

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from York County
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Case No. 2018-CP-46-01459

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SC Court of Appeals

Teresa Murphy, as Personal Representative for the Estate of Isaac Strong,

Respondent,

v.

Hunt Valley Holdings, LLC f/k/a Fundamental Long-Term Care Holdings, LLC;
Fundamental Clinical and Operational Services, LLC; Fundamental Consulting,
LLC; Fundamental Administrative Services, LLC; THI of Baltimore, Inc.; THI of
South Carolina, LLC; THI of South Carolina at Rock Hill, LLC d/b/a Magnolia
Manor of Rock Hill; and Amisub of S.C., Inc. d/b/a Piedmont Medical Center,

Defendants,

Of which Fundamental Clinical and Operational Services, LLC; Fundamental
Administrative Services, LLC; THI of South Carolina, LLC; and THI of South
Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill are the

Appellants.

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² "FAS" is Appellant Fundamental Administrative Services, LLC.

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT

Teresa Murphy, as Personal Representative) Civil Action No.: 2018-CP-46-01459
for the Estate of Isaac Strong,)

Plaintiff,)

v.)

Hunt Valley Holdings, LLC f/k/a)
Fundamental Long Term Care Holdings,)
LLC; Fundamental Clinical and Operational)
Services, LLC; Fundamental Consulting,)
LLC; Fundamental Administrative)
Services, LLC; THI of Baltimore, Inc.;)
THI of South Carolina, LLC; THI of South)
Carolina at Rock Hill, LLC d/b/a Magnolia)
Manor of Rock Hill; and Amisub of S.C.,)
Inc. d/b/a Piedmont Medical Center,)

ORDER

Defendants.)

This matter came before the Court on Defendant THI of South Carolina, LLC d/b/a Magnolia Manor Rock Hill's ("THI") Motion to Dismiss and Compel Arbitration or, Alternatively, to Compel Arbitration and Stay Proceedings. A hearing was held on August 30, 2018. After considering the parties' written submissions and oral arguments and for the reasons stated below, THI's motion is **DENIED**.¹

FACTS

Plaintiff's Complaint alleges Isaac Strong was admitted to Magnolia Manor of Rock Hill ("Facility") on December 22, 2014, following a multi-week hospitalization in Piedmont Medical

¹ Defendants Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, and THI of South Carolina, LLC also filed motions to stay Plaintiff's claims against them pending resolution of THI's motion to compel arbitration. In light of the Court's ruling denying to compel arbitration, the motions to stay are dismissed as moot.

Center related to a stroke that caused persistent weakness along his right side. (Compl. ¶¶ 25, 28). Four days before Mr. Strong was transferred to the Facility, his daughter Teresa Murphy was presented with two contracts. The first was an "Admission Agreement" that governed the type of care Mr. Strong would receive at the Facility and Mr. Strong's financial obligation to pay for those services. On the Admission Agreement's final page, labeled as "Page 12 of 12," there was an "Entire Agreement" provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Mr. Strong's admission to the Facility. Ms. Murphy signed the Admission Agreement on the "Signature of Representative" line. Ms. Murphy was not Mr. Strong's conservator, guardian, or attorney-in-fact.

On the same day, Ms. Murphy signed a contract called "Arbitration Agreement." This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate entity (labeled "Page 1 of 1") with its own signature blocks. The Arbitration Agreement, purportedly a contract between the Facility and Mr. Strong, provides for alternative dispute resolution for any claim a party may bring against another arising out of Mr. Strong's admission in the Facility. Ms. Murphy signed the Arbitration Agreement on the line labeled "Resident/Representative Signature." THI informed the Court that Mr. Strong agreeing to arbitrate was not a prerequisite to his admission at the Facility.

When Mr. Strong arrived in the Facility on December 22, 2014, he had a pressure ulcer and was at an elevated risk of developing new ulcers. (Compl. ¶ 28). Orders were entered requiring that Mr. Strong be turned or repositioned ever two hours. (Compl. ¶ 26). However, over the next couple weeks, Mr. Strong's pressure ulcer worsened, becoming infected and then septic. (Compl. ¶¶ 31-33). Mr. Strong's condition grew increasingly severe over the following months requiring hospitalizations and procedures before his passing away on September 5, 2015. (Compl. ¶¶ 34-

46). On May 14, 2018, Ms. Murphy initiated this action as the personal representative for Mr. Strong's estate. The Complaint alleges wrongful death and survival claims arising from Defendants' failure to properly treat Mr. Strong's skin condition while at PMC and the Facility. On July 17, 2018, THI filed a Motion to Compel Arbitration and Petition to Stay State Court Proceedings. Relying on the Arbitration Agreement that Mr. Strong did not sign, THI argues Plaintiff must arbitrate rather than litigate her claims.

LEGAL REASONING

I. There is no valid agreement to arbitrate claims stated in Plaintiff's Complaint.

Plaintiff's Complaint alleges causes of action for negligence (wrongful death and survivor actions). The survival claim relates to duties established and breached during Isaac Strong's life and damages sustained during his life. This claim belongs to Mr. Strong. Plaintiff Teresa Murphy (Mr. Strong's personal representative) presents this claim on Mr. Strong's behalf. See S.C. Code Ann. § 15-5-90 (stating that claims "survive both to and against the personal or real representative...of a deceased person"). Accordingly, THI must show a valid and enforceable arbitration agreement between Mr. Strong and THI to prevail on its motion. Defendants' motion, memorandum, and attached documents do not meet this burden.

Basic contract law holds that a contract binds only those parties who show an "objective manifestation of . . . assent at the time the contract was made." Laser Supply & Services, Inc. v. Orchard Park Assoc., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009). Mr. Strong did not sign the Arbitration Agreement or personally give any other objective manifestations of assent to this contract. THI contends Mr. Strong is bound to the agreement through the signature of Teresa Murphy, whom THI asserts was acting as Mr. Strong's agent. Defs.' Mem. at 6-9. For agency situations, the legal burden is on the party asserting that an agency exists. Frasier v. Palmetto

Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). In this case, THI must show that all necessary elements of an agency relationship are “clearly established” by the facts. Id. A party dealing with an agent has a duty to use due care to ascertain the scope of the agent’s authority to act. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996).

A. The Admission Agreement and Arbitration Agreement are Separate Contracts that do not Merge.

As discussed below, THI argues the Arbitration Agreement signed by Teresa Murphy is valid because, even though she had no actual authority to sign it on Mr. Strong’s behalf, she was Mr. Strong’s apparent agent or, in the alternative, Mr. Strong’s estate is estopped from contesting her alleged authority. These arguments have a common premise. Defendants stake both arguments to the notion that the Arbitration Agreement and Admission Agreement merge into a single contract that must be construed as a unit. For example, THI argues Mr. Strong created an agency relationship to support arbitration because he “accepted” admission. (Defs.’ Mem. at 8). THI then argues Plaintiff is estopped from denying authority to bind Mr. Strong to arbitration because she does not deny authority to admit him to the Facility. (Defs.’ Mem. at 12). Accepting merger is a prerequisite to accepting Defendants’ arguments. However, recent case law governing nursing home arbitration contracts reject THI’s argument. Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert. denied Aug. 21, 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014).

South Carolina law states that contracts signed at the same time by the same parties and for the same purpose will be construed together “in the absence of anything indicating a contrary intention.” Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts Resort Realty, Inc. v.

Down'round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). Coleman refused to apply the merger doctrine because language in the contracts “recognize[d] the ‘separateness’ of the admission and arbitration agreements.” 407 S.C. at 355, 755 S.E.2d at 455. Thompson and Hodge applied Coleman and provided further examples of factors demonstrating “separateness” and preventing merger. 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.

An admission contract with an “Entirety of Agreement” provision is separate “on its face” from an arbitration contract especially where the provision identifies the two contracts distinctly—i.e. “this [Admission] Agreement *or* in the Arbitration Agreement.” Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). In fact, when the arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has “Arbitration Agreement” atop its first page, these factors further “indicat[e] the parties’ intent for it to stand by itself as an independent contract.” Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302. Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home. Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

Many of these same factors are present here. The “Admission Agreement” presented to Ms. Murphy contains an “Entire Agreement” provision stating that “this Agreement represents the entire agreement” related to Mr. Strong’s admission to the Facility. Thus, “Agreement” is a defined term in this contract and, as stated in the contract’s opening paragraph, is limited to the “Admission Agreement,” not the separate Arbitration Agreement. Like in Hodge, the separate contracts have separate signature pages and separate pagination—i.e. the Admission Agreement ends with “Page 12 of 12” while the Arbitration Agreement is “Page 1 of 1.” As in Thompson, the arbitration agreement states its independence with its “Arbitration Agreement” title. Moreover, THI’s counsel

argued at the hearing that agreeing to arbitrate was not required for Mr. Strong to be admitted to Defendants' facility. To the extent there are any ambiguities in this contract language, they must be resolved against merger. Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685 (citing Coleman). THI was in sole control of the language chosen for these form contracts of adhesion and it was their responsibility to make merger clear if they so desired.

In sum, THI cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit.

B. Teresa Murphy was not Mr. Strong's Actual or Apparent Agent.

Agency is a "fiduciary relationship that results from the manifestation of consent by one person to another to be subject to the control of the other and to act on his behalf." Peoples Fed. Savs. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 145, 425 S.E.2d 764, 773 (Ct. App. 1992) (citing Restatement (Second) of Agency § 1 (1958)). An agency relationship may be established with clear evidence of actual or apparent authority conferred by the purported principal on the purported agent. Cowburn v. Leventis, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). Actual authority is "expressly conferred upon the agent by the principal." Richardson v. PV, Inc., 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009). Apparent authority is based on "representations made by the principal to the third party and reliance by the third party on those representations." Young v. S.C. Dep't of Disabilities & Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). To prove apparent authority, a party must show (1) purported principal consciously or impliedly represented another to be his agent; (2) reliance on the representation by a third party; and (3) change in position by third party in reliance on the representation. Cowburn, 366 S.C. at 39-40, 619 S.E.2d at 448.

South Carolina law provides that an agency relationship cannot be established solely by the words and actions of the purported agent. Id. For apparent authority to exist, “[e]ither the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such belief.” R & G Constr., Inc. v. Lowcountry Reg’l Transp. Auth., 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000). THI has not identified any conduct by Mr. Strong showing he intended to cause THI to believe Teresa Murphy was authorized to act for him. In fact, THI argued at the hearing Mr. Strong suffered from serious health issues that may have affected his ability to understand events occurring during his admission.

THI then argues Mr. Strong represented Teresa Murphy had authority to waive his jury trial right simply by his continued residency in the Facility. Defs.’ Mem. at 8. The Court rejects this argument for several reasons. First, Defendants conclude Mr. Strong’s presence alone can constitute an affirmative representation. Defs.’ Mem. at 7-8 (citing Carraway v. Beverly Enters. Ala., Inc., 978 So.2d 27, 30-31 (Ala. 2007)). Carraway is not binding precedent in this Court and its expansive view of apparent agency was rejected in Hodge, where the court rejected the notion that a nursing home resident represents his/her family member has authority to enter an arbitration agreement on the resident’s behalf simply by failing to object to the family member’s signature. 422 S.C. at 573-74, 813 S.E.2d at 308 (noting home argued resident “represented” her husband had authority by “allowing him to procure her admission” but still finding “no evidence . . . that [the resident], as the principal, represented husband was her agent”). THI makes a similar argument to the one Hodge rejected. Defs.’ Mem. at 8 (suggesting Mr. Strong created apparent agency relationship “by allowing Ms. Murphy to procure Mr. Strong’s admission to the Facility”).

Second, even accepting THI's recently rejected premise, any representation Mr. Strong's presence conveyed could only cover admission and not arbitration. As THI argued during the hearing, Mr. Strong's admission was in no way contingent on agreeing to arbitrate disputes. Third, THI's argument conflates the Admission Agreement and Arbitration Agreement in another important way. THI argues Mr. Strong "accept[ed] the benefits of the contracts." Def's. Mem. at 8. However, the only "benefit" THI cites is admission itself, a benefit THI has admitted to be separate from arbitration. THI never attempts to explain what supposed "benefit" of the independent Arbitration Agreement Mr. Strong derived during his time as a resident in Defendants' facility. Any such attempt would have been futile given the Court of Appeals' unambiguous ruling in Thompson which held that "any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement's] requirement that [resident] waive her right to access the courts and her right to a jury trial." 416 S.C. at 60, 784 S.E.2d at 688. Since Mr. Strong made no affirmative representations that Ms. Murphy had authority to sign the Arbitration Agreement on his behalf, the Court rejects THI's actual and apparent agency arguments.

C. Plaintiff is not Estopped from Challenging the Arbitration Agreement's Validity.

THI argues Plaintiff is equitably estopped from opposing enforcement of the Arbitration Agreement. Equitable estoppel is a contract defense for which the asserting party "bears the burden of establishing all the elements." Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the

party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id.

THI briefly mentions some of these elements but make no effort to apply them. Def's. Mem. at 10 (citing Boyd v. BellSouth Tele. Tele. Co., Inc., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006)). Instead, THI suggests an alternative equitable estoppel standard and rely on federal cases. Defs.' Mem. at 17-18. THI contend their contract-based argument is subject to federal law rather than the law of South Carolina, the state where the alleged contract was signed and its alleged parties resided. The Court rejects this argument as at odds with U.S. Supreme Court precedent. An arbitration contract concerning interstate commerce are governed by the FAA but its provisions apply state law to enforceability questions such as the application of equitable estoppel. 9 U.S.C. § 2 (requiring enforcement of arbitration contract "save upon such grounds as exist at law or in equity for the revocation of any contract"). The FAA does not "alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." Arthur Anderson LLP v. Carlisle, 556 U.S. 624, 630 (2009). Arthur Andersen specifically applied this principle to equitable estoppel arguments. Id. at 632 (noting question on remand was "whether the relevant state contract law recognizes equitable estoppel"). At least eight

federal circuits² along with multiple district³ and state courts⁴ have cited Arthur Andersen with multiple courts modifying or overruling precedent to comply with the Supreme Court's ruling.

Moreover, the Court finds THI could not prevail even if its equitable estoppel argument was governed by federal law. THI relies primarily on International Paper Co. v. Schwabedissen Maschinen & Anlae GmbH, 206 F.3d 411, 417-18 (4th Cir. 2000) which held that a party may be estopped from denying arbitration when he has received a "direct benefit" from a contract containing an arbitration clause. THI then argues Mr. Strong's admission to the Facility was the required "direct benefit." In doing so, THI tie their estoppel argument inextricably to their flawed merger argument. See Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (noting nursing home's "equitable estoppel argument is premised on [the home's] contention that, under state law, the

² Richmond Health Facilities v. Nichols, 811 F.3d 192, 195 (6th Cir. 2016) (citing Arthur Andersen) ("in determining the enforceability of an arbitration agreement, we apply state law of contract formation"); Crawford Profl Drugs, Inc. v. CVS Caremark Corp., 748 F.3d 249, 255 (5th Cir. 2014) (holding "state contract law" applied to equitable estoppel issue and noting prior decisions "based on federal common law, rather than state contract law . . . have be modified to conform with Arthur Andersen"); Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1128 (9th Cir. 2013) (citing Arthur Andersen and applying California law to the equitable estoppel analysis); Awuah v. Coverall N. Am., Inc., 703 F.3d 36, 41-42 (1st Cir. 2012) (same for Massachusetts law); The Republic of Iraq v. BNP Paribas USA, 472 F.3d 11, 13-14 (2d Cir. 2012) (same for New York law); Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 449 Fed. Appx. 704, 708 n. 2 (10th Cir. 2011) (finding Arthur Andersen "made it clear that state law governs who may be bound to an arbitration clause"); Lawson v. Life of the S. Ins. Co., 648 F.3d 1166, 1172 (11th Cir. 2011) (holding that "to the extent any of our earlier decisions indicate to the contrary, those indications are overruled or at least undermined to the point of abrogation by [Arthur Andersen]"); Donaldson Co. v. Burroughs Diesel, Inc., 581 F.3d 726, 732 (8th Cir. 2009) ("The Supreme Court has ruled that state contract law governs the ability of nonsignatories to enforce arbitration provisions").

³ MacDonald v. Unisys Corp., 951 F. Supp. 2d 729, 736-38 (E.D. Pa. 2013) ("Post-Arthur Andersen, it is incontrovertible that state law governs the equitable estoppel and third-party beneficiary determinations"); Hospira, Inc. v. Therabel Pharma N.V., Case No. 12-C-8544, 2013 WL 3811488 *11-14 (N.D. Ill. July 19, 2013) (citing Arthur Andersen and applying state law to equitable estoppel analysis); FR 8 Singapore Pte. Ltd. v. Albacore Maritime Inc., 794 F. Supp. 2d 449, 455 (S.D.N.Y. 2011) ("the question of who was bound by [arbitration] agreement was treated as a question of state law").

⁴ See e.g., Carter v. TD Ameritrade Holding Corp., 721 S.E.2d 256, 261-62 (N.C. Ct. App. 2012) (citing Arthur Andersen and considering ratification argument under state law).

admission agreements and the [arbitration agreements] merged”). Admission can be the “direct benefit” that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same contract. For the reasons outlined above, the two contracts are separate, they do not merge, and Mr. Strong’s admission does not support equitable estoppel.

Again, precedent is decisive on this point. Citing International Paper, the Court of Appeals recently held in Thompson that any benefit of admission “is of no moment” for the application of equitable estoppel to a separate arbitration contract. 416 S.C. at 59-60, 784 S.E.2d at 688; see also Coleman, 407 S.C. at 354-55, 755 S.E.2d at 455. Hodge cited and reaffirmed Thompson’s estoppel analysis. 422 S.C. at 558-59, 813 S.E.2d at 300.⁵ Since admission is unavailable as a “direct benefit” to support estoppel, THI would be required to point to some benefit Mr. Strong received from the Arbitration Agreement alone. However, Mr. Strong and his estate derived no benefit from the Arbitration Agreement. Hodge, 422 S.C. at 563, 813 S.E.2d at 302 (finding family members, resident, and resident’s estate “received no benefit from the Arbitration Agreement”). Even if they had, “any possible benefit emanating from the [Arbitration Agreement] alone is offset by the [Arbitration Agreement’s] requirement that [Mr. Strong] waive [his] right to access the courts and [his] right to a jury trial.” Thompson, 416 S.C. at 60, 784 S.E.2d at 688.

THI then makes a broader argument that it would be “manifestly inequitable” for Plaintiff to pursue a tort claim based on the Admission Agreement while denying Ms. Murphy’s authority to sign the Arbitration Agreement. Defs.’ Mem. at 18. Defendants misunderstand the legal distinction between health care and dispute resolution decisions. It is not unusual for a family

⁵ Hodge was also skeptical of the notion that admission was a benefit to the resident considering Complaint allegations that the nursing home’s acts during the admission caused the resident’s death. 422 S.C. at 563, 813 S.E.2d at 303 (“we find it difficult to find [resident] benefitted even from being admitted”).

member to have authority to admit a loved one to a nursing home while lacking authority to waive the loved one's jury trial right. That is what the Adult Health Care Consent Act permits. It provides statutory authority for family members to make an incapacitated loved one's "health care" decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code. Coleman, 407 S.C. at 353, 755 S.E.2d at 454 (finding statutory power to make "health care" decisions limited to nursing home admission and related financial decisions). Plus, Plaintiff is not asserting any claim based on the Admission Agreement; she alleges only common-law negligence claims. See Hodge, 422 S.C. at 563, 813 S.E.2d at 302 ("because [resident and estate] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement" and are not estopped from challenging the Arbitration Agreement).

In sum, THI's equitable estoppel argument is rejected under South Carolina and federal law as interpreted in Thompson and Hodge.⁶

D. Ms. Murphy did not have Inherent Agency Power to Bind Mr. Strong or his Estate to Arbitration.

THI next ask the Court to find a binding agency relationship even if Ms. Murphy lacked actual or apparent authority to admit Mr. Strong to the Facility. Def's. Mem. at 12-13. THI cites

⁶ THI assert "agency by estoppel" as a separate basis for compelling arbitration (Def's. Mem. at 10-12) but the arguments in that section are subsumed by THI's other arguments. THI cites a sentence from R & G Construction holding that a principal is estopped from denying the existence of an agency relationship. However, that same sentence makes clear that estoppel only applies if the principal has acted in a way to create an agency relationship. For the reasons stated in Section 2(B), there is no agency relationship here. THI then cite Boyd v. BellSouth Tele. Tele. Co., Inc., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006), but the elements cited there are for equitable estoppel. Finally, THI relies heavily on McCutcheon v. THI of S.C. at Charleston, LLC, an unreported federal district court. No. 2:11-cv-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011). Any value McCutcheon may have held is significantly undercut by the facts that the McCutcheon reviewed merged contracts and that this (at best) persuasive authority preceded the binding rulings in Coleman, Thompson, and Hodge.

just one South Carolina case in support of this proposition. Smith v. Fitton & Pittman, Inc., 264 S.C. 129, 212 S.E.2d 925 (1975). Smith was later overruled but, even on its own, Smith does not support THI's theory because the only reference to agency in the whole opinion was the court rejecting the inherent agency theory. Id. at 134, 212 S.E.2d at 927 ("appellant has offered no authority, and we have found none, that [individual] would have inherent agency power . . ."). There is no basis for inherent agency in South Carolina law for nursing home arbitration contracts.

E. The South Carolina Bill of Rights for Residents of Long-Term Care Facilities did not Authorize Ms. Murphy to Bind Mr. Strong to Arbitration.

Finally, the Court rejects Defendants' argument that a statute designed to protect nursing home residents' dignity and personal integrity actually paves the way for a resident to lose his right to litigate claims for nursing home neglect. (Defs.' Mem. at 13-14). The "Bill of Rights" for nursing home residents is intended to help residents "retain their individuality and personal freedom" and to support residents' "need for self-determination." S.C. Code Ann. § 44-81-20. To make these rights meaningful, the statute requires nursing homes to provide a written explanation of each right to the resident or his representative and provides a grievance procedure to address alleged violations. S.C. Code Ann. §§ 41-81-40, -60. Defendants cite this statute to suggest that, because Ms. Murphy may have been the "representative" who received a copy of Mr. Strong's explanation of the Bill of Rights, she then gained legal authority to bind him to arbitration. However, the Bill of Rights makes no mention of arbitration, and the Court finds neither the statute's language nor its legislative purpose support arbitration in this case.

F. THI is not Entitled to Depose Ms. Murphy or to Conduct Other Discovery before the Court Rules on its Motion.

Finally, THI argued at the hearing that it should be allowed to depose Ms. Murphy or conduct additional discovery to support its agency and estoppel arguments before the Court rules on arbitration. Hodge recently rejected a similar argument. 422 S.C. at 575, 813 S.E.2d at 309. As

discussed above, agency depends on the representations of the purported principal (i.e. Mr. Strong) and cannot be formed based on the representations of the purported agent (i.e. Ms. Murphy). Accordingly, Ms. Murphy's deposition "would not add anything to [the agency] determination." Id. at 578, 813 S.E.2d at 310. Moreover, while THI argues on reply that it needs additional discovery on Mr. Strong's mental capabilities when the arbitration contract was signed, records documenting Mr. Strong's mental faculties at admission lie within THI's own medical records. The Court finds no need for additional discovery to rule on the issues raised in THI's motion.

CONCLUSION

For all these reasons, THI's motion to dismiss/compel arbitration is **DENIED**. In light of this ruling, the motions to stay filed by Defendants Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, and THI of South Carolina, LLC are **DISMISSED AS MOOT**.

IT IS SO ORDERED

William A. McKinnon
Circuit Court Judge, 16th Judicial Circuit

October __, 2018



York Common Pleas

Case Caption: Teresa Murphy , plaintiff, et al VS Hunt Valley Holdings, Llc ,
defendant, et al
Case Number: 2018CP4601459
Type: Order/Dismissal

So Ordered

/s William A. McKinnon, #2761, Circuit Judge

Electronically signed on 2018-10-24 14:03:50 page 15 of 15

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
Teresa Murphy, as Personal Representative	)	Civil Action No.: 2018-CP-46-01459
for the Estate of Isaac Strong,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Hunt Valley Holdings, LLC f/k/a	)	ORDER DENYING MOTIONS
Fundamental Long Term Care Holdings,	)	TO RECONSIDER
LLC; Fundamental Clinical and Operational	)	
Services, LLC; Fundamental Consulting,	)	
LLC; Fundamental Administrative	)	
Services, LLC; THI of Baltimore, Inc.;	)	
THI of South Carolina, LLC; THI of South	)	
Carolina at Rock Hill, LLC d/b/a Magnolia	)	
Manor of Rock Hill; and Amisub of S.C.,	)	
Inc. d/b/a Piedmont Medical Center,	)	
	)	
Defendants.	)	

This matter came before the Court on Defendant THI of South Carolina, LLC d/b/a Magnolia Manor Rock Hill's ("THI") Motion to Reconsider the Court's October 24, 2018 order and motions by numerous other Defendant's to reconsider the Court's October 24, 2018 holding that the Motions to Stay were moot. A hearing was held on December 5, 2018. After considering the parties' written submissions and oral arguments and for the reasons stated below, THI's motion is **DENIED IN PART AND GRANTED IN PART** and all of the Motions to Reconsider the Decision to Deny a Stay are **DENIED**.

At the hearing, counsel for THI stated that although THI disagreed with the Court's ruling in many respects, THI was seeking reconsideration on two grounds: 1) the Court's denial of limited discovery with regard to the alleged arbitration agreement, and 2) the Court's failure to address THI's ratification argument.

Defendant THI is, of course, free to conduct any discovery contemplated by the South Carolina Rules of Civil Procedure. THI has not done so, it states, because it fears waiving any right to arbitrate by invoking civil discovery procedures. This is not an idle fear. See, e.g., Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007) (right to arbitrate waived by engaging in discovery). THI claims it is in a Catch-22 because it cannot prove its right to arbitrate without discovery but engaging in discovery risks waiver of the right to arbitrate. THI therefore asks the Court to order limited discovery that preserves THI right to demand arbitration.

Any Catch-22 is of THI's own making, however. THI, when faced with the imminent admission of Mr. Strong in December 2014, was under no obligation to accept Mr. Strong. It could have conditioned admission of Mr. Strong on proof that Plaintiff Murphy possessed the authority of a power-of-attorney, or demanded that Mr. Strong explicitly agree himself or ratify the alleged arbitration agreement, and have had him examined by its own medical providers to determine competency. It did not take any of these actions. Rather, THI accepted Mr. Strong on faith (with regard to the purported arbitration agreement) and now wants the Court to sanction discovery, pursuant to the civil litigation system, to determine whether or not Mr. Strong might in some currently unknown way have agreed to the arbitration agreement, while denying the benefits of the same civil litigation system to Plaintiff Murphy. The Court declines to do so, especially given the principal (Mr. Strong) is deceased and unable to testify concerning any of his thoughts or actions, and any written records or medical records concerning Mr. Strong's admission are already in the possession of THI. See, e.g., Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018) (circuit court did not err in denying request to depose husband with regard to agency issues). The request for discovery is even weaker in this matter than in Hodge, because in Hodge the defendants had evidence the husband had previously signed contracts

on his wife's behalf in other situations. Reconsideration of the denial of the request for discovery is therefore denied.

With regard to the ratification claim, counsel for THI conceded that THI currently has no evidence of ratification. The Court therefore denies reconsideration on this claim.

Finally, THI argues the Court erroneously stated at p.3 of its Order that THI "breached" duties owed to Mr. Strong. In this, THI is correct. The Court wrote: "The survival claim relates to duties established and breached during Isaac Strong's life and damages sustained during his life." That sentence should have stated: "The survival claim relates to alleged breaches of duties during Isaac Strong's life and damages allegedly sustained during his life." The Order is AMENDED to make this substitution.

CONCLUSION

For all these reasons, THI's Motion to Reconsider is **GRANTED** with regard to amending the sentence on page three, and is **DENIED IN ALL OTHER RESPECTS**. In light of this ruling, the Motions to Reconsider filed by the other Defendants are **DENIED**.

IT IS SO ORDERED

William A. McKinnon
Circuit Court Judge, 16th Judicial Circuit

December __, 2018



York Common Pleas

Case Caption: Teresa Murphy , plaintiff, et al VS Hunt Valley Holdings, Llc ,
defendant, et al
Case Number: 2018CP4601459
Type: Order/Amend

So Ordered

/s William A. McKinnon, #2761, Circuit Judge

Electronically signed on 2018-12-05 16:00:09 page 4 of 4

ELECTRONICALLY FILED - 2018 Dec 05 4:23 PM - YORK - COMMON PLEAS - CASE#2018CP4601459

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Teresa Murphy, as Personal
Representative for the Estate of Isaac
Strong

Plaintiff,

v.

Hunt Valley Holdings, LLC f/k/a
Fundamental Long Term Care Holdings,
LLC; Fundamental Clinical and
Operational Services, LLC; Fundamental
Consulting, LLC, Fundamental
Administrative Services, LLC; THI of
Baltimore, Inc.; THI of South Carolina,
LLC; THI of South Carolina at Rock
Hill, LLC d/b/a Magnolia Manor of Rock
Hill; and Amisub of SC, Inc. d/b/a
Piedmont Medical Center,

Defendants.

IN THE COURT OF COMMON PLEAS

SIXTEENTH JUDICIAL CIRCUIT

Civil Action No: 18-CP-46-_____

SUMMONS

TO: THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to Answer the Complaint in this action, a copy of which is served upon you, and to serve a copy of your Answer to the Complaint on the subscriber at his office at 1539 Health Care Drive, Rock Hill, South Carolina, 29732, within thirty (30) days of service, exclusive of the date of service; and if you fail to Answer the Complaint within that time, judgment by default will be rendered against you for the relief demanded in the Complaint.

MCGOWAN HOOD & FELDER, LLC

s/Chad McGowan

Chad A. McGowan
Eve Goodstein
McGowan, Hood, & Felder, LLC
1539 Healthcare Drive
Rock Hill, South Carolina 29730
(803) 327-7800
(803) 324-1483 Facsimile
cmcgowan@mcgowanhood.com

May 14, 2018.

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS

C.A. File No. 2018-CP-46 - _____

Teresa Murphy, as Personal
Representative for the Estate of Isaac
Strong,

Plaintiff,

vs.

Hunt Valley Holdings, LLC f/k/a
Fundamental Long Term Care
Holdings, LLC; Fundamental Clinical
and Operational Services, LLC;
Fundamental Consulting, LLC,
Fundamental Administrative
Services, LLC; THI of Baltimore, Inc.;
THI of South Carolina, LLC;
THI of South Carolina at Rock Hill,
LLC d/b/a Magnolia Manor of
Rock Hill; and Amisub of SC, Inc.
d/b/a Piedmont Medical Center,

Defendants.

COMPLAINT
(JURY TRIAL DEMANDED)

The Plaintiff, above named, complaining of the Defendants herein, would respectfully show unto the Court:

PARTIES AND JURISDICTION

1. The Plaintiff, Teresa Murphy, is the duly appointed Personal Representative of the estate of her father, Isaac Strong.
2. Decedent Isaac Strong ("Mr. Strong") was, at all times relevant hereto, a resident of THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill in the County of York, State of South Carolina.

3. Defendant Hunt Valley Holdings, LLC f/k/a Fundamental Long Term Care Holdings, LLC (hereinafter "Hunt") is, upon information and belief, a for profit entity incorporated under the laws of the State of Delaware managing and/or operating the remaining defendants doing business in the State of South Carolina with no registered agent in the state.
4. Upon information and belief Defendant Fundamental Clinical and Operational Services, LLC (hereinafter "Fundamental COS") is the management company of THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill providing clinical supervision for the clinical department, clinical consultants, clinical supervision, policies and procedures and back office support.
5. Upon information and belief, Fundamental COS is a for profit entity incorporated under the laws of the State of Delaware, doing business in the State of South Carolina.
6. Upon information and belief, Fundamental Clinical Consulting, LLC (hereinafter "FCC") is a company also providing clinical supervision of the nursing department of THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor – Rock Hill, in addition to developing and implementing clinical policies and procedures for the nursing department.
7. Upon information and belief, FCC is a for profit entity incorporated under the laws of the State of Delaware, doing business in the State of South Carolina with no registered agent in the state.
8. Upon information and belief, Fundamental Administrative Services, LLC (hereinafter "FAS") is a company providing personnel, training, staffing, policies and procedures as well as the budget for Magnolia Manor of Rock Hill.

9. Upon information and belief, FAS is a for profit entity incorporated under the laws of the State of Delaware, doing business in the State of South Carolina with no registered agent in the state.
10. Upon information and belief, THI of Baltimore, Inc. (hereinafter "Baltimore") is a company providing evaluation and implementation of policies and procedures, personnel, training, and management of the nursing department of Magnolia Manor of Rock Hill.
11. Upon information and belief, Baltimore is a for profit entity incorporated under the laws of the state of Delaware, doing business in the State of South Carolina with no registered agent in the state.
12. Defendant THI of South Carolina, LLC (hereinafter "THI SC") is, upon information and belief, the governing body of THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill and therefore responsible for appointing an Administrator and medical director for Magnolia Manor of Rock Hill.
13. Upon information and belief, THI SC is a for profit entity incorporated under the laws of the State of Delaware, doing business in the State of South Carolina.
14. THI of South Carolina at Rock Hill, LLC (hereinafter "THI of Rock Hill") is the licensee of Magnolia Manor of Rock Hill, doing business as Magnolia Manor of Rock Hill (hereinafter "Magnolia"). THI of Rock Hill is a for profit entity incorporated under the laws of the State of Delaware, licensed and doing business in the County of York, State of South Carolina.
15. At all times relevant hereto, Decedent Isaac Strong, was a resident at Magnolia and there existed a resident/patient relationship between Mr. Strong and Defendants, and therefore

Plaintiff was entitled to all the protections afforded such residents by both the state and federal governments.

16. At all times relevant hereto, THI of Rock Hill d/b/a Magnolia delivered nursing home care for a fee and had authority, express or implied, to control the means and agencies employed to execute the delivery of nursing home care to Decedent during his residency.
17. Upon information and belief, at all times relevant hereto, Hunt, Fundamental COS, FCC, FAS, Baltimore and THI SC (hereinafter "Fundamental Defendants") were involved in the ownership, operation, and /or management of nursing homes for profit including Magnolia. Further, the Fundamental Defendants exerted managerial control and operational control over Magnolia, and that such control was so extensive and pervasive that the Fundamental Defendants actually operated, managed and did business as Magnolia. Further, the control was so extensive and pervasive over Magnolia, that the business of Magnolia was the business of the Fundamental Defendants.
18. Upon information and belief, at all times relevant hereto, the deficiencies at Magnolia were authorized, approved and ratified by all of the Fundamental Defendants named herein.
19. At all times relevant to this action, physicians, nurses, residents, interns and staff health care providers for Mr. Strong at Magnolia were employees and/or agents of Magnolia and the Fundamental Defendants, or were apparent agents and were acting within the course and scope of their employment and/or agency or apparent agency.
20. Defendant Amisub of SC, Inc. d/b/a Piedmont Medical Center ("Amisub"), is organized under the laws of the State of South Carolina with its principal place of business in York County, SC. Defendant Amisub, at all times relevant hereto, was the entity employing certain nurses and other medical staff at a facility known as the Piedmont Medical Center

("PMC") who at all relevant times, were employees or agents acting within the scope of their employment with Defendant Amisub.

21. The negligent acts, omissions and liability of the Defendants includes their agents, principals, employees and/or servants, both directly and vicariously, pursuant to principals of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency and/or respondeat superior.
22. This Court has personal jurisdiction over Defendants pursuant to S.C. Code § 36-2-802, because Defendants reside in or have enduring relationships with the state of South Carolina.
23. Venue is appropriate pursuant to S.C. Code § 15-7-30 because the most substantial part of the acts giving rise to these claims occurred in York County, South Carolina.

JOINT AND SEVERAL LIABILITY

24. The above-named Defendants are jointly and severally liable for all damages alleged herein since their negligent, grossly negligent, reckless and wanton acts and omissions, singularly or in combination, are the contributing proximate cause of the Plaintiff's damages, injuries, losses, and ultimate death.

FACTUAL ALLEGATIONS

25. Mr. Strong was admitted to PMC on December 02, 2014, for right-sided weakness after suffering stroke. On admission, Mr. Strong's skin condition is documented by PMC as "dry and intact without rashes, bruises, or breakdown". (PMC 0535).
26. Upon admission to PMC, the nursing staff determined Mr. Strong to be at risk for pressure ulcers, assigning Mr. Strong a Braden score of 16. On December 03, 2014, the nursing

staff institutes an order to protect Mr. Strong's bony prominences and to use a sheet to move the patient. (PMC 1200). A turn and reposition schedule is initiated by the nursing staff on December 04, 2014, along with orders to keep the head of the bed at 30 degrees or less, apply skin protectant, and frequently change linens. (PMC 1199). These orders are standard interventions that, if followed, will prevent pressure ulcers.

27. Follow their own orders, they did not do. For instance, Mr. Strong was left in the same position without repositioning in excess of two hours on multiple occasions from December 2, 2014 until his discharge from PMC on December 22, 2014, all of which contributed to the breakdown of his skin.
28. On December 22, 2014, Mr. Strong was transferred and admitted to Magnolia Manor for long-term rehabilitation. Upon admission to Magnolia, Mr. Strong underwent an assessment that documented a stage II sacral decubitus ulcer measuring 3.2 x 2.6 x 0.1 cm.
29. Magnolia's care plan for Mr. Strong documented his immobility and that he required staff assistance with all activities of daily living.
30. Magnolia's Care Plan for Mr. Strong addressed his severe risk for impaired skin integrity and thus instituted certain orders, that if followed, will prevent new pressure ulcers from forming and the worsening of present pressure ulcers. (Magnolia 0101).
31. Mr. Strong's condition continued to deteriorate and on December 31, 2014, his sacral wound measured 4.0 x 2.5 x 0.1 cm with serosanguinous drainage. (Magnolia 0146).
32. On January 2, 2015, Mr. Strong is transported back to PMC, as he is unresponsive and febrile.
33. At PMC, Mr. Strong is admitted for sepsis treatment and it is determined that the source of the infection is a stage II sacral decubitus ulcer. (PMC 2252).

34. On January 3, 2015, the nursing staff documents that the pressure ulcer has advanced to stage III. (PMC 3637).
35. On January 9, 2015, Mr. Strong's sacral pressure ulcer is unstageable and requires surgical intervention. (PMC 2595).
36. Mr. Strong undergoes an excision debridement of his sacrococcygeal ulcer on January 11, 2015 by Dr. Kamran Borhanian. (PMC 2393).
37. During his January admission to PMC, not only does Mr. Strong endure the worsening of his existing decubitus ulcer, but he also suffers from new wounds as a result of additional skin breakdown. For example, on January 12, 2015, the PMC nursing staff documents a skin tear to his left lower arm (PMC 3632). A Physical Therapy evaluation on January 13, 2015, documents multiple red marks and irritation, along with continued issues related to his sacral ulcer. (PMC 2617).
38. Mr. Strong is discharged from PMC on January 24, 2015, and returns to Magnolia. He requires total assistance with all activities of daily living and has a PEG feeding tube and Foley catheter in place.
39. Mr. Strong remains at Magnolia from January 24, 2015 until February 18, 2015. The records from Magnolia indicate that Mr. Strong continues to be awake and alert, but non-verbal.
40. On January 29, 2015, the wound care nurse at Magnolia documents that Mr. Strong continues to have complications of his stage IV sacral pressure ulcer and an additional, unstageable wound to his left heel.
41. On February 13, 2015, Mr. Strong's sacral wound show signs of infection again, as foul smelling serosanguinous drainage is documented.

