had engaged in "extensive discovery." The Defendants' actions with respect to discovery were wholly consistent with their position that the Plaintiffs' claims must be submitted to arbitration.

The Defendants have never acted in a manner contrary to their contractual right to arbitrate. The Defendants raised arbitration in their Answers after the Plaintiff initially breached the arbitration agreement. The Defendants then challenged the Plaintiff's Motion to Strike in order to enforce the arbitration agreement. Thereafter, the Defendants conducted discovery for the express purpose of enforcing the arbitration agreement. The Defendants' conduct has been the *exact opposite* of a knowing and voluntary relinquishment of a known right. Accordingly, the trial court's finding of waiver is unsupported by the record.

Finally, as to the issue of prejudice, the Court found that the only explanation for moving to compel arbitration when it the Defendants did was to “cause an unnecessary delay and unfair prejudice to the Plaintiff.” This conclusion is not supported by the record. The Plaintiff cannot claim prejudice when the issue of arbitration has been an issue raised from the very beginning of this case. The Plaintiff raised the issue of arbitration two weeks after an answer was filed and cannot now claim surprise or prejudice that the Defendants would move to compel arbitration. The Defendants have attempted to follow a logical progression towards a motion to compel arbitration in that after the Plaintiff’s motion to strike the arbitration defense was resolved in March 2011, they conducted limited discovery on the arbitration issue. After this discovery was conducted, the Defendants timely moved for arbitration. Defendants have engaged in no conduct in the litigation that is inconsistent with their position that Plaintiffs’ claims must be submitted to arbitration.

The issue of arbitration has been at the forefront of this case from its inception, and the Plaintiff cannot claim prejudice at this stage when she has been aware from the beginning. See Rich v. Walsh, 357 S.C. 64, 590 S.E.2d 506 (Ct. App. 2003) (holding that mere delay, regardless of its duration, should not be considered as a factor independent of the actual prejudice it occasions). Moreover, any doubts should be resolved in favor of arbitration, including the waiver issue. Towles v. United HealthCare Corp., 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). Numerous South Carolina courts have addressed waiver issues and have rejected plaintiffs’ waiver defenses in cases similar to the present case. See Gen. Equip. & Supply Co. v. Keller Rigging & Constr., Inc., 344 S.C. 553, 557, 544 S.E.2d 643, 645 (Ct. App. 2001) (finding an eight-month period where the “litigation

consisted of routine administrative matters and limited discovery [that] did not involve the taking of depositions or extensive interrogatories” did not establish waiver); Toler’s Cove Homeowners Ass’n. Inc. v. Trident Constr. Co., 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (finding a thirteen-month period in which discovery was limited in nature did not demonstrate waiver); Rich v. Walsh, 357 S.C. 64, 590 S.E.2d 506 (finding no waiver even though parties exchanged discovery, conducted a brief deposition, and the motion was filed one year after suit began).

**Conclusion**

For the reasons set forth herein, the Court of Appeals should reverse the trial court’s decision and remand the matter to the trial court for the entry of an order compelling arbitration.

SO W E L L G R A Y S T E P P & L A F F I T T E , L L C .

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