42. Mr. Strong's sacral ulcer continued to worsen and he is transferred back to PMC on February 19, 2015. Mr. Strong was found to be in septic shock upon arrival and his sacral wound had deteriorated to the point that bone was exposed. (PMC 3904).
43. On February 20, 2015, Mr. Strong is diagnosed with sacral osteomyelitis, it is noted that Mr. Strong's bone is completely exposed, but that he is not a candidate for surgical intervention. Thus, the decision is made to do a chemical debridement.
44. Mr. Strong is given IV broad spectrum antibiotics and discharged back to Magnolia on February 26, 2015 for continued wound care, as it is determined by the providers at PMC that there is nothing else they can do for Mr. Strong.
45. On April 23, 2015, a stage II pressure ulcer is identified on Mr. Strong's left heel and foot.
46. Mr. Strong's condition continued to deteriorate and he passed away on September 5, 2015.
47. Mr. Strong's death on September 5, 2015 is a direct result of the Defendants' failure to properly care for Mr. Strong.
48. Had the Defendant healthcare providers properly treated Mr. Strong by taking measures to prevent the development and/or worsening of decubitus ulcers, much of his pain and suffering from December 2014 through his death on September 5, 2015, could have been prevented.
49. The injuries to and death of Mr. Strong were the direct and proximate result of and were caused and occasioned by the negligence, carelessness, recklessness, willfulness, and wantonness on the part of Defendants, in failing to possess and exercise that degree of medical training, competency, and skill ordinarily and customarily possessed and exercised by physicians, nurses and skilled nursing facility staff under similar circumstances and thereby rendered inappropriate medical care to Mr. Strong by deviating from and falling

below the prevailing and acceptable standards of care in one or more of the following particulars, as follows:

- In failing to properly document skin assessments and failing to implement modalities for prevention and/or healing;
- In failing to turn and position Mr. Strong;
- In failing to properly monitor Mr. Strong's skin;
- In failing to promote proper hearing;
- In failing to provide proper wound care;
- In failing to communicate changes in patient status;
- In failing to exercise independent skill and judgment in the role as patient advocates; and
- In such other ways as may be shown at the trial of this matter.

Attached as **Exhibits A and B** are affidavits of qualified experts who will testify to one or more deviations for the standard of care by the various professionals.

FOR A FIRST CAUSE OF ACTION
(WRONGFUL DEATH)

50. Plaintiff reiterates paragraphs 1-49 as if set forth verbatim herein.

51. As a direct and proximate result of the negligence, carelessness, gross negligence, recklessness and departure from the professional standards of care by Defendants, Mr. Strong suffered from severe debilitating injuries which resulted in his death, and thus the Defendants' fault was the cause of the loss of the support, aid, society, comfort, and companionship of his heirs at law. Pursuant to S.C. Code § 15-51-20, the estate is therefore entitled to recover from defendants a sum of money to compensate the heirs at law for the medical expenses, funeral expenses, mental anguish, loss of earnings capacity, and loss for the aid, society, comfort, and companionship of the decedent. Plaintiff is also entitled to recover a sum of punitive damages to punish and deter these defendants and others like them from similar conduct in the future. All damages should be in an amount determined by a jury in this action.

FOR A SECOND CAUSE OF ACTION
(SURVIVAL ACTION)

52. Plaintiff reiterates paragraphs 1-51 above as if set forth verbatim herein.

53. As a direct and proximate result of the negligence, carelessness, gross negligence, recklessness and departure from the professional standards of care by Defendants, Mr. Strong suffered from severe debilitating injuries which resulted in his permanent injury and disability, and conscious pain and suffering, as a result of which Mr. Strong is entitled to recover a sum to compensate his estate for his conscious pain and suffering, medical expenses, mental anguish, loss of earnings capacity, loss of enjoyment of life, and other damages pursuant to S.C. Code § 15-5-90. Plaintiff is also entitled to recover a sum of punitive damages to punish and deter these defendants and others like them from similar conduct in the future. All damages should be in an amount determined by a jury in this action.

WHEREFORE, Plaintiff respectfully prays for judgment against the Defendants for actual damages, special damages, consequential damages, and punitive damages in an amount to be determined by the jury at the trial of this action, for the costs and disbursements of this action and for such other and further relief as this Court deems just and proper. Plaintiff specifically avers that the damages at issue in this case are more than \$100,000, such averment made to allow all manner of discovery under South Carolina Law.

MCGOWAN HOOD & FELDER, LLC

s/Chad McGowan

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ATTORNEYS FOR PLAINTIFF

Rock Hill, South Carolina

May 14, 2018

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT
2018-CP-46-01459

Teresa Murphy, as)
Personal Representative)
of the Estate of Isaac)
Strong)

vs.)
Hunt Valley)
Holdings, LLC f/k/a)
Fundamental Long Term)
Care Holdings, LLC, et)
al.)
)

TRANSCRIPT OF RECORD

AUGUST 30, 2018
YORK, SOUTH CAROLINA

BEFORE THE HONORABLE WILLIAM MCKINNON

APPEARANCES:

Jordan Calloway, ESQUIRE
Rock Hill, South Carolina

Eve S. Goodstein, ESQUIRE
Rock Hill, South Carolina

ATTORNEYS FOR THE PLAINTIFF

Perry Buckner, ESQUIRE
Columbia, South Carolina

ATTORNEY FOR THE DEFENDANT

SHIRLEY BROOM
16TH Circuit Court Reporter

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I-N-D-E-X

WITNESSES: DIRECT CROSS RE-DIRECT RE-CROSS

(NO TESTIMONY TAKEN)

E X H I B I T S

DESCRIPTION:

ID.

EV.

NO EXHIBITS

1 THE COURT - Next up we have Murphy vs. Hunt
2 Valley Holdings. (Pause) And counsel, before we go any
3 further, let me put on the record that McGowan, Hood &
4 Felder is my former law firm. I want to say I don't have a
5 current association with them. I had a continuing
6 financial interest in cases in the firm until either
7 February or March of this year when I was bought out by the
8 firm, so I have -- I have no continuing financial interest
9 or any connection with the firm at all, but that is my
10 former firm, and until, let's see, the first quarter of
11 this year I did have a financial interest in cases pending
12 in the firm, and that's no longer true.

13 MR. BUCKNER - Thank you, Judge.

14 THE COURT - All right, yes, sir.

15 MR. BUCKNER - May it please the Court, Your
16 Honor, Perry Buckner for a number of defendants that are
17 named in this action. Before Your Honor today principally
18 is THI South Carolina at Rock Hill, LLC's motion to compel
19 arbitration, and there are some accompanying motions to
20 stay that were filed on behalf of Fundamental Clinical and
21 Operation Services, THI of South Carolina, LLC and
22 Fundamental Administrative Services, LLC. Now, just to be
23 clear for the record, I believe the motions to stay were
24 not scheduled for today. They were filed subsequent to the
25 motion to compel arbitration, but obviously the issues

1 involved in the stay are contingent on the arbitration
2 motion, so I would ask that those be heard today. They're
3 not, you know, substantively all that different and
4 obviously the disposition of those motions would be
5 affected by the motion to compel arbitration, so ---

6 THE COURT - Mr. Calloway, what's your position on
7 hearing those other motions?

8 MR. CALLOWAY - Your Honor, Ms. Goodstein's going
9 to be arguing this case on behalf of ---

10 THE COURT - I'm sorry?

11 MR. CALLOWAY - Ms. Goodstein's going to be
12 arguing those on behalf ---

13 THE COURT - All right, Ms. Goodstein?

14 MS. GOODSTEIN - We're prepared to go ahead with
15 the motion to stay as well.

16 THE COURT - Okay.

17 MS. GOODSTEIN - Thank you.

18 MR. BUCKNER - Thank you.

19 THE COURT - Counsel, what -- Mr. Buckner, what
20 order do you suggest we hear these?

21 MR. BUCKNER - Probably the arbitration motion
22 first, which is as I referenced is the primary motion for
23 today and involves a arbitration agreement that was signed
24 in December of 2014 by Ms. Teresa Murphy who is also the PR
25 of the estate and the named plaintiff in this case. She is

1 the daughter of Isaac Strong who was admitted to Magnolia
2 Manor Rock Hill in December of 2014 for skilled care
3 following a stroke and extensive hospitalization that he
4 suffered and came to the facility, and one of the things,
5 Your Honor, that will be discussed in a little bit more
6 detail as I go forward, obviously with this being a motion
7 to compel arbitration due to fear of waiver, there's been
8 no discovery or subpoenas issued whatsoever, so I have no
9 understandings exactly of what plaintiff's position is
10 regarding Mr. Strong's cognition and his competency. I can
11 tell you that medical records, admission records show that
12 Mr. Strong was alert but did not have the ability to speak
13 or probably use his hands as a result of the stroke. I'm
14 not certain what their position is with regard to his
15 capacity, but obviously that changes a little bit of the
16 legal arguments before the Court and also our firm having
17 done no discovery is not aware of there being any power of
18 attorney or ---

19 THE COURT - Well, that was going to be my first
20 question. So I -- the arbitration agreement is not signed
21 by the patient.

22 MR. BUCKNER - Correct.

23 THE COURT - So what -- what was -- what, if any,
24 was the legal relationship between Ms. Murphy and her
25 father on the date she signed the agreement?

1 MR. BUCKNER - At present we do not have any
2 evidence or a record that she had power of attorney,
3 conservator or guardian authority, a legal authority that
4 would be vested by a probate court or something of that
5 nature. We obviously do think that she had authority that
6 would arise by operation of law due to agency or
7 potentially estoppel. However, to date we have not been
8 able to locate any records. Now, one of the things Your
9 Honor that I can get to, and maybe I'm putting the cart
10 before the horse a little bit, is, you know, obviously
11 agency is fact dependent. We think there is enough facts
12 in the agreement itself and everything that was signed by
13 Ms. Murphy on behalf of her father that shows that she made
14 representations and there was a holding out of her by her
15 father to -- that she could be considered both an apparent
16 agent or an agency by estoppel, however, if the Court is
17 not inclined to agree with that, we would ask in the
18 alternative that we just be allowed to depose Ms. Murphy
19 again. Due to fear of waiver of the arbitration we have
20 not conducted any discovery in this case, but that would
21 need to be ferreted out of the ---

22 THE COURT - Your concern is by -- by continuing
23 any discovery in the Circuit Court you're going to waive
24 arbitration?

1 MR. BUCKNER - Correct. And this is probably
2 something that -- and to be candid with the Court -- that
3 maybe the plaintiff would even do by consent. We haven't
4 had that conversation yet. This case was filed I think in
5 June or July. At least that's when our answer was due I
6 believe, and so there hasn't been much done on the file,
7 but in order to establish that agency -- and again,
8 obviously it's the facility's position in this case and
9 that the record show, there is evidence -- evidence of
10 agency, and we think a ruling came be made from it, but to,
11 you know, prove that there was an agency relationship and
12 the Court were not satisfied by what's before it now, a
13 deposition of both Mr. (sic) Murphy and potentially, you
14 know, my clients as well might help ferret that issue.

15 THE COURT - If it's okay, Mr. Buckner, let me
16 hear from Ms. Goodstein on that issue, because it seems to
17 the Court that a ruling on these issues without any
18 evidentiary basis is going to be kind of tricky, so let me
19 see -- if the parties can agree to take those depositions,
20 it seems like we'd be in a much better position to get a
21 ruling if we know what -- you know, what his competency was
22 at the time and what -- what Ms. Murphy thought. You know,
23 that's ---

24 MR. BUCKNER - Correct, and just so that I'm being
25 completely candid with the Court, I believe there are

1 progress notes that -- by a physician who's not employed by
2 the facility but probably was a medical director in my best
3 recollection that puts forth that he's unable to provide,
4 you know, medical history, not just for historian type
5 stuff but unable to respond, because I think he lost the
6 ability to speak, but there are also notes that show he's
7 alert but they do not say oriented, so that's kind of where
8 we come to with that and ---

9 THE COURT - So he's non-verbal according to some
10 medical notes?

11 MR. BUCKNER - Correct, probably was verbal before
12 the stroke, although I don't know much of his medical
13 history prior to that, and again, you know, the -- another
14 purpose of discovery would serve as, you know, our best
15 powers and ability at this stage due to the fear of waiver
16 of arbitration rights is basically just to search
17 surrounding counties. We know where Ms. Murphy lives; we
18 know where Mr. Strong did live, so different counties do it
19 differently whether it be by probate court or register of
20 deeds, so -- and, of course, they're not all filed, so at
21 this time we just haven't been able to ascertain that, but
22 to be candid with the Court, we have no evidence of a legal
23 authority that -- as a result of an instrument.

1 THE COURT - Well, I'll come back to you on the
2 substantive issues, but let me -- Ms. Goodstein if I could
3 hear from you.

4 MR. BUCKNER - Thank you, Your Honor.

5 THE COURT - It seems like the easiest way to
6 resolve this is to get some very limited discovery without
7 dissolving the issue of whether the matter is to be
8 arbitrated or not.

9 MS. GOODSTEIN - Your Honor, our -- our position
10 would be that what Ms. Murphy thought or what she
11 represented to the nursing home really is irrelevant and
12 would be what -- what event -- what the decedent
13 represented, and he did not make any sort of comments or
14 actions that would lead a reasonable person to suggest that
15 Ms. Murphy had the authority to sign -- to enter an
16 arbitration agreement on his behalf.

17 THE COURT - Okay, Ms. Goodstein, so your position
18 is, even if she actually made representations to the
19 nursing home that she had authority to sign on her behalf,
20 she is not estopped from now denying that authority as a
21 plaintiff in a lawsuit?

22 MS. GOODSTEIN - Well, -- our position is that she
23 didn't have the authority to enter the arbitration
24 agreement on Mr. Strong's behalf, and so now the real
25 question is going to be whether or not Mr. Strong ever gave

1 any indication that Ms. Murphy had the authority to enter.
2 the arbitration agreement on his behalf, and we have no
3 evidence of that here.

4 THE COURT - But when you say no evidence, there's
5 been no discovery. Right? I mean that ---

6 MS. GOODSTEIN - That's true, yes, sir, but there
7 also -- she wasn't appointed as his -- there's no power of
8 attorney and she wasn't his guardian. There's -- there's
9 nothing -- no legal instrument that gives her the authority
10 to enter the arbitration agreement on Mr. Strong's behalf.

11 THE COURT - I hear you, Ms. Goodstein. My
12 concern is -- I mean your client signed the arbitration
13 agreement and is now disclaiming and in trying to proceed
14 in Circuit Court and not arbitration, don't you think the
15 defense is entitled to discovery on the -- at least on her
16 signing of the agreement and what -- what she -- what her
17 thinking was in signing that agreement?

18 MS. GOODSTEIN - Well, our position is that the
19 South Carolina law states that an agency relationship
20 cannot be established solely -- solely by the word and
21 actions of the purported agent.

22 THE COURT - Well, apparent agency I -- I --
23 cannot be established solely by the actions of the agent.
24 Correct?

25 MS. GOODSTEIN - Yes, sir.

1 THE COURT - I agree with you. But doesn't that
2 suggest that a deposition of -- well, I guess he's -- he's
3 deceased, so he can't -- I mean -- so your position is, no
4 matter what he -- what she said, there's no -- okay. And I
5 -- let's assume for the moment that I'm convinced by that
6 argument, can she not still be estopped though from -- from
7 denying what she said? Because it's not -- I mean even if
8 you say there's no apparent agency, she is directly
9 contradicting -- she's trying to get the legal benefit of -
10 --

11 MR. CALLOWAY - Your Honor, I would just say that
12 -- recognize that she is now here in two different
13 capacities. She made those representations in her
14 individual capacity. She's suing in the representative
15 capacity for the decedent. So the representations she
16 makes in her individual capacity have no bearing. Your
17 Honor, I would also mention that the defendant's motion in
18 memorandum fails to cite a very important case, the
19 Thompson vs. Pruitt case where all of these issues were
20 addressed, the estoppel and the agency and third party
21 beneficiary of -- the bulk of these arguments were already
22 addressed -- that when you've got to separate agreements
23 like we've got here, the arbitration agreement and the
24 admission agreement are two separate documents, they make
25 the estoppel argument or you're accepting the benefit.

1 Well, he may have been accepting the benefit of admission
2 but not the separate supposed benefits of proposed
3 arbitration, and, in fact, Thompson made that position
4 specifically. Judge Geathers said in that -- that argument
5 in that case that whatever benefits he -- the resident
6 received from admission were completely undone by the fact
7 that in the arbitration he's losing his jury trial right.
8 That's right from Judge Gather's opinion. So there's two
9 different capacities we're talking here. There's nothing
10 they're going to get from a deposition from the PR that is
11 going to be able to overcome the clear law on agency and on
12 equitable estoppel.

13 MR. BUCKNER - Your Honor, if I could ---

14 THE COURT - Yes, Mr. Buckner.

15 MR. BUCKNER - I think they're going off on a
16 completely different direction with the legal issues of
17 Thompson. I mean the question that you pose was about
18 whether discovery would help the parties aid in any of
19 this, and I think the answer to that on both apparent
20 authority, inherent agency and to some extent agency by
21 estoppel, although admittedly probably less so in that
22 regard, but certainly Ms. Murphy can testify as to the
23 conduct, speech and actions of her father who's no longer
24 here. My admissions coordinator can testify as to what she
25 perceived, which is important obviously in the role of

1 apparent agency and inherent agency and agency by estoppel
2 in what was going on, so Your Honor's aware the admission -
3 - the physical admission in the nursing home in this case
4 actually occurred on December 22nd, 2014, but these
5 documents are signed December 18th, 2014, which means, as
6 is somewhat customary, this probably happened at the
7 hospital with Mr. Strong at the bedside. So I think it's
8 very possible, although I have no evidence at this stage to
9 put before the Court, that he was present for. And, of
10 course, at that point he'd been hospitalized for the better
11 part of three weeks, so we do believe he was stable. So
12 certainly the admissions coordinator and Ms. Murphy herself
13 can provide evidence of what was presented to them. With
14 regard to whether it's in her individual or representative
15 capacity for survival and wrongful death, she has the
16 ability to bind both of those under the wrongful death
17 statute, and she can testify as to both. There's certainly
18 nothing that I understand in Thompson, Hodge or Coleman
19 opinion that foreclose the possibility of her as a
20 signatory binding the estate. So I think those issues are
21 still very much relevant. And all we're asking is if the
22 Court -- now, again, what we would ask the Court to do
23 today is based on the fact that she may -- I think it's the
24 first, you know, line in the admission agreement that
25 states, signator -- the signatory in this case verifies

1 that all information submitted to the facility including
2 without limitation, financial authority, medical history,
3 medical diagnosis is true and correct and acknowledges that
4 providing false information constitutes a breach of this
5 agreement, and then three pages later acknowledges that she
6 has the authority to sign all of this paperwork. Now, I
7 recognize that under the Coleman opinion now, if you have
8 authority for an admission agreement and not an arbitration
9 agreement, there's an entire new framework and analysis
10 about separateness, but if the Court for agency, completely
11 separate issue, because you can have agency where you don't
12 otherwise have legal authority; you can have agency where
13 we don't otherwise have the operation of merger, because --
14 -

15 THE COURT - Okay, but aren't the plaintiff's
16 right though that apparent agency cannot be based solely on
17 representations of the agent?

18 MR. BUCKNER - They're a hundred percent correct,
19 but the plaintiff herself can provide testimony as to what
20 the principal said, did and we can ---

21 THE COURT - Wouldn't that -- I mean if the claim
22 as the principal somehow acknowledged her agency, wouldn't
23 that be to your folks? Wouldn't your -- I mean wouldn't
24 that be what your -- your witnesses -- wouldn't they know
25 that?

1 MR. BUCKNER - They would know that, and that
2 would be something that we would also want to put forth,
3 whether it be by way of an affidavit or their deposition.
4 We would be willing to put her up. And also we would like,
5 you know, the estate being a party to this case as well,
6 request for admission to determine these issues of whether
7 there, in fact, was no power of attorney, conservator or
8 not. A lot of times, especially when, you know, someone's
9 been ill for a long time, these things are done in
10 different places and at a time where, you know, they may
11 not even recall when the lawsuit happens ten years later
12 and there was a general durable power of attorney.

13 THE COURT - Talk to me -- I -- I mean not -- I'll
14 be honest, I'm not -- I never litigated the issue of waiver
15 of arbitration agreement. What are the consequences of
16 proceeding with litigation?

17 MR. BUCKNER - Well, I think there are two things
18 that are required for a waiver, is the -- the standard is
19 invoking of litigation of machinery and then also prejudice
20 to the plaintiff. Our office in handling these takes those
21 issues very conservatively, because I don't want to invite
22 a waiver argument, and I think that, you know, to some
23 extent, whether it be the filing of a motion, providing
24 discovery, certainly issuing subpoenas and trying to
25 ascertain any of this information and through in any formal

1 meetings would potentially constitute an invocation to
2 litigation machinery. That's why we've sort of stayed
3 where we are, because, of course, Your Honor, we're mindful
4 that we have a signed contract that's facially valid but
5 for the representations of the plaintiff.

6 THE COURT - Ms. Goodstein, Mr. Calloway, what --
7 what about the waiver issue? Because I mean without the
8 waiver issue, obviously is the answer is we just move
9 forward with this litigation and you take discovery -- both
10 sides take discovery and everything moves forward.

11 MR. BUCKNER - And, Your Honor, sorry to push back
12 on one thing, I think that if the Court authorizes
13 discovery solely for the subject matters relevant to the
14 legal issues in the case regarding arbitration, I don't
15 think that can be deemed waiver.

16 THE COURT - Right, but my point is, other than
17 the waiver issue, there's no reason not to just have the
18 case proceed normally, and if you during discovery develop
19 evidence that the arbitration agreement's binding, then you
20 make your motion then, but the procedural issue with that
21 is you're worried about waiver. Correct?

22 MR. BUCKNER - Correct.

23 THE COURT - Okay. So Mr. Calloway?

24 MR. CALLOWAY - Couple of things that are -- one,
25 I have reason to necessarily doubt that (sic) he's said

1 there about the nature of waiver, but that was not part of
2 the motion for today, so it's not been briefed or argued.
3 What I mean by that is, just from the standpoint of, you
4 know, we weren't really put on notice that he was going to
5 make those arguments today or about the idea that he'd be
6 asking for discovery. That was not the nature of the
7 motion, so we didn't get a chance to really address it or
8 to look at the law on that issue, and so we were really not
9 put on notice of that, so, Your Honor, procedurally we
10 would object to that, because we weren't given an
11 opportunity. I mean -- well, I think the essence of this
12 nature of the arbitration is that they're asking to forego
13 the legal process, and now they're saying, well, let us
14 jump into the legal process and then later we're going to
15 try to jump back out. And so, Your Honor, that's what
16 they're asking for. You know, the nature of arbitration
17 is, well, you're essentially kind of opting out of the
18 discovery process and now they're asking for discovery just
19 so that they can get what they think they want and then so
20 they can jump back out, so I ---

21 THE COURT - Let me give you the other argument,
22 Mr. Calloway. I mean they've got a signed arbitration
23 agreement by your client in which she purports to have
24 authority to sign it. How do they contest that? I mean I
25 -- how do they enforce it without discovery?

1 MR. CALLOWAY - Right. Well, she doesn't have
2 authority. They don't have any arg -- any basis in fact to
3 argue.

4 THE COURT - But she said she does. She
5 represents in the document she does.

6 MR. CALLOWAY - In a form contract that she had no
7 basis -- I mean that -- that she had no authority to sign -
8 - and they're saying that she's made some representation to
9 her (sic) -- to them -- and that even if she made that
10 representation that somehow it's bound on him. So now
11 we're at -- another step removed from them ever getting to
12 arbitration, because whatever she represented to them does
13 not matter, because it's what he represented that mattered,
14 so ---

15 THE COURT - Well, but she's the beneficiary of
16 the estate, is she not? So she -- she can be -- I don't
17 know if I -- I mean ---

18 MR. CALLOWAY - The claim, the wrongful death
19 claim, right, is the representative capacity, two different
20 capacities. I'm not arguing new law here. This is
21 Thompson, this is Coleman, this is the case from earlier
22 this year. I mean all of those cases have sort of found
23 that when you're dealing with these issues, there's ---
24 there's nothing she's ever going to be able to say to them,
25 that gets them to agency. The only one who could've made a

1 representation to them was the decedent. And he's going to
2 say, well -- he can -- she can tell us what the decedent
3 said. Well, now you got hearsay issues; you've got dead
4 man statute, you've got all sorts of potential evidentiary
5 issues there if you try to -- try to jump into discovery on
6 this issue, and Your Honor, we -- we haven't had a chance
7 to brief this, because we had no idea that was going to be
8 their argument today. We thought they were going to raise
9 the same arguments that have been rejected by the Supreme
10 Court and the Court of Appeals multiple times and try to
11 compel arbitration under these circumstances. They didn't
12 do arbitration right. They tried to get someone to sign it
13 who didn't have the authority to sign it, and now they're
14 trying to enforce it against the decedent when he wasn't --
15 when she didn't have the capacity to sign ---

16 THE COURT - Mr. Calloway, what -- what if there's
17 a power of attorney on file in Chester County or something?
18 What is -- what do they -- what did -- how do they do that?

19 MR. CALLOWAY - They could've gotten that at the
20 time. They could've said if you want to get into our
21 nursing home, show us the power of attorney; show us some -
22 - it's -- they're arguing equitable estoppel, and one of
23 the elements of equitable estoppel under South Carolina law
24 is if you do not have the capacity to know the truth, so
25 you couldn't have found that out, and so if they had

1 evidence or they -- if it's possible to find a power of
2 attorney, they could've asked her, are you a power of
3 attorney; I know what you're saying is contract, but prove
4 it to me. And so they're trying to make an estoppel
5 argument. The estoppel argument does not work, because
6 under South Carolina law, you have to prove -- if you want
7 equitable estoppel -- if you want -- so you have clean
8 hands, you're coming in and asking for equitable relief?
9 You've got to show me that not only did you not know, but
10 you didn't have the capacity to find it out. They can't
11 make that representation. Sure, maybe there's a -- well,
12 we don't think there's any chance there's a power of
13 attorney out there, but they're a sophisticated business
14 entity; this is someone trying to get in a nursing home.
15 They could've asked, if you've got a power of attorney,
16 show it to us before you sign these documents.

17 THE COURT - Okay, Mr. Buckner, what about the
18 plaintiff's argument that you're -- what you're arguing in
19 Court today is beyond what you filed?

20 MR. BUCKNER - Well, let me first start out that I
21 am not asking the Court as a primary argument to grant
22 discovery, and I started out by asking that the ---

23 THE COURT - Okay.

24 MR. BUCKNER - --- Court can reach the decision I
25 want without any of this. So I'm not coming in here and

1 fighting this -- just to be candid with the Court, if you
2 have ---

3 THE COURT - So tell me the -- what is the basis
4 for me to rule in your favor without discovery?

5 MR. BUCKNER - Well, first of all I think there's
6 evidence in the records that have been signed to show
7 inherent agency. You're not hearing anything from Mr.
8 Calloway, plaintiff's counsel, whatsoever, that Mr. Strong
9 was admitted, not sign the arbitration agreement, signing
10 an admission agreement without authority. Clearly Mr.
11 Strong was admitted to Magnolia Manor in Rock Hill lawfully
12 and with the authority of Ms. -- Ms. Murphy. What they
13 take issue with is waiver of the right to a jury trial in
14 the arbitration agreement. So once we have a situation
15 which probably by consent that there is authority for him
16 to be admitted, now we fall into the Coleman framework,
17 which is if you have authority for one, now we can see if
18 there's merger by operation of law for authority for the
19 arbitration agreement. And, of course, until Coleman came
20 out in 2014, there was a presumption of merger for
21 documents that are signed by the same parties and, of
22 course, the same transaction, the same date and time, which
23 all of these were. And what Coleman says was wait, not so
24 fast, if there's this sufficient separateness, we're going
25 to find that the merger presumption does not apply, and for

1 the first time now merger was not an equitable estoppel,
2 was not a valid argument. Our agreement is not the same
3 agreement that was presented for signature in Coleman.
4 It's a completely different facility, completely different
5 language. They're -- the merger clause which is contained
6 in there does not reference the arbitration agreement,
7 which when you read Coleman is really what holds the Court
8 up, is that the merger clause actually says in the --
9 excuse me -- in the admission agreement it refers to the
10 arbitration agreement; we don't have that here. In Coleman
11 in the admission agreement, it also had a right of
12 revocation that was not present in the other agreement. We
13 don't have anything like that in this case. So factually
14 we think Coleman is distinguishable as such that equitable
15 estoppel and merger still apply, and because we have a
16 valid admission agreement, we can get authority there. We
17 also think that the Court can find agency to exist by
18 virtue of estoppel, or, maybe more importantly based on the
19 comments by plaintiff's counsel, inherent agency, which is
20 if you have authority to admit someone to the nursing home
21 as a loved one, then you also have authority and powers co-
22 extensive with that right, which we would argue the
23 arbitration was, and, of course, most importantly, unlike
24 Coleman, this was not a pre-condition for admission. So

1 all of those are legal issues we don't need discovery on
2 and if ---

3 THE COURT - Is not -- I mean it -- so you're
4 telling me that they could've just refused to sign the
5 arbitration agreement?

6 MR. BUCKNER - Correct, of course.

7 THE COURT - And you would not have ---

8 MR. BUCKNER - I've had cases with this facility
9 at least in the last five years where I've got refusal to
10 sign, not a pre-condition for admission, not mandatory, is
11 not an issue. We see refuse to sign all the time. They
12 don't turn people away on a -- whatsoever. (sic) And so --
13 I didn't mean to invite this -- I -- I understand exactly
14 where Mr. Calloway's coming from. These issues were not
15 briefed. At the outset of my argument, I was just trying
16 to let the Court know if they did not think there was
17 evidence of that, that's another thing that we could do,
18 because I did have fear of waiver, I was just trying to be
19 candid. I am not coming to the Court asking for that
20 primary relief before we go forward, but I do think that
21 that is something he referenced all of these cases usually
22 have testimony that's referenced in the opinions, and
23 that's because the depositions had probably be taken. If I
24 had to guess, although I can't gather from reading the
25 appellate opinions, it was done by consent.

1 THE COURT - All right. Mr. Calloway, Ms.
2 Goodstein, anything y'all want to add?

3 MR. CALLOWAY - Your Honor, I disagree with his
4 argument on the Coleman line of cases about the
5 separateness in that this case did not have the same pre-
6 acceptance that we saw Coleman, again, it's not just
7 Coleman; it's also Coleman and Thompson which is completely
8 absent from their -- from their memoranda. I would cite
9 this particular footnote from Thompson. It's Thompson
10 footnote one, 2016 Court of Appeals case.

11 THE COURT - Which footnote, Mr. Calloway?

12 MR. CALLOWAY - It's footnote one. It's the only
13 footnote in the case, Your Honor, and I do have a copy for
14 -- it says, in fact, the front ---

15 THE COURT - Why don't you -- if you don't mind,
16 why don't you approach and pass it up. That way we can
17 read along instead of ---

18 THE COURT - Oh, that looks like --- you've got a
19 copy for the Court.

20 MR. CALLOWAY - I do. I'm going to read right off
21 of ---

22 (WHEREUPON, DOCUMENT HANDED UP TO THE COURT)

23 THE COURT - Looks like I'm taking your copy.

24 MR. CALLOWAY - No, I'm going to read off Ms.
25 Goodstein's computer. According to Judge Geathers, says,

1 in -- in fact, the front page of the AA is labeled
2 arbitration agreement indicating the parties' intent for it
3 to stand by itself as a independent contract. The exhibits
4 to their -- to their memorandum, which is the arbitration
5 agreement -- top of the page -- arbitration agreement.
6 Judge Geathers says that shows up separateness, just as
7 much as Coleman and just as much as that was found in the
8 Thompson case. Another fact that shows that there is
9 separateness is that there is a merger clause -- I don't
10 want to confuse the two concepts -- a merger clause, an
11 entire agreement clause at the end of the admission
12 agreement which says, this is it; this agreement, capital
13 A, defined at the beginning of the contract states that
14 this document is the entire between the parties, nothing to
15 do with the arbitration agreement. Those are two separate
16 contracts. Now he says that these -- there was -- she
17 wasn't required to sign; she could've said no. That goes
18 to show the separateness of the two contracts. The reason
19 why they do that, Your Honor, candidly, is because it's not
20 -- then a lot of times if it's all in one contract, then
21 you're kind of setting up an unconscionability argument,
22 that you're requiring us to agree to arbitration just to
23 get in the home, and that's why they set them up as two
24 different contracts, and they put them in separate
25 contracts for that specific purpose, and that's where you

1 get into the merger of the situation with the Coleman and
2 Thompson, two separate contracts that undermines their
3 equitable estoppel argument.

4 MR. BUCKNER - Your Honor, if I could participate
5 just briefly on that.

6 THE COURT - You may.

7 MR. BUCKNER - Certainly we acknowledge these are
8 two separate contracts. The idea of merger by operation of
9 law -- you know, you see it first and foremost I think with
10 promissory notes along with mortgages. All of these
11 documents that are signed -- when we talk about merger, we
12 talk about same parties, same time, of course, in the same
13 transaction. We don't say the same documents. Of course
14 we admit they're two separate contracts. What Coleman
15 says, there can be indicia of separateness that takes it
16 out of that realm, but, of course, a promissory note and a
17 mortgage are different documents; they're two different
18 purposes. Of course in an arbitration agreement and
19 admission agreement aren't identical; we acknowledge that,
20 and the footnote in Thompson was not the holding of the
21 Court and, of course, I -- I don't even -- I don't think
22 that the Supreme Court -- may still have that case under
23 review ---

24 MR. CALLOWAY - No, actually, Cert was denied in
25 that case.

1 MR. BUCKNER - The Thompson opinion to the Court
2 of Appeals does not stay that simply by having arbitration
3 agreement at the top, we no longer have any analysis of
4 separateness under Coleman. I don't read that footnote to
5 say that whatsoever.

6 THE COURT - Now, I guess I should ask you
7 directly -- I mean Thompson seems to be dispositive to your
8 arguments, I mean technically. How do you distinguish
9 Thompson?

10 MR. BUCKNER - Well, because I think the
11 agreements are different.

12 THE COURT - I mean the -- the argument -- the
13 language in your agreements are different?

14 MR. BUCKNER - Correct. And just the merger
15 clause alone and of itself does not make separateness
16 standard when you have to have to have more than that. In
17 other words, in Coleman you had a merger clause that
18 referenced the arbitration agreement. So they said, how
19 can you argue this isn't one single transaction when the
20 merger clause itself referenced it. Our merger clause
21 doesn't reference the arbitration agreement. It's very,
22 very significant under Coleman. It takes it out of that
23 entire realm. I don't think Thompson says that having a
24 merger clause alone is dispositive of this, and again,
25 without having the Thompson opinion in front of me and

1 their discussion of agency, I don't think that they just
2 had the facts that we had a signed document. I think there
3 was more there, but I don't know that that's actually
4 discussed in the opinion, and I apologize if I've taking us
5 down this rabbit-hole of discovery; that was not my intent,
6 but I do think as a secondary position that in order to
7 figure out these issues of authority, that would be very,
8 very, very helpful. I wanted that to be court-authorized
9 for fear of waiver.

10 THE COURT - Well, okay. Anything you want to
11 add, Mr. Calloway, Ms. Goodstein?

12 MR. CALLOWAY - Just one thing, Your Honor, just
13 from the standpoint of we just got the motion a couple of
14 days ago, if the Court wouldn't mind if you're going to
15 take it under advisement, if we could submit a written
16 response, a memoranda in opposition.

17 THE COURT - Absolutely, yeah. Any objection, Mr.
18 Buckner?

19 MR. BUCKNER - None at all, none at all.

20 THE COURT - Well, I'll -- Mr. Calloway, how long
21 do you need to prepare your memo?

22 MR. CALLOWAY - Your Honor, if we could have five
23 days.

24 THE COURT - So if you'll get me a memo by --
25 we'll give you an extra day. By Friday of next week?

1 MR. CALLOWAY - Yes, sir, thank you.

2 THE COURT - Okay.

3 MR. BUCKNER - And we can submit a reply I
4 presume?

5 THE COURT - Okay. Okay, Mr. Buckner, how long
6 will you need to submit a reply?

7 MR. BUCKNER - We can do it within five -- the
8 following Friday.

9 THE COURT - That'll be fine. Okay.

10 MR. CALLOWAY - Thank you, Your Honor.

11 THE COURT - I'll take this matter under
12 advisement. I will hold off that -- well-argued on both
13 sides. I'll look forward to the memos.

14 MR. BUCKNER - And just to be clear, I know that
15 we also had the pending motions to stay, but because those
16 are sort of secondary to this, I assume they'll sort of be
17 held abeyance as well.

18 THE COURT - That is correct.

19 MR. BUCKNER - Thank you, Your Honor..

20 MR. CALLOWAY - Thank you, Your Honor.

21 THE COURT - Thank you all; well argued. I'll
22 look forward to your memos.

23 (END OF TRANSCRIPT)

24

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT
2018-CP-46-01459

Teresa Murphy, as)
Personal Representative)
of the Estate of Isaac)
Strong)

vs.)

TRANSCRIPT OF RECORD

Hunt Valley)
Holdings, LLC f/k/a)
Fundamental Long Term)
Care Holdings, LLC, et)
al.)

DECEMBER 5, 2018
YORK, SOUTH CAROLINA

BEFORE THE HONORABLE WILLIAM MCKINNON

APPEARANCES:

Jordan Calloway, ESQUIRE
Rock Hill, South Carolina

Eve S. Goodstein, ESQUIRE
Rock Hill, South Carolina

ATTORNEYS FOR THE PLAINTIFF

Perry Buckner, ESQUIRE
Columbia, South Carolina

Walker Barnes, ESQUIRE
Columbia, South Carolina

ATTORNEYS FOR THE DEFENDANT

SHIRLEY BROOM
16TH Circuit Court Reporter

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I-N-D-E-X

WITNESSES: DIRECT CROSS RE-DIRECT RE-CROSS

(NO TESTIMONY TAKEN)

EXHIBITSDESCRIPTION:ID.

EV.

NO EXHIBITS

1 THE COURT - All right, it's your motion, so
2 whenever y'all are ready.

3 MR. BUCKNER - Thank you, Judge. Perry Buckner on
4 behalf of THI of South Carolina at Rock Hill, LLC and the
5 four the other moving defendants which have motions to
6 stay. Obviously the principal motion before the Court is
7 the nursing home of THI of South Carolina at Rock Hill,
8 LLC's motion ---

9 THE COURT - Everyone else is just sort of piggy-
10 back the one that said until we rule on your motion, the --
11 we hold off on the, you know, motion to stay.

12 MR. BUCKNER - Correct, Your Honor, just to
13 request under the Federal Arbitration Act for a stay for
14 all the non-signatories.

15 THE COURT - All right.

16 MR. BUCKNER - And, Your Honor, chiefly, obviously
17 we have argued primarily in the beginning that we think the
18 presumption of merger should still apply here between the
19 arbitration agreement and the admissions agreement. Your
20 Order has addressed that. We obviously are not abandoning
21 those, but that is a pure legal argument that has been
22 fully briefed by plaintiff's counsel and fully addressed in
23 your Order. Obviously we raise those again, again don't
24 want to abandon them, but the primary crux of our motion to

1 reconsider is the denial of our request for discovery, and

2 ---

3 THE COURT - Okay, hold on. Okay, so if you don't
4 mind let me -- so you can have discovery on these issues
5 now along with the rest of the case. Right? I mean ---

6 MR. BUCKNER - Yeah, I just think it needs to be
7 Court sanctioned, because if not I think there's a fear of
8 waiver, and when we were here last on the primary motion, I
9 addressed this and plaintiff's counsel, you know, was not
10 aware that that would've been a possibility. Obviously we
11 were not aware of what their opposition was to the primary
12 motion, but if I go out and, you know, subpoena all
13 relevant medical records and notice of deposition, I think
14 that I am jeopardizing my client's legal position at least
15 in part because of a waiver, because invoking the
16 litigation machinery is the standard in South Carolina
17 along with prejudice, and I certainly think that would
18 check that first box and so ---

19 THE COURT - Even -- even if you've got a court
20 ruling that says you have to basically, because I denied
21 your motion.

22 MR. BUCKNER - Well, if -- if the Court sanctions
23 it here today I think I'd be more than comfortable in
24 opposing any argument of waiver and if plaintiff's counsel
25 wouldn't, you know, feel the same way, then we could

1 proceed with the case accordingly, take that discovery in
2 the normal of the course of the case and revisit it.

3 THE COURT - That was my intent in granting the
4 Order and not to preclude you from doing discovery. Okay,
5 so that may make today's hearing pretty quick then. So,
6 what -- Mr. Calloway or Ms. Goodstein, who's going to argue
7 on your behalf?

8 MR. BUCKNER - There's one -- one further thing
9 Your Honor -- I'm sorry to interrupt -- is I guess my only
10 other concern with that is obviously because this has to do
11 with mode of trial, a denial of this motion today would be
12 immediately appealable. As long as we have some mechanism
13 to revisit this if and when that discovery happens so that
14 we can bring it before the court and that putative ruling
15 would then be the final ruling and I would have a right of
16 an immediate appeal, then I have no problem with that, but
17 if there's somehow going to be an argument that we did not
18 file the immediate appeal because of today, then I'm sort
19 of walking into a host of new problems.

20 THE COURT - Okay, well, that's an interesting
21 issue, because I mean I -- at some point depending on what
22 happens in discovery you may file again and say based on
23 discovery, now we're renewing our agency argument or
24 whatever, that's going to be appealable, but you're worried
25 ----

1 MR. BUCKNER - Well, if -- if the position of the
2 plaintiff is that we would not waive our right to an
3 immediate appeal by pursuing the case normally and taking
4 up discovery in the normal course of the case, and that's o
5 the record, I would have no concerns.

6 THE COURT - Okay, so let's -- let's talk about --
7 Mr. Calloway or Ms. Goodstein ---

8 MR. CALLOWAY - We will make no such concession,
9 Your Honor, on that issue. If they want -- they want to
10 get out of the litigation process through arbitration but
11 first they want you to sanction them to precipitate through
12 the litigation process only so far as they want to go, then
13 so they can come and hopefully support their argument
14 further so they can get out of the litigation process, and
15 while this arbitration agreement doesn't specifically
16 reference any arbitration rules, my experience is when you
17 get into arbitration there is conscribed or conscripted
18 discovery, very limited potential discovery. They want
19 discovery insofar as it benefits them, and then they want
20 discovery no further until you get into the arbitration
21 process where you've got limited discovery, so we would not
22 be willing to put on the record that we're not going to be
23 making a waiver argument if they get into discovery. I
24 mean they're ---

1 THE COURT - Okay, so what you're saying is you
2 want them to go ahead and appeal my Order now?

3 MR. CALLOWAY - Yeah, if they've got -- if they
4 want to appeal now they -- they can do that. Now, let me
5 also say, I mean we presented to them today and we would
6 present to the Court an affidavit from Ms. Murphy which
7 addresses several of the issues in their motion where she
8 says basically a couple of things. I mean a large part of
9 their issue is saying, well, we don't know what Mr. Strong
10 was doing that day. Mr. Strong wasn't at the nursing home
11 that day. He was still in the hospital and would be for an
12 additional four days. They said in their reply memo to the
13 original motion that Ms. Murphy and Mr. Strong were there
14 that day. That's -- that's false, and it's false based on
15 records in their medical record from Mr. Strong, and so
16 that's a big part of the discovery they want, he wasn't
17 even there, and then their other -- a big part of their
18 argument is ratification, that somehow Mr. Strong ratified
19 this days later or times later. The affidavit from Ms.
20 Murphy says, at no point in time did she or -- and her
21 father have any conversations whatsoever about an
22 arbitration agreement or about alternative dispute
23 resolution in any respects. And so it goes back to the
24 issue that was talked about in Hodge which Court of Appeals
25 decided this spring and for which the Supreme Court denied

1 Cert this fall and said that's -- there's -- it doesn't add
2 anything to take her deposition, so they say, well, the
3 other issue they want discovery on is this question about
4 his capacity, did he have the capacity to understand what's
5 going on this day, that sort of thing. They say the
6 medical records that we gave are not conclusive. They've
7 cited other medical records. Well, what do they want to
8 get from Ms. Murphy that's going to be more conclusive on
9 his state of mind than the objective medical records that
10 are already in their possession, and so we stand on those
11 arguments in addition to adding this affidavit to the
12 record to say that there's nothing they're going to get
13 from her that's going to be a benefit to them to their
14 argument on agency or on ratification or on equitable
15 estoppel, but just to address your initial question though,
16 we -- we are not conceding waiver if they choose to pursue
17 this. If they wanted to pursue discovery and take that
18 chance up front, under Rule 26 they can file discovery as
19 soon as we file the complaint, and so if they wanted to do
20 that, they could've, but they've come to you and asked you
21 to say right now to get on the record that they're not
22 waiving it by invoking the litigation machinery. We will
23 not concede that here.

24 THE COURT - Mr. Buckner, talk to me about the
25 ratification argument. I -- I mean I struggle with how,

1 you know, someone who's in the nursing home, how would you
2 ratify the agreement to give up his right to the -- you
3 know the arbitration agreement. I mean I understand with
4 regard to the admission agreement that he -- you know, they
5 ratify that by accepting medical care and meals and things,
6 but how exactly would a patient ratify the arbitration
7 agreement?

8 MR. BUCKNER - Well, I don't think Your Honor that
9 would be the only issue to which discovery would be
10 relevant.

11 THE COURT - Right. That was one of your motions.
12 That was one of the things you said I didn't rule on.

13 MR. BUCKNER - Correct. After Dean vs. Heritage
14 Health Corp was remanded from the Supreme Court and it went
15 back down to provide of a record, which is what we're
16 asking here -- that's principally what this is all about,
17 building a record -- they actually addressed off hand sort
18 of what might be ratification of both the admissions
19 agreement, which you said correctly would be continued
20 care, and then possibly the arbitration agreement, meaning
21 staying in the facility without ever opposing it on any way
22 shape or form. I have a case actually in another state
23 right now where we have gotten an Order for ratification or
24 at least we've presented it to the Court, where there's
25 deposition testimony that the arbitration agreement was

1 given to the resident, and he reviewed it and then never
2 stated any objection. That would be an example of
3 ratification. And so, Your Honor, the problem that we are
4 having here with plaintiff's counsel's argument is this is
5 a bit of a game of gotcha and a catch 22. Right? We're
6 not agreeing to allowing them to have a record to figure
7 out whether these issues are meritorious, but if we do,
8 we're also going to argue waiver, so we don't want a record
9 to figure out whether we can prevail, but we also -- if we
10 do that we're going to argue waiver. I don't think that
11 the law supports that, and I don't think general principles
12 of equity would support that. We need -- we have some
13 medical records. He said all we need is the medical
14 records. We can't issue a subpoena, so all we have is
15 what's given from the hospital to the nursing home and then
16 the nursing home chart itself, which is effectively from
17 the hospital standpoint just the H&P, history and physical.
18 I haven't gotten any other records. What he does going
19 forward in the nursing home isn't probably as relevant to
20 his capacity in the days leading up to his admission, so if
21 I can subpoena all the relevant medical providers and get
22 some of the information that I already have, which for
23 instance a nursing data collection tool says he has the
24 ability to understand others and to make his needs known,
25 both, which I would argue would be very pertinent to the

1 issues before this Court, that makes this completely
2 different from Hodge. Plaintiff's counsel's absolutely
3 correct that Hodge stands for the proposition that there
4 can be no apparent agency when the principal is
5 incapacitated, but we have at best a mixed record as to
6 whether the principal in this case, plaintiff's decedent,
7 Mr. Strong, was incapacitated. There is conflicting
8 evidence at best, and if not, weak evidence, that he had --
9 he was entirely incapacitated. Plaintiff's counsel notes
10 that he did not have the ability to speak. That does not
11 foreclose one's ability to authorize an agent to act on his
12 behalf, and so this idea that the Court could not not make
13 this a final ruling, allow the case to proceed under
14 limited discovery and then we can come back -- and he may
15 be correct -- maybe we won't establish a record to support
16 our arguments -- is I think complete nonsense, because you
17 can't have it both ways to diminish the record to determine
18 these issues and then argue waiver when we explore them. I
19 think the Court can permit that without running afoul of
20 either waiver or the ability for a later Court to have a
21 record about this. This is exactly with Dean I think did
22 on a remand.

23 THE COURT - Okay, so ---

24 MR. CALLOWAY - Your Honor, may I ---

1 THE COURT - That's okay, Mr. Calloway. Give me a
2 second. I understand what you're saying, but why not --
3 the vehicle to protect your rights is to file an appeal.
4 Why -- I understand you believe I'm wrong. Why not just
5 file your appeal, and let's see what the Court of Appeals
6 says?

7 MR. BUCKNER - Because I don't have a record for
8 the appellate court to gauge the agency arguments. I need
9 an appellate record, and I'm being foreclosed of that just
10 because we're being cautious under a waiver argument. I'm
11 not saying that Mr. -- a couple of things. The admissions
12 process doesn't necessarily always take place in the
13 nursing home. Just because the resident's in the hospital
14 -- these -- these admissions coordinators are more often in
15 the hospital than they are in the nursing home, so the idea
16 that we could not to take discovery to figure out the
17 representations, if any, that were made surrounding the
18 execution of the arbitration agreement and the admissions
19 agreement, which may be to plaintiff's counsel's benefit, I
20 do not think is supported by the case law. We need a
21 record for the appellate court to rule on these issues,
22 because right now we're just guessing. And I don't think
23 there's anything wrong with someone who has potential
24 arbitration rights to ask the Court for limited discovery.
25 We're doing it probably in four or five other cases right

1 now in South Carolina. We were before Your Honor in
2 Greenwood, and we started conducting that discovery as well
3 just to see -- and again, if we had someone who was fully
4 incapacitated, I don't think I'd have an argument, but we
5 have a record that shows there's at least a possibility, I
6 would suggest stronger, of someone who had capacity and the
7 ability to make his needs known and to either through
8 conduct or words have someone act on his behalf.

9 THE COURT - To be honest I don't remember the --
10 the specifics of the Greenwood case. My recollection was
11 that was not contested though, the other side didn't
12 contest the limited discovery.

13 MR. BUCKNER - I believe it was Jennifer Burnette,
14 and I don't remember her position on that to be honest with
15 you, Your Honor.

16 THE COURT - I don't think she -- my recollection
17 was she did not oppose that.

18 MR. BUCKNER - You may be correct.

19 THE COURT - All right, Mr. Calloway, let me hear
20 ---

21 MR. CALLOWAY - Your Honor, I want to address
22 this, this gotcha game, that we're trying to prevent them
23 from creating a record. If they wanted to know if he had
24 the capacity or she had the capacity to sign that
25 agreement, they had the absolute ability on December 18th,

1 2014 to ask to see the power of attorney. They want to say
2 that we're not giving them the ability to create a record.
3 You had at the moment where these documents were signed and
4 presented the ability to ask that question, and if you were
5 diligent, then you would've. They are bringing equitable
6 arguments, equitable estoppel, agency by estoppel. Equity
7 favors the diligent. If they wanted to have that
8 information, that was the time to get it, and so this say
9 (sic) that we're trying to prevent them from getting
10 information, they had every ability to get it and they had
11 every ability to say we unfortunately will not allow Mr.
12 Strong to enter our home until you provide us evidence that
13 you have the authority to enter the contract on his behalf.
14 It's not a gotcha game. I strongly reject any assertions
15 of that nature, that we're trying to prevent them from
16 having access to something that they otherwise could've had
17 access to. If they wanted it, they could've had it and had
18 it four years ago, and they didn't ask for it. And now
19 they're trying to go in around and say we want to invoke
20 litigation so far as it helps us, but we're not -- we're
21 not confident enough in our legal position to just go ahead
22 and send the discovery, we want the Court to sanction it up
23 front or get opposing counsel to say we're not going to
24 have any waiver argument and then argue to the Court that
25 we're playing a gotcha game. That's not an accurate

1 representation whatsoever. This idea that he could make
2 his needs known without being able to speak and somehow
3 make a representation as to his daughter's ability to sign
4 an arbitration agreement on his behalf, I'm not sure what
5 the basis is for that, and then, finally, arbitration and
6 admission are two very different things. The fact that she
7 signed that agreement and he stayed there may have
8 something to do with admission. It has nothing to do with
9 arbitration, was just that the statement (sic) they made at
10 an earlier hearing that -- arbitra -- admission was not
11 dependent on arbitration. And so the -- the gotcha game
12 thing is the thing that really bothers me there, because
13 that seems like that's what we're arguing about here today
14 is to whether they get discovery or more importantly
15 whether they can ask the Court to give them discovery
16 without risking any sort of waiver process in so doing, and
17 we're not conceding that, and I don't think -- I think if
18 they want to pursue this further, file their notice of
19 appeal and then we can deal with that at the Court of
20 Appeals. You know, we can deal with how far Hodge goes and
21 if Hodge is going to remain good law. If Court of Appeals
22 says it is -- the Supreme Court affirmly said it did by not
23 taking the case on, but if they want to argue that, let's
24 go down to Columbia and argue it. I mean I think that's
25 where we are here today. They're asking the Court to

1 reexamine -- the previous Order the Court already ruled on
2 their discovery argument. Their next step is to file
3 their notice of appeal.

4 THE COURT - Mr. Buckner?

5 MR. BUCKNER - Judge, I was making specific
6 reference to -- his affidavit is dated December 5th, which
7 is today, the day of the hearing, so I show up today, the
8 same day of the hearing, get an affidavit, and I'm being
9 told that discovery is a waste of time, there's no need to
10 do this, you shouldn't need to depose my client, and then I
11 get affirmative representations as to what their client,
12 Teresa Murphy's, position is. So they can use her
13 testimony all there to (sic) their advantage, and I don't
14 have a right to depose her without fear of waiver. I think
15 that's entirely ---

16 THE COURT - Well, I've not said I'm going to
17 consider the affidavit, and I'm not sure I can. I mean
18 because that's -- on this -- Mr. Calloway, in a Rule 12
19 motion, I can't consider affidavits, can I?

20 MR. CALLOWAY - Well, I know usually when these
21 type of arbitration motions are filed, there are affidavits
22 filed by the admission coordinator at the home; they didn't
23 do that here, but typically that's the way these things go
24 with their motions.

1 THE COURT - No, I understand. I mean I -- but
2 just under general rules of civil procedure on a Rule 12
3 motion, aren't I limited to the pleadings? I mean not --
4 not affidavits?

5 MR. CALLOWAY - Well, for a 12(B)(6) you would.
6 This isn't a 12(B)(6) though. It's a 12 -- I guess a
7 12(B)(2). Right? Where the personal -- or a subject
8 matter jurisdiction question, so I don't know that there
9 would be a -- exact prohibition on it. I just know that my
10 general practice -- I mean we do these -- I think we both
11 do this a lot -- is that typically there are affidavits
12 attached to these motions to dismiss.

13 THE COURT - Okay, so your argument is this is a
14 12(B)(2) it's a jurisdictional motion and I can, you know -
15 --

16 MR. BUCKNER - I guess it's a -- a blend of a
17 12(B)(1) and 12(B)(6). Probably not a 12(B)(2), but I
18 guess they could -- I think we filed it as a 12(B)(1) and a
19 12(B)(6), because we are arguing that the Court doesn't
20 have subject matter jurisdiction, but also I guess there's
21 the 12(B)(6) sort of form motion attached to that. It's a
22 motion to compel arbitration, so I -- you know, we can
23 address that however we want to. I don't know that it
24 would be any different, um ---

1 THE COURT - Mr. Buckner, I understand your
2 position, but I'm not inclined to change my original
3 ruling. I mean I -- you know, I may be wrong on this, but
4 I -- I mean I -- the way I read the cases is -- is that I
5 should deny the motion to arbitrate, and I -- I think your
6 remedy is not discovery, but to appeal my -- to appeal my
7 ruling. Now, I -- you do argue in your memorandum that
8 there are issues I did not properly address in the original
9 Order, and I know you said that basically other than merger
10 issue you argue, that I did not address the other argument
11 that you had. I thought that I did. I mean what
12 particular arguments do you think I did not address
13 sufficiently?

14 MR. BUCKNER - I think there was an argument
15 regarding inherent agency, if I'm not mistaken.

16 THE COURT - All right.

17 MR. BUCKNER - I have to look back here briefly --
18 that may not have been addressed.

19 MR. CALLOWAY - And I don't want to interrupt you
20 but ---

21 MR. BUCKNER - And ratification.

22 MR. CALLOWAY - Yeah, the ratification definitely
23 we -- but I think inherent agency -- it may have been
24 agency by estoppel, but inherent agency was -- was
25 discussed on page 12 and 13 of the record -- of the Order.

1 MR. BUCKNER - It may just be ratification.

2 MR. CALLOWAY - Okay.

3 MR. BUCKNER - I was looking through, Your Honor,
4 just to make sure that's the case. It appears that it's
5 just ratification.

6 THE COURT - Okay, and you're -- I mean the fourth
7 point you make in your memorandum obviously you're right
8 on. I should not have used the phrase breach; I should've
9 said an alleged breach. I'll make that correction in the
10 Order. Well, let me hear from you about ratification. I
11 mean I -- I must say I'm real skeptical of a ratification
12 argument on these facts, but that ---

13 MR. BUCKNER - Understand, and the argument there
14 is simply we need more information as well as a record
15 argument for the basis for discovery as well. We recognize
16 that at this point in time we do not have a record to point
17 to ratification. We're asking the Court to permit
18 discovery for the same reasons. We don't think that we
19 should be prejudiced by a limited record and have to fear a
20 waiver of arbitration rights in order to conduct it.

21 THE COURT - I mean I -- but isn't that the
22 position the law puts in you in? I mean that's -- that you
23 -- I mean if you get discovery on these issues, you're
24 waiving your right to compel arbitration? I mean I -- I
25 understand that's a difficult choice, but if you don't ---

1 MR. BUCKNER - No, I don't think so at all, Your
2 Honor. I don't think so. I think that if the Court
3 sanctioned discovery on issues limited to the legal issue,
4 which would ultimately be in a record for appeal are
5 completely permissible. I don't think that -- I think
6 waiving your right to arbitration by engaging in discovery
7 pertinent to issues about contract formation which are the
8 bedrock issues in the arbitration motion is not a waiver,
9 and it's not directly addressed under the FAA. It's not
10 directly addressed by appellate South Carolina law, but I
11 think in order to fully examine these legal issues limited
12 to discovery is necessary, and I recognize as plaintiff's
13 counsel pointed out that it may be that when Teresa
14 Murphy's deposed that her testimony is not reflective of
15 ratification or apparent agency or inherent agency,
16 however, right now we don't know, and we get affidavits
17 from them supporting the position that have no ability or
18 mechanism to point out the flaws in that testimony. That's
19 our concern is that we essentially have no way to fight
20 back on this issue but for there being some form of limited
21 discovery. And if it's taken up in the normal course of
22 the case, I can't imagine why it would be an issue.

23 THE COURT - Okay, but when you say fight back, I
24 mean it's your motion to compel arbitration. You're
25 arguing ratification but then saying we concede we don't

1 have any evidence of ratification and you want to go
2 looking for it. That's not really fighting back. I mean
3 that's asserting a claim for which you don't have evidence.

4 MR. BUCKNER - Well, once we get this affidavit, I
5 think it certainly is fighting, but that's why I used that
6 term, but what -- it's all because of the law on waiver,
7 and the law on waiver in South Carolina is invoking the
8 litigation machinery along with prejudice is waiver, and I
9 don't think I'm doing my clients any justice by sending out
10 subpoenas and noticing depositions so the good, talented
11 plaintiff's lawyers like we have on the other side can then
12 argue a waiver. I mean that could potentially be legal
13 malpractice. I certainly don't want to invite a new
14 defense to the agreement by doing that, and so I thought
15 the appropriate method would be to file a motion, come to
16 the Court and ask for this secondary relief if the Court
17 cannot rule on these issues in the record before them, and
18 I don't think that's -- that's waiver under South Carolina
19 law, and if I had to do it and then face that argument, I
20 guess so be it, but I'd rather not. I mean I think the
21 prudent cautious way to do it so as to avoid that is to
22 proceed as we have.

23 THE COURT - Mr. Buckner, I disagree with you. I
24 mean I may very well be wrong, but the basis is and for my
25 ruling is, I mean your client has the right on admission to

1 build any record that they want. I mean you have -- you
2 have all of the documents, all of the evidence that your
3 client required upon his admission, and if you don't have
4 the evidence that you need to argue for the arbitration
5 agreement, that is your client's responsibility for not
6 obtaining that back on the admission and I don't think -- I
7 mean you filed what I think was an offensive motion to
8 require arbitration. If your client didn't obtain the
9 evidence it needed upon admission, I don't think you can
10 complain to the Court that you're -- that you've got a
11 impossible, you know, catch 22, because you don't have
12 evidence to back up the arbitration claim. That's -- and I
13 may be wrong about that and the Court of Appeals may tell
14 me that I -- I should've given you discovery, but that's --
15 I'm not inclined to alter my original ruling.

16 MR. BUCKNER - Thank you, Your Honor.

17 THE COURT - You're welcome. But like I said, if
18 I -- I don't want to miss any issues, so the ratification,
19 what I would propose to say in my -- I'm going to amend the
20 Order slightly is that you've conceded at the hearing that
21 you currently don't have any evidence of ratification and
22 you would like to pursue through the discovery, and I've
23 denied you that right. Is that -- is that fair?

24 MR. BUCKNER - That's completely fair, Your Honor.

25 Thank you.

1 THE COURT - And then I -- I will make that
2 change. Obviously that was a slip-up on my part. Instead
3 of saying, you know, breaches of the standard of care, I'll
4 say alleged -- alleged breaches.

5 MR. BUCKNER - Thank you.

6 THE COURT - Anything else we need to cover?

7 MR. BUCKNER - Not at all.

8 MR. CALLOWAY - Nothing from our side.

9 THE COURT - Okay. Thank you all. Appreciate it.

10 MR. CALLOWAY - Thank you, Your Honor.

11 (END OF TRANSCRIPT)

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMONS PLEAS
	)	
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
TERESA MURPHY, AS PERSONAL	)	CASE NO. 2018-CP-46-01459
REPRESENTATIVE FOR THE ESTATE	)	
OF ISAAC STRONG,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	
HUNT VALLEY HOLDINGS, LLC	)	
F/K/A FUNDAMENTAL LONG TERM	)	DEFENDANT THI SOUTH CAROLINA
CARE HOLDINGS, LLC;	)	AT ROCK HILL, LLC D/B/A MAGNOLIA
FUNDAMENTAL CLINICAL AND	)	MANOR-ROCK HILL'S MOTION TO
OPERATIONAL SERVICES, LLC;	)	COMPEL ARBITRATION AND PETITION
FUNDAMENTAL CONSULTING, LLC;	)	TO STAY STATE COURT
FUNDAMENTAL ADMINISTRATIVE	)	PROCEEDINGS
SERVICES, LLC; THI OF BALTIMORE,	)	
INC.; THI OF SOUTH CAROLINA,	)	
LLC; THI OF SOUTH CAROLINA AT	)	
ROCK HILL, LLC D/B/A MAGNOLIA	)	
MANOR OF ROCK HILL; AND	)	
AMISUB OF SC, INC. D/B/A	)	
PIEDMONT MEDICAL CENTER ,	)	
	)	
DEFENDANTS.	)	

TO: CHAD MCGOWAN, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor-Rock Hill (hereinafter referred to as "this Defendant" or the "Facility"), by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure and compelling this matter to arbitration, or, alternatively, staying the action pending arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.

Plaintiff has sued this Defendant for Negligence / Gross Negligence pursuant to the Plaintiff's decedent's residency at the Facility. Prior to being admitted to the Facility, Plaintiff's decedent entered into an Arbitration Agreement with the Facility. (See Arbitration Agreement attached as **Exhibit A**).

The parties to the Arbitration Agreement agreed that the South Carolina Uniform Arbitration Act would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, because the services and reimbursement thereof to be provided to the Plaintiff upon his admission to the facility involved interstate commerce. In accordance with the terms of this agreement, the Defendant respectfully requests that this matter be compelled to arbitration.

Alternatively, this Defendant requests that these proceedings be stayed pending the outcome of arbitration pursuant to Section 3 of the FAA. Defendant respectfully requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any other motions or discovery filed or served by Plaintiff while the current motion is pending.

This Motion and Petition are supported by the attached Arbitration Agreement, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

[signature block on following page]

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Perry M. Buckner, IV

J. Joseph Owens

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; jdavis@ycrlaw.com

*Attorneys for the Defendant THI of South Carolina
at Rock Hill, LLC d/b/a Magnolia Manor-Rock Hill*

Charleston, South Carolina

Dated: July 17, 2018

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMONS PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT

TERESA MURPHY, AS PERSONAL) CASE NO. 2018-CP-46-01459
REPRESENTATIVE FOR THE ESTATE)
OF ISAAC STRONG,)

PLAINTIFFS,)

vs.)

HUNT VALLEY HOLDINGS, LLC)
F/K/A FUNDAMENTAL LONG TERM)
CARE HOLDINGS, LLC;)
FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC;)
FUNDAMENTAL CONSULTING, LLC;)
FUNDAMENTAL ADMINISTRATIVE)
SERVICES, LLC; THI OF BALTIMORE,)
INC.; THI OF SOUTH CAROLINA,)
LLC; THI OF SOUTH CAROLINA AT)
ROCK HILL, LLC D/B/A MAGNOLIA)
MANOR OF ROCK HILL; AND)
AMISUB OF SC, INC. D/B/A)
PIEDMONT MEDICAL CENTER,)

DEFENDANTS.)

**DEFENDANT THI SOUTH CAROLINA
AT ROCK HILL, LLC D/B/A MAGNOLIA
MANOR-ROCK HILL'S AMENED
MOTION TO COMPEL ARBITRATION
AND PETITION TO STAY STATE COURT
PROCEEDINGS**

TO: CHAD MCGOWAN, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor-Rock Hill (hereinafter referred to as "this Defendant" or the "Facility"), by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure and compelling this matter to arbitration, or, alternatively, staying the action pending arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.

Plaintiff has sued this Defendant for Negligence / Gross Negligence pursuant to the Plaintiff's decedent's residency at the Facility. Prior to being admitted to the Facility, Plaintiff's decedent entered into an Arbitration Agreement with the Facility. (See Arbitration Agreement attached as **Exhibit A**).

The parties to the Arbitration Agreement agreed that the South Carolina Uniform Arbitration Act would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, because the services and reimbursement thereof to be provided to the Plaintiff upon his admission to the facility involved interstate commerce. In accordance with the terms of this agreement, the Defendant respectfully requests that this matter be compelled to arbitration.

Alternatively, this Defendant requests that these proceedings be stayed pending the outcome of arbitration pursuant to Section 3 of the FAA. Defendant respectfully requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any other motions or discovery filed or served by Plaintiff while the current motion is pending.

This Motion and Petition are supported by the attached Arbitration Agreement, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

[signature block on following page]

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Perry M. Buckner, IV

J. Joseph Owens

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; jdavis@ycrlaw.com

*Attorneys for the Defendant THI of South Carolina
at Rock Hill, LLC d/b/a Magnolia Manor-Rock Hill*

Charleston, South Carolina

Dated: July 24, 2018

PLEASE READ CAREFULLY

FACILITY - RESIDENT/REPRESENTATIVE
ARBITRATION AGREEMENT

This Agreement is made between Magnolia Manor ("Facility"), its agents, employees and servants, and Isaac Strong ("Resident") or ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative"). It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons dealing with their claims through or on behalf of Resident.

It is understood by Resident/Representative that he/she is not required to use the aforesaid Facility for Resident's healthcare needs and that there are numerous other health care providers in the State where Facility is located that are qualified to provide such care to Resident.

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry. If the parties cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court. The arbitrator shall hear and decide the controversy, and the decision shall be binding on all parties, and may be enforced by a court of competent jurisdiction.

The parties acknowledge and agree that, because the services and reimbursement thereof effect a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law.

I understand and agree that I am giving up and waiving my right to a jury trial.

This Agreement shall remain in effect for all care rendered at Facility and shall survive termination or breach of this Agreement or the Admission Agreement. By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.

<u>Teresa Murphy</u>	<u>12.18.14</u>	<u>Teresa Murphy</u>
Resident/Representative Signature	Date	Printed Name of Resident/Representative
<u>Chasity Byars</u>	<u>12/18/14</u>	<u>Chasity Byars</u>
Authorized Agent of Facility	Date	Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMONS PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT

TERESA MURPHY, AS PERSONAL) CASE NO. 2018-CP-46-01459
REPRESENTATIVE FOR THE ESTATE)
OF ISAAC STRONG,)

PLAINTIFFS,)

vs.)

HUNT VALLEY HOLDINGS, LLC)
F/K/A FUNDAMENTAL LONG TERM)
CARE HOLDINGS, LLC;)
FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC;)
FUNDAMENTAL CONSULTING, LLC;)
FUNDAMENTAL ADMINISTRATIVE)
SERVICES, LLC; THI OF BALTIMORE,)
INC.; THI OF SOUTH CAROLINA,)
LLC; THI OF SOUTH CAROLINA AT)
ROCK HILL, LLC D/B/A MAGNOLIA)
MANOR OF ROCK HILL; AND)
AMISUB OF SC, INC. D/B/A)
PIEDMONT MEDICAL CENTER,)

DEFENDANTS.)

**FUNDAMENTAL ADMINISTRATIVE
SERVICES, LLC'S
MOTION TO STAY**

TO: CHAD A. MCGOWAN ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that Defendant Fundamental Administrative Services, LLC, hereinafter referred to as "this Defendant", by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order staying this action.

Defendant THI of South Carolina at Rock Hill, LLC ("Facility Defendant") has filed a Motion in this case to compel Plaintiff's claims to arbitration pursuant to a valid and enforceable arbitration agreement entered into between those parties.

This Defendant respectfully requests this Honorable Court specifically stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement and the appellate process, if any, has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion and Petition will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Perry M. Buckner, IV

J. Joseph Owens

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; jdavis@ycrlaw.com

Attorneys for the Defendant

Fundamental Administrative Services, LLC

Charleston, South Carolina

Dated: August 23, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMONS PLEAS
	)	
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
TERESA MURPHY, AS PERSONAL	)	CASE NO. 2018-CP-46-01459
REPRESENTATIVE FOR THE ESTATE	)	
OF ISAAC STRONG,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	
HUNT VALLEY HOLDINGS, LLC	)	
F/K/A FUNDAMENTAL LONG TERM	)	
CARE HOLDINGS, LLC;	)	
FUNDAMENTAL CLINICAL AND	)	FUNDAMENTAL CLINICAL AND
OPERATIONAL SERVICES, LLC;	)	OPERATIONAL SERVICES, LLC'S
FUNDAMENTAL CONSULTING, LLC;	)	MOTION TO STAY
FUNDAMENTAL ADMINISTRATIVE	)	
SERVICES, LLC; THI OF BALTIMORE,	)	
INC.; THI OF SOUTH CAROLINA,	)	
LLC; THI OF SOUTH CAROLINA AT	)	
ROCK HILL, LLC D/B/A MAGNOLIA	)	
MANOR OF ROCK HILL; AND	)	
AMISUB OF SC, INC. D/B/A	)	
PIEDMONT MEDICAL CENTER ,	)	
	)	
DEFENDANTS.	)	

TO: CHAD A. MCGOWAN ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that Defendant Fundamental Clinical and Operational Services, LLC, hereinafter referred to as "this Defendant", by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order staying this action.

Defendant THI of South Carolina at Rock Hill, LLC ("Facility Defendant") has filed a Motion in this case to compel Plaintiff's claims to arbitration pursuant to a valid and enforceable arbitration agreement entered into between those parties.

This Defendant respectfully requests this Honorable Court specifically stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement and the appellate process, if any, has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion and Petition will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

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J. Joseph Owens

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; jdavis@ycrlaw.com

Attorneys for the Defendant

*Fundamental Clinical and Operational
Services, LLC*

Charleston, South Carolina

Dated: August 23, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMONS PLEAS
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
TERESA MURPHY, AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF ISAAC STRONG,	)	CASE NO. 2018-CP-46-01459
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	
HUNT VALLEY HOLDINGS, LLC	)	
F/K/A FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC;	)	
FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC;	)	
FUNDAMENTAL CONSULTING, LLC;	)	
FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; THI OF BALTIMORE, INC.; THI OF SOUTH CAROLINA, LLC; THI OF SOUTH CAROLINA AT ROCK HILL, LLC D/B/A MAGNOLIA MANOR OF ROCK HILL; AND AMISUB OF SC, INC. D/B/A PIEDMONT MEDICAL CENTER ,	)	
	)	
DEFENDANTS.	)	

**THI OF SOUTH CAROLINA, LLC'S
MOTION TO STAY**

TO: CHAD A. MCGOWAN ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that Defendant THI of South Carolina, LLC, hereinafter referred to as "this Defendant", by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order staying this action.

Defendant THI of South Carolina at Rock Hill, LLC ("Facility Defendant") has filed a Motion in this case to compel Plaintiff's claims to arbitration pursuant to a valid and enforceable arbitration agreement entered into between those parties.

This Defendant respectfully requests this Honorable Court specifically stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement and the appellate process, if any, has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion and Petition will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

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P.O. Box 993, Charleston, SC 29402

(843) 720-5406; jdavis@ycrlaw.com

Attorneys for the Defendant

THI of South Carolina, LLC

Charleston, South Carolina

Dated: August 23, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMONS PLEAS
	)	
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
TERESA MURPHY, AS PERSONAL	)	CASE NO. 2018-CP-46-01459
REPRESENTATIVE FOR THE ESTATE	)	
OF ISAAC STRONG,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	
HUNT VALLEY HOLDINGS, LLC	)	
F/K/A FUNDAMENTAL LONG TERM	)	
CARE HOLDINGS, LLC;	)	DEFENDANT THI OF SOUTH
FUNDAMENTAL CLINICAL AND	)	CAROLINA AT ROCK HILL, LLC D/B/A
OPERATIONAL SERVICES, LLC;	)	MAGNOLIA MANOR OF ROCK HILL'S
FUNDAMENTAL CONSULTING, LLC;	)	MOTION TO RECONSIDER, ALTER
FUNDAMENTAL ADMINISTRATIVE	)	AND/OR AMEND PURSUANT TO RULE
SERVICES, LLC; THI OF BALTIMORE,	)	59, SCRPC
INC.; THI OF SOUTH CAROLINA,	)	(HEARING REQUESTED)
LLC; THI OF SOUTH CAROLINA AT	)	
ROCK HILL, LLC D/B/A MAGNOLIA	)	
MANOR OF ROCK HILL; AND	)	
AMISUB OF SC, INC. D/B/A	)	
PIEDMONT MEDICAL CENTER ,	)	
	)	
DEFENDANTS.	)	

THE DEFENDANT, THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill (hereinafter "this Defendant"), by and through its undersigned counsel, respectfully requests and moves pursuant to Rule 59(e) of the *South Carolina Rules of Civil Procedure* and requests that this Honorable Court alter, amend, and/or reconsider and vacate the Order Denying this Defendant's Motion to Compel Arbitration, which Order was dated and filed October 24, 2018. See Order, attached hereto as **Exhibit 1**. This Defendant received notice of the Court's entry of the Order the same day, and the present Motion is timely made. This Motion is based on the following grounds:

1. The Order incorrectly holds that this Defendant's arguments in support of the validity of the Arbitration Agreement at issue are solely dependent on the doctrine of Merger.

In the Order, the Court holds that this Defendant's positions regarding Ms. Murphy's agency powers are wholly staked "to the notion that the Arbitration Agreement and Admission Agreement merge into a single contract that must be construed as a unit." Ex 1, p. 4. To the contrary, while this Defendant does assert that the Admissions and Arbitration Agreement should be merged, the merger theory was set forth by this Defendant as an additional basis for relief after the application of the agency principles to the Arbitration Agreement in their own right under this Defendant's Memorandum in Support of its Motion to Compel (*See* Memo in Support, attached as **Exhibit 2**, p. 6 – 14).

This Defendant's non-merger arguments in support of the validity of the Arbitration Agreement are further elaborated and set forth in this Defendant's Reply to Plaintiff's Memorandum in Opposition (*See* Reply, attached as **Exhibit 3**, p. 4 - 9). However, none of this Defendant's additional sustaining arguments set forth in the Reply are noted or ruled upon by the Court's Order and only the merger-related arguments set forth in this Defendant's Memorandum in Support are noted and analyzed by the Order.

In summary, those arguments maintain that Ms. Murphy could be found to have actual or apparent authority or agency by virtue of estoppel for her father without the Admissions Agreement and Arbitration Agreement being found to have merged for the reasons set forth in the Memorandum in Support and further elaborated in the Reply. As such, this Defendant reasserts and does not waive its arguments in support of this position as set forth in the referenced filings and the Order should be amended or altered to rule upon these issues.

2. Discovery is necessary to determine agency for reasons not set forth or ruled upon in the Order.

The Order holds that deposing Ms. Murphy or otherwise completing discovery on the issue of agency “would not add anything to the agency determination” because “agency depends on the representations of the purported principal (i.e. Mr. Strong) and cannot be based on the representations of the purported agent (i.e. Ms. Murphy).” Ex.1, p. 14 (citing Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018)). Accordingly, the Order implicitly holds that Ms. Murphy’s testimony or other discovery mechanisms which do not include Mr. Strong’s actual testimony are incapable of establishing agency in this instance.

As specifically noted in this Defendant’s Reply, “[t]he existence of an agency relationship is ... determined by the relation, the situation, the conduct, and the declarations of the party sought to be charged as principal.”¹ “[T]he relationship of agency need not depend upon express appointment and acceptance thereof, but may be, and frequently is, implied by the words and conduct of the parties and the circumstances of the particular case. Indeed, the law creates the relationship of principal and agent where the parties, in the conduct of their affairs, actually place themselves in such position as requires the relationship to be inferred by the courts.”² For these reasons, “[w]hether an agency relationship exists is a fact-intensive inquiry that is guided by common law agency principles.”³ While it is true that “an agency may not be established solely by the declarations and conduct of an alleged agent[.]”⁴, “**such declarations**

¹ Langdale v. Carpets, 395 S.C. 194, 201, 717 S.E.2d 80, 83 (Ct. App. 2011).

² Nationwide Mut. Ins. Co. v. Prioleau, 359 S.C. 238, 243, 597 S.E.2d 165, 168 (Ct. App. 2004)

³ United States v. Ellyson, 326 F.3d 522, 527 (4th Cir. 2003)

⁴ Cowburn v. Leventis, 366 S.C. 20, 39–40, 619 S.E.2d 437, 448 (Ct. App. 2005)(quoting Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996)).

and conduct are admissible as circumstances in connection with other evidence tending to establish the agency.”⁵

Pursuant to the above authorities and in the Reply, this Defendant set forth a variety of additional reasons why an order for limited discovery would aid in the Court’s ability to fully and properly adjudicate the validity of the Arbitration Agreement under principles of agency. *See* Ex. 3, p. 4 – 15. At the very least, there is an ambiguity as to whether Mr. Strong manifested consent to his daughter’s acts during or prior to the admissions process such that limited discovery on the topic of agency is appropriate and warranted. Indeed, the true nature and extent of Mr. Strong’s behavior and capacity at the time of the admissions process could further be established via limited discovery. As noted in this Defendant’s Reply, while Plaintiff now claims that Mr. Strong lacked capacity to grant any form of authority to any person, the medical records are, at best for Plaintiff, ambiguous on this topic.

Through limited discovery, the Parties could also determine whether Ms. Murphy had previously been designated as her father’s authorized representative to execute legal documents such that her execution of the Arbitration Agreement at issue in this case was completed under proper authority. Similarly, the Parties could inquire as to whether Ms. Murphy and her father ever had any post-admission discussions or other interactions in regards to the documents she executed on his behalf during the admissions process, such that Mr. Strong could later have repudiated any such agreements to the extent they were not entered into by his daughter under proper authority. Finally, the Arbitration Agreement specifically states Ms. Murphy was representing to Magnolia Manor that she had “authority to sign on [her father’s] behalf so as to bind the Resident as well as the Representative[.]” and, although agency may not be established

⁵ Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 83, 124 S.E.2d 602, 606 (1962)(emphasis added).

solely by the actions of the agent, those and other. “such declarations and conduct are admissible as circumstances in connection with other evidence tending to establish the agency.”⁶

3. The Order does not address this Defendant’s Arguments regarding the doctrine of Ratification.

In its Memorandum in Support of the underlying Motion, this Defendant cited to this Court’s holding in Dean v. Heritage Healthcare of Ridgeway, LLC, 2014 WL 11802563 (S.C. Com. Pl. September 8, 2014). Citing to Fuller v. E. Fire & Cas. Ins. Co., this Court ruled that “[r]atification as it relates to the law of agency may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent. Whether or not there has been a ratification of an unauthorized act by acceptance or retention of benefits thereof is usually a question of fact for the jury and not one of law for the court.”⁷ Ultimately, in facts very similar to the case at bar, this Court in Dean ruled that, “To the extent the Plaintiff is correct that [the resident] had capacity to contract, I find that [the resident] gave apparent authority to her daughter to contract on her behalf or she ratified both contracts during her two and a half years residency.”⁸

This Defendant set forth this holding and applied the doctrine of ratification to the facts under review in its Reply. *See* Ex. 3, p. 13 – 14. However, this argument is not addressed in the Court’s Order. As such, this Defendant reasserts and does not waive its arguments in support of this position as set forth in the referenced filings and the Order should be amended or altered to

⁶ This Defendant also set forth arguments as to why limited discovery on the issue of intent as applied in the context of estoppel (both state and federal) would be appropriate and warranted. Ex. 3, p. 8 – 9. 12 – 13. Again, however, these arguments were not ruled upon by the Order.

⁷ 240 S.C. 75, 86, 124 S.E.2d 602, 608 (1962)(citing Barber v. Carolina Auto Sales, 236 S.C. 594, 599, 115 S.E.2d 291, 294 (1960)).

⁸ 2014 WL 11802563, at 4*

rule upon this issue. This Defendant would further assert, again, that discovery would be the proper vehicle by which to develop this argument.

4. The Order should be amended to the extent it holds that Defendants “breached” any duty owed to Plaintiff or her decedent

Finally, the Order should be altered or amended to establish that Plaintiff’s survival claim relates to *alleged* duties and breaches by Defendants and damages by Plaintiff. Specifically, the Order reads that Plaintiff’s “survival claim relates to duties established and breached during Isaac Strong’s life and damages sustained during his life.” Ex. 1, p. 3. However, the Court’s Order should be amended to provide that Plaintiff’s claims in this regard as they relate to duties breached by Defendants or resultant damages sustained by Plaintiff or her decedent are allegations and not statements of fact.

CONCLUSION

Pursuant to the above authorities and legal arguments, the Court’s Order Denying this Defendant’s Motion to Compel Arbitration should be Altered or Amended pursuant to Rule 59(e), SCRCP as set forth in this filing. This Honorable Court should also grant and direct such further relief as it deems just and proper. This Motion is supported by the attached Exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Perry M. Buckner, IV

J Joseph Owens

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; jdavis@ycrlaw.com

*Attorneys for the THI of South Carolina at Rock
Hill, LLC d/b/a Magnolia Manor of Rock Hill*

Charleston, South Carolina

Dated: November 5, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMONS PLEAS
	)	
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
TERESA MURPHY, AS PERSONAL	)	CASE NO. 2018-CP-46-01459
REPRESENTATIVE FOR THE ESTATE	)	
OF ISAAC STRONG,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	
HUNT VALLEY HOLDINGS, LLC	)	
F/K/A FUNDAMENTAL LONG TERM	)	
CARE HOLDINGS, LLC;	)	DEFENDANT FUNDAMENTAL
FUNDAMENTAL CLINICAL AND	)	ADMINISTRATIVE SERVICES, LLC'S
OPERATIONAL SERVICES, LLC;	)	MOTION TO RECONSIDER, ALTER
FUNDAMENTAL CONSULTING, LLC;	)	AND/OR AMEND PURSUANT TO RULE
FUNDAMENTAL ADMINISTRATIVE	)	59(E), SCRC
SERVICES, LLC; THI OF BALTIMORE,	)	(HEARING REQUESTED)
INC.; THI OF SOUTH CAROLINA,	)	
LLC; THI OF SOUTH CAROLINA AT	)	
ROCK HILL, LLC D/B/A MAGNOLIA	)	
MANOR OF ROCK HILL; AND	)	
AMISUB OF SC, INC. D/B/A	)	
PIEDMONT MEDICAL CENTER ,	)	
	)	
DEFENDANTS.	)	

THE DEFENDANT, Fundamental Administrative Services, LLC, (hereinafter "this Defendant"), by and through its undersigned counsel, respectfully requests and moves pursuant to Rule 59(e) of the *South Carolina Rules of Civil Procedure* and requests that this Honorable Court alter, amend, and/or reconsider and vacate the Order Denying this Defendant's Motion to Stay, which Order was dated and filed October 24, 2018. See Order, attached hereto as **Exhibit 1**. This Defendant received notice of the Court's entry of the Order the same day, and the present Motion is timely made. This Motion is based on the following grounds:

1) In the Order, the Court denied as moot this Defendant's Motion to Stay in light of the Order's primary ruling that the Arbitration Agreement at issue between Plaintiff and Defendant THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill ("Facility Defendant") was not enforceable. However, Defendant Facility has recently filed a Motion to Alter or Amend the Order such that the Court may find that the Arbitration Agreement at issue is valid and enforceable. Accordingly, the Court should also alter or amend the Order denying this Defendant's Motion to Stay as moot until such time as this Court has issued a final decision regarding Defendant Facility's pending Motion to Compel Arbitration and Motion to Alter or Amend, and the appellate process, if any, has been exhausted.

CONCLUSION

Pursuant to the above authorities and legal arguments, the Court's Order Denying this Defendant's Motion to Stay should be Altered or Amended pursuant to Rule 59(e), SCRCPP as set forth in this filing. This Honorable Court should also grant and direct such further relief as it deems just and proper. This Motion is supported by the attached Exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

[signature block on following page]

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Perry M. Buckner, IV

J. Joseph Owens

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*Attorneys for the Defendant Fundamental
Administrative Services, LLC*

Charleston, South Carolina

Dated: November 5, 2018

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMONS PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT

TERESA MURPHY, AS PERSONAL) CASE NO. 2018-CP-46-01459
REPRESENTATIVE FOR THE ESTATE)
OF ISAAC STRONG,)

PLAINTIFFS,)

vs.)

HUNT VALLEY HOLDINGS, LLC)
F/K/A FUNDAMENTAL LONG TERM)
CARE HOLDINGS, LLC;)
FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC;)
FUNDAMENTAL CONSULTING, LLC;)
FUNDAMENTAL ADMINISTRATIVE)
SERVICES, LLC; THI OF BALTIMORE,)
INC.; THI OF SOUTH CAROLINA,)
LLC; THI OF SOUTH CAROLINA AT)
ROCK HILL, LLC D/B/A MAGNOLIA)
MANOR OF ROCK HILL; AND)
AMISUB OF SC, INC. D/B/A)
PIEDMONT MEDICAL CENTER,)

DEFENDANTS.)

**DEFENDANT FUNDAMENTAL
CLINICAL AND OPERATIONAL
SERVICES, LLC'S MOTION TO
RECONSIDER, ALTER AND/OR AMEND
PURSUANT TO RULE 59(E), SCRCP
(HEARING REQUESTED)**

THE DEFENDANT, Fundamental Clinical and Operational Services, LLC, (hereinafter "this Defendant"), by and through its undersigned counsel, respectfully requests and moves pursuant to Rule 59(e) of the *South Carolina Rules of Civil Procedure* and requests that this Honorable Court alter, amend, and/or reconsider and vacate the Order Denying this Defendant's Motion to Stay, which Order was dated and filed October 24, 2018. *See Order*, attached hereto as **Exhibit 1**. This Defendant received notice of the Court's entry of the Order the same day, and the present Motion is timely made. This Motion is based on the following grounds:

1) In the Order, the Court denied as moot this Defendant's Motion to Stay in light of the Order's primary ruling that the Arbitration Agreement at issue between Plaintiff and Defendant THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill ("Facility Defendant") was not enforceable. However, Defendant Facility has recently filed a Motion to Alter or Amend the Order such that the Court may find that the Arbitration Agreement at issue is valid and enforceable. Accordingly, the Court should also alter or amend the Order denying this Defendant's Motion to Stay as moot until such time as this Court has issued a final decision regarding Defendant Facility's pending Motion to Compel Arbitration and Motion to Alter or Amend, and the appellate process, if any, has been exhausted.

CONCLUSION

Pursuant to the above authorities and legal arguments, the Court's Order Denying this Defendant's Motion to Stay should be Altered or Amended pursuant to Rule 59(e), SCRCP as set forth in this filing. This Honorable Court should also grant and direct such further relief as it deems just and proper. This Motion is supported by the attached Exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

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*Attorneys for the Defendant Fundamental Clinical
and Operational Services, LLC*

Charleston, South Carolina

Dated: November 5, 2018

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COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT

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CARE HOLDINGS, LLC;)
FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC;)
FUNDAMENTAL CONSULTING, LLC;)
FUNDAMENTAL ADMINISTRATIVE)
SERVICES, LLC; THI OF BALTIMORE,)
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ROCK HILL, LLC D/B/A MAGNOLIA)
MANOR OF ROCK HILL; AND)
AMISUB OF SC, INC. D/B/A)
PIEDMONT MEDICAL CENTER ,)

DEFENDANTS.)

**DEFENDANT THI OF SOUTH
CAROLINA, LLC'S MOTION TO
RECONSIDER, ALTER AND/OR AMEND
PURSUANT TO RULE 59(E), SCRCP
(HEARING REQUESTED)**

THE DEFENDANT, THI of South Carolina, LLC, (hereinafter "this Defendant"), by and through its undersigned counsel, respectfully requests and moves pursuant to Rule 59(e) of the *South Carolina Rules of Civil Procedure* and requests that this Honorable Court alter, amend, and/or reconsider and vacate the Order Denying this Defendant's Motion to Stay, which Order was dated and filed October 24, 2018. *See Order*, attached hereto as **Exhibit 1**. This Defendant received notice of the Court's entry of the Order the same day, and the present Motion is timely made. This Motion is based on the following grounds:

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CONCLUSION

Pursuant to the above authorities and legal arguments, the Court's Order Denying this Defendant's Motion to Stay should be Altered or Amended pursuant to Rule 59(e), SCRCR as set forth in this filing. This Honorable Court should also grant and direct such further relief as it deems just and proper. This Motion is supported by the attached Exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

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*Attorneys for the Defendant THI of South Carolina,
LLC*

Charleston, South Carolina

Dated: November 5, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMONS PLEAS
	)	
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
TERESA MURPHY, AS PERSONAL	)	CASE NO. 2018-CP-46-01459
REPRESENTATIVE FOR THE ESTATE	)	
OF ISAAC STRONG,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	
HUNT VALLEY HOLDINGS, LLC	)	
F/K/A FUNDAMENTAL LONG TERM	)	
CARE HOLDINGS, LLC;	)	
FUNDAMENTAL CLINICAL AND	)	FUNDAMENTAL ADMINISTRATIVE
OPERATIONAL SERVICES, LLC;	)	SERVICES, LLC'S MEMO IN SUPPORT
FUNDAMENTAL CONSULTING, LLC;	)	OF MOTION TO STAY
FUNDAMENTAL ADMINISTRATIVE	)	
SERVICES, LLC; THI OF BALTIMORE,	)	
INC.; THI OF SOUTH CAROLINA,	)	
LLC; THI OF SOUTH CAROLINA AT	)	
ROCK HILL, LLC D/B/A MAGNOLIA	)	
MANOR OF ROCK HILL; AND	)	
AMISUB OF SC, INC. D/B/A	)	
PIEDMONT MEDICAL CENTER ,	)	
	)	
DEFENDANTS.	)	

COMES NOW, Defendant Fundamental Administrative Services, LLC (hereinafter "this Defendant"), by and through its undersigned attorneys and submits this Memorandum in Support of Motion to Stay.

BACKGROUND FACTS

Co-Defendant THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill ("Magnolia Manor"), entered into a valid Arbitration Agreement with Plaintiff, Isaac Strong, (the "Arbitration Agreement") prior to Mr. Strong's admission to Magnolia Manor. Per the Arbitration Agreement, Mr. Strong and Magnolia Manor agreed that the South Carolina Uniform

Arbitration Act, S.C. Code §15-48-10; et seq., would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, 9 U.S.C. §1, et seq. (the “FAA”), because the services and reimbursement thereof to be provided to Mr. Strong upon his admission to the facility affected and involved interstate commerce.

Defendant Magnolia Manor has filed a Motion with this Court to enforce the Arbitration Agreement against the Plaintiff. *See* Motion to Dismiss and Compel Arbitration, attached as **Exhibit 1**. Per this Court’s inherent power to manage its own docket, this Defendant respectfully requests that this matter be stayed as to this Defendant until such time as the Court has made a final decision regarding Magnolia Manor’s pending action to Compel Arbitration, and the appellate process, if any, has been exhausted. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, such a decision would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

ARGUMENT

The FAA, 9 U.S.C. § 3, entitled “Stay of proceedings where issue therein referable to arbitration,” states the following:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, **the court** in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, **shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement**, providing the applicant for the stay is not in default in proceeding with such arbitration.

(Emphasis added.)¹

¹ The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. *See*, S.C. Code Ann. § 15-48-20(d) (“Any action or proceeding involving an issue

Citing this statutory provision, the South Carolina Court of Appeals held the “FAA clearly requires a court stay ‘any suit or proceeding’ pending the arbitration of ‘any issue referable to arbitration under an agreement in writing for such arbitration’ upon the application of one of the parties.” *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002).

Both federal and state policy favor arbitration of disputes. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Even when, as is the case here, a party to the lawsuit is not a party to the arbitration agreement, it “may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21, 103 S. Ct. 927, 939 (1983). This Court also possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court’s discretion. *Id.* See also, *Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936)(“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.”).

The Court’s decision on whether to stay the pending action against this Defendant “should be motivated by the court’s ‘concern that litigation against a party not bound by an arbitration provision may impair an arbitrator’s consideration of claims against a party that is compelled to arbitrate.’” *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999), citing *Kroll v. Doctor’s Associates, Inc.*, 3 F.3d 1167, 1171 (7th Cir. 1993).

subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section...” (emphasis added)

In the instant matter, the Plaintiff's claims against this Defendant arise out of the exact same factual underpinnings as her claims against Magnolia Manor, a party and signatory to the Arbitration Agreement. To be sure, the claims against both this Defendant and Magnolia Manor-Rock Hill are solely concerned with Mr. Strong's stay at Magnolia Manor and the provision of care and treatment provided to him. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration. Without the issuance of a stay, disposition of the Plaintiff's claims against this Defendant may affect the disposition of the matter against Magnolia Manor, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

Plaintiff's allegations of liability in the Complaint assert that this Defendant exerted extensive and pervasive control over Magnolia Manor's medical treatment of Plaintiff's decedent such that this Defendant is liable for the facility's alleged medical malpractice. In no uncertain terms, Plaintiff seeks to prove that this Defendant and Magnolia Manor should be viewed as one in the same by this Court. If this Defendant is forced to continue with this litigation, the arbitration proceedings against Magnolia Manor could become redundant and meaningless because of the substantial overlap in factual and legal underpinnings of the cases against this Defendant and Magnolia Manor. Should discovery and the trial of this matter continue against this Defendant in this Court, the right to arbitration of Magnolia Manor would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir. 2000)(Stay granted to defendant non-signatory to arbitration agreement because continuing with litigation would adversely affect signatory's right to arbitrate.)

Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

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D. Jay Davis, Jr.

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*Attorneys for the Defendant Fundamental
Administrative Services, LLC*

Charleston, South Carolina

Dated: August 28, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMONS PLEAS
	)	
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
TERESA MURPHY, AS PERSONAL	)	CASE NO. 2018-CP-46-01459
REPRESENTATIVE FOR THE ESTATE	)	
OF ISAAC STRONG,	)	
	)	
PLAINTIFFS,	)	
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vs.	)	
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HUNT VALLEY HOLDINGS, LLC	)	
F/K/A FUNDAMENTAL LONG TERM	)	
CARE HOLDINGS, LLC;	)	
FUNDAMENTAL CLINICAL AND	)	FUNDAMENTAL CLINICAL AND
OPERATIONAL SERVICES, LLC;	)	OPERATIONAL SERVICES, LLC'S
FUNDAMENTAL CONSULTING, LLC;	)	MEMO IN SUPPORT OF MOTION TO
FUNDAMENTAL ADMINISTRATIVE	)	STAY
SERVICES, LLC; THI OF BALTIMORE,	)	
INC.; THI OF SOUTH CAROLINA,	)	
LLC; THI OF SOUTH CAROLINA AT	)	
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MANOR OF ROCK HILL; AND	)	
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PIEDMONT MEDICAL CENTER ,	)	
	)	
DEFENDANTS.	)	

COMES NOW, Defendant Fundamental Clinical and Operational Services, LLC (hereinafter "this Defendant"), by and through its undersigned attorneys and submits this Memorandum in Support of Motion to Stay.

BACKGROUND FACTS

Co-Defendant THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill ("Magnolia Manor"), entered into a valid Arbitration Agreement with Plaintiff, Isaac Strong, (the "Arbitration Agreement") prior to Mr. Strong's admission to Magnolia Manor-Rock Hill. Per the Arbitration Agreement, Mr. Strong and Magnolia Manor agreed that the South Carolina

Uniform Arbitration Act, S.C. Code §15-48-10, et seq., would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, 9 U.S.C. §1, et seq. (the “FAA”), because the services and reimbursement thereof to be provided to Mr. Strong upon his admission to the facility affected and involved interstate commerce.

Defendant Magnolia Manor has filed a Motion with this Court to enforce the Arbitration Agreement against the Plaintiff. *See* Motion to Dismiss and Compel Arbitration, attached as **Exhibit 1**. Per this Court’s inherent power to manage its own docket, this Defendant respectfully requests that this matter be stayed as to this Defendant until such time as the Court has made a final decision regarding Magnolia Manor’s pending action to Compel Arbitration, and the appellate process, if any, has been exhausted. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, such a decision would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

ARGUMENT

The FAA, 9 U.S.C. § 3, entitled “Stay of proceedings where issue therein referable to arbitration,” states the following:

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(Emphasis added.)¹

¹ The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. *See*, S.C. Code Ann. § 15-48-20(d) (“Any action or proceeding involving an issue

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The Court’s decision on whether to stay the pending action against this Defendant “should be motivated by the court’s ‘concern that litigation against a party not bound by an arbitration provision may impair an arbitrator’s consideration of claims against a party that is compelled to arbitrate.’” *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999), citing *Kroll v. Doctor’s Associates, Inc.*, 3 F.3d 1167, 1171 (7th Cir. 1993).

subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section...” (emphasis added)

In the instant matter, the Plaintiff's claims against this Defendant arise out of the exact same factual underpinnings as her claims against Magnolia Manor, a party and signatory to the Arbitration Agreement. To be sure, the claims against both this Defendant and Magnolia Manor-Rock Hill are solely concerned with Mr. Strong's stay at Magnolia Manor and the provision of care and treatment provided to him. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration. Without the issuance of a stay, disposition of the Plaintiff's claims against this Defendant may affect the disposition of the matter against Magnolia Manor, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

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**THI OF SOUTH CAROLINA, LLC'S
MEMO IN SUPPORT OF MOTION TO
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subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section...” (emphasis added)

In the instant matter, the Plaintiff's claims against this Defendant arise out of the exact same factual underpinnings as her claims against Magnolia Manor, a party and signatory to the Arbitration Agreement. To be sure, the claims against both this Defendant and Magnolia Manor-Rock Hill are solely concerned with Mr. Strong's stay at Magnolia Manor and the provision of care and treatment provided to him. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration. Without the issuance of a stay, disposition of the Plaintiff's claims against this Defendant may affect the disposition of the matter against Magnolia Manor, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

Plaintiff's allegations of liability in the Complaint assert that this Defendant exerted extensive and pervasive control over Magnolia Manor's medical treatment of Plaintiff's decedent such that this Defendant is liable for the facility's alleged medical malpractice. In no uncertain terms, Plaintiff seeks to prove that this Defendant and Magnolia Manor should be viewed as one in the same by this Court. If this Defendant is forced to continue with this litigation, the arbitration proceedings against Magnolia Manor could become redundant and meaningless because of the substantial overlap in factual and legal underpinnings of the cases against this Defendant and Magnolia Manor. Should discovery and the trial of this matter continue against this Defendant in this Court, the right to arbitration of Magnolia Manor would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir. 2000)(Stay granted to defendant non-signatory to arbitration agreement because continuing with litigation would adversely affect signatory's right to arbitrate.)

Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

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Charleston, South Carolina

Dated: August 28, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMONS PLEAS
	)	
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
TERESA MURPHY, AS PERSONAL	)	CASE NO. 2018-CP-46-01459
REPRESENTATIVE FOR THE ESTATE	)	
OF ISAAC STRONG,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	
HUNT VALLEY HOLDINGS, LLC	)	
F/K/A FUNDAMENTAL LONG TERM	)	
CARE HOLDINGS, LLC;	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC;	)	
FUNDAMENTAL CONSULTING, LLC;	)	
FUNDAMENTAL ADMINISTRATIVE	)	
SERVICES, LLC; THI OF BALTIMORE,	)	
INC.; THI OF SOUTH CAROLINA,	)	
LLC; THI OF SOUTH CAROLINA AT	)	
ROCK HILL, LLC D/B/A MAGNOLIA	)	
MANOR OF ROCK HILL; AND	)	
AMISUB OF SC, INC. D/B/A	)	
PIEDMONT MEDICAL CENTER ,	)	
	)	
DEFENDANTS.	)	
	)	

**THI OF SOUTH CAROLINA AT ROCK
HILL, LLC D/B/A MAGNOLIA MANOR
OF ROCK HILL'S MEMO IN SUPPORT
OF MOTION TO COMPEL
ARBITRATION AND STAY STATE
COURT PROCEEDINGS**

INTRODUCTION

COMES NOW the Defendant, THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill (hereinafter referred to as "Magnolia Manor", "Facility", or "this Defendant") and submits the following Memorandum in Support of its Motion to Dismiss pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq, and South Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6).

Plaintiff has sued this Defendant for Negligence (Wrongful Death and Survival) based upon Mr. Isaac Strong's residency at this Defendant's skilled nursing facility. However, this

Defendant and Mr. Strong entered into an Arbitration Agreement prior to his admission at the Facility which pertains to all allegations raised in the Complaint. Accordingly, and for the reasons set forth herein, this Defendant respectfully requests that Plaintiff's Complaint be dismissed and/or stayed and for the Court to compel arbitration pursuant to the contract between the parties.

FACTUAL BACKGROUND

The Plaintiff's decedent in this action, Isaac Strong, was admitted to Magnolia Manor on December 22, 2014. Prior to his admission, Mr. Strong entered into a number of contracts with the Facility. The contracts were each signed by Mr. Strong's daughter, Teresa Murphy, as representative of Mr. Strong. (**Exhibit 1**, Admission Agreement; **Exhibit 2**, Arbitration Agreement; **Exhibit 3**, Other Signed Agreements). Ms. Murphy is the Plaintiff in this action and the Personal Representative of Mr. Strong's estate. These executed contracts included an Admission Agreement and an Arbitration Agreement. (Ex.1, Ex. 2). Based on these contracts and pursuant to the agreements set forth therein, Mr. Strong was admitted to Magnolia Manor and received skilled nursing care for the treatment of his multiple, serious comorbidities. During his stay at Magnolia Manor, Mr. Strong accepted the benefits of the contracts entered into on his behalf by his representative, Teresa Murphy, including his admission to the Facility and his receipt of the skilled nursing care provided therein.

The Arbitration Agreement at issue defines Magnolia Manor as the "Facility," Mr. Strong as the "Resident," and Ms. Murphy as the "Representative." The relevant provisions of the Arbitration Agreement state the following:

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or

rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

Ex. 2. The Arbitration Agreement further provides:

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law.

Ex. 2. Regarding Ms. Murphy's authority to sign on behalf of father, the Arbitration Agreement states:

By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.

Ex. 2.

The Arbitration Agreement was executed by Ms. Murphy as "Representative" and Chasity Byars, the Admissions Director of the Facility, on behalf of Magnolia Manor. Because the acts complained of by the Plaintiff fall within the scope of the Arbitration Agreement, the Court should dismiss the Plaintiff's action, or stay these proceedings, and compel this matter to arbitration.

ARGUMENT AND CITATION TO AUTHORITY

There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir.1997). Indeed, both federal and state policy favor arbitrating disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) ("The policy of the United States and this State is to favor arbitration of disputes."). "This preference for arbitration has manifested itself in

legislation and judicial decisions supporting the expeditious appeal of decisions denying an application to compel arbitration.” *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999). Therefore, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Id.*, 338 S.C. at 41, 524 S.E. 2d at 846 (internal quotations and citations omitted).

I. THE FEDERAL ARBITRATION ACT GOVERNS THE ARBITRATION AGREEMENT AND THE CLAIMS ASSERTED BY THE PLAINTIFF IN THE COMPLAINT

As an initial matter, the Arbitration Agreement, by its terms and by law, is governed by the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014)(holding that skilled nursing facility admission agreements and residencies implicate interstate commerce, and thus are governed by the FAA). Indeed, in the Arbitration Agreement at issue in this case, the parties acknowledged and agreed that their transaction involved interstate commerce and would be governed by the FAA. *See* Ex. 2.

Under the FAA, any written provision in “a contract evidencing a transaction involving commerce” providing that disputes be settled by arbitration is “valid, irrevocable, and enforceable.” 9 U.S.C. § 2. The language of the Act is mandatory and requires the enforcement of all 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 (emphasis added). “By its terms, the act leaves no place for the exercise of discretion by a... court, but instead mandates that... 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). Indeed, “the basic purpose of the FAA is to overcome courts’ refusals to enforce agreements to arbitrate and ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement.” *Dean, supra*, 759 S.E.2d at 731 (internal quotations, citations, and punctuation omitted).

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 interstate commerce. 9 U.S.C. § 2. As discussed and further described herein, such a binding and enforceable written agreement to arbitrate disputes exists in this case and Plaintiff’s claims should be dismissed and compelled to arbitration.

II. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE

A. The Plain Language of the Agreement Binds Plaintiff

Mr. Strong’s daughter, Teresa Murphy, represented herself to staff and admissions personnel at Magnolia Manor as her father’s representative, with the authority to sign documents on Mr. Strong’s behalf and bind Mr. Strong and the Facility pursuant to those documents.¹ It was clearly Ms. Murphy’s intention to bind her father (and herself, as personal representative) according to the terms of the Admissions Agreement and Arbitration Agreement, and Mr. Strong evinced no intentions or directions to the contrary. Consequently, Plaintiff, individually and as

¹ See Ex. 2, Arbitration Agreement: “It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assignees, **personal representatives**, guardians, or any persons deriving their claims through or on behalf of Resident.” (emphasis added).

Mr. Strong's Personal Representative, is bound under the Arbitration Agreement and her claims must be dismissed and compelled to arbitration.

Notably, this Court was very recently addressed with facts almost identical to the case at bar in *Macie Price v. THI of South Carolina at Magnolia Manor Inman, LLC et. al*, 2018-CP-42-01054 (S.C. Com. Pls. August 7, 2018). (See *Price* decision, attached hereto as **Exhibit 4**). There, the plaintiff was the wife of a skilled nursing home resident at a skilled nursing facility in Inman, South Carolina. Like in this case, the wife executed a number of documents on her husband's behalf upon the latter's admission to the facility, including an admissions agreement and arbitration agreement identical to the ones in the case at bar. Ex. 4, p. 2-3. Ultimately, this Court determined that "the terms of the Arbitration Agreement clearly apply to the instant dispute[.]" in that it was clearly the intent of the wife to bind her husband (and herself, as personal representative) according to the terms of the Admissions and Arbitration Agreement. Ex. 4, p. 5.

B. Teresa Murphy Possessed the Actual or Apparent Authority to Bind Isaac Strong under the Arbitration Agreement, and Plaintiff Should be Estopped from Denying the Validity of the Arbitration Agreement

a. Agency Relationship

A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)).

“An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145-146, 425 S.E.2d 764, 773 (Ct. App. 1992).

In *Carraway v. Beverly Enters. Ala., Inc.*, 978 So. 2d 27 (Ala. 2007), the facts are substantially similar to the case at bar. There, the plaintiff was the brother of a resident of a nursing home facility who executed a number of documents on his sister's behalf upon her admission to the facility, including an arbitration agreement. The brother signed the documents as his sister's authorized representative but did not have a power of attorney for his sister at the time. Nevertheless, as in this case, the admissions agreement in *Carraway* provided that plaintiff was his sister's legal representative for the purposes of admission as he was her next-of-kin represented himself to be authorized to make health care decisions on her behalf. The arbitration agreement in *Carraway* was a separate document and was not a condition of admission to the facility. *Id.*

When signing the arbitration agreement, the brother in *Carraway* left the resident signature line blank and signed it as the “authorized representative” of his sister. Suit was later filed and the facility moved to compel arbitration, which the trial court granted. On appeal, the Alabama Supreme Court affirmed the trial court's decision holding, relevant here, that the resident's brother possessed the apparent authority to enter into the arbitration agreement on his sister's behalf, as evidenced by the fact that she never objected to him signing on her behalf and the arbitration agreement specifically provided that any person authorized by the resident may execute it on her behalf. *Id.* See also, *Tenn. Health Mgmt. v. Johnson*, 49 So. 3d 175 (Ala.

2010)(holding that a daughter possessed the apparent authority to enter into an arbitration agreement on her mother's behalf).

Notably, the Supreme Court of Alabama's holding in *Carraway* was applied as "persuasive authority" by this Court in *Price*, *supra*. Ex. 4, p. 8. Mirroring the analysis in *Carraway*, the *Price* court ruled that, where a resident's wife executed the admissions and arbitration agreements in her capacity as "representative" of the resident, the facility was "reasonable and justified" in its belief that the wife/personal representative was her husband's authorized representative at the time the admissions documents were signed such that the arbitration agreement was enforceable. Ex. 4, p. 8-9. As previously set forth, the admission and arbitration agreements in *Price* are identical to those in the case under review.

Applying the *Price* and *Carraway* decisions to the instant facts, Teresa Murphy executed various admission documents on behalf of her father including the Arbitration Agreement. She executed these documents in her capacity as "representative." (See Ex. 1, 2, 3). Just as in *Price* and *Carraway*, the Arbitration Agreement provides that signing was on behalf of the resident. (See Ex. 2). It was Magnolia Manor's reasonable and justified belief that Ms. Murphy was her father's authorized representative and had the authority to execute the documents on his behalf.

Moreover, by allowing Ms. Murphy to procure Mr. Strong's admission to the Facility and thereafter by accepting the benefits of the contracts entered into in connection with that admission, Mr. Strong represented that Ms. Murphy was his authorized representative to act on his behalf in connection with his admission. See *R&G*, *supra*, 343 S.C. at 433, 540 S.E.2d at 118 ("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.”). There is no evidence that Mr. Strong or Ms. Murphy ever attempted to repudiate or invalidate Ms. Murphy’s actions in signing the Admissions Agreement and Arbitration Agreement during the former’s admission to the Facility. Instead, Mr. Strong accepted the benefits of these contracts with Magnolia Manor and, as such, he ratified them through his conduct (*i.e.*, remaining at the Facility and receiving care and other services pursuant to his preferences, as laid out in the admissions paperwork).² If Mr. Strong’s daughter was not authorized to act on Mr. Strong’s behalf in admitting him to the Facility, certainly Mr. Strong would have not stayed at the Facility. 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).

In the face of Mr. Strong and Ms. Murphy’s joint representation that Ms. Murphy was authorized to execute the admission paperwork, including the documents providing for Mr. Strong’s stay and the skilled nursing care provided at the Facility, Magnolia Manor reasonably relied upon these representations in allowing Ms. Murphy to execute the paperwork and admit Ms. Strong into the Facility. It would be disingenuous for the Plaintiff, on behalf of her father’s estate, to now claim her father should not be bound by a contract he entered into via his

² *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 2014 WL 11802563, at *4 (S.C. Com. Pl. September 8, 2014)(“To the extent the Plaintiff is correct that [the resident] had capacity to contract, I find that [the resident] gave apparent authority to her daughter to contract on her behalf or she ratified both contracts during her two and a half years residency.”); *See also Fuller v. Eastern Fire & Cas. Ins Co* 240 S.C.75, 86, 124 S.E.2d 602, 608 (1962)(holding “[r]atification as it relates to the law of agency may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent.”).

appointment of his daughter as his agent and representative and benefitted from during his residency at Magnolia Manor.

b. Agency by Estoppel

“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.**”

R & G, supra, 343 S.C. at 433, 540 S.E.2d at 118. To properly show estoppel in South Carolina, this Defendant must show: “(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.” *Strong v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006).

In *Price, supra*, this Court ruled that the Plaintiff was equitably estopped from denying that she was her husband’s authorized agent during the latter’s admission to the skilled nursing facility:

In the case at bar, [the facility] had no knowledge or reason to believe that Plaintiff was not [her husband’s] authorized agent for purposes of executing the Arbitration Agreement or and other admissions paperwork. [The facility] relied on the affirmative representations of Plaintiff in admitting her husband to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by [the facility] for years only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, agency by estoppel is present based upon the record before this Court such that the arbitration agreement is similarly enforceable.

Ex. 4, p. 9.

Similarly, in *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011), the facts are also substantially similar to the case at bar. (See *McCutcheon*, attached hereto as **Exhibit 5**). There, the plaintiff was the husband of a resident of a nursing home facility in South Carolina who executed a number of documents on his wife's behalf upon her admission to the facility, including an arbitration agreement. Like here, the husband signed the documents as his wife's authorized representative but did not have a power of attorney for his sister at the time. Nevertheless, as in this case, the admissions agreement in *McCutcheon* provided that plaintiff was his wife's legal representative for the purposes of admission as he was her next-of-kin and represented himself to be authorized to make health care decisions on her behalf. Also like here, the arbitration agreement in *McCutcheon* was a separate document and was not a condition of admission to the facility.

Because the Court in *McCutcheon* determined that the arbitration and admission agreements should be merged under general principles of contract law (See, merger argument in following section), the Court determined that the plaintiff was bound to arbitrate his claims under the federal doctrine of equitable estoppel. *Id.* at *4. However, the Court also ruled that,

Even if the Arbitration Agreement and Admissions Agreement constitute two separate contract, plaintiff takes inconsistent positions regarding these contracts, which were executed by the same parties under the same purported authority. [Accordingly,] [i]t would be inequitable [] to allow plaintiff to assert that Elijah McCutcheon had authority to sign the Admissions Agreement on behalf of [his wife], but lacked such authority to sign the Arbitration Agreement. For these reasons, the court finds that plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

Id. at *5.

Like in *Price* and *McCutcheon*, it would be disingenuous and inequitable to allow Mr. Strong to effectively admit that his daughter was his authorized agent as to the Admissions Agreement, but not the Arbitration Agreement.

In summary, there is a duly implemented Arbitration Agreement in place executed by Teresa Murphy as her father's actual and apparent agent. Under the terms of the Arbitration Agreement, Plaintiff is bound to arbitrate this matter. Moreover, to the extent Ms. Murphy was not authorized to execute the Arbitration Agreement on behalf of her father, which is denied, it would be inequitable for this Honorable Court to allow Plaintiff to enforce Mr. Strong's rights under the Admissions Agreement while simultaneously denying the validity of the Arbitration Agreement.

C. Teresa Murhpy Possessed Inherent Agency Powers to Bind Isaac Strong to the Arbitration Agreement

Assuming arguendo that Ms. Murphy, on behalf of her father, lacked actual or apparent authority to enter into the terms of the Admissions Agreement, she still possessed sufficient inherent agency powers to render the agreement enforceable. Such powers are recognized by South Carolina courts and are used to enforce agreements where supposed unauthorized actions "accompany or are incidental to transactions which the agent is authorized to conduct...." See, §§ 8A, 161 *Restatement (Second) of Agency* (1958); *Smith v. Fitton & Pittman, Inc.*, 264 S.C. 129, 212 S.E.2d 925 (1975)(*abrogated on unrelated grounds*)(examining whether party had properly demonstrated the existence of inherent agency powers); *Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r*, 309 P.3d 372 (Wash. 2013); *Daly v. Aspen Ctr. for Women's Health, Inc.*, 134 P.3d 450, 452 (Colo. App. 2005); *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210-11. (Ind. 2000); *Cange v. Stotler & Co.*, 826 F.2d 581, 591 (7th Cir.

1987)(“[t]he powers of an agent are, prima facie, coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.”)(citing *Lumbermen's Mut. Ins. Co. v. Slide Rule & Scale Eng'g Co.*, 177 F.2d 305, 309 (7th Cir. 1949)).

The basis for this doctrine is that, as between an equally innocent principal and third party, the third party should prevail. This well-established law follows from one of the cardinal principles of agency law: that third parties, such as Magnolia Manor, should not be disadvantaged because they dealt with an agent rather than a principal. As set forth above, there can be no uncertainty that Ms. Murphy was authorized to admit her father to Magnolia Manor. To the extent Plaintiff takes issue with her own authority to bind Ms. Strong to the Arbitration Agreement and the specific terms therein, her authority in that capacity merely accompanied or was incidental to her authority to admit Mr. Strong as a resident at Magnolia Manor. *See Price, supra*, at 7. Magnolia Manor should not be disadvantaged for acting in accordance with the express representations of Ms. Murphy regarding her authority.

D. Teresa Murphy Possessed Statutory Authority under the S.C. Bill of Rights for Residents of Long-Term Care Facilities to Bind Isaac Strong under the Arbitration Agreement

In addition to Teresa Murphy's actual, apparent, or implied authority to sign the Arbitration Agreement on Plaintiff's behalf, Ms. Murphy possessed the statutory authority to do so and the Arbitration Agreement is binding against Mr. Strong's estate.

Teresa Murphy possessed statutory authority as Mr. Strong's "representative" under the South Carolina Bill of Rights for Residents of Long-Term Care Facilities ("Bill of Rights"), S.C. Code Ann. §44-81-10 et seq. to enter into the Arbitration Agreement. Under the Bill of Rights, a

"representative" is defined as "a resident's legal guardian, committee, or next of kin or other person acting as agent of a resident who does not have a legally appointed guardian." S.C. Code Ann. § 44-81-30(3). The Bill of Rights further provides that a "resident's representative must be given by the facility a written and oral explanation of the rights, grievance procedures, and enforcement provisions of this chapter before or at the time of admission to a long-term care facility. Written acknowledgment of the receipt of the explanation by the resident or the resident's representative must be made a part of the resident's file." S.C. Code Ann. § 44-81-40. Since Mr. Strong (upon information and belief) did not have a legally appointed guardian at the time of his admission, Ms. Murphy was his representative and agent pursuant to the Bill of Rights. This is evidenced by the fact that Ms. Murphy, as Mr. Strong's "legal representative," received the statutorily required information from the facility at the time of Plaintiff's admission and signed a written acknowledgment reflecting the same. (*See* Ex. 3, p. 1). Acting as Mr. Strong's agent under the Bill of Rights, Teresa Murphy signed the Arbitration Agreement as Plaintiff's "Representative," binding Mr. Strong to arbitration in the event of any and all claims against the Facility based on his residency.

In accordance with the foregoing, Ms. Murphy possessed the actual authority, pursuant to statute, to make health care decisions on behalf of Mr. Strong as his agent, and this included executing the Arbitration Agreement as part of Mr. Strong's admission to Magnolia Manor.

E. The Arbitration Agreement and Admission Agreement Must be Construed Together, and Plaintiff Should Be Estopped from Denying the Parties' Mutual Right to Arbitration

i. Merger

As additional grounds to compel arbitration and in the alternative, the Admissions Agreement and Arbitration Agreement should be construed together and Plaintiff is bounds to arbitrate her claims against the Facility.

In the instant case, the agreements at issue were executed by Teresa Murphy, Mr. Strong's daughter and representative, on behalf of Mr. Strong. The validity of these agreements, including the Arbitration Agreement, 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).

The Arbitration Agreement provides that "any controversy or dispute between the parties *arising out of or relating to Facility's Admission Agreement . . .* or relating in any way to Resident's stay at Facility" shall be resolved by arbitration pursuant to the terms of the Arbitration Agreement. (Ex. 2)(emphasis added). As described, the Arbitration Agreement and the Admission Agreement were both signed by Ms. Murphy on behalf of her father on the same day, at the same time, in the days leading up to Mr. Strong's admission to Magnolia Manor.

Courts in South Carolina construe contemporaneous instruments together; if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated. *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977). Absent some evidence indicating a contrary intention, when

instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will generally consider and construe them together on the theory that the instruments are effectively one instrument or contract. *Id. See also Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994) (holding that promissory notes and a mortgage agreement executed contemporaneously on the same date, must be construed together). Furthermore, even when instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. *See Plaza Development Services v. Joe Hardin Builder, Inc.*, 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988); *accord Cafe Associates, Ltd v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991).

As previously set forth, the United States District Court in *McCutcheon* analyzed facts almost identical to the case at bar and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. (Ex. 5, p. 4 - 5). Indeed, this Court has cited to *McCutcheon* on numerous occasions in holding that a nursing home arbitration agreement merged with the admissions agreement for purposes of equitable estoppel under precisely the same circumstances. *See Price, supra at 10 – 12*; *Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012). (See *Abrams, Campsen* attached hereto as **Exhibit 6**).

Accordingly, Mr. Strong, by and through the acts of his representative, Teresa Murphy, and Magnolia Manor both contemplated that the terms of the agreement to admit Mr. Strong were contained in the Admissions Agreement and Arbitration Agreement. Mr. Strong's daughter executed the Arbitration Agreement at the same time as the Admissions Agreement; the

Arbitration Agreement and the Admissions Agreement both covered the same subject matter and transaction (Mr. Strong's residency at Magnolia Manor); the Arbitration Agreement and Admissions Agreement were executed by the same parties; the Arbitration Agreement specifically makes citation to and incorporates the Admission Agreement; and thus the Arbitration Agreement and Admissions Agreement should be construed as part and parcel of the same agreement between the parties.

ii. **Equitable Estoppel of Merged Agreement**

"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 Co. v. Schwabedissen Maschinen & Anlaegen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (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)). The doctrine of equitable estoppel "exists to prevent a litigant from unfairly receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the contract, namely the contractual arbitration provision." *S. Ill. Bev., Inc. v. Hansen Bev. Co.*, 2007 U.S. Dist. LEXIS 76229 (S.D. Ill. 2007). Moreover, the Fourth Circuit has held that "no party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein." *United States v. Bankers Ins. Co.*, 245 F.3d 315, 323 (4th Cir. 2001).

"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 *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (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*:

It is an axiomatic rule of contract law that 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)(quoting in part *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bide. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981)(citing in part *Int'l Paper Co.*, 206 F.3d at 416)(internal quotations omitted).³

In the present case, Mr. Strong embraced all aspects of the Admission Agreement with Magnolia Manor. It would be manifestly inequitable to permit a party to claim the other is liable in tort based upon a contractual relationship, while at the same time allowing that party to avoid the arbitration provisions of the contract upon which the party bases its claims, when such claims

³ See also *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) (“Hall’s care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate.”); accord *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. 7:13-CV-2929-BHH, 2014 WL 6863550, at *4 (D.S.C. Oct. 31, 2014), report and recommendation adopted, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. Mar. 19, 2015).

are in the scope of the arbitration provisions. In other words, Plaintiff cannot “have it both ways” by relying upon certain terms of the Admissions Agreement when it works to her advantage and repudiating the Arbitration Agreement when it works to her disadvantage. *See Price, supra*, p. 12-13.

As described, the Plaintiff's allegations fall within the scope of the Arbitration Agreement. In accordance with the foregoing law, Plaintiff cannot assert claims against this Defendant based upon certain terms of the Admissions Agreement while repudiating the Arbitration Agreement, and should be prevented from doing so pursuant to the doctrine of equitable estoppel. Moreover, as is cited above, numerous courts hold that where a plaintiff receives the benefits of the contract, which Mr. Strong certainly did, the non-signatory is estopped from denying an arbitration agreement merely because he did not sign the contract under which he received all of the benefits.

iii. Coleman and Hodge are Distinguishable

To the extent Plaintiff argues the Admissions Agreement and Arbitration Agreement are not merged pursuant to *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018) and *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 350, 755 S.E.2d 450, 452 (2014), such reliance is misplaced.

In *Coleman*, Ann Coleman signed a number of documents, including arbitration agreements, when admitting her sister to a health care facility. 407 S.C. at 350, 755 S.E.2d at 452. Coleman brought suit after her sister's death, and the facility sought to compel arbitration. In determining that the arbitration and admission agreements in the case had not merged, the supreme court found, “On its face, this clause recognizes the ‘separatedness’ of the [arbitration agreement] and the admission agreement, not a merger of the two contracts. Moreover, the

[arbitration agreement] could be disclaimed within thirty days of signing while the admission agreement could not, evidencing an intention that each contract remain separate.” *Id.* at 452. “By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply.” *Id.*

Similarly, in *Hodge*, the admissions agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law. 422 S.C. 544, 813 S.E.2d at 302. Furthermore, like in *Coleman*, the arbitration agreement in *Hodge* recognized a separateness as it referenced the two documents separately, stating “[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement.” *Id.* Finally, the arbitration agreement in *Hodge* stated it could be revoked within thirty days, whereas the admission agreement contained no such indication. *Id.*

Unlike the arbitration agreements in *Coleman* and *Hodge*, the Arbitration Agreement and Admissions Agreement in the case at bar should not be considered “separate” for purposes of denying merger. Unlike *Coleman* and *Hodge*, the Arbitration Agreement in this case does not state that it can be revoked after it has been signed. Furthermore, it does not state that arbitration is a precondition to admission to the Facility.

Instead, in the present case, the agreements “were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction” and, therefore, the documents merged.” *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts*, *supra*, 268 S.C. at 88, 232 S.E.2d at 24). Specifically, the Admissions and Arbitration Agreements were signed by Ms. Murphy, on Plaintiff’s behalf, and the Facility on December 18, 2014. The documents were signed by the exact same people: Teresa Murphy as representative for Plaintiff and Chasity

Byars for the Facility. The documents were signed for the same purpose and transaction of establishing James Strong's residency at the facility. While the Admissions Agreement in this case does contain an "Entire Agreement" clause, unlike the admission agreements in *Hodge* and *Coleman*, the provision in this case does not separately reference the Arbitration Agreement (in fact, it doesn't refer to it at all). Accordingly, there is no language in either the Admission or Arbitration Agreement akin to the language in *Hodge* or *Coleman* to indicate the parties desired the documents be considered as separate contracts. As such, *Coleman* and *Hodge* are not controlling and this Honorable Court should compel Plaintiff's claims to arbitration pursuant to the contract. *Accord, Price*, Ex. 4, p. 13 – 15.

iv. The Arbitration Agreement is Not Unconscionable

Should Plaintiff contend this Arbitration Agreement is unenforceable because it is unconscionable, the law and facts surrounding Mr. Strong entering into this Arbitration Agreement and the clear language of the Agreement demonstrate this is clearly not the case.

As an initial matter, both state and federal courts in South Carolina have consistently ruled that arbitration agreements identical to the one *sub judice* are not unconscionable. See *McCutcheon, supra*, at 6* - *8; *Benson v. THI of S.C. at Charleston, LLC*, No. C.A. No. 7:11-CV-2613-HMH (D.S.C. Nov. 30, 2011); *Abrams, supra*; *Campsen, supra*; *Price, supra*, Ex. 4 at 15 – 16; (See also *Benson*, attached hereto as **Exhibit 7**).

Furthermore, anyone who enters into a written contract has a duty to read the contract which she signs. *Maw v. McAlister*, 252 S.C. 280, 284-285, 166 S.E.2d 203, 204 (1969). Anyone who is capable of reading and understanding, but fails to read a contract before signing is bound by the terms thereof. *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Furthermore, arbitration clauses are not unconscionable and will be enforced if a person who can

read fails to read the contract, regardless of whether he was advised of the arbitration terms by the contracting party. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding the plaintiff's failure to read an arbitration provision did not render it unconscionable even though the plaintiffs claimed they were not advised of those terms). Additionally, "inequality of bargaining power alone will not invalidate an arbitration agreement." *Id.*

The Arbitration Agreement clearly articulates that the resident entering into the Agreement is fully aware of his or her healthcare options and other potential providers of nursing home facilities. The Agreement states:

It is understood by Resident/Representative that he/she is not required to use the aforesaid Health Care Center for Resident's healthcare needs and that there are numerous other health care providers in the State where Health Care Center is located that are qualified to provide such care to Resident.

Ex. 2. Furthermore, on that same signature page, the Arbitration Agreement states clearly in bold lettering in a separate heading: "**I understand and agree that I am giving up and waiving my right to a jury trial.**" Ex. 2 (emphasis in original).

Since Mr. Strong's representative and agent, Teresa Murphy, had a duty to read and understand the documents she was signing on Mr. Strong's behalf under proper authority, she also had a duty to communicate those terms to Mr. Strong as his agent. To the extent she did not, Plaintiff cannot now claim that Mr. Strong was unaware of the terms of the Arbitration Agreement that Ms. Murphy voluntarily and with proper authority executed on her father's behalf.

Finally, should Plaintiff cite to 42 C.F.R. §483.10 in support of the assertion that a facility may not require additional consideration for admission to the facility, reliance upon this section of the federal regulations would be misplaced. The regulation states "[a] facility must not

require a resident (or his or her representative) to request any item or service as a condition of admission or continued stay.” 42 C.F.R. § 483.10(c)(i)(B). Arbitration agreements are clearly not contemplated as “items or services” under this section (rather the regulation refers to things such as dietary services, room maintenance, television, personal comfort items, etc.). *Id.* As also described, the Arbitration Agreement makes clear that the resident is free to seek health care services from another provider should he or she so wish. As such, the Arbitration Agreement is not unconscionable and should be enforced by this Court.

CONCLUSION

The FAA applies to this case as demonstrated by the arguments and authority set forth herein and, accordingly, arbitration must be compelled. Congress, through the FAA, established a strong federal policy in support of arbitration, requiring that courts “rigorously enforce agreements to arbitrate.” *Shearson/American Express v. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332, 2337 (1987). Where the FAA governs, and where the dispute is fairly covered under the terms of a written arbitration provision, a court called upon to do so must compel arbitration of that dispute. Courts are not at liberty to ignore or decline to enforce a valid arbitration agreement. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 105 S. Ct. 1238 (1985). The United States Supreme Court has stated:

By its terms, the [FAA] leaves no room for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on the issues as to which an arbitration agreement has been signed.

Id.

Furthermore, both state and federal courts in South Carolina have consistently upheld the validity and enforceability of arbitration agreements like the one at issue in this case. Mr. Strong is bound to arbitrate his claims against the Facility under the theories previously set forth in this

supporting Memorandum. Accordingly, this Defendant respectfully requests that this Court enter an Order either dismissing or staying the pending action and compelling arbitration.

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Perry M. Buckner, IV

J. Joseph Owens

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*Attorneys for the Defendant THI of South Carolina
at Rock Hill, LLC*

Charleston, South Carolina

Dated: August 28, 2018

ADMISSION AGREEMENT - SOUTH CAROLINA

RESIDENT NAME:

Isaac Strong

RESIDENT NUMBER:

300921

DATE OF ADMISSION:

December 22nd 2014

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among Magnolia Manor Book Hill ("Facility"), Isaac Strong ("Resident") and/or _____ ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative").

WHEREAS, the parties wish to admit Resident to Facility and hereto agree as follows:

I. GENERAL CONDITIONS

1. **Inducement:** Resident and/or Representative verifies that all information submitted to Facility, including without limitation, financial information, medical history and medical diagnosis, is true and correct and acknowledges that providing false information constitutes a breach of this Agreement.
2. **Personal Property:** It is understood that Facility is not responsible for either damage to or theft/loss of Resident's valuables, monies or clothing unless the item(s) are held in trust by Facility and the damage, theft, loss was caused by the negligent or willful conduct of Facility personnel. Personal property will not be considered to be held in trust unless the policies and procedures outlined in the *Admission Handbook*, which is made a part of this Agreement by reference herein, and any future amendments thereto, have been followed. Facility reserves the right to prohibit certain personal effects, funds or other property in accordance with state and federal law. Facility is not liable for either damages to or theft/loss of any personal belongings or personal care items, such as dentures, hearing aides and eyeglasses, except with respect to damage, theft or loss caused by the negligent or willful conduct of Facility personnel.
3. **Emergency Care:** In case of an emergency and Resident's personal physician is not available, Resident and/or Representative allows Facility to retain a physician on Resident's behalf. The physician will bill Resident directly and Facility will not be responsible for payment of the bill for such service.
4. **Representative:** When Resident has a Representative, Representative will act on Resident's behalf for all purposes permitted under applicable law. Representative will pay all fees and charges incurred hereunder by or on behalf of Resident using proceeds from Resident's assets or estate. Representative may act in more than one capacity and will be bound by the applicable terms and conditions of this Agreement. Except when Representative has access to Resident's assets, or as otherwise expressly provided to the contrary herein, or as permitted by state or federal law, Representative will not become personally liable for the payment of Resident's fees and charges by signing this Agreement. To the extent possible, Resident acknowledges and consents to the execution of this Agreement by Representative.
5. **Terms and Conditions:** By signing this Agreement, Resident and/or Representative agrees to comply with all terms and conditions set forth in this Agreement and Facility's policies, as same apply and as may change from time to time.

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FFSC001 South Carolina Admission Agreement (Rev. 6/2009)

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II. AGREEMENT FOR CARE

A. FACILITY AGREES TO:

1. Admit Resident upon receipt of a physician's order; assist in obtaining physician services if a personal physician becomes unavailable; obtain emergency physician services when required. *Resident is not deemed admitted until such time as all agreements required by law and Facility have been appropriately executed.* This provision may be waived in writing by Facility, at its sole discretion.
2. Maintain written records of financial transactions with Resident and/or Representative responsible for payment. Resident has the right to have personal funds held in trust in accordance with applicable state and federal law, as may be amended from time-to-time.
3. Furnish room, routine meals, nursing care, personal care, or custodial care to Resident in accordance with applicable State and Federal law. This provision expressly excludes extraordinary services, including but not limited to, physician care, private duty nursing, private sitters, specialty foods and therapies not required by law. Resident will be placed in a semi-private room, absent medical need for a private room as determined by Facility staff. Residents residing in private rooms will be billed accordingly.
4. Assist in applying for private insurance benefits, but not to accept assignment thereof unless otherwise noted as an exception herein.
5. Assist Resident and/or Representative in applying for Medicare or Medicaid benefits where applicable.
6. Provide assistance in daily living and restorative nursing care in accordance with Resident's care plan, where appropriate. Resident and/or Representative reserves the right to refuse said treatment. If said treatment is refused, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
7. Arrange for transfer of Resident to a hospital upon physician's order or in an emergency situation. Expenses of transfer and care of Resident at the hospital are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment of those services.
8. Obtain and administer medication as prescribed. Expenses for the cost of obtaining the medications are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment for the medications. Resident and/or Representative has the right to refuse medication. If Resident refuses medication, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
9. Provide an activities program for Resident, components of which will be at the discretion of Facility.
10. Furnish Resident bed linens and hospital gowns. All personal clothing will be supplied by Resident or Representative and will be properly labeled as outlined in the *Admission Handbook* for identification purposes.

Original: Business File • Photocopy: Resident/Representative

B. RESIDENT AND/OR REPRESENTATIVE AGREE(S) TO:

1. Provide complete and accurate information regarding Resident to Facility as requested. This information must be updated on a regular basis and when any substantial change occurs.
2. Provide Facility, prior to or at the time of admission, orders from Resident's attending physician for the immediate care of Resident, medical history, physical examination, current physician's orders and physician's statement that Resident is free from communicable disease at the time of Resident admission or within the required time limitation. If Resident is suffering from communicable disease, Resident and/or Representative will provide a physician's certificate that the disease is not in a transferable stage, or that adequate or appropriate isolation measures are being carried out to control transmission of the disease. Facility retains the right to refuse admission to any Resident suffering from a communicable disease, whether that disease is in a transferable stage or not, so long as said refusal is in compliance with state and federal law. Resident's attending physician will provide, at Resident's expense, a physical examination performed either within five (5) days prior to admission or within forty-eight (48) hours following admission.
3. Allow Facility staff to perform such functions as may be necessary to maintain Resident's well-being, including but not limited to, assistance with bathing and hygiene, dressing, toileting, daily activities, performance of restorative nursing care as appropriate (including bowel and bladder training), and the performance of therapies determined necessary by a physician, but limited to those therapies for which Resident has funding. Resident and/or Representative has the right to refuse medication and treatment prescribed by Resident's physician. In accordance with the policies of Facility, in the event that Resident and/or Representative refuses to abide by the physician's orders, Facility retains the right to discharge Resident from Facility if, in the judgment of appropriate Facility staff, it is determined that discharge or transfer is appropriate under applicable federal and state law. In addition, if Resident and/or Representative refuses to abide by the physician's order, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
4. Pay all fees and charges described in this Agreement upon the terms agreed to herein.
5. Adhere to Facility's *Bed Reservation Policy* as outlined in the *Admission Handbook* and the *Facility's Policy and State Requirements for a Temporary Leave Bed-Hold*.
6. Provide and be responsible for personal items of clothing and property.
7. (a) Vacate/remove Resident from Facility within thirty (30) days, upon receipt of a Notice of Discharge and Transfer for any of the reasons required or allowable under state or federal law; (b) cooperate with Facility's efforts to locate alternative placement; (c) Vacate/remove Resident from Facility in less than thirty (30) days if the situation warrants immediate removal. All transfers and discharges will be carried out in accordance with state and federal law.
8. In the event Resident no longer requires Medicare or Medicaid services, Resident and/or Representative agree that Resident will be relocated to a bed certified for the appropriate level of care needed. Please note, room-to-room changes within the same certified unit of Facility are not considered a transfer for purposes of this section.
9. Notify Facility at least three (3) days in advance of Resident's voluntary discharge from Facility, excepting discharge as the result of an emergency. If advance notice is not provided, Resident and/or Representative will be liable for payment of three (3) days.

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10. Accept full responsibility for, absolve and release Facility, its agents, Medical Director and/or attending physicians from any liability for any event, including but not limited to injury, illness, accident, or deterioration of medical condition suffered by Resident when Resident is not on Facility premises and is not under the care, custody and/or supervision of Facility and its staff.

11. Abide by Facility's policies and procedures as amended from time to time and outlined in the *Admission Handbook* and other Admissions materials, which are made a part of this Agreement by reference herein, as well as the Resident Rights under applicable state law and any future amendments. Facility's rules, regulations, policies and procedures shall not be construed as imposing contractual obligations on Facility, and are subject to change.

12. Cooperate with Facility in securing third-party payments, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments.

13. In the event Resident is transferred or discharged, Resident and/or Representative will be responsible for collecting and moving Resident's personal property within forty-eight (48) hours of the transfer/discharge. If the property is not moved, Facility will remove all property from the Resident's room and store same at Resident's and/or Representative's cost and risk. Facility is not responsible for any damage, theft or loss to Resident's property during this period of time. Unclaimed property will be disposed of in accordance with applicable state law.

14. Resident and/or Representative will be responsible for any damage caused to Facility property by Resident or his/her guests beyond normal wear and tear and will pay for such damage, based on the initial charge to Facility for repair or replacement.

15. Resident and/or Representative will be responsible for obtaining adequate information from Resident's attending physician before any extraordinary treatment. Absent knowledge that the consent was not informed, Facility staff may rely upon the physician's written order as evidence that the physician obtained informed consent.

16. Resident and/or Representative will be responsible for any damages or injuries caused by Resident to other persons, and will indemnify and hold Facility harmless from any claims, actions or proceedings against Facility resulting from Resident's actions or omissions.

17. In the event of Resident's death, Representative agrees to authorize Facility to notify the person(s) designated by Resident and/or Representative. Additionally, Facility is authorized to transfer Resident's body to the designated funeral home. If Resident has not designated a funeral home, Resident's family will be consulted and Resident's body will be transferred in accordance with their wishes. All costs associated with the transfer and funeral expenses will be the responsibility of Resident's estate.

18. In the event Resident becomes incapable of making medical decisions and no guardian, proxy, surrogate or agent under a valid durable power of attorney for health care or no person qualified under the South Carolina Adult Health Code Consent Act is available, Facility is authorized to seek court appointment of a legal guardian. All associated costs and attorneys' fees will be borne by Resident or Resident's estate.

19. Resident and/or Representative agree that they will present grievances in an orderly manner. Information on Facility's Grievance Procedure can be found in the *Admission Handbook* and the *Resident Rights* under applicable state law. Nothing herein will preclude Resident or any other party from filing a complaint with any governmental agency, but will be ancillary thereto. Facility will review and investigate all complaints in a timely manner.

Original: Business File • Photocopy: Resident/Representative

20. Resident and/or Representative will be responsible for paying all costs, expenses and reasonable attorneys' fees, whether or not suit is brought, in the event costs, expenses, and/or attorneys' fees are incurred by Facility in the collection of sums due from and owed by Resident or any other party on Resident's behalf to Facility.

III. FINANCIAL AGREEMENT

Resident and/or Representative will be responsible for immediate payment of all charges incurred as follows:

1. Room and board, including meals, laundering of linens and bedding, nursing care, personal care or custodial care for the health, grooming and well-being of Resident in ☐-private ☒-semi-private accommodations, for a basic fee of \$ 160.00 per day, payable one month in advance. In the event Resident is unable or unwilling to receive any of the services included in the room and board charge, such as meals, laundry, etc., no adjustment will be made to the daily rate. Payment for all invoices is due upon receipt. In the event public aid funds are denied for services for which coverage has been expected, Resident and/or Representative will be responsible for payment and will pay such charges upon receipt of invoice. Resident and/or Representative agree(s) to pay any rate change charged to Resident so long as each party to the Agreement is given at least thirty (30) days written notice of the new rate, including any increases or adjustments in Resident's liability by any financial third party or regulatory agency. Additional notice may be provided under applicable state regulations.

- a. Additional services and items may be provided at a separate charge. The current rates charged for additional services and items are set out in Exhibit B. These charges may change from time to time. Resident and/or Representative agree(s) to pay the charges in effect at the time that the service is performed or the item supplied. Facility agrees to give thirty (30) days advance notice to Resident and/or Representative of any price changes.
- b. Services or items not provided by Facility may be supplied by third-party vendors. Facility will assist Resident and/or Representative in securing such items or services, but will assume no liability for providing the services and makes no representations or warranties regarding the quality of such items or services. Facility assumes no liability for payment of any services provided by third-party vendors.
- c. The daily rate will be charged for the day of admission. Private pay residents will not be charged the daily charge for the day of discharge if discharge occurs before 12:00 p.m. unless the discharge is for emergency medical treatment. Medicare and Medicaid Residents will not be charged a daily charge for the day of discharge. The daily rate will be charged, if applicable, on the day of death.

2. Facility may charge a private pay resident a late payment fee of interest at a rate equal to the lesser of (a) eighteen percent (18%) per annum or, if lesser, the highest percentage allowed by law, on all charges (exclusive of interest) for which resident is liable that are outstanding for more than thirty (30) days from the date on which the resident was billed for said charges or (b) the amount set forth in any Agreement Addendum.

3. Refunds will be made for any prepaid room and board services for which payment has been received. The refund of the unused portion of prepaid fees and charges will be made within thirty (30) days following Resident's discharge. In the event of Resident's death, refunds will be made in accordance with

Original: Business File • Photocopy: Resident/Representative

state and federal law. Any personal property belonging to Resident in Facility at the time of Resident's discharge or death will be released in accordance with Section II-B-13 herein.

4. In the event Resident leaves Facility and has personal funds on account, Facility may deduct any outstanding monies due to Facility from said personal funds. The remainder will be distributed in accordance with applicable state and federal law.

5. If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative shall pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

IV. TERMINATION

1. Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.

2. Except as otherwise provided herein, Facility may terminate this Agreement by providing at least fifteen (15) days advance notice to Resident and/or his/her legal representative.

3. This Agreement may be terminated immediately upon the occurrence of any of the following.

- a. Resident's condition has improved sufficiently so that he/she no longer requires the services provided by Facility.
- b. Resident's physical or mental condition changes and he/she requires a higher level of care which cannot be provided by Facility.
- c. Resident's death
- d. The safety or health of individuals in the Facility is endangered.
- e. Resident and/or his/her legal representative has failed to pay for his/her stay.
- f. Facility ceases to operate or is no longer able to provide services to Resident.
- g. Sanctions or remedies imposed by the Department.

4. In the event Facility terminates this Agreement through an involuntary transfer or Discharge, Facility shall provide appropriate notice and discharge planning as required by State and Federal law.

V. MEDICAID BENEFICIARIES

1. Eligibility. Eligibility for Medicaid-sponsored long-term care services is based on income and medical necessity. To qualify for assistance through the Medicaid program, a nursing home patient must need intermediate or skilled nursing care as determined through an assessment conducted by Medicaid program staff. The fact that a patient has already been admitted to a nursing home is not considered in this determination. It is possible that a patient could exhaust all other means of paying for nursing home care and meet Medicaid income criteria but still be denied assistance due to the lack of medical necessity.

It is recommended that all persons seeking admission to a nursing home be assessed by the Medicaid program prior to admission. This assessment will provide information about the level of care needed and the viability of community services as an alternative to admission. The Department may charge a fee, not to exceed the cost of the assessment, to persons not eligible for Medicaid-sponsored long-term care services.

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2. Covered Services If Resident is a Medicaid recipient, the Medicaid Program will reimburse Facility for certain skilled services ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to: hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream, toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, and basic personal laundry.

3. Non-Covered Services

- a. Medicaid is a cost-sharing program. Resident's monthly income must be contributed to the cost of his or her care. Medicaid determines how much of the Resident's monthly income must be paid to the Facility (also called "patient liability"). To the extent permitted by law, Resident's monthly Social Security and pension funds, minus the personal allowance retained by Resident (or other allowance as set by law), will be paid to Facility.
- b. Resident and/or Representative may purchase from Facility certain miscellaneous products and services that are not covered by Medicaid. An itemized list of fees for these additional products and services is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office.

4. Assignment of Benefits In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicaid for services rendered by Facility and authorizes Facility to receive payments from Medicaid pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicaid refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative will remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from Medicaid.

5. Benefit Disallowance If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

6. Application/ Appeals Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VI. MEDICARE BENEFICIARIES

1. Covered Services If Resident is a Medicare recipient, the Medicare Program will reimburse Facility for certain skilled services such as nursing services and certain therapies ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to, hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream,

Original: Business File • Photocopy: Resident/Representative

toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, basic personal laundry and medically related social services.

2. Non-Covered Services. Resident and/or Representative will be required to pay certain other "Allowable Charges" which include, but are not limited to:

- a. Fees for certain products and services not covered under the Medicare program. Fees for such services will be identical those charged to private pay residents of Facility for the same products and services.
- b. Fees for certain products and services that are more expensive than the products and services covered under the Medicare program (e.g., a private room), as requested by a Resident and/or Representative. Fees charged for the more expensive products and services will be based on the difference between the fees charged to private pay residents of Facility and the customary charge for the same products and services under Medicare. Facility staff will inform Resident and/or Representative requesting additional or more expensive products or services that there will be a specified charge.
- c. Certain deductibles and co-insurance amounts under the Medicare Program.

3. Assignment of Benefits. In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicare for services rendered by Facility and authorizes Facility to receive direct payments from Medicare pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicare refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative shall remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from Medicare.

4. Benefit Disallowance. If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

5. Application/ Appeals. Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VII. PRIVATE PAY/INSURANCE

1. Routine Services. If Resident is paying for his/her stay privately OR if he/she is having his/her stay paid for through a third-party insurance carrier, Resident and/or Representative will reimburse Facility for routine services ("Routine Services") which include: routine nursing services; routine dietary services; routine activities programs; and routine room and bed maintenance services. Beauty shop fees are not included in the daily rate. Resident and/or Representative shall pay a deposit of two months' basic room and board prior to admission. Each subsequent monthly payment is due on or before the 10th day of the month.

Original: Business File • Photocopy: Resident/Representative

2. Ancillary Services. Resident and/or Representative may purchase services and products that are not included in Routine Services from Facility. An itemized list of fees for these additional services and products is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office. Resident and/or Representative shall pay for ancillary services at the end of the month in which such services are rendered.

3. Assignment of Benefits. In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from any insurance company paying benefits to Resident for services rendered by Facility and authorizes Facility to receive payments from such insurance company pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent such insurance company refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative shall remain liable for payment for these services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from such insurance company.

4. Benefit Disallowance. If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

5. Application/ Appeals. Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VIII. NOTICES

All notices, consents, approvals and the like required to be given hereunder shall be given in writing to Facility to the address below or such other address as Facility may designate:

Magnolia Manor
127 Murrah Dr
Rock Hill, SC
29732

All notices, consents, approvals and the like required to be given to Resident and/or Representative shall be given in writing to Resident and/or Representative to the address below or at such other address as he/she may designate:

Notice may be given via facsimile, e-mail or U.S. Mail, certified mail return receipt requested.

Original: Business File • Photocopy: Resident/Representative

IX. GOVERNING LAW

This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located. This Agreement will be binding and inure to the benefit of each of the undersigned parties and their respective heirs, personal representatives, successors and assigns.

X. SEVERABILITY

If any provision(s) of this Agreement will be deemed to be illegal or otherwise unenforceable, all other provisions will remain in full force and effect as if the invalid provision had not been part of this Agreement.

XI. CAPTIONS

Captions are for the purpose of reference only and do not govern, limit, modify, enlarge or in any manner affect the scope, meaning and intent of the provisions of this Agreement, nor will such captions be given any legal effect.

XII. MODIFICATIONS

Facility reserves the right to unilaterally modify this Agreement to conform to law and regulations that may be passed from time to time. Reasonable notice, considering all of the circumstances, will be given to Resident and/or Representative when any change is made in accordance with this paragraph. Any modification, except as otherwise specifically reserved herein, will be made in writing and signed by all relevant parties.

XIII. WAIVER

Facility reserves the right to waive any obligation of Resident under the provisions of this Agreement in its sole and absolute discretion. No term, provision or obligation of this Agreement will be deemed to have been waived by Facility unless in writing, signed by Facility. Any waiver of any provision of this Agreement will not be deemed a waiver of any other term, provision or obligation of this Agreement and the other obligations of Resident and/or Representative and this Agreement will remain in full force and effect.

XIV. RESIDENT

Use of the term "Resident" herein includes the Resident and any person with legal authority to handle Resident's funds or property and/or make medical decisions depending on the context in which the term is used.

XV. ASSIGNABILITY

This Agreement is fully assignable by Facility in the event that Facility is sold and the license is transferred such that a new licensee operates Facility. This Agreement, at Facility's option, may be assigned to Resident and/or Representative, may be automatically assigned to the new licensee and will be fully binding upon Resident and the new licensee.

Original: Business File • Photocopy: Resident/Representative

XVI. INFORMATION RELEASE/BILLING AUTHORIZATION

1. Resident information included in Facility's records is confidential. Unauthorized persons will not be allowed to review these records without Resident's and/or Representative's consent, except as required or permitted by law. Resident's records are the sole property of Facility, but may be reviewed by authorized person(s) by appointment, in the presence of a Facility representative, as permitted by applicable state or federal law. Authorized persons may request and purchase photocopies of the medical record or any portion thereof with two (2) business days notice, unless a longer time period is permitted under state law. The fees for reproduction will be billed at the current rate permitted by applicable state or federal law.

2. Resident and/or Representative authorize(s) Facility to release all or part of Resident's protected health information ("PHI") as defined by the Health Information Protection and Portability Act of 1996 to any person or entity which has or may have a legal contractual obligation to pay all or a portion of the costs of care provided to Resident, including but not limited to Medicare, Medicaid, hospital or medical service companies, insurance companies, workers' compensation carriers, welfare funds and/or Resident's employer.

3. Resident and/or Representative authorize(s) Facility to release all or any part of Resident's PHI to any medical professional or institution responsible for Resident's medical or nursing care when Resident is receiving treatment, is transferring, or is discharged from Facility.

4. Resident and/or Representative authorize(s) Facility to send and release PHI to Medicare, Medicaid or other third-party payers for the purpose of receiving payment of covered services. Resident and/or Representative further authorize(s) and request(s) that Medicare, Medicaid, their representatives, their intermediaries and other third-party payers send payment for covered services directly to Facility. This authorization does not release Resident and/or Representative from financial responsibility for charges that may be non-covered or denied by Medicare or Medicaid, or other third party payer.

XVII. MISCELLANEOUS

1. In the event Resident is unable to physically sign his/her name, Resident will sign below by making a mark. If this is the manner in which the Agreement is signed, the witness will verify that Resident was aware that he/she was signing an Agreement and that it was his/her intent to sign.

2. In the event Resident has appointed a Representative to control his/her assets and even if such appointment has not been made through a legal document, Representative will be fully bound to the extent of those assets to the terms of this Agreement, to the extent allowed by law in the State where Facility is located.

3. A copy of any court order appointing a guardian for the Resident's person or estate must be supplied to Facility. This court order must appoint the legal guardian to sign contracts on behalf of Resident. The legal guardian will only be given such rights under this Agreement as are set out in that court order. In addition, the legal guardian must file with Facility on an annual basis the same financial documents filed with the court showing the resources available to pay for Resident's care.

4. Representative will supply Facility with a copy of any power of attorney, durable power of attorney, durable power of attorney for health care or other legal documentation permitting him or her to act on Resident's behalf. It is understood that the Representative will pay for the care of Resident in accordance with this Agreement to the extent that he/she has access to Resident's income or resources. Failure to utilize the Resident's income or resources for payment to Facility may subject Representative to legal action. Facility may require an accounting from time to time as to the type of said resources. Failure to supply such an accounting will be a breach of this Agreement.

Original: Business File • Photocopy: Resident/Representative

5. In the event that an individual voluntarily agrees to become legally responsible for payment for the care and treatment of Resident, said Representative will be fully bound to the terms of this Agreement. Please note, Facility does not require a third-party guarantor.

6. Facility reserves the right to apply its indigent care policy, as appropriate, to the Resident.

XVIII. ENTIRE AGREEMENT

I/we hereby acknowledge that I/we have read this page and all preceding pages of this Agreement and agree that this Agreement represents the entire agreement and understanding between the parties and supersedes all previous representations, understandings or agreements, oral or written, between the parties and shall not be amended except by written agreement of the parties.

By signing below, I/we further acknowledge that I/we have made the above promises and representations in order to induce Facility to enter into this Agreement. The parties further understand that, by signing this Agreement, Facility is relying upon the truthfulness of the promises and representations I/we have made. The parties further agree that if any term or provision of the Agreement is found by a court or agency of competent jurisdiction to be legally unenforceable, the term and provision will be deemed severed from the Agreement and the remaining terms or provisions will be fully enforceable.

The undersigned further acknowledges that he/she has received and read the *Admission Handbook* and other Admissions materials and understand that these documents are made a part of this Agreement by reference herein.

Signature of Resident

Date

Printed Name of Resident

Resident Social Security Number

Witness Signature

Date

Printed Name of Witness

OR

[Signature]
Signature of Representative, if any

12-18-14
Date

Teresa Murphy
Printed Name of Representative

Witness Signature

Date

Printed Name of Witness

Representative Social Security No. (Voluntary Info.)

[Signature]
Signature of Facility Official

12/18/14
Date

Chastity Byars
Printed Name of Facility Official & Title

Original: Business File • Photocopy: Resident/Representative

Acknowledgement

I acknowledge I have received the following information and/or documentation, which fully explains my rights under Federal and applicable state laws as a nursing home resident, and the rules and regulations governing my conduct as a resident. *(Resident/Representative should check and initial each item listed as it is furnished and explained.)*

- ☒ J.M. A written copy of Facility's Admission Agreement
- ☒ J.M. A written copy of Facility's Handbook, which includes the facility's rules/regulations governing resident conduct, as well as written explanations of the following: (Admission, Discharge and Readmission policies; Bed assignment, reservation, and refund policies; Protection of Resident Funds; Resident's Rights under Federal law; Bed Hold policies; Policies/procedures for bringing personal items into the facility and securing personal belongings, valuables and money; Special Services, such as laundry, barbers and activities; Policies/procedures for filing grievances; Medicare/Medicaid Funding; Smoking Policies)
- ☒ J.M. A written copy of resident's rights under applicable state laws.
- ☒ J.M. A written copy of facility's policy on Advance Directives.
- ☒ J.M. A written explanation of the charges for services provided by facility and outlined in the Handbook and those services offered on an as-needed basis.
- ☒ J.M. A separate listing of local and government resources as furnished by the state Ombudsman and any other advocacy groups as required by state/federal law.
- ☒ J.M. A separate listing of all medical professionals available to provide on-site services.
- ☒ J.M. A written copy of facility's policy on the use of physical or chemical restraints, including bed rails.
- ☒ J.M. A written copy of facility's Notice of Privacy Practices.

By my signature below, I agree to abide by all facility's rules, policies, terms and conditions as explained to me and provided above, as well as all federal and applicable state laws.

Resident Signature _____ Date _____

Teresa Murphy 12.18.14
Legal Representative Signature, if any _____ Date _____

Printed Name of Resident _____

Teresa Murphy
Printed Name of Representative _____

Witness Signature _____ Date _____

Printed Name of Witness _____

Chasity Byars 12/18/14
Facility Representative Signature _____ Date _____

Chasity Byars
Printed Name and Title _____

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative

AUTHORIZATIONS, CONSENTS & ACKNOWLEDGMENTS

Please read, review and acknowledge each the following:

Treatment/Health Care Professionals:

Authorization for Treatment

- ☐ J.M
(initial) I hereby authorize Facility's professional staff to administer nursing procedures, podiatric procedures, therapies, skin scrapings, nonsurgical dental procedures and laboratory and x-ray procedures on me/Resident. I understand that I may withdraw this consent at any time by notifying Facility in writing. I further understand that an additional consent will be required for any surgical treatment or for any treatment requiring the use of general anesthesia.

Medical Treatment

- ☐ J.M
(initial) It is understood and agreed that Resident is under the control of his/her elected physician and/or his/her designee and that Facility is not liable for any act or omission as a result of following instructions of said physician(s)/designee(s). Resident consents to diagnostic imaging procedures, laboratory procedures, or medical treatment rendered to Resident under the general and special instructions of Resident's physician or physician's designee.

General Duty Nursing

- ☐ J.M
(initial) Facility provides general duty nursing care. Under this system, nurses are called to the resident's bedside by a signal system. If Resident is in such condition as to need continuous or special duty nursing care, it is agreed that Resident, Resident's legal representative or Resident's physician(s) will make the necessary arrangements for such care. It is understood and agreed that Facility shall not, in any way, be responsible for the failure to provide such care and is hereby released from any and all liability arising from the fact Resident is not provided with such care.

Independent Status of Health Care Providers and their Agents/Designees

- ☐ J.M
(initial) Resident and/or Resident's legal representative acknowledges that any and all health care providers and their agents/designees are not agents or employees of Facility. Resident and/or Resident's legal representative understands and agrees that each health care provider or their agent/designee who renders services to Resident will independently bill and collect fees for these services. Resident and/or Resident's legal representative agrees and understands that the health care provider's bills will be separate and apart from Facility's.

Selection of Medical Professionals:

You have the right to use your personal health care providers during your stay. In the event you do not have a current provider, the facility has a list of independent providers who are available to provide on-site care. If you have difficulty contacting any of these professionals, please notify our staff. Please indicate your choice of health care providers below, including the provider's phone number and address.

PHYSICIAN:

Name: Dr. James Jewell
Address: 1147 Ebenezer Rd
Phone: 803 329 6648

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative

DENTAL ☐ Yes ☐ No Examination Charge \$ _____

I would like to receive dental services at the above charge and have selected the following provider:

Name: _____
 Address: _____
 Phone: _____

VISION ☐ Yes ☐ No Examination Charge \$ _____

I would like to receive vision services at the above charge and have selected the following provider:

Name: _____
 Address: _____
 Phone: _____

PODIATRY ☐ Yes ☐ No Examination Charge \$ _____

I would like to receive podiatry services at the above charge and have selected the following provider:

Name: _____
 Address: _____
 Phone: _____

Self-Administration of Medications

Please indicate whether or not you wish to invoke your right to self-administer medications prescribed by your physician as outlined in the Admission Handbook.

- ☐ _____
 (initial) I wish to invoke my right to self-administer medications prescribed by my physician. I authorize and consent to an evaluation by the Interdisciplinary Team in order to determine my ability to carry out this responsibility.
- ☐ J.M.
 (initial) I wish to waive my right to self-administer medications. I request and authorize Facility's nursing staff to administer medications prescribed by my physician. I understand that I am entitled to this right and that I may invoke this right any time in the future by written notification to the facility.

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative

Personal Property/Valuables/Money:

- ☐ J.M
(initial) I acknowledge that I have received, read or had read to me, and understand Facility's policy on personal property, valuables and money. I understand that all personal belongings should be labeled properly and entered on a personal inventory list. I understand that all items removed from or brought into the facility after admission should be documented on the inventory list and that missing items must be reported to appropriate staff as soon as possible.
- ☐ J.M
(initial) I acknowledge and understand that Facility is not responsible for damage to or theft/loss of any personal property/valuables/money not kept in compliance with Facility policies.

Deposit of Personal Funds:

Please indicate below whether or not you wish to deposit personal funds with Facility in accordance with the *Protection of Resident's Funds* policy outlined in the Admission Handbook. **Please note that you are not required to deposit any funds with the facility.**

- ☐ J.M
(initial) I do not wish to deposit personal funds with the facility at this time.
- ☐ _____
(initial) I authorize Facility to accept, hold and account for my personal funds in accordance with the policies outlined herein. I acknowledge that I have the right to revoke this authorization at any time upon written notice to Facility. I acknowledge that authorized State agencies may audit this account, regardless of my payer source.

Beneficiary Designation: (THIS PORTION TO BE FILLED IN BY RESIDENT ONLY)

In the event of my death, I authorize Facility to transfer all personal funds and property held by Facility to the following person(s): _____ If I have not named a beneficiary or the beneficiary cannot be located, I understand that Facility will hold and pay the funds in line with the State's regulations.

Advance Directive Acknowledgment:

- ☐ _____
(initial) I acknowledge that I have received, read or have had read to me, and understand *Facility's Policy and State Requirements for Advance Directives* and have executed the following advance directive measures and **a photocopy has been provided to the facility for inclusion with my Medical Records:**
- ☐ Living Will
 - ☐ Durable Power of Attorney for Health Care or similar agent designation
 - ☐ "Do-Not-Resuscitate" Identification (CPR)
 - ☐ Other: _____
- ☐ J.M
(initial) I acknowledge that I have received, read or have had read to me, and understand *Facility's Policy and State Requirements for Advance Directives* and have elected **NOT** to execute any advance directive at this time, including DNR Identification. I understand that facility staff will respond to medical emergencies with CPR measures and a full code will be instituted.

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative

Special Services:

Please indicate whether or not you authorize the following services to be provided. All associated fees will be charged to your account:

Telephone	☐ Yes	☐ No	☐ N/A	Charge \$ _____
Television	☐ Yes	☐ No	☐ N/A	Charge \$ _____
Newspaper	☐ Yes	☐ No	☐ N/A	Charge \$ _____
Laundry	☐ Yes	☐ No	☐ N/A	Charge \$ _____
Beauty Shop	☐ Yes	☐ No	☐ N/A	See charge list
Other(s) (Please Specify Below)				
_____	☐ Yes	☐ No		Charge \$ _____
_____	☐ Yes	☐ No		Charge \$ _____

Photographs by State/Federal Survey Agencies

I acknowledge and understand that, during my/Resident's stay, Federal and/or State surveyors (investigators) may take my/Resident's photograph as part of their independent survey/investigation process and in line with conditions of my/Resident's participation in the Medicare and/or Medicaid program. I understand that, in line with CMS guidelines, the surveyors must obtain written consent from Resident or his/her surrogate **before** any photographs are taken. I understand that the Federal/State Survey Agency is wholly responsible for acquiring and securing any photographs they may take.

☐ J.M.
(initials) I acknowledge and understand that neither Facility nor its parent, affiliates, officers, directors, employees, attorneys, assigns or any other person acting on its behalf, has any oversight or responsibility for the surveyors actions or inactions as it relates to taking photographs for their independent investigations.

Photograph/Audiotape/Videotape

☐ Yes J.M. ☐ No _____
(initial) (initial)

I hereby authorize Facility to photograph/audiotape/videotape me/Resident for its use in resident identification, infection control, surveillance and/or other medical purposes. I understand that, if the facility wishes to photograph/audiotape/video tape me for any other reason, (activities, marketing, media coverage, etc.), the facility will secure permission from me through a separate written authorization.

Posted Information ☐ Yes J.M. ☐ No _____
(initial) (initial)

To better serve you and meet your health care needs, permission is needed to post information regarding your/Resident's health care needs within your room and the facility as needed. The information to be disclosed will be the minimum amount necessary and shall serve as a means of communication, enabling staff to provide service while, at the same time, ensuring your/Resident's rights to privacy. Information to be disclosed may include, but not be limited to, therapy schedules, activities of daily living, ambulation/mobility parameters, swallowing and aspiration precautions, do-not-resuscitate orders.

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative

Authorization to Release and Obtain Information

☐ Yes SM ☐ No _____
(initial) (initial)

I hereby authorize the facility to release and/or obtain medical information or other necessary data which may be necessary for my/Resident's continued treatment and care at the facility, including but not limited to the filing of insurance claims in my/Resident's/Facility's interest. I further authorize the release of information, medical or otherwise, to any government agency without my prior approval or that of my representative, if any.

Authorization to Receive/Open Mail

☐ Yes SM ☐ No _____
(initial) (initial)

I hereby authorize Facility to open all mail received by me/Resident. Further, I would like this mail to be read to me/Resident upon receipt. You have the right to revoke this authorization at any time upon written notice to the facility.

Resident Signature

Date

Teresa Murphy

12.18.14

Printed Name of Resident

Teresa Murphy

Legal Representative Signature, if any

Date

Printed Name of Representative

Witness Signature

Date

Printed Name of Witness

Chasity Byars 12/18/14

Facility Representative Signature

Date

Chasity Byars

Printed Name and Title

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative

FINANCIAL ACKNOWLEDGMENT AND QUESTIONNAIRE

Resident Name: Isaac Strong Date of Admission: 12/22/2014

By his/her initials on each line where indicated and by his/her signature below, Resident/Representative acknowledges and understands that:

Medicare Coinsurance:

- _____ Medicare Part A coinsurance is \$152.00 per day beginning with day 21 through day 100 of a covered skilled benefit period.
- _____ Medicare Part B coinsurance is 20% of the total Fee Schedule charge.

Medicaid/Medicaid Pending:

- J.M. Medicaid application must be completed on Admission or within 7 days of Admission based on State specific guidelines.
- J.M. Name and phone number of Caseworker: _____
- J.M. Total assets must be below \$2000 in order to apply for Medicaid coverage.
- J.M. Resident/Representative will notify Facility of intent to apply for Medicaid Coverage 45 days prior to application. In the event of Medicaid application the Resident/Representative understands the resident must reside in a Medicaid certified bed within the facility.
- J.M. Failure to pay ANY private portions due and owing on behalf of a resident is cause for a resident's discharge from the facility and cause for possible legal action.

HMO/Insurance/Medicare Advantage Plan Co-pay and/or Deductible:

- _____ Co-pay is \$ _____ per day Comments: _____
- _____ Deductible is \$ _____ Comments: _____

Private Payers:

- _____ Payment amount due today \$ _____
- _____ Private pay residents must pay Room and Board charges one month in advance and private pay residents are responsible for all ancillary charges (supplies, medications, etc.).
- _____ Resident/Representative is responsible for payment of all personal items (barber/beauty services, telephone/television charges) requested by Resident/Representative and supplied by Facility or its independent providers.

Additional Provisions:

- J.M. Failure to pay ANY funds due and owing on behalf of a resident is cause for a resident's discharge from the facility and cause for possible legal action.
- J.M. A change in level of care may impact benefits.
- J.M. Eligibility is not a guarantee of benefits or payments.
- J.M. The information provided herein is not a guarantee of benefits. Resident's third-party payer shall make all final determinations for benefits. No action or statement by Facility employees shall be interpreted as a guarantee of benefits.
- J.M. Resident/Representative is responsible for notifying Facility of any prior stays that qualify as a skilled nursing stays or any prior hospital stays.
- J.M. Resident/Representative will notify Facility of any enrollment in a Medicare Advantage Plan before the policy's effective date.
- J.M. In the event eligibility or coverage is denied or terminated by Medicaid, Medicare or any other third-party payer, all charges shall become the personal responsibility of resident or their legal representative as outlined in the Facility's Admission Agreement.
- J.M. Resident/Representative agrees to assist the facility in coordinating claims and collecting payment from any third-party payer as outlined in Facility's Admission Agreement.

Original: Business File Photocopy: Resident/Representative

Estimate of Patient Liability (Medicaid/Medicaid Pending ONLY). Medicaid is a cost-sharing program. Your monthly income must be contributed to the cost of your care. Medicaid determines how much of your monthly income must be paid to the Facility (also called your "patient liability"). All patient liabilities are due and payable to Facility at the beginning of every month. The amount below is only an estimate. Once the actual patient liability amount is set by the State's Medicaid Office/income division, some adjustments may be necessary. If the estimated amount has already been paid and it is too high, a credit will be applied to the next statement or refunded. If the estimate is too low, the difference will appear on the next statement and will be due to Facility. Patient liability must be paid to the Facility while your application for Medicaid benefits is pending and once you are approved for coverage.

Sources of income.

	<u>Amount</u>	<u>Direct Deposit</u>	<u>Recipient's Name & Mailing Address</u>
Social Security	\$ _____	[] Y or [] N _____	_____
Pension *	\$ _____	[] Y or [] N _____	_____
Veteran Benefits	\$ _____	[] Y or [] N _____	_____
Royalties, if any	\$ _____	[] Y or [] N _____	_____
Other _____	\$ _____	[] Y or [] N _____	_____
Total:	\$ _____		
Less:	\$ _____	Personal Allowance	
Less:	\$ _____	Other _____	

Estimated Monthly Patient Liability: \$ _____
 (NOTE: This amount may change as benefits or income increase and decrease).

* Company Name & Address: _____

Direct Deposit/Representative Payee:

_____ I would like to have my/Resident's personal funds (i.e.: social security/pension benefits) directly deposited into Facility's Resident Trust Account, as more fully described in Facility's Admission Handbook. I understand that this process is operated by and through the Resident Fund Management Services (RFMS) system, which system is more fully described in the RFMS form. (Complete RFMS Form and review Admission Handbook)

_____ I would like the Facility to become Representative Payee for my/Resident's Social Security benefits. I understand that, through this process, my/Resident's Social Security benefits will be submitted by the Social Security office directly to the Facility and that the Facility will apply those funds to my/Resident's debt and any remaining funds will be provided to me. (Complete Social Security form.)

Original: Business File Photocopy: Resident/Representative

Asset Information:

The following information is needed in order to estimate eligibility and patient liability portions for Medicaid benefits and is used for informational purposes only.

1. Do you own your own home? ☐ NO ☐ YES, approximate equity \$ _____
Property Address: _____
2. Do you own other real estate? ☐ NO ☐ YES, total value \$ _____
Property Address: _____
3. Do you have any other assets (e.g.: checking/savings account, CD, IRA, Mutual Funds, Stocks, Bonds)?
☒ NO ☐ Yes. If yes, approximate value: \$ _____

Affidavit of Resident and/or Representative:

By my signature below, I hereby certify that the answers to the foregoing questions are true, correct and complete, and that I have not knowingly or intentionally withheld any facts or circumstances, which would, if disclosed, adversely affect the prospective resident's application for admission to the Facility. I affirm that I will not sell, give away, donate, or in any other way dissipate the assets identified in this form and/or other disclosures to Facility and that the assets will be retained for the exclusive use of paying for Resident's nursing home care. I understand that any sale or transfer of assets will be for the sole purpose of converting the asset into another form to pay for the Resident's care.

I further warrant that all income and assets included in this financial statement, and owned by Resident, are available to pay for treatment and care rendered to Resident, unless specifically noted. I hereby authorize the Facility or its agents to fully investigate any of the statements contained in this application, including but not limited to ordering a credit report.

Teresa Murphy 12.18.2014 Teresa Murphy
Signature of Resident/Representative Date Printed Name/Relationship to Resident/Authority

Charity Byars 12/18/14
Signature of BOM/Facility Representative Date

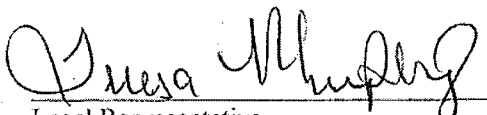
Original: Business File Photocopy: Resident/Representative

ACKNOWLEDGEMENT OF RECEIPT OF THE NOTICE OF PRIVACY
PRACTICES

By my signature below, I acknowledge that I received a copy of the Notice of Privacy Practices

Signature of Patient/Resident

Print Name



Legal Representative



Print Name

If the Patient/Legal Representative is unable to sign this acknowledgement, state why below:



Signature of Health Care Center Representative

**PRIVACY ACT STATEMENT FOR DISCLOSURES
TO THE CENTERS FOR MEDICARE AND MEDICAID ("CMS")**

THIS FORM IS NOT A CONSENT FORM TO RELEASE OR USE HEALTH CARE INFORMATION PERTAINING TO YOU; RATHER, IT IS A REQUIREMENT OF THE PRIVACY ACT OF 1974.

Pursuant to the Privacy Act of 1974, this long-term care facility is required to submit certain personal information, including some of your medical information, to the Centers for Medicare and Medicaid ("CMS"). The submission of this information will facilitate tracking of changes in your health and functional status over time for purposes of evaluating and assuring the quality of care provided by nursing homes that participate in the Medicare or Medicaid programs. The gathering of such data is mandated by Sections 1819(f), 1919(f), 1819(b)(3)(A), 1919(b)(3)(A), and 1864 of the Social Security Act.

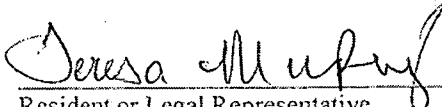
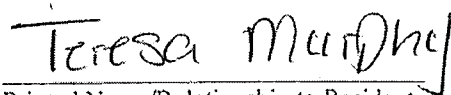
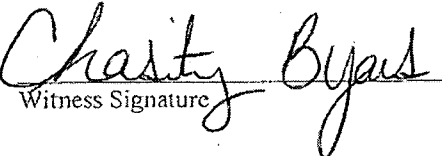
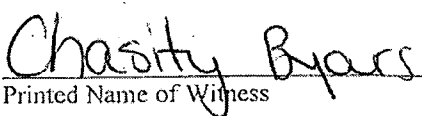
The information will also aid in the administration of the survey and certification of Medicare/Medicaid long-term care facilities and help to study the effectiveness and quality of care given in those facilities. This system will further support regulatory, reimbursement, policy, and research functions. Please note that it will collect the minimum amount of personal data needed to accomplish its stated purpose.

The information collected will be entered into the Long Term Care Minimum Data Set (LTCMDS) system of records, System No. 09-70-1517. Information from this system may be disclosed, under specific circumstances, to: (1) a congressional office from the record of an individual in response to an inquiry from the congressional made at the request of that individual; (2) the Bureau of Census; (3) the Department of Justice; (4) an individual or organization for a research, evaluation, or epidemiological project related to the prevention of disease of disability, or the restoration of health; (5) contractors working for CMS to carry out Medicare/Medicaid functions, collating or analyzing data, or to detect fraud or abuse; (6) an agency of a State government for purposes of determining, evaluating and/or assessing overall or aggregate cost, effectiveness, and/or quality of health care services provided in the State; (7) another Federal agency to fulfill a requirement of a Federal statute that implements a health benefits program funded in whole or in part with Federal funds or to detect fraud or abuse; (8) Peer Review Organizations to perform Title XI or Title XVIII functions, (9) another entity that makes payment for or oversees administration of health care services for preventing fraud or abuse under specific conditions.

For nursing home residents residing in a certified Medicare/Medicaid nursing facility, the requested information is mandatory for the reasons stated above. Refusal to allow use of this information as explained in this Notice, may result in the loss of Medicare/Medicaid benefits provided by the nursing home.

Your signature merely acknowledges that you have been advised of the foregoing. A copy of this form will be furnished to you.

By signing below, I acknowledge that I have been notified of the requirements set forth in the Privacy Act of 1974 pertaining to my medical information.

 Resident or Legal Representative	12.18.14 Date	 Printed Name/Relationship to Resident
 Witness Signature	12/18/14 Date	 Printed Name of Witness

Original: Business File • Photocopy: Resident/Representative

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
Teresa Murphy, as Personal Representative for the Estate of Isaac Strong,	)	Civil Action No.: 2018-CP-46-01459
	)	
Plaintiff,	)	
	)	
v.	)	PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND COMPEL ARBITRATION OR ALTERNATIVELY, TO COMPEL ARBITRATION AND STAY PROCEEDINGS
	)	
Hunt Valley Holdings, LLC f/k/a	)	
Fundamental Long Term Care Holdings,	)	
LLC; Fundamental Clinical and Operational	)	
Services, LLC; Fundamental Consulting,	)	
LLC; Fundamental Administrative	)	
Services, LLC; THI of Baltimore, Inc.;	)	
THI of South Carolina, LLC; THI of South	)	
Carolina at Rock Hill, LLC d/b/a Magnolia	)	
Manor of Rock Hill; and Amisub of S.C.,	)	
Inc. d/b/a Piedmont Medical Center,	)	
	)	
Defendants:	)	
	)	

Plaintiff Teresa Murphy, as Personal Representative for the Estate of Isaac Strong, through her attorney, respectfully submits this Memorandum of Law in Opposition to Defendants' Motion to Dismiss and Compel Arbitration or, Alternatively, to Compel Arbitration and Stay Proceedings.

INTRODUCTION

Defendants' motion to compel arbitration is effectively a motion to enforce a contract. In the ordinary course, a nursing home resident who alleges injury would bring her claims before the Court as Plaintiff has done here and the nursing home would mount its defense in the same forum. A valid contract to arbitrate their disputes is the only way for the parties to opt out of the litigation process. Defendants had no such contract with Mr. Strong. The "Arbitration Agreement" on which Defendants' motion relies is invalid because, under bedrock contract principles, there can be no

contract without the mutual assent of its proposed parties. Mr. Strong never assented to the Arbitration Agreement and did not empower anyone else to assent on his behalf.

Nothing Defendants cite in federal or state statutes or South Carolina contract law cure this fundamental flaw. The Federal Arbitration Act (“FAA”) provides a broad definition of arbitrable disputes but it does not alter contract formation requirements. 9 U.S.C. § 2 (providing arbitration contracts may be invalidated “upon such grounds as exist at law or in equity for the revocation of any contract”). The South Carolina Adult Health Care Consent Act provides a statutory right for family members to admit a resident to a nursing home without power of attorney but does not extend the right to separate arbitration contracts. Moreover, the precise agency and estoppel arguments raised in Defendants’ memorandum have been rejected in one or more South Carolina appellate court opinions in just the last five years.

The same is true for Defendants’ request for jurisdictional discovery made for the first time at the hearing. Discovery disputes afford the Court considerable discretion but, as the Court of Appeals showed earlier this year, Defendants’ request is futile. Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018) (cert. denied Aug. 21, 2018). Deposing Plaintiff cannot prove agency because her statements to Defendants during Mr. Strong’s admission cannot create an agency relationship. Nor can discovery overcome the legal hurdles to Defendants’ estoppel arguments. Estoppel requires proof Plaintiff garnered a direct benefit from the Arbitration Agreement and that Defendants had no capacity to determine her lack of authority to sign the contract on Mr. Strong’s behalf. There is no direct benefit to nursing home residents from a pre-admission arbitration contract separate from the admission agreement, and it is completely up to Defendants to explain why they could not simply ask Plaintiff for proof of authority before signing the Arbitration Agreement. In sum, the issue before the Court is purely

legal and there is a rich body of recent jurisprudence finding no agreement to arbitrate under similar circumstances.

LEGAL STANDARD

South Carolina's appellate courts have addressed contract formation requirements in the context of nursing home arbitration agreements a number of times over the last five years. These cases apply three different legal structures— (1) South Carolina common law contract formation principles; (2) South Carolina statutory law governing health care decisions for incapacitated patients; and (3) the FAA (9 U.S.C. § 1 *et seq.*). These precedents contain a number of binding principles governing the issues in Defendants' motion.

First, while the South Carolina Adult Health Care Consent Act (S.C. Code Ann. § 44-66-10 to -80) empowers a nursing home resident's family member to make "health care" decisions on the resident's behalf even in the absence of a conservatorship, guardianship, or power of attorney, this statutory authority does not apply to a separate, voluntary arbitration contract signed when the resident is admitted to the home. Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014) (citing S.C. Code Ann. § 44-66-20(1)). Second, an arbitration contract is separate from a contemporaneously-signed admission contract where it contains an "Entirety of Agreement" provision recognizing the two contracts as distinct documents. Id. at 356, 755 S.E.2d at 453-54. Even when such clauses are ambiguous, they must be construed against the nursing home since nursing homes are inevitably the exclusive drafter of contracts presented to their residents' families. Id. (citing Davis v. KB Homes of S.C., Inc., 394 S.C. 116 n. 4, 713 S.E.2d 799 n. 4 (Ct. App. 2011)).

Third, a family member lacking legal authority to contract away the resident's jury trial right does not become the resident's actual or apparent agent based on representations made by the

family member either in the arbitration contract or when the contract is presented for signing. Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016). An agency relationship may only be formed by the resident's representations to the home and a resident can make no such representations if he/she is absent when the arbitration contract is presented or suffering mental/physical deficits that prevent active participation in the process. Id. Moreover, when admission and arbitration are governed by separate contracts, a resident does not create an agency relationship or ratify the arbitration contract simply by silently remaining in the home. Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert. denied Aug. 21, 2018) (noting home argued resident "represented" her husband had authority by "allowing him to procure her admission" but still finding "no evidence . . . that [the resident], as the principal, represented husband was her agent").

Fourth, so long as the admission and arbitration contracts are separate documents, alleged misrepresentations made by a resident's family member when signing the contracts does not equitably estop the resident's estate from challenging the family member's authority to bind the resident (and the estate) to arbitration. A family member who signs an arbitration contract without legal authority to bind the resident acts in her individual capacity and her misrepresentations have no bearing on claims against the home by the resident's estate even if the misrepresenting family member is also the estate's representative. Thompson, 416 S.C. 43, 62, 784 S.E.2d 679 (Ct. App. 2016) (finding nursing home "may not hold [resident's] estate responsible for any possible misrepresentations Son or Daughter may have made in their individual capacities").

Finally, a nursing home moving to compel arbitration of a resident's negligence claims is not entitled, as a matter of right, to conduct discovery before the motion is resolved. Courts are granted substantial discretion in ruling on discovery issues and need not permit discovery requests

that cannot affect the outcome of the arbitration motion. Accordingly, a nursing home is not entitled to depose a family member who signed an arbitration contract on a resident's behalf because the family member's testimony cannot establish an agency relationship to validate the contract. Hodge, 422 S.C. at 578, 813 S.E.2d at 310 (finding family member's testimony "would not add anything to [the agency] determination").

FACTS

Isaac Strong was admitted to Magnolia Manor of Rock Hill ("Facility") on December 22, 2014, following a multi-week hospitalization in Piedmont Medical Center related to a stroke that caused persistent weakness along his right side. (Compl. ¶¶ 25, 28). Four days before Mr. Strong was transferred to the Facility, his daughter Teresa Murphy was presented with two contracts. The first was an "Admission Agreement" that governed the type of care Mr. Strong would receive from Defendants and Mr. Strong's financial obligation to pay for those services. On the Admission Agreement's final page, labeled as "Page 12 of 12," there was an "Entire Agreement" provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Mr. Strong's admission to the Facility. Ms. Murphy signed the Admission Agreement on the "Signature of Representative" line. Ms. Murphy was not Mr. Strong's conservator, guardian, or attorney-in-fact. Upon information and belief, Defendants did not ask Ms. Murphy for proof of authority to act on Mr. Strong's behalf.

On the same day, Ms. Murphy signed a contract called "Arbitration Agreement." This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate entity (labeled "Page 1 of 1") with its own signature blocks. The Arbitration Agreement, purportedly a contract between Defendants and Mr. Strong, provides for alternative dispute resolution for any claim a party may bring against another arising out of Mr. Strong's admission

in the Facility. Ms. Murphy signed the Arbitration Agreement on the line labeled "Resident/Representative Signature." Defendants have admitted to the Court that Mr. Strong agreeing to arbitrate was not a prerequisite to his admission at the Facility.

When Mr. Strong arrived in the Facility on December 22, 2014, he had a pressure ulcer and was at an elevated risk of developing new ulcers. (Compl. ¶ 28). Orders were entered requiring that Mr. Strong be turned or repositioned ever two hours. (Compl. ¶ 26). However, over the next couple weeks, Mr. Strong's pressure ulcer worsened, becoming infected and then septic. (Compl. ¶¶ 31-33). Mr. Strong's condition grew increasingly severe over the following months requiring hospitalizations and painful procedures before passing away on September 5, 2015. (Compl. ¶¶ 34-46). On May 14, 2014, Ms. Murphy initiated this action as the personal representative for Mr. Strong's estate. The Complaint alleges wrongful death and survival claims arising from Defendants failure to properly treat Mr. Strong's skin condition while at PMC and the Facility. On July 17, 2018, the nursing home Defendants filed a Motion to Compel Arbitration and Petition to Stay State Court Proceedings. Relying on the Arbitration Agreement that Mr. Strong did not sign, the moving Defendants argue Plaintiff must arbitrate rather than litigate her claims.

ARGUMENT

I. Federal Arbitration Act ("FAA") mandatory language only applies where parties have a valid and enforceable arbitration agreement.

Plaintiff does not dispute Defendants' citation to the mandatory language in the FAA. However, it is important to note that this mandatory language only applies in instances where a valid arbitration agreement has been established. This is evident from the FAA provisions quoted in Defendants' memorandum. (Defs' Mem. at 4-5). "The court shall make an order directing the parties to proceed to arbitration" but only "upon being satisfied that the making of the agreement...is not in issue." 9 U.S.C. § 4. While it is true that the U.S. Supreme Court has held

that the FAA “leaves no place for the exercise of discretion,” the Court also cited the FAA’s savings provision that denies enforcement of agreements susceptible to the general contract defenses of fraud, duress, and unconscionability. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985); 9 U.S.C. § 2; see also Defs’ Mem. P. 5 (quoting Byrd).

Defendants cite the FAA’s broad scope of arbitrable issues (Defs’ Mem. at 4) but this case asks a more fundamental question about contract formation. Pro-arbitration policy does not validate a contract that lacks the building blocks of a binding contract. The South Carolina Supreme Court has noted that “the FAA does not require parties to arbitrate when they have not agreed to do so.” Zabinski v. Bright Acres Assocs., 346 S.C. 580, 591, 553 S.E.2d 110, 116 (2001) (citing Volt Info. Scis. Inc. v. Board of Trs., 489 U.S. 468, 478 (1989)). Plaintiff does not dispute that the FAA contains mandatory language, but the mandatory language does not require arbitration here since there is no valid arbitration agreement between the parties.

II. There is no valid agreement to arbitrate claims stated in Plaintiff’s Complaint.

Plaintiff’s Complaint alleges causes of action for negligence (wrongful death and survivor actions). The survival claim relates to duties established and breached during Isaac Strong’s life and damages sustained during his life. This claim belongs to Mr. Strong. Plaintiff Teresa Murphy (Mr. Strong’s personal representative) presents this claim on Mr. Strong’s behalf. See S.C. Code Ann. § 15-5-90 (stating that claims “survive both to and against the personal or real representative...of a deceased person”). Accordingly, Defendants must show a valid and enforceable arbitration agreement between Mr. Strong and Defendants to prevail on their motion. Defendants’ motion, memorandum, and attached documents do not meet this burden.

Basic contract law holds that a contract binds only those parties who show an “objective manifestation of . . . assent at the time the contract was made.” Laser Supply & Services, Inc. v.

Orchard Park Assoc., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009). Mr. Strong clearly did not sign the Arbitration Agreement or personally give any other objective manifestations of assent to this contract. Defendants contend Mr. Strong is bound to the agreement through the signature of Teresa Murphy, whom Defendants assert was acting as Mr. Strong's agent. Defs.' Mem. at 6-9. For agency situations, the legal burden is on the party asserting that an agency exists. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). In this case, Defendants must show that all necessary elements of an agency relationship are "clearly established" by the facts. Id. A party dealing with an agent has a duty to use due care to ascertain the scope of the agent's authority to act. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996).

A. The Admission Agreement and Arbitration Agreement are Separate Contracts that do not Merge.

As discussed below, Defendants argue the Arbitration Agreement signed by Teresa Murphy is valid because, even though she had no actual authority to sign it on Mr. Strong's behalf, she was Mr. Strong's apparent agent or, in the alternative, Mr. Strong's estate is estopped from contesting her alleged authority. These arguments have their individual flaws but a common false premise. Defendants stake both arguments to the notion that the Arbitration Agreement and Admission Agreement merge into a single contract that must be construed as a unit. For example, Defendants argue Mr. Strong created an agency relationship to support arbitration because he "accepted" admission. (Defs.' Mem. at 8). Defendants then argue Plaintiff is estopped from denying authority to bind Mr. Strong to arbitration because she does not deny authority to admit him to Defendants' facility. (Defs.' Mem. at 12). Accepting merger is a prerequisite to accepting Defendants' arguments. However, Coleman, Thompson, and Hodge all rejected Defendants' merger argument.

South Carolina law states that contracts signed at the same time by the same parties and for the same purpose will be construed together “in the absence of anything indicating a contrary intention.” Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts Resort Realty, Inc. v. Down’round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). Coleman refused to apply the merger doctrine because language in the contracts “recognize[d] the ‘separateness’ of the admission and arbitration agreements.” 407 S.C. at 355, 755 S.E.2d at 455. Thompson and Hodge applied Coleman and provided further examples of factors demonstrating “separateness” and preventing merger, 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.

An admission contract with an “Entirety of Agreement” provision is separate “on its face” from an arbitration contract especially where the provision identifies the two contracts distinctly—i.e. “this [Admission] Agreement *or* in the Arbitration Agreement.” Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). In fact, when the arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has “Arbitration Agreement” atop its first page, these factors further “indicat[e] the parties’ intent for it to stand by itself as an independent contract.” Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302. Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home. Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

Many of these same factors are present here. The “Admission Agreement” presented to Ms. Murphy contains an “Entire Agreement” provision stating that “this Agreement represents the entire agreement” related to Mr. Strong’s admission to Defendants’ facility. Thus, “Agreement” is a defined term in this contract and, as stated in the contract’s opening paragraph, is limited to the “Admission Agreement,” not the separate Arbitration Agreement. Like in Hodge, the separate

contracts have separate signature pages and separate pagination—i.e. the Admission Agreement ends with “Page 12 of 12” while the Arbitration Agreement is “Page 1 of 1.” As in Thompson, the arbitration agreement announces its independence with its “Arbitration Agreement” title. Moreover, defense counsel argued at the hearing that agreeing to arbitrate was not required for Mr. Strong to be admitted to Defendants’ facility. To the extent there is any ambiguities in this contract language, they must be resolved against merger. Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685 (citing Coleman). Defendants were in sole control of the language chosen for these form contracts of adhesion and it was their responsibility to make merger clear if they so desired.¹

In sum, Defendants cannot meet their burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit.

B. Teresa Murphy was not Mr. Strong’s Actual or Apparent Agent.

Agency is a “fiduciary relationship which results from the manifestation of consent by one person to another to be subject to the control of the other and to act on his behalf.” Peoples Fed. Savs. & Loan Ass’n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 145, 425 S.E.2d 764, 773 (Ct. App. 1992) (citing Restatement (Second) of Agency § 1 (1958)). An agency relationship may

¹ There is at least one additional reason why the Admission Agreement and Arbitration Agreement do not merge. Merger can only apply if the two contracts were entered for the same purpose. Klutts, 268 S.C. at 88, 232 S.E.2d at 24. The Admission Agreement was entered for the purpose of securing Mr. Strong’s admission to Defendants’ facility. In contrast, the Arbitration Agreement’s purpose was to outline a dispute resolution procedure for claims that may arise in the future. Defendants’ memorandum suggests both contracts were entered to “establish James Strong’s residency at the facility.” Defs.’ Mem. at 21. But, as defense counsel told the Court during the hearing, Mr. Strong would have been admitted to the facility regardless of any decision to arbitrate. Therefore, the contracts did not have the same purpose and do not qualify for merger.

be established with clear evidence of actual or apparent authority conferred by the purported principal on the purported agent. Cowburn v. Leventis, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). Actual authority is “expressly conferred upon the agent by the principal.” Richardson v. PV, Inc., 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009). Apparent authority is based on “representations made by the principal to the third party and reliance by the third party on those representations.” Young v. S.C. Dep’t of Disabilities & Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). To prove apparent authority, a party must show (1) purported principal consciously or impliedly represented another to be his agent; (2) reliance on the representation by a third party; and (3) change in position by third party in reliance on the representation. Cowburn, 366 S.C. at 39-40, 619 S.E.2d at 448.

South Carolina law clearly states that an agency relationship cannot be established solely by the words and actions of the purported agent. Id. For apparent authority to exist, “[e]ither the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such belief.” R & G Constr., Inc. v. Lowcountry Reg’l Transp. Auth., 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000). Defendants have not identified any conduct by Mr. Strong showing he intended to cause Defendants to believe Teresa Murphy was authorized to act for him. In fact, Defendants argued at the hearing Mr. Strong suffered from serious health issues that may have affected his ability to understand events occurring during his admission.

Defendants then argue Mr. Strong represented Teresa Murphy had authority to waive his jury trial right simply by his continued residency in Defendants’ facility. Defs.’ Mem. at 8. This argument is flawed for several reasons. First, Defendants conclude Mr. Strong’s presence alone

can constitute an affirmative representation.² Defs.' Mem. at 7-8 (citing Carraway v. Beverly Enters. Ala., Inc., 978 So.2d 27, 30-31 (Ala. 2007)). Carraway could never be binding precedent in this Court and its expansive view of apparent agency was rejected in Hodge, where the court rejected the notion that a nursing home resident represents his/her family member has authority to enter an arbitration agreement on the resident's behalf simply by failing to object to the family member's signature. 422 S.C. at 573-74, 813 S.E.2d at 308 (noting home argued resident "represented" her husband had authority by "allowing him to procure her admission" but still finding "no evidence . . . that [the resident], as the principal, represented husband was her agent"). Defendants make the precise argument Hodge rejected. Defs.' Mem. at 8 (suggesting Mr. Strong created apparent agency relationship "by allowing Ms. Murphy to procure Mr. Strong's admission to the Facility").

Second, even accepting Defendants' recently rejected premise, any representation Mr. Strong's presence conveyed could only cover admission and not arbitration. As Defendants argued during the hearing, Mr. Strong's admission was in no way contingent on agreeing to arbitrate disputes. Third, Defendants' argument conflates the Admission Agreement and Arbitration Agreement in another important way. Defendants argue Mr. Strong "accept[ed] the benefits of the contracts." Defs.' Mem. at 8. However, the only "benefit" Defendants cite is admission itself, a benefit Defendants have admitted to be separate from arbitration. Defendants never attempt to explain what supposed "benefit" of the independent Arbitration Agreement Mr. Strong derived

² The notion that Mr. Strong had a duty to speak up against Ms. Murphy signing papers during his admission to Defendants' facility borders on cruel. According to medical records obtained from Defendants' own file, Mr. Strong was in no position to voice any objection during the admission. He suffered from "moderately impaired" decision making and was noted to have "[n]o speech—absence of spoken words" due to his stroke history. See "Nursing Data Collection Tool," dated Dec. 22, 2014 (Magnolia Manor 0088-92) (attached as **EXHIBIT 1**).

during his time as a resident in Defendants' facility. Any such attempt would have been futile given the Court of Appeals' unambiguous ruling in Thompson, which held that **"any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement's] requirement that [resident] waive her right to access the courts and her right to a jury trial."** 416 S.C. at 60, 784 S.E.2d at 688 (emphasis added). Since Mr. Strong made no affirmative representations that Ms. Murphy had authority to sign the Arbitration Agreement on his behalf, Defendants' motion to compel arbitration should be denied.

C. Plaintiff is not Estopped from Challenging the Arbitration Agreement's Validity.

Defendants incorrectly allege Plaintiff is equitably estopped from opposing enforcement of the Arbitration Agreement. Equitable estoppel is a contract defense for which the asserting party "bears the burden of establishing all the elements." Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conduct be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id.

Defendants briefly mention some of these elements but make no effort to apply them. Defs.' Mem. at 10 (citing Boyd v. BellSouth Tele. Tele. Co., Inc., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006)). Instead, Defendants suggest an alternative equitable estoppel standard and rely on federal cases. Defs.' Mem. at 17-18. Defendants contend their contract-based argument is subject to federal law rather than the law of South Carolina, the state where the alleged contract was signed and its alleged parties resided. This argument is at odds with U.S. Supreme Court

precedent. Arbitration contracts concerning interstate commerce are governed by the FAA but its provisions apply state law to enforceability questions such as the application of equitable estoppel. 9 U.S.C. § 2 (requiring enforcement of arbitration contract “save upon such grounds as exist at law or in equity for the revocation of any contract”). The FAA does not “alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them).” Arthur Anderson LLP v. Carlisle, 556 U.S. 624, 630 (2009). Arthur Andersen specifically applied this principle to equitable estoppel arguments. Id. at 632 (noting question on remand was “whether the relevant state contract law recognizes equitable estoppel”). At least eight federal circuits³ along with multiple district⁴ and state courts⁵ have cited Arthur Andersen with multiple courts modifying or overruling precedent to comply with the Supreme Court’s ruling. By

³ Richmond Health Facilities v. Nichols, 811 F.3d 192, 195 (6th Cir. 2016) (citing Arthur Andersen) (“in determining the enforceability of an arbitration agreement, we apply state law of contract formation”); Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp., 748 F.3d 249, 255 (5th Cir. 2014) (holding “state contract law” applied to equitable estoppel issue and noting prior decisions “based on federal common law, rather than state contract law . . . have be modified to conform with Arthur Andersen”); Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1128 (9th Cir. 2013) (citing Arthur Andersen and applying California law to the equitable estoppel analysis); Awuah v. Coverall N. Am., Inc., 703 F.3d 36, 41-42 (1st Cir. 2012) (same for Massachusetts law); The Republic of Iraq v. BNP Paribas USA, 472 Fed. Appx. 11, 13-14 (2d Cir. 2012) (same for New York law); Lenox MacLaren Surgical Corp. v. Medtronic, Inc. 449 Fed. Appx. 704, 708 n. 2 (10th Cir. 2011) (finding Arthur Andersen “made it clear that state law governs who may be bound to an arbitration clause”); Lawson v. Life of the S. Ins. Co., 648 F.3d 1166, 1172 (11th Cir. 2011) (holding that “to the extent any of our earlier decisions indicate to the contrary, those indications are overruled or at least undermined to the point of abrogation by [Arthur Andersen]”); Donaldson Co. v. Burroughs Diesel, Inc., 581 F.3d 726, 732 (8th Cir. 2009) (“The Supreme Court has ruled that state contract law governs the ability of nonsignatories to enforce arbitration provisions”).

⁴ MacDonald v. Unisys Corp., 951 F. Supp. 2d 729, 736-38 (E.D. Pa. 2013) (“Post-Arthur Andersen, it is incontrovertible that state law governs the equitable estoppel and third-party beneficiary determinations”); Hospira, Inc. v. Therabel Pharma N.V., Case No. 12-C-8544, 2013 WL 3811488 *11-14 (N.D. Ill. July 19, 2013) (citing Arthur Andersen and applying state law to equitable estoppel analysis); FR 8 Singapore Pte. Ltd. v. Albacore Maritime Inc., 794 F. Supp. 2d 449, 455 (S.D.N.Y. 2011) (“the question of who was bound by [arbitration] agreement was treated as a question of state law”).

⁵ See e.g., Carter v. TD Ameritrade Holding Corp., 721 S.E.2d 256, 261-62 (N.C. Ct. App. 2012) (citing Arthur Andersen and considering ratification argument under state law).

looking past South Carolina contract law, Defendants stand in the untenable position of asking the Court to ignore the U.S. Supreme Court's interpretation of a federal statute.

Petitioners could not prevail even if their equitable estoppel argument was governed by federal law. Defendants rely primarily on International Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH, 206 F.3d 411, 417-18 (4th Cir. 2000) which held that a party may be estopped from denying arbitration when he has received a "direct benefit" from a contract containing an arbitration clause. Defendants then argue Mr. Strong's admission to Defendants' facility was the required "direct benefit." In doing so, Defendants tie their estoppel argument inextricably to their flawed merger argument. See Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (noting nursing home's "equitable estoppel argument is premised on [the home's] contention that, under state law, the admission agreements and the [arbitration agreements] merged"). Admission can be the "direct benefit" that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same contract. For the reasons outlined above, the two contracts are separate, they do not merge, and Mr. Strong's admission does not support equitable estoppel.

Again, precedent is decisive on this point. Citing International Paper, the Court of Appeals recently held in Thompson that any benefit of admission "is of no moment" for the application of equitable estoppel to a separate arbitration contract. 416 S.C. at 59-60, 784 S.E.2d at 688; see also Coleman, 407 S.C. at 354-55, 755 S.E.2d at 455. Hodge cited and reaffirmed Thompson's estoppel analysis. 422 S.C. at 558-59, 813 S.E.2d at 300.⁶ Since admission is unavailable as a "direct benefit" to support estoppel, Defendants would be required to point to some benefit Mr. Strong

⁶ Hodge was also skeptical of the notion that admission was a benefit to the resident considering Complaint allegations that the nursing home's acts during the admission caused the resident's death. 422 S.C. at 563, 813 S.E.2d at 303 ("we find it difficult to find [resident] benefitted even from being admitted").

received from the Arbitration Agreement alone. However, Mr. Strong and his estate derived no benefit from the Arbitration Agreement. Hodge, 422 S.C. at 563, 813 S.E.2d at 302 (finding family members, resident, and resident's estate "received no benefit from the Arbitration Agreement"). Even if they had, "any possible benefit emanating from the [Arbitration Agreement] alone is offset by the [Arbitration Agreement's] requirement that [Mr. Strong] waive [his] right to access the courts and [his] right to a jury trial." Thompson, 416 S.C. at 60, 784 S.E.2d at 688.

Unmoored from the legal tests for equitable estoppel, Defendants then make a broader argument that it would be "manifestly inequitable" for Plaintiff to pursue a tort claim based on the Admission Agreement while denying Ms. Murphy's authority to sign the Arbitration Agreement. Defs.' Mem. at 18. Defendants misunderstand the legal distinction between health care and dispute resolution decisions. It is not at all unusual for a family member to have authority to admit a loved one to a nursing home while lacking authority to waive the loved one's jury trial right. That is precisely what the Adult Health Care Consent Act does. It provides statutory authority for family members to make an incapacitated loved one's "health care" decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code. Coleman, 407 S.C. at 353, 755 S.E.2d at 454 (finding statutory power to make "health care" decisions limited to nursing home admission and related financial decisions). Plus, Defendants are misrepresenting Plaintiff's claims. Plaintiff is not asserting any claim based on the Admission Agreement; she alleges only common-law negligence claims. See Hodge, 422 S.C. at 563, 813 S.E.2d at 302 ("because [resident and estate] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement" and are not estopped from challenging the Arbitration Agreement).

In sum, Defendants' equitable estoppel argument should be rejected because Defendants cite the wrong test and their arguments have been rejected by South Carolina appellate courts multiple times.⁷

D. Ms. Murphy did not have Inherent Agency Power to Bind Mr. Strong or his Estate to Arbitration.

Defendants next ask the Court to find a binding agency relationship even if Ms. Murphy lacked actual or apparent authority to admit Mr. Strong to Defendants' facility. Defs.' Mem. at 12-13. Defendants cite just one South Carolina case in support of this proposition. Smith v. Fitton & Pittman, Inc., 264 S.C. 129, 212 S.E.2d 925 (1975). Smith was later overruled but, even on its own, Smith does not support Defendants' novel theory. In fact, the only reference to agency in the whole opinion was the court rejecting the inherent agency theory. Id. at 134, 212 S.E.2d at 927 ("appellant has offered no authority, and we have found none, that [individual] would have inherent agency power . . ."). There is no basis for inherent agency in South Carolina law for nursing home arbitration contracts.

E. The South Carolina Bill of Rights for Residents of Long-Term Care Facilities did not Authorize Ms. Murphy to Bind Mr. Strong to Arbitration.

Finally, the Court should reject Defendants' disconcerting argument that a statute designed to protect nursing home residents' dignity and personal integrity actually paves the way for a

⁷ Defendants assert "agency by estoppel" as a separate basis for compelling arbitration (Defs.' Mem. at 10-12) but the arguments in that section are subsumed by Defendants' other arguments. Defendants cite a sentence from R & G Construction holding that a principal is estopped from denying the existence of an agency relationship. However, that same sentence makes clear that estoppel only applies if the principal has acted in a way to create an agency relationship. For the reasons stated in Section 2(B), there is no agency relationship here. Defendants then cite Boyd v. BellSouth Tele. Tele. Co., Inc., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006), but the elements cited there are for equitable estoppel. Finally, Defendants rely heavily on McCutcheon v. THI of S.C. at Charleston, LLC, an unreported federal district court. No. 2:11-cv-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011). Any value McCutcheon may have held is significantly undercut by the facts that the McCutcheon reviewed merged contracts and that this (at best) persuasive authority preceded the binding rulings in Coleman, Thompson, and Hodge.

resident to lose his right to litigate claims for nursing home neglect. (Def.'s Mem. at 13-14). The "Bill of Rights" for nursing home residents is intended to help residents "retain their individuality and personal freedom" and to support residents' "need for self-determination." S.C. Code Ann. § 44-81-20. Accordingly, the statute provides that a resident has a right to know he is entitled to participate in the care plan created for him and to know the conditions for which he is being treated. S.C. Code Ann. § 44-81-40(C). To make these rights meaningful, the statute requires nursing homes to provide a written explanation of each right to the resident or his representative and provides a grievance procedure to address alleged violations. S.C. Code Ann. §§ 41-81-40, -60. Defendants cite this statute to suggest that, because Ms. Murphy may have been the "representative" who received a copy of Mr. Strong's explanation of the Bill of Rights, she then gained legal authority to bind him to arbitration. There is no basis in the statute for this analytical leap. The Bill of Rights make no mention of arbitration. Plus, Defendants' argument is at odds with the spirit of the statute. The legislature's goal was to "safeguard[]" nursing home residents' rights and to provide "the means to assert their rights-fully as individual citizens." S.C. Code Ann. § 44-81-20. Taking away Mr. Strong's right to a jury trial does not serve these interests.

CONCLUSION

Based on the arguments above, Plaintiff respectfully requests the Court deny Defendants' motion to compel arbitration. Mr. Strong did not sign the Arbitration Agreement and Ms. Murphy lacked any legal authority to sign on his behalf. In the absence of a valid Arbitration Agreement, Defendants' motion should be denied. Moreover, pursuant to the Court of Appeals' recent ruling in Hodge, there is no reason to conduct depositions or other discovery before the Court rules

because the discovery Defendants seek would have no bearing on the legal question raised by their motion.

Respectfully submitted,

s/Eve S. Goodstein

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Attorneys for Plaintiff

September 7, 2018
Rock Hill, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMONS PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT

TERESA MURPHY, AS PERSONAL) CASE NO. 2018-CP-46-01459
REPRESENTATIVE FOR THE ESTATE)
OF ISAAC STRONG,)

PLAINTIFFS,)

vs.)

HUNT VALLEY HOLDINGS, LLC)
F/K/A FUNDAMENTAL LONG TERM)
CARE HOLDINGS, LLC;)
FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC;)
FUNDAMENTAL CONSULTING, LLC;)
FUNDAMENTAL ADMINISTRATIVE)
SERVICES, LLC; THI OF BALTIMORE,)
INC.; THI OF SOUTH CAROLINA,)
LLC; THI OF SOUTH CAROLINA AT)
ROCK HILL, LLC D/B/A MAGNOLIA)
MANOR OF ROCK HILL; AND)
AMISUB OF SC, INC. D/B/A)
PIEDMONT MEDICAL CENTER ,)

DEFENDANTS.)

**THI OF SOUTH CAROLINA AT ROCK
HILL, LLC D/B/A MAGNOLIA MANOR
OF ROCK HILL'S REPLY TO
PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS AND COMPEL
ARBITRATION**

TO: CHAD A. MCGOWAN, EVE S. GOODSTEIN, AND JORDAN C. CALLOWAY,
ATTORNEYS FOR PLAINTIFF:

COMES NOW the Defendant, THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill (hereinafter "Magnolia Manor", "this Defendant", or the "Facility"), by and through its undersigned counsel, and respectfully submits this Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss and Compel Arbitration and Stay State Court Proceedings. For the reasons set forth herein, this Honorable Court should grant this Defendant's Motion and compel this matter to arbitration pursuant to the valid and enforceable Arbitration Agreement executed between this Defendant and Plaintiff's decedent. In the alternative, and as

set forth more fully below, the Court should authorize and permit discovery limited to those issues surrounding the execution of the Arbitration Agreement at issue and Mr. Strong's continued residency as the Facility.

INTRODUCTION

The factual background of the underlying Motion has been extensively set forward in the Parties' memorandums in support of their respective filings. In summary, Plaintiff's decedent, Isaac Strong, was admitted to Magnolia Manor on December 22, 2014 for the receipt of skilled nursing care. Several days before his admission, Mr. Strong's daughter, Teresa Murphy, who is the Plaintiff in this action and Personal Representative of Mr. Strong's estate, executed a number of contracts with Magnolia Manor on behalf of and in the presence of Mr. Strong. At issue here, Ms. Murphy signed and executed an Arbitration Agreement on behalf of Mr. Strong in addition to an Admissions Agreement necessary to complete Mr. Strong's admission to the facility. Ultimately, Plaintiff filed the present lawsuit alleging medical negligence against this Defendant based on Mr. Strong's residency at Magnolia Manor. On July 17, 2018, this Defendant filed its Motion to Dismiss and Compel Arbitration pursuant to the valid and enforceable Arbitration Agreement, which applies to the claims pursued by Plaintiff in this litigation. Plaintiff's counsel never submitted any form of memoranda or briefing opposing this Defendant's Motion prior to the hearing.

At the hearing on this Defendant's Motion, the undersigned also recommended to the Court that, in the alternative to outright enforcement of the Arbitration Agreement, the parties should be allowed to conduct limited discovery in order to determine whether Ms. Murphy was Mr. Strong's agent for purposes of executing the Arbitration Agreement. This Court should also order limited discovery in the alternative to determine whether Mr. strong ratified the Arbitration

Agreement through his conduct in remaining a resident at the Facility. In practice, this would likely involve the taking of Ms. Murphy and the Admissions Director's depositions on this limited topic and exchanging limited discovery to determine the extent of Ms. Murphy's authority to execute the at-issue documents on Mr. Strong's behalf, as well as the nature of Mr. Strong's understanding and knowledge of the Arbitration agreement due to his continued residency at the Facility.

In opposition to this Defendant's Motion, the Plaintiff generally argues that the Arbitration Agreement is unenforceable because (1) the Admissions Agreement and Arbitration Agreements are separate contracts that do not merge; (2) Ms. Murphy was not Mr. Strong's actual or apparent agent for purposes of executing the Arbitration Agreement; (3) Plaintiff is not estopped from denying the validity of the Arbitration Agreement; (4) Ms. Murphy did not have the inherent agency power to bind Mr. Strong to the Arbitration Agreement; (5) and that the South Carolina Long Term Care Resident Bill of Rights does not grant express authority to bind the Plaintiff's decedent to an arbitration agreement.¹ Plaintiff also relies extensively on three South Carolina appellate cases—Coleman², Hodge³, and Thompson⁴—to support these positions.⁵ Furthermore, Plaintiff's Memorandum in Opposition argues that limited discovery and depositions to determine whether Ms. Murphy was Mr. Strong's agent for purposes of executing the Arbitration Agreement is not necessary, as the analysis is purely legal.

¹ As to the latter two issues ((4) inherent agency and (5) S.C. Bill of Rights), this Defendant will let the record stand and does not address those respective issues in this filing.

² Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014).

³ Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

⁴ Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016).

⁵ Plaintiff also argues that the Federal Arbitration Act (FAA) is not applicable to the enforcement of the Arbitration Agreement, because the Agreement is invalid under general principles of contract law. It appears that both Parties agree that, if valid and enforceable, the Arbitration Agreement is governed by the FAA. Accordingly, that issue is not further explored in this filing.

For the reasons set forth herein, Plaintiff's arguments and reliance on these cases are misplaced. The factual circumstances in the cases cited by Plaintiff's counsel are distinguishable from those in the case under review. Moreover, Plaintiff misapplies and mischaracterizes this Defendant's factual and legal arguments in favor of arbitration. Finally, Plaintiff's argument that the issue in this Motion at it relates to Ms. Murphy's agency powers to execute the Arbitration Agreement being purely legal is incorrect. Instead, there is plentiful case law on the subject, which indicates that the determination of agency is a fact-intensive inquiry and, to the extent limited discovery on the topic of agency (or ratification) is ordered by this Honorable Court, it would certainly be warranted.

ARGUMENT

I. Validity of Arbitration Agreement Not Dependent on Merger, and It Would be Appropriate to Order Limited Discovery on the Issue of Agency and Estoppel

In opposition to the underlying Motion, Plaintiff's counsel erroneously argues that this Defendant's positions regarding Mr. Murphy's agency powers are wholly staked "to the notion that the Arbitration Agreement and Admission Agreement merge into a single contract that must be construed as a unit." Pltf. Mem. at 8. This is simply incorrect. Agency is an independent legal theory which does not necessarily rely on merger or estoppel for the agreement to be deemed valid. While this Defendant does assert that the Admissions and Arbitration Agreement should be merged for purposes of applying both agency and estoppel doctrines, the merger theory was set forth by this Defendant as an additional basis for relief after the application of the agency principles to the Arbitration Agreement in its own right. Ms. Murphy could certainly be found to have apparent authority, inherent authority, or be an actual agent by virtue of estoppel without the Admissions Agreement and Arbitration Agreement being found to have merged.

A. Agency

This Defendant agrees with Plaintiff in that ordinary state-law principles of contract formation, not the federal common law, determine whether an agreement to arbitrate exists.⁶ Federal case law concerning the FAA concedes as much. Plaintiff's argument that the Arbitration Agreement at issue in this case is not enforceable under general principles of contract law deals solely with the fact that Ms. Murphy, rather than her father, signed the Agreement. Specifically, Plaintiff's counsel argues that Ms. Murphy lacked the authority under principles of agency law to bind her father to the Arbitration Agreement. Accordingly, Plaintiff effectively concedes that, to the extent Ms. Murphy *was* acting as her father's authorized agent in signing the Arbitration Agreement on her father's behalf, the contract is valid and enforceable.

During the admissions process, Ms. Murphy and Mr. Strong were present with the Admissions Director of the facility, while Ms. Murphy executed a number of documents on behalf of her father, including the Arbitration Agreement. Although Plaintiff's counsel brazenly claims it is "cruel" (Pltf. Mem. at 12), due to Mr. Strong's alleged incapacity at the time, for this Defendant to assert that it was reasonable for Magnolia Manor to believe Ms. Murphy was her father's authorized agent under the circumstances, the relevant medical records which outline Mr. Strong's medical condition and capacity at the time of admission are far from dispositive of issue, as Plaintiff's counsel would have this Court believe. Instead, Mr. Strong's alleged "incapacity" is but one issue on which discovery would aid the development of a record necessary for the Court to fairly adjudicate any agency issues.

⁶ See *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999)("In determining whether an agreement to arbitrate exists, "the court should apply 'ordinary state-law principles that govern the formation of contracts.'")(quoting *Johnson v. Circuit City Stores*, 148 F.3d 373, 377 (4th Cir:1998)).

Specifically, although one nursing record conveniently selected by Plaintiff's counsel does state that Mr. Strong's decision-making capacity was "moderately impaired" and he exhibited "no speech" near the time of the admissions process, the very same clinical records also clearly state that Mr. Strong was able to "make[] self understood", had "clear comprehension", and had the "ability to understand others." See Nursing Data Collection Tool, (attached as **Exhibit 1**). Plaintiff's Memorandum omits these crucial details, knowing well that, regardless of Mr. Strong's capacity, it appears that Ms. Murphy gave every appearance of full authority to execute the admissions documents on behalf of her father. Moreover, Ms. Murphy executed numerous other agreements with this Defendant which are not subject to Plaintiff's claims of invalidity because, unlike the Arbitration Agreement, it is not advantageous to avoid the enforceability of those agreements.

"The existence of an agency relationship is ... determined by the relation, the situation, the conduct, and the declarations of the party sought to be charged as principal."⁷ "[T]he relationship of agency need not depend upon express appointment and acceptance thereof, but may be, and frequently is, implied by the words and conduct of the parties and the circumstances of the particular case. Indeed, the law creates the relationship of principal and agent where the parties, in the conduct of their affairs, actually place themselves in such position as requires the relationship to be inferred by the courts."⁸ For these reasons, "[w]hether an agency relationship exists is a fact-intensive inquiry that is guided by common law agency principles."⁹ While it is true that "an agency may not be established solely by the declarations and conduct of an alleged

⁷ Langdale v. Carpets, 395 S.C. 194, 201, 717 S.E.2d 80, 83 (Ct. App. 2011).

⁸ Nationwide Mut. Ins. Co. v. Prioleau, 359 S.C. 238, 243, 597 S.E.2d 165, 168 (Ct. App. 2004)

⁹ United States v. Ellyson, 326 F.3d 522, 527 (4th Cir. 2003)

agent[.]”¹⁰, “such declarations and conduct are admissible as circumstances in connection with other evidence tending to establish the agency.”¹¹

Accordingly, at the very least, there is an ambiguity as to whether Mr. Strong manifested consent to his daughter’s acts during or prior to the admissions process such that limited discovery on the topic of agency is appropriate and warranted. The true nature and extent of Mr. Strong’s behavior and capacity at the time of the admissions process could further be established via limited discovery. The Parties could also determine whether Ms. Murphy had previously been designated as her father’s authorized representative to execute legal documents such that her execution of the Arbitration Agreement at issue in this case was completed under proper authority. Similarly, the Parties could inquire as to whether Ms. Murphy and her father ever had any post-admission discussions or other interactions in regards to the documents she executed on his behalf during the admissions process, such that Mr. Strong could later have repudiated any such agreements to the extent they were not entered into by his daughter under proper authority. Finally, the Arbitration Agreement specifically states Ms. Murphy was representing to Magnolia Manor that she had “authority to sign on [her father’s] behalf so as to bind the Resident as well as the Representative[.]” and, although agency may not be established solely by the actions of the agent, those and other “such declarations and conduct are admissible as circumstances in connection with other evidence tending to establish the agency.”¹²

¹⁰ Cowburn v. Leventis, 366 S.C. 20, 39–40, 619 S.E.2d 437, 448 (Ct. App. 2005)(quoting Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996)).

¹¹ Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 83, 124 S.E.2d 602, 606 (1962).

¹² Id.

B. Estoppel

To the extent Ms. Murphy did not have proper agency authority to execute the Arbitration Agreement on her father's behalf, she should nevertheless be estopped from denying the validity of the Arbitration Agreement in its own right and regardless of the merger doctrine.

Plaintiff's Memorandum in Opposition claims this Defendant could not establish equitable estoppel under South Carolina state law, as opposed to the federal doctrine of estoppel. Pltf. Mem. at 13-17. Under South Carolina Law, the elements of equitable estoppel as to the party to be estopped are:

(1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.¹³

In *Thompson*, a case relied on by Plaintiff in opposition to the application of estoppel in this instance, the Court of Appeals ruled that the skilled-nursing resident in the case was "prevented [] from forming the intent or having the requisite knowledge to mislead [the nursing home] or consent to the [Arbitration Agreement's] terms" due to her incapacity cause by dementia.¹⁴ In this case, as previously set forth, there is certainly an ambiguity as to the extent of Mr. Strong's mental and physical capacity and Ms. Murphy's representations prior to and at the time of admissions, such that limited discovery on the issue of intent under the South Carolina estoppel doctrine would be warranted for the same reasons as an evaluation of Mr. Strong's

¹³ *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006).

¹⁴ 416 S.C. at 60.

capacity to establish agency (when combined with Ms. Murphy's actions) through limited discovery would also be warranted as set forth in the preceding section.¹⁵

II. In the Alternative, To the Extent the Arbitration Agreement is Not Enforceable in its Own Right Under Agency, the Doctrine of Merger Still Applies

Having argued that Mr. Strong was incapacitated upon admission, Plaintiff's counsel implicitly concedes that Ms. Murphy had authority to admit Mr. Strong to this Defendant's skilled nursing facility under the South Carolina Adult Health Care Consent Act. While her authority to execute the Admissions Agreement could not otherwise be legitimately challenged and Mr. Strong's capacity is, at best, unclear, this point is now moot. Therefore, this Defendant respectfully asks that the presumption of merger apply when documents, such as the Admissions Agreement and the Arbitration Agreement at issue in this instance, are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction.¹⁶

¹⁵ This Defendant would also assert that, under the federal theory of estoppel as outlined in *Thompson*, the Plaintiff should still be estopped from denying the validity of the Arbitration Agreement. Under the federal theory as outlined in *Thompson*, "when '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.'" 416 S.C. at 59 (quoting *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 295, 733 S.E.2d 597, 604 (Ct. App. 2012)). As would be the case in this instance, one possible benefit of the Arbitration Agreement would be the avoidance of the expense and delay of extended court proceedings in favor of arbitration. *See id.* Ultimately, however, as Plaintiff's note, the Court in *Thompson* ruled that "any possible benefit emanating from the [Arbitration Agreement] alone is offset by the [Agreement's] requirement that [the non-signatory] waiver her right to access to the courts and her right to a jury trial." *Id.* at 60. On its face, this provision of the Court of Appeal's decision would seem to "single out arbitration agreements for disfavored treatment" in violation of the FAA, as held by the United States Supreme Court in the recent decision of *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1425, 197 L. Ed. 2d 806 (2017). Accordingly, this Defendant's federal estoppel argument remains viable despite the law as promulgated in *Thompson* due to Mr. Strong's direct benefit in, among other things, having an expedient and less costly method of resolving his claims against Magnolia Manor pursuant to the Arbitration Agreement.

¹⁶ *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)).

A. *Coleman, Thompson, and Hodge are Distinguishable*

As previously set forth, Plaintiff's argument that the Admissions Agreement and Arbitration Agreement are not merged pursuant to *Hodge, Thompson, and Coleman* is misplaced.

In *Coleman*, Ann Coleman signed a number of documents, including an arbitration agreement, when admitting her sister to a health care facility. 407 S.C. at 350, 755 S.E.2d at 452. Coleman brought suit after her sister's death, and the nursing facility sought to compel arbitration. In determining that the arbitration and admission agreements in the case had not merged, the South Carolina Supreme Court found that "[o]n its face, the [merger] clause recognizes the 'separatedness' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts. Moreover, the [arbitration agreement] could be disclaimed within thirty days of signing while the admission agreement could not, evidencing an intention that each contract remain separate." *Id.* at 452. "By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply." *Id.*

Following *Coleman*, the South Carolina Court of Appeals in *Thompson* found no merger, and thus no equitable estoppel, from the specific record before it because of the "separateness" in another set of admission and arbitration agreements. Relying primarily on disclaimer language present in the arbitration agreement, the *Thompson* court found that such language prevented merger of the agreement to an admissions agreement.¹⁷

Similarly, in *Hodge*, the admissions agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law.¹⁸ Furthermore, like in *Coleman*, the arbitration agreement in *Hodge* recognized a certain separateness as it referenced the two documents separately, stating "[a]ny and all claims or

¹⁸ 422 S.C. 544, 813 S.E.2d at 302.

controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement.”¹⁹ Finally, the arbitration agreement in *Hodge* stated it could be revoked within thirty days, whereas the admission agreement contained no such indication.²⁰

Unlike the arbitration agreements in *Coleman*, *Thompson*, and *Hodge*, the Arbitration Agreement and Admissions Agreement in the case do not possess such “separateness” characteristics. The Arbitration Agreement does not contain any conflicting disclaimer language similar to that in found *Thompson*. The Admissions Agreement does not possess a merger clause that identifies and references the Arbitration Agreement, similar to that in *Coleman*. There are no conflicting provisions concerning governing law in the agreements now before this Court such as there were in *Hodge*. The Arbitration Agreement at issue should not be considered “separate” for purposes of denying merger.

Instead, in the present case, the agreements “were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction” and, therefore, the documents merged.”²¹ Specifically, the Admissions and Arbitration Agreements were signed by Ms. Murphy, on behalf of her father, on December 18, 2014, as part of Mr. Strong’s admission to the nursing home. The documents were signed by the exact same people: Teresa Murphy as representative for her father and Chasity Byars for the Facility. The documents were signed for the same purpose and transaction of establishing Mr. Strong’s residency at the facility and establishing an expedient and cost-efficient manner of resolving any claims against either party based on Mr. Strong’s residency at the facility. While the Admissions Agreement in this case does contain an “Entire Agreement” clause, unlike the admission agreements in *Hodge* and

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts*, *supra*, 268 S.C. at 88, 232 S.E.2d at 24).

Coleman, the provision in this case does not separately reference the Arbitration Agreement. In fact, it doesn't refer to it at all. Accordingly, there is no language in either the Admission or Arbitration Agreement akin to the language in *Hodge*, *Coleman*, or *Thompson* to indicate the parties desired the documents be considered as separate contracts. As such, *Hodge*, *Coleman*, and *Thompson* are not controlling and this Honorable Court should compel Plaintiff's claims to arbitration pursuant to the merged Arbitration Agreement.

B. Because the Admissions and Arbitration Agreements are Merged, Plaintiff Should be Estopped From Denying the Validity of the Agreement

Because *Hodge*, *Coleman*, or *Thompson* are distinguishable from the legal and factual circumstances under review and the Admissions Agreement and Arbitration Agreement merged, Plaintiff should be estopped from denying the validity of Arbitration Agreement.

While this Defendant stands by its application of law as to these issues as set forth in its initial Memorandum in Support, it should be noted that the federal and state doctrines of merger as specifically delineated by Plaintiff's counsel and in *Thompson* should also affirmatively be applied in this case.

Under the federal theory applied, Mr. Strong received the direct benefit of the merged Admissions Agreement and Arbitration Agreement in his receipt of skilled nursing care for the treatment of his numerous and serious comorbidities. Accordingly, Plaintiff should be estopped from denying the validity of the Arbitration Agreement under the federal theory of merger as applied by Plaintiff's Memorandum in Opposition.

Under the state law theory of estoppel as espoused by Plaintiff's counsel²² and the Court in Thompson, there is certainly an ambiguity as to the extent of Mr. Strong's mental and physical capacity at the time of admissions (and thereafter), such that limited discovery on the issue of intent under the state estoppel doctrine would be warranted for the same reasons as an evaluation to establish agency through limited discovery would also be warranted as set forth in this Memorandum. As with the determination of agency, the determination of capacity and intent would also be a fact-intensive inquiry which further warrants an Order of limited discovery as an alternative to outright enforcement of the Arbitration Agreement.

III. Mr. Strong Ratified Ms. Murphy's Actions in Executing the Arbitration Agreement Through His Conduct

In its Memorandum in Support of the underlying Motion, this Defendant cited to this Court's holding in Dean v. Heritage Healthcare of Ridgeway, LLC, 2014 WL 11802563 (S.C. Com. Pl. September 8, 2014). Citing to Fuller v. E. Fire & Cas. Ins. Co., this Court ruled that "[r]atification as it relates to the law of agency may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent. Whether or not there has been a ratification of an unauthorized act by acceptance or retention of benefits thereof is usually a question of fact for the jury and not one of law for the court."²³ Ultimately, in facts very similar to the case at bar, this Court ruled that, "To the extent the Plaintiff is correct that [the resident] had capacity to

²² "Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id." Pltf. Mem. at 13.

²³ 240 S.C. 75, 86, 124 S.E.2d 602, 608 (1962)(citing Barber v. Carolina Auto Sales, 236 S.C. 594, 599, 115 S.E.2d 291, 294 (1960)).

contract, I find that [the resident] gave apparent authority to her daughter to contract on her behalf or she ratified both contracts during her two and a half years residency.”²⁴

In this case, Mr. Strong remained as a resident at the facility for approximately ten months following his initial admission to the facility. Accordingly, to the extent he had capacity at the time of admission to designate Ms. Murphy as his agent (which could be established through limited discovery) Mr. Strong ratified the Arbitration Agreement by his continued admission at the facility. At the very least, there is an ambiguity as to whether Mr. Strong ratified the Arbitration Agreement through his continued admission at the facility, and this ambiguity should be resolved by an Order from this Honorable Court for the parties to conduct limited discovery on this issue of ratification.

CONCLUSION

For the reasons set forth herein, this Honorable Court should GRANT this Defendant’s Motion to Dismiss and Compel Arbitration. In the Alternative, this Court should order limited discovery on the various issues set forth herein, and should award whatever other relief as may be just and proper.

[signature block on following page]

²⁴ 2014 WL 11802563, at *4

YOUNG CLEMENT RIVERS, LLP

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Perry M. Buckner, IV
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Attorneys for the Moving Defendant

Charleston, South Carolina

Dated: 9/21/18

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Teresa Murphy, as Personal Representative)
for the Estate of Isaac Strong,)

Plaintiff,)

v.)

Hunt Valley Holdings, LLC f/k/a)
Fundamental Long Term Care Holdings,)
LLC; Fundamental Clinical and Operational)
Services, LLC; Fundamental Consulting,)
LLC; Fundamental Administrative)
Services, LLC; THI of Baltimore, Inc.;)
THI of South Carolina, LLC; THI of South)
Carolina at Rock Hill, LLC d/b/a Magnolia)
Manor of Rock Hill; and Amisub of S.C.,)
Inc. d/b/a Piedmont Medical Center,)

Defendants.)

IN THE COURT OF COMMON PLEAS

SIXTEENTH JUDICIAL CIRCUIT

Civil Action No.: 2018-CP-46-01459

**PLAINTIFF'S MEMORANDUM
OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION TO
RECONSIDER, ALTER AND/OR
AMEND PURSUANT TO
RULE 59, SCRPC**

Plaintiff Teresa Murphy, as Personal Representative for the Estate of Isaac Strong, through her attorney, respectfully submits this Memorandum of Law in Opposition to Defendant THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill's Motion to Reconsider, Alter, or Amend. Defendant's motion raises issues that were thoroughly addressed in the Court's October 24, 2018, Order and arguments rejected by binding South Carolina precedent. Defendant's further claim that it was entitled to discovery before the Court ruled on its motion is also rejected by South Carolina law. Defendant's attempt to now bolster this flawed argument is based on a false representation of the process by which Mr. Strong was admitted to Defendant's facility.

ARGUMENT

1. Defendant's Agency and Estoppel Arguments are Dependent on its Flawed Merger Argument and All of Defendant's Arguments are Addressed in the Order.

Defendant argues some portions of its agency and estoppel arguments are not dependent on the notion that the Admission Agreement and Arbitration Agreements presented to Mr. Strong's daughter (Teresa Murphy) merged into a single agreement that must be construed as a unit. Def's. Mot. at 2. However, Defendant must win on its merger argument to support agency or estoppel because Defendant's goal is to claim Ms. Murphy had authority to admit Mr. Strong to Defendant's nursing home and, in turn, she must also have the authority to bind him to arbitration or should be estopped from denying such authority.

Defendant's agency argument has consistently portrayed the separate contracts presented to Ms. Murphy as a unit and asked the Court to construe Mr. Strong's admission as evidence to support Ms. Murphy's authority to bind Mr. Strong to a separate arbitration contract. According to Defendant, the only purported representations Mr. Strong made to support an agency relationship was "allowing Ms. Murphy to procure [his] admission." Def's. Mem. in Supp. at 8. There were no arbitration contract-specific representations; Defendant is merely asking the Court to consider the two contracts as one. Just one paragraph later, Defendant argued Mr. Strong ratified the arbitration contract by accepting admission and refusing to object to nursing home care. *Id.* at 9. That argument, otherwise flawed as described below, can have no persuasive thrust unless the Court first assumes the admission and arbitration contracts are inextricable. Citing Mr. Strong's continued acceptance of nursing home care, Defendant then claimed Mr. Strong accepted part of "the contract" while attempting to avoid another part of the same contract. *Id.* Yet, the arbitration contract Defendant seeks to enforce says nothing about nursing home care. Here again, Defendant depends on the Court interpreting the two separate contracts as a unit.

Defendant's motion also argues the Court failed to address its agency by estoppel argument and that this argument is not dependent on merger. Def's. Mot. to Alter or Amend J. at 4. Neither portion of this argument is accurate. The Order does address agency by estoppel. Order at 12 n. 6. Plus, as the Order indicates, what Defendant labels as "agency by estoppel" is not substantively different from equitable estoppel, a doctrine thoroughly addressed in the Order. Id.; see also Boyd v. BellSouth Tele. Tele. Co., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006). Moreover, Defendant's entire equitable estoppel argument lies within the heading "Equitable Estoppel of Merged Agreement." See Defs.' Mem. in Supp. of Mot. to Compel Arb. at 17-19. For reasons explained in the Order, the admission and arbitration contracts in this case do not merge because their language shows the parties' intent for these documents to remain separate. Order at 4-6 (citing Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert. denied Aug. 21, 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014)).

2. The Court Properly Rejected Defendant's Request for Discovery.

Defendant next reiterates the belief that it is entitled to a deposition from Ms. Murphy or other discovery to show she was Mr. Strong's agent when the arbitration agreement was signed. Defs.' Mot. at 4-5. As noted in the Order, that precise argument was rejected by the Court of Appeals earlier this year. Hodge, 422 S.C. at 577-79, 813 S.E.2d at 309-11: Citing long-standing South Carolina law, Hodge held this type of deposition was not required to rule on a family member's apparent authority to sign an arbitration contract because agency may not be formed by the purported agent's representations on their own. Id. at 577, 813 S.E.2d at 310 (quoting Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996)).

Defendant attempts to distinguish Hodge by arguing that, while Ms. Murphy's representations to Defendant may not be the sole evidence to show agency, her representations are relevant evidence. Defs.' Mot. to Alter or Amend J. at 3-4 and n. 5 (citing Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 83, 124 S.E.2d 602, 606 (1962)). But, Hodge forecloses this argument as well because it noted this language from Fuller but still refused to permit a deposition of the signing family member. Hodge, 422 S.C. 544, 577, 813 S.E.2d 292, 310 (Ct. App. 2018).

More broadly, Defendant seeks discovery on whether Ms. Murphy had previously been designated as Mr. Strong's legal representative and whether Ms. Murphy had any post-admission discussions with Mr. Strong that could validate the arbitration contract. Def's. Mot. to Alter or Amend J. at 3-4. In short, Defendant argues discovery is needed to determine the "true nature and extent of Mr. Strong's behavior and capacity at the time of the admissions process." Id. at 4. However, in an effort to show why discovery could be fruitful, Defendant misrepresents the facts by arguing that, during the admissions process on December 18, 2014, "Ms. Murphy *and Mr. Strong* were present with the Admissions Director." Def's. Reply Mem. at 5 (emphasis added). In truth, Mr. Strong was still a PMC patient on December 18th when the admission and separate arbitration contracts were presented at Defendant's facility to Ms. Murphy for her signature. This is evident from the order transferring Mr. Strong from PMC to Defendants' facility on December 22, 2014, as well as the PMC discharge summary dated the same day.¹ Moreover, since a transfer summary² is part of Defendant's *own medical file* on Mr. Strong, there is no basis for Defendant to claim Mr. Strong was present when the contracts were presented and no support for Defendant's

¹ The transfer order (PMC 0984) and discharge summary (PMC 0550-54) collectively are attached as **EXHIBIT 1**.

² Magnolia Manor 0194-96. attached as **EXHIBIT 2**.

implication that Mr. Strong somehow made representations to them at that time sufficient to support an agency relationship.

Thus, Defendant's discovery pursuit is grounded in a false representation belied by its own records. A probing inquiry of the contract signing on December 18th cannot show Mr. Strong's thinking because he was not even there when the documents were signed. Moreover, there is substantial evidence to show Mr. Strong lacked the mental and physical capacity to make affirmative representations to Defendants during this period. See Pla.'s Mem. in Opp. to Defs.' Mot. at 12 n. 2.³ When Mr. Strong was transferred to Defendant's facility (four days after Ms. Murphy signed the arbitration contract), the medical records show he was unable to speak. Defendant now argue the medical evidence shows Mr. Strong was competent and able to make decisions for himself and cites a medical record to support the argument. Defs.' Reply Mem. at 5-6. Regardless of the dubious merits of Defendant's medical argument, no discovery is needed for Defendant to assert it. Both Defendant's capacity and Plaintiff's incapacity arguments are taken directly from medical records currently within Defendant's control. There is nothing more Defendant could ask for or that Plaintiff could provide that would be more probative of Mr. Strong's capacity than the objective medical records Defendant already has.

3. Defendant cannot meet its burden to show Mr. Strong "ratified" the Arbitration Agreement.

Defendant then asks the Court to alter or amend the Order to specifically address Defendant's "ratification" argument. While the Order does not reference ratification by name, that argument fails for many of the reasons stated in the Order. The ratification doctrine holds that a

³ These records (Magnolia Manor 0088-92) were referenced as an exhibit to Plaintiff's earlier memorandum but mistakenly omitted from the final filing. They are attached to this memorandum as **EXHIBIT 3**.

non-agent's conduct may be binding on the purported principal if he later learns of the conduct and positively affirms the non-agent's act. Under South Carolina law, the doctrine does not apply unless Defendants prove (1) Mr. Strong accepted some benefit from the Arbitration Agreement Ms. Murphy signed; (2) Mr. Strong had full knowledge of the facts related to the arbitration contract; and (3) Mr. Strong "affirmative[ly] elect[ed]" to accept arbitration as the mechanism for resolving disputes with Defendants. Stiltner v. USAA Cas. Ins. Co., 395 S.C. 183, 191, 717 S.E.2d 74, 78 (Ct. App. 2011).

Ratification fails here primarily because Defendant has not identified any alleged benefit Mr. Strong received from the Arbitration Agreement. Since the Admission Agreement and Arbitration Agreement do not merge, Mr. Strong's care at Defendant's facility cannot be cited as a benefit. Plus, South Carolina law holds that there is no net benefit to a nursing home resident from a stand-alone arbitration contract. Hodge, 422 S.C. at 563, 813 S.E.2d at 302; Thompson, 416 S.C. at 60, 784 S.E.2d at 688. Moreover, since Mr. Strong's medical records indicate he lacked full mental and physical capacity, Defendant cannot meet its burden to show he had full knowledge of the arbitration contract. Since these medical records are already in Defendant's possession, none of Defendant's requested discovery could change this fact. Finally, Defendant's ratification argument is at odds with a bulk of persuasive authority refusing to find a resident ratified an arbitration contract after moving into a nursing home.⁴

4. The Order draws no conclusions on the substance of Plaintiff's claims.

⁴ McKean v. GGNSC Atlanta, LLC, 765 S.E.2d 681, 685 (Ga. App. 2014) (rejecting ratification argument even where resident later granted signatory relative power-of-attorney to sign future arbitration contracts on resident's behalf); State v. King, 740 S.E.2d 66, 76 n. 10 (W. Va. 2013) (rejecting nursing home claim that incapacitated nursing home resident ratified arbitration contract by failing to rescind it); GGNSC Omaha Oak Grove, LLC v. Payich, No. 4:12CV3040, 2012 WL 2021868, at * 6 (D. Neb. June 5, 2012) (*aff'd* 708 F.3d 1024 (6th Cir. 2013)); Landers v. Integrated Health Servs. of Shreveport, 903 So.2d 609, 612 (La. App. 2005) (rejecting nursing home's argument that resident "tacitly" ratified arbitration contract by remaining in home).

Finally, Defendant points to one sentence in the Order and argue it states as fact that Defendant breached duties owed to Mr. Strong. Def's. Mot. to Alter or Amend J. at 6 (citing Order at 6). This argument overlooks the context of this sentence as well as the procedural posture of Defendant's original motion. In the immediately preceding sentence, the Order acknowledges the paragraphs in Plaintiff's Complaint "allege[]" misconduct and do not yet establish it. Plus, this legal action is just at the pleading stage. Evidence to establish or disprove Plaintiff's claims will be developed through discovery and at trial after Defendant answers the Complaint.

CONCLUSION

For all these reasons and those identified in Plaintiff's earlier briefing, Plaintiff respectfully requests the Court deny Defendant's motion to alter or amend judgment. The Order thoroughly addresses all of Defendant's arguments in favor of arbitration and none of Defendant's proposed discovery could produce evidence that would support arbitration.

Respectfully submitted,

s/ Eve S. Goodstein
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Attorneys for Plaintiff

December 3, 2018
Rock Hill, South Carolina

* Auth (Verified) *

ELECTRONICALLY FILED - 2018 Dec 03 7:37 PM - YORK - COMMON PLEAS - CASE#2018CP4601459

PATIENT TRANSFER FORM (INTER-AGENCY REFERRAL)	
ACCT# REDA MR # 000551090 STRONG, ISAAC L 56Y M GREEN DONNIELLE L 12/02/2014 PIEDMONT MEDICAL CENTER NAME MI 2. SEX 3. HEALTH INSURANCE CLAIM NUMBER STATE ZIP CODE DATE OF BIRTH RELIGION	
7. DATE OF THIS TRANSFER 12/22/14	8. FACILITY NAME AND ADDRESS TRANSFERRING TO MAC MANOR ROCK HILL
11. Dates of qualifying stay FROM 12/2/14 THRU 12/22/14	12-A. FACILITY NAME AND ADDRESS TRANSFERRING FROM PAC
12-B. QUALIFYING AND OTHER PRIOR STAY INFORMATION (Including Medical Record Numbers)	
13. INSURING ORGANIZATION OR STATE AGENCY NAME AND ADDRESS	14. POLICY OR MEDICAL ASSISTANCE NO.
CLINIC APPOINTMENT DATE TIME ATTACH CLINIC APPOINTMENT CARD DATE OF LAST PHYSICAL EXAMINATION	
1. NAME AND ADDRESS OF PHYSICIAN AT NEW FACILITY 2. FINAL DIAGNOSIS(ES), OR PHOTOCOPY ATTACHED PRIMARY: ALL OTHER CONDITIONS: REHAB POTENTIAL: 3. Surgical Procedure(s) and Date(s) or, Check None 4. PHYSICIAN ORDERS ON TRANSFER: LEVEL OF NURSING HOME CARE: SKILLED INTERMEDIATE MEDICINE PRESCRIPTIONS: 5. ESTIMATED MEDICALLY NECESSARY STAY: DAYS WEEKS OR MONTHS 6. DRUG SENSITIVITIES OR, CHECK NONE 7. DIETARY REGIMEN 8. PHYSICIAN'S SIGNATURE DATE 12/22/14 9. SPEECH NORMAL Impaired Unable To Speak 10. HEARING NORMAL Impaired Deaf 11. SIGHT NORMAL Impaired Blind 12. MENTAL STATUS ALWAYS ALERT Occasionally Confused Always Confused 13. FEEDING INDEPENDENT Help with Feeding Cannot Feed Self 14. DRESSING INDEPENDENT Help With Dressing Cannot Dress Self 15. ELIMINATION INDEPENDENT Help To Bathroom Bed Bath With Help Incontinent 16. BATHING INDEPENDENT Bathing With Help Bed Bath With Help Bed Bath 17. STATUS AMBULATORY INDEPENDENT Walks With Assistance Help From Bed to Chair Bed Bound 18. DRESSINGS AND BANDAGES: OR, CHECK NONE 19. APPLIANCES OR SUPPORTS: OR, CHECK NONE 20. NURSING ASSESSMENT AND RECOMMENDATIONS: Turn every 2 hours 21. SIGNATURE TITLE DATE 12/22/14 22. NAME AND ADDRESS OF PERSON TO CONTACT: 803-379-3299 RELATIONSHIP TO PATIENT TELEPHONE NUMBER 23. PATIENT LIVES: ALONE WITH FAMILY WITH SPOUSE OTHER EXPLAIN: 24. PATIENT ATTITUDE Lethargic 25. SUMMARY ATTACHED SOCIAL/EMOTIONAL FACTORS YES NO 26. POST STAY PLANS: 27. SIGNATURE DATE 12/19/14 TITLE RN	

Piedmont Medical Center
222 S. Herlong Avenue
Rock Hill, SC 29732-1158

Patient: STRONG, ISAAC L

MRN #: 551090

Account #: REDACT

DOB/Age/Sex: / 58 years / Male

Attending Provider: GREEN DO, DONNIELLE L

Admission Date: 12/2/2014

Discharge Date: 12/22/2014

Lab Medical Director(s): Robert E. Thomas Jr., MD

Discharge Summary

Document Type: Discharge Summary
Document Subject: Transfer Summary
Document Date/Time: 12/22/2014 10:17 EST
Document Status: Auth (Verified)
Performed By: GREEN DO, DONNIELLE L (12/22/2014 10:56 EST)
Authenticated By: GREEN DO, DONNIELLE L (1/18/2015 15:46 EST)

Transfer Summary

PIEDMONT MEDICAL CENTER
222 South Herlong Avenue
Rock Hill, South Carolina 29732
(803) 329-1234

Patient Name: STRONG, ISAAC L

MRN: 551090PMC

DOB: REDACTED

ACCT: REDACTED

ADM: 12/02/2014

DIS:

CONSULTANTS ON-BOARD: Include Dr. Bret Garretson and Dr. Ebinehita Arhebamen.

PRIMARY CARE PHYSICIAN: Malik Ashe, MD, in Chester.

DISCHARGE DIAGNOSES:

1. Acute cerebrovascular accident in the distribution of left lateral basal ganglia complex and left paramidline pons. Patient also noted to have some chronic ischemic changes.
2. Hemiplegia.
3. Peripheral vascular disease with previous below-knee amputation.
4. Dysphagia, status post percutaneous endoscopic gastrostomy tube placement.
5. Urinary tract infection, currently on intravenous antibiotics.
6. Intermittent chest congestion secondary to inability to clear secretions secondary to patient very weak after his stroke.
7. Electrolyte abnormality including hyponatremia.
8. Malignant hypertension at the time of his arrival.
9. Diabetes mellitus.

BRIEF HISTORY AND HOSPITAL COURSE: This is a 56-year-old gentleman who has past medical history of peripheral vascular disease with previous lower extremity BKA as well as patient had a previous CVA with residual speech deficit and left facial droop, coronary artery disease, MI status post cardiac stenting, dyslipidemia, hypertension, severe vascular disease with AKA,

Report Request ID: 86242687

Printed: 5/15/2017 12:21 EDT

Piedmont Medical Center
222 S. Herlong Avenue
Rock Hill, SC 29732-1158

Patient: STRONG, ISAAC L

MRN #: 551090

Account #: REDACT

DOB/Age/Sex: [REDACT] / 58 years / Male

Attending Provider:

GREEN DO, DONNIELLE L

Admission Date:

12/2/2014

Discharge Date:

12/22/2014

Lab Medical Director(s):

Robert E. Thomas Jr., MD

Discharge Summary

relatively poor historian, who came into the hospital on day of presentation secondary to significant progressive weakness over a 2-week period. Per his girlfriend, she noted that he has gotten progressively weak over the past several weeks. She notes that, however, in the past several days, patient gets weak to where he could not even lift a cup to drink and that, although he had the AKA, he was able to use his walker, that he was dragging his good foot.

Patient seen and examined. He had significant hypertension at the time of his arrival and was found to have acute CVAs. Patient was seen by Dr. Ebinehita Arhebamen, neurology services, and patient has continued to be on his aspirin as well as his Plavix. Patient also noted to have reduction in his blood pressure. Patient in that regard has been stable. However, he is noted to have significant dysphagia, made n.p.o. almost within 24 hours of his hospitalization due to his aspiration risk and failed swallow study as well as failed evaluation by speech. Patient is currently on tube feeds.

Patient with his PEG was noted to have some hyponatremia. He was getting very frequent water flushes, almost 100 mL every hour, to which his sodium levels went down into the 120s. That has been drastically decreased to where his sodium level is now at 130 range. Patient over the past several days was noted to have increasing white count on Thursday of last week as well as some decreased level of consciousness. He did have a urinalysis done, which showed he had a urinary tract infection and is started on medication to cover both possible hospital-acquired pneumonia as well as his urine. His chest x-ray was proved to be normal, and patient is thus on a cephalosporin for his urinary tract infection. His culture came back with multiple contaminants, however, since that time, patient has improved.

Patient also had noted transient hypotension. Patient received all of his medications at the same time between Friday and Saturday for his blood pressure. Noted blood pressure went down to the 90s. He was symptomatic. He was clammy and unresponsive. Patient was given 1.5 L of IV fluids and he perked up well. Patient's medications on Sunday were given a little bit distanced apart where patient did not have this hypotensive episode.

Patient was seen and examined. He is sleeping, which he does most of the time; however, you walk in the room, you call his name, he does open his eyes and when you ask him if there is anything wrong, he did respond by shaking his head. Patient no issues of nausea, vomiting, diarrhea.

PHYSICAL EXAMINATION:

VITAL SIGNS: His blood pressure is slightly elevated at 177/91, pulse rate 65, respiration 18, he is afebrile and he is 97% on room air.

GENERAL: This is a 56-year-old gentleman who is in no acute cardiopulmonary

Report Request ID: 86242687

Printed: 5/15/2017 12:21 EDT

Piedmont Medical Center
222 S. Herlong Avenue
Rock Hill, SC 29732-1158

Patient: STRONG, ISAAC L

MRN #: 551090

Account #: REDACT

DOB/Age/Sex: / 58 years / Male

Attending Provider: GREEN DO, DONNIELLE L

Admission Date: 12/2/2014

Discharge Date: 12/22/2014

Lab Medical Director(s): - Robert E. Thomas Jr., MD

Discharge Summary

distress. He has anicteric sclerae. He does have some missing teeth.

NECK: He has no JVD.

CARDIOVASCULAR: His heart rate is 65. S1, S2. He does have some upper airway congestion, but his heart is otherwise clear.

ABDOMEN: Soft, positive bowel sounds, positive PEG.

EXTREMITIES: No lower extremity edema. He does have AKA.

SKIN: Warm and dry.

IMPRESSION AND PLAN: Per above.

Patient for his tube feeds, in regards to his water flushes, we probably prefer patient to get 100 mL q. 6-8 hours just so his electrolytes can be within normal limits. Otherwise, his aspirin is 300 mg rectal deposit or if it can be put in his tube feeds, it can be 325, benazepril 20 mg daily, Cefitin 500 mg b.i.d. for an additional 4 days. If this needs to be changed for facility equivalent or liquid formulation to get down his PEG tube, that is fine. Celexa 20 tab daily, clonidine 0.2 tab q. 12, Plavix 75 daily, Lovenox 40 subcutaneous q. 24 hours, hydralazine 5 mg q. 8 hours, NovoLog sliding scale a.c. and at bedtime, isosorbide 30 mg daily, metformin 1000 mg daily with meal, metoprolol 50 mg q. 12. Patient, of course, if he needs the _____ syringe for hypoglycemia.

PREPARATION FOR PATIENT'S DISCHARGE: Greater than 30 minutes.

Dictated by: DONNIELLE L. GREEN, DO

TR:DLG/CN

DD:12/22/2014 10:17 EST

DT:12/22/2014 10:56 EST

JOB:14212017/5761966

cc: MALIK ASHE MD

TFS-**-Transfer Summary-**-20141222105621

Electronically Signed on 01/18/2015 15:46 EST

GREEN DO, DONNIELLE L

Piedmont Medical Center
222 S. Herlong Avenue
Rock Hill, SC 29732-1158

Patient: STRONG, ISAAC L

MRN #: 551090

Account #: REDACTED

DOB/Age/Sex: [REDACTED] / 58 years / Male

Attending Provider: GREEN DO, DONNIELLE L

Admission Date: 12/2/2014

Discharge Date: 12/22/2014

Lab Medical Director(s): Robert E. Thomas Jr., MD

Discharge Documentation_Instructions

Document Type: IP Depart Summary
Document Subject: IP Depart Summary
Document Date/Time: 12/22/2014 20:16 EST
Document Status: Modified
Performed By: Laney RN, Shauna (12/22/2014 20:16 EST)
Authenticated By: Laney RN, Shauna (12/22/2014 20:16 EST)

IP Depart Summary

Piedmont Medical Center

Clinical Summary

Current Date: 12/22/2014 20:16:35

Name: STRONG, ISAAC L

Address: REDACTED

Phone: REDACTED

Date of Birth: [REDACTED] MRN: 100000000843 FIN:

Encounter Type: 1 - Inpatient

PHYSICIANS INFORMATION

Primary Care Physician: ASHE MD, MALIK E Phone Number: 8035812800

Consulting Physician: MATTHEWS JR MD, CURTIS J; MARFO MD, MAGDALENE; TAORMINA MD, MARTIN V; ARHEBAMEN MD, EBINEHITA

Attending Physician: GREEN DO, DONNIELLE L

Admitting Physician: GREEN DO, DONNIELLE L

Piedmont Medical Center would like to thank you for allowing us to assist you with your healthcare needs. The following includes patient education materials and information regarding your injury/illness.

CLINICAL INFORMATION

Allergies: NKA

Discharge Diagnosis: UNSPECIFIED ESSENTIAL HYPERTENSION; Weakness 780.79

Report Request ID: 86242687

Printed: 5/15/2017 12:21 EDT

Piedmont Medical Center
222 S. Herlong Avenue
Rock Hill, SC 29732-1158

Patient: STRONG, ISAAC L

MRN #: 551090

Account #: REDACT

DOB/Age/Sex: / 58 years / Male

Attending Provider: GREEN DO, DONNIELLE L

Admission Date: 12/2/2014

Discharge Date: 12/22/2014

Lab Medical Director(s): Robert E. Thomas Jr., MD

Discharge Documentation_Instructions

Discharge Orders:

FOLLOW UP INSTRUCTIONS/APPOINTMENTS:

With:

MARTIN TAORMINA

Address:

When:

Within 2-4 weeks

Comments:

Nurse will call to schedule appointment - needs to be seen 2 weeks after discharge.

Immunizations:

Immunization Name	Date	Dose	Route	Vaccine Info Sheet & Comments
tuberculin purified protein derivative	12/03/2014 05:27:00	5 Unit(s)	IntraDermal Forearm Mid Right	

Discharge Assessment: Discharge Summary

12/22/14 20:15 EST Performed by Laney RN, Shauna

Entered on 12/22/14 20:16 EST

Nursing Discharge Summary CPOE

Discharged to: Another care facility

Discharge Date: 12/22/14 14:00

Accompanied By, Discharge: EMT/paramedics

Mode of Discharge: Stretcher

Mode of Transportation-ClinDoc: Van

Medications DC: Final medication list provided to patient/caregiver

Transfer Patient to Another Facility

Patient's Transfer Condition: Stable

Mode of Transfer: Ground ambulance

Data Sent with Patient: Chart copy, Demographic sheet, Med Rec

Report Request ID: 86242687

Printed: 5/15/2017 12:21 EDT

Discharge Summary

STRONG, ISAAC L - 551090

* Preliminary Report *

* Preliminary Report *

Transfer Summary

PIEDMONT MEDICAL CENTER
222 South Herlong Avenue
Rock Hill, South Carolina 29732
(803) 329-1234

Patient Name: STRONG, ISAAC L
MRN: 551090PMC
DOB: 06/29/1958
ACCT: REDACTED
ADM: 12/02/2014
DIS:

CONSULTANTS ON-BOARD: Include Dr. Bret Garretson and Dr. Ebinehita Arhebamen.

PRIMARY CARE PHYSICIAN: Malik Ashe, MD, in Chester.

DISCHARGE DIAGNOSES:

1. Acute cerebrovascular accident in the distribution of left lateral basal ganglia complex and left paramedian pons. Patient also noted to have some chronic ischemic changes.
2. Hemiplegia.
3. Peripheral vascular disease with previous below-knee amputation.
4. Dysphagia, status post percutaneous endoscopic gastrostomy tube placement.
5. Urinary tract infection, currently on intravenous antibiotics.
6. Intermittent chest congestion secondary to inability to clear secretions secondary to patient very weak after his stroke.
7. Electrolyte abnormality including hyponatremia.
8. Malignant hypertension at the time of his arrival.
9. Diabetes mellitus.

BRIEF HISTORY AND HOSPITAL COURSE: This is a 56-year-old gentleman who has past medical history of peripheral vascular disease with previous lower extremity BKA as well as patient had a previous CVA with residual speech deficit and left facial droop, coronary artery disease, MI status post cardiac stenting, dyslipidemia, hypertension, severe vascular disease with AKA, relatively poor historian, who came into the hospital on day of presentation secondary to significant progressive weakness over a 2-week period. Per his girlfriend, she noted that he has gotten progressively weak over the past several weeks. She notes that, however, in the past several days, patient gets weak to where he could not even lift a cup to drink and that, although he had the AKA, he was able to use his walker, that he was dragging his good foot.

Patient seen and examined. He had significant hypertension at the time of his arrival and was found to have acute CVAs. Patient was seen by Dr. Ebinehita

Printed by: Farlow RN, Karen
Printed on: 12/22/2014 11:23 EST

Page 1 of 3
(Continued)

Discharge Summary

STRONG, ISAAC L - 551090

* Preliminary Report *

Arhebamen, neurology services, and patient has continued to be on his aspirin as well as his Plavix. Patient also noted to have reduction in his blood pressure. Patient in that regard has been stable. However, he is noted to have significant dysphagia, made n.p.o. almost within 24 hours of his hospitalization due to his aspiration risk and failed swallow study as well as failed evaluation by speech. Patient is currently on tube feeds.

Patient with his PEG was noted to have some hyponatremia. He was getting very frequent water flushes, almost 100 mL every hour, to which his sodium levels went down into the 120s. That has been drastically decreased to where his sodium level is now at 130 range. Patient over the past several days was noted to have increasing white count on Thursday of last week as well as some decreased level of consciousness. He did have a urinalysis done, which showed he had a urinary tract infection and is started on medication to cover both possible hospital-acquired pneumonia as well as his urine. His chest x-ray was proved to be normal, and patient is thus on a cephalosporin for his urinary tract infection. His culture came back with multiple contaminants, however, since that time, patient has improved.

Patient also had noted transient hypotension. Patient received all of his medications at the same time between Friday and Saturday for his blood pressure. Noted blood pressure went down to the 90s. He was symptomatic. He was clammy and unresponsive. Patient was given 1.5 L of IV fluids and he perked up well. Patient's medications on Sunday were given a little bit distanced apart where patient did not have this hypotensive episode.

Patient was seen and examined: He is sleeping, which he does most of the time; however, you walk in the room, you call his name, he does open his eyes and when you ask him if there is anything wrong, he did respond by shaking his head. Patient no issues of nausea, vomiting, diarrhea.

PHYSICAL EXAMINATION:

VITAL SIGNS: His blood pressure is slightly elevated at 177/91, pulse rate 65, respiration 18, he is afebrile and he is 97% on room air.

GENERAL: This is a 56-year-old gentleman who is in no acute cardiopulmonary distress. He has anicteric sclerae. He does have some missing teeth.

NECK: He has no JVD.

CARDIOVASCULAR: His heart rate is 65. S1, S2. He does have some upper airway congestion, but his heart is otherwise clear.

ABDOMEN: Soft, positive bowel sounds, positive PEG.

EXTREMITIES: No lower extremity edema. He does have AKA.

SKIN: Warm and dry.

IMPRESSION AND PLAN: Per above.

Patient for his tube feeds, in regards to his water flushes, we probably prefer patient to get 100 mL q. 6-8 hours just so his electrolytes can be within normal limits. Otherwise, his aspirin is 300 mg rectal deposit or if it can be put in his tube feeds, it can be 325, benazepril 20 mg daily, Ceftin 500 mg b.i.d. for an additional 4 days. If this needs to be changed for facility equivalent or liquid formulation to get down his PEG tube, that is

Printed by: Farlow RN, Karen
Printed on: 12/22/2014 11:23 EST

Page 2 of 3
(Continued)

ELECTRONICALLY FILED - 2018 Dec 03 7:37 PM - YORK - COMMON PLEAS - CASE#2018CP4601459

Discharge Summary

STRONG, ISAAC L - 551090

* Preliminary Report *

fine. Celexa 20 tab daily, clonidine 0.2 tab q. 12, Plavix 75 daily, Lovenox 40 subcutaneous q. 24 hours, hydralazine 5 mg q. 8 hours, NovoLog sliding scale a.c. and at bedtime, isosorbide 30 mg daily, metformin 1000 mg daily with meal, metoprolol 50 mg q. 12. Patient, of course, if he needs the _____ syringe for hypoglycemia.

PREPARATION FOR PATIENT'S DISCHARGE: Greater than 30 minutes.

Dictated by: DONNIELLE L. GREEN, DO
TR:DEG/CN
DD:12/22/2014 10:17 EST
DT:12/22/2014 10:56 EST
JOB:14212017/5761966

cc: MALIK ASHE MD
TFS-***-Transfer Summary-***-20141222105621

Completed Action List:

* Perform by GREEN DO, DONNIELLE L on December 22, 2014 10:56 EST

Result type: Discharge Summary
Result date: December 22, 2014 10:17 EST
Result status: Transcribed
Result title: Transfer Summary
Performed by: GREEN DO, DONNIELLE L on December 22, 2014 10:56 EST
Encounter info: 102772167, PMC, 1 - Inpatient, 12/02/2014 -
Contributor system: PMC_TRANS

Printed by: Farlow RN, Karen
Printed on: 12/22/2014 11:23 EST

Page 3 of 3
(End of Report)

NURSING DATA COLLECTION TOOL

Evaluation Date:

12/22/14

☒ **Admission/Readmission** - Entire form must be completed by Licensed Nurse within 24 hours of Admission. Complete based on items that are evident on Admission.

Admission Date: 12 / 22 / 14
mm dd yyyy

Time of Arrival: _____ : _____
am pm

☐ **Quarterly** - Entire form must be completed by Licensed Nurse (Start with Section 2: Identified Prior Risks)

☐ **Annual** - Entire form must be completed by Licensed Nurse (Start with Section 2: Identified Prior Risks)

SECTION 1: FACILITY ORIENTATION

(Check all that apply)

- | | | |
|---|--|---|
| ☐ Staff | ☐ Room | ☐ Roommate |
| ☐ Call System | ☐ Bathroom | ☐ Shower |
| ☐ Meals/Time | ☐ Dining Room | ☐ Smoking Policy |
| ☐ Common Areas | ☐ Activity Calendar | ☐ Telephone |
| ☐ Visiting Hours | ☐ Resident Rights | |

SECTION 2: IDENTIFIED PRIOR RISKS

(Check all that apply)

- | | | |
|---|--|---|
| ☐ Swallowing Problems | ☐ Smoker | ☐ Unplanned Wt. Change |
| ☐ Fluid Restriction | ☐ Chewing Problems | ☐ Palliative Care |
| ☐ Wanderer/Exit Seeker | ☐ Seizure Precautions | ☐ Behavior Problems |
| ☐ Crush Medications | ☐ Falls | |

SECTION 3: VITAL SIGNS

Temp: 98 Pulse: 76 Respirations: 18

B/P Sitting: 100/58 B/P Standing: _____

SECTION 4: ACTIVE DIAGNOSIS IN LAST 7 DAYS

(Check all that apply)

- ☐ Cancer (with or without metastasis)
- ☐ Anemia (e.g., aplastic, iron deficiency, pernicious, and sickle cell)
- ☐ Atrial Fibrillation or Other Dysrhythmias (e.g., bradycardias and tachycardias)
- ☐ Coronary Artery Disease (CAD) (e.g., angina, myocardial infarction, and atherosclerotic heart disease (ASHD))
- ☐ Deep Venous Thrombosis (DVT), Pulmonary Embolus (PE), or Pulmonary Thrombo-Embolism (PTE)
- ☐ Heart Failure (e.g., congestive heart failure (CHF) and pulmonary edema)
- ☐ Hypertension
- ☐ Orthostatic Hypotension
- ☐ Peripheral Vascular Disease (PVD) or Peripheral Arterial Disease (PAD)
- ☐ Cirrhosis
- ☐ Gastroesophageal Reflux Disease (GERD) or Ulcer (e.g., esophageal, gastric, and peptic ulcers)
- ☐ Ulcerative Colitis, Crohn's Disease, or Inflammatory Bowel Disease
- ☐ Benign Prostatic Hyperplasia (BPH)
- ☐ Renal Insufficiency, Renal Failure, or End-Stage Renal Disease (ESRD)
- ☐ Neurogenic Bladder
- ☐ Obstructive Uropathy
- ☐ Multidrug-Resistant Organism (MDRO)
- ☐ Pneumonia
- ☐ Septicemia
- ☐ Tuberculosis
- ☐ Urinary Tract Infection (UTI) (LAST 30 DAYS)
- ☐ Viral Hepatitis
- ☐ Wound Infection (other than foot)
- ☐ Diabetes Mellitus (DM)
- ☐ Hyponatremia
- ☐ Hyperkalemia
- ☐ Hyperlipidemia (e.g., hypercholesterolemia)
- ☐ Thyroid Disorder
- ☐ Arthritis
- ☐ Osteoporosis
- ☐ Hip Fracture
- ☐ Other fracture
- ☐ Alzheimer's Disease
- ☐ Aphasia
- ☐ Cerebral Palsy

SECTION 4: ACTIVE DIAGNOSIS IN LAST 7 DAYS (continued)

- ☐ Cerebrovascular Accident (CVA), Transient Ischemic Attack (TIA), or Stroke
- ☐ Dementia
- ☐ Hemiplegia/hemiparesis
- ☐ Paraplegia
- ☐ Quadriplegia
- ☐ Multiple Sclerosis (MS)
- ☐ Huntington's Disease
- ☐ Parkinson's disease
- ☐ Tourette's Syndrome
- ☐ Seizure Disorder or Epilepsy
- ☐ Traumatic Brain Injury (TBI)
- ☐ Malnutrition (protein, calorie)
- ☐ Anxiety Disorder
- ☒ Depression (other than bipolar) *Hx of Depression*
- ☐ Manic depression (bipolar disease)
- ☐ Psychotic Disorder (other than schizophrenia)
- ☐ Schizophrenia (e.g., schizoaffective and schizopreniform disorders)
- ☐ Post Traumatic Stress Disorder (PTSD)
- ☐ Asthma, Chronic Obstructive Pulmonary Disease (COPD), or Chronic Lung Disease
- ☐ Respiratory Failure
- ☐ Cataracts, Glaucoma, or Macular Degeneration
- ☐ None of the above active diagnoses within the last 7 days

Comments: *POAKA - Dysphagia, Png Tube*

SECTION 5: ALLERGIES

(Check all that apply)

- ☒ Drugs: _____ ☐ Food: _____
- ☐ Other: _____
- ☐ Allergy sticker on chart ☐ Allergy identification on Patient/Resident
- ☒ No known allergies

SECTION 6: PATIENT/RESIDENT/FAMILY EDUCATION NEEDS

(Check all that apply)

Specific barriers to learning:

- | | | |
|---|---|---|
| ☐ Physical | ☐ Motivation | ☐ Reading |
| ☐ Emotional | ☐ Language | ☐ Cultural |
| ☐ Age-related issues | ☐ Religious | ☐ Sensory (visual) |
| ☐ Cognitive | ☐ Sensory (auditory) | ☐ Financial |

Comments: _____

SECTION 7: DISCHARGE POTENTIAL

What is the resident's goal toward discharge?

- ☒ Expects to be discharged to the community
- ☐ Expects to remain in this facility
- ☐ Expects to be discharged to another facility/institution
- ☐ Unknown or uncertain

What is the source of discharge information?

- ☐ Resident
- ☐ If not resident, then family or significant other
- ☐ If not resident, family, or significant other, then guardian or legally authorized representative
- ☒ None of the above

Comments: _____

Resident Name:

Strong trace

Attending Physician:

Jewell

Record #:

300931

Room/Bed:

221

ROA 228

Magnolia Manor 0088
NURSING DATA COLLECTION TOOL

SECTION 8: PHYSICAL EVALUATION**NEUROLOGICAL/COGNITION**

(Check all that apply, in last 7 days or since admission)

- 1) Comatose ☒ Persistent vegetative state/no discernible consciousness (If checked, skip to Musculoskeletal)
- 2) Memory ☐ Short-term memory problem ☐ Long-term memory problem
- 3) Memory/Recall - Patient/Resident can normally recall ☐ Current season ☐ That he/she is in a nursing home ☐ Staff name/faces ☐ None of the above are recalled ☐ Location of room
- 4) Decision Making ☐ Independent - decisions consistent/reasonable ☐ Modified independent - some difficulty in new situations ☒ Moderately impaired - decisions poor, cues/supervision required ☐ Severely impaired - never rarely made decisions
- 5) Comments: _____

HEARING/COMMUNICATION, SPEECH, VISION

(Check all that apply, in last 7 days or since admission)

- 1) Hearing (with hearing aid or hearing appliances if normally used) ☒ Adequate-no difficulty in normal conversation, social interaction, listening to TV ☐ Minimal difficulty-difficulty in some environments (e.g., when person speaks softly or setting is noisy) ☐ Moderate difficulty-speaker has to increase volume and speak distinctly ☐ Highly impaired-absence of useful hearing
- 2) Communication Devices ☐ Hearing aid, present and used: ☐ R ☐ L ☐ Hearing aid, present and not used regularly ☐ R ☐ L Why? _____ ☐ Hearing amplifier: ☐ Yes ☐ No
- 3) Speech Pattern ☐ Clear speech-distinct intelligible words ☐ Unclear speech-slurred or mumbled words ☒ No speech-absence of spoken words
- 4) Modes of Expression *expression appears* ☐ Speech ☐ Signs/gestures/sounds ☐ Communication board ☐ Other: _____ ☐ Writing messages ☐ None of the above ☐ American sign language/Braille
- 5) Makes Self Understood ☒ Understood ☐ Usually understood-difficulty communicating some words or finishing thoughts but is able if prompted or given time. ☐ Sometimes understood-ability is limited to making concrete requests. ☐ Rarely/never understood
- 6) Ability to Understand Others ☒ Understands-clear comprehension ☐ Usually understands-misses some part/intent of message but comprehends most conversation ☐ Sometimes understands-responds adequately to simple, direct communication only ☐ Rarely/never understands
- 7) Vision (with glasses or other visual appliances) ☒ Adequate-sees fine detail, including regular print in newspapers/books ☐ Impaired-sees large print, but not regular print in newspapers/books ☐ Moderately impaired-limited vision; not able to see newspaper headlines but can identify objects ☐ Highly impaired-object identification in question, but eyes appear to follow objects ☐ Severely impaired-no vision or sees only light, colors or shapes; eyes do not appear to follow objects
- 8) Pupils ☒ Equal ☐ Eye drainage ☐ R ☐ L ☒ React to light Describe: _____

HEARING/COMMUNICATION, SPEECH, VISION (continued)

9) Visual Appliances

- ☐ Glasses/Magnifying glass ☐ Contact lenses ☐ Eye prosthesis ☐ R ☐ L ☐ Eye appliance(s) present and not used regularly Why: _____ ☒ None of the above

10) Last Eye Exam, if known _____

11) Comments: _____

MOOD

(Check all that apply, in the last 7 days or since admission)

- 1) Indicators of Depression - Check all that apply from resident observation, staff, and/or family interview ☐ Little interest or pleasure in doing things ☐ Feeling or appearing down, depressed or hopeless ☐ Trouble falling or staying asleep ☐ Sleeping too much ☐ Feeling tired or having little energy ☐ Poor appetite or overeating ☐ Feeling bad about self, is a failure, or has let family/self down ☐ Trouble concentrating on things, such as reading the newspaper or watching television ☐ Moving or speaking so slowly that other people have noticed ☐ Being so fidgety or restless that resident has been moving around a lot more than usual ☐ Being short-tempered, easily annoyed ☐ States that life isn't worth living, wishes for death, or attempts to harm self ☒ None of the above
- 2) Safety Notification Was responsible staff or provider informed that there is a potential for resident self harm? ☐ No ☐ Yes ☒ NA NAME: _____
- 3) Comments: _____

BEHAVIOR

(Check all that apply, in the last 7 days or since admission)

(Monitor using Behavior/Side Effect Tracking Record)

1) Behavioral Symptoms

- ☐ WANDERING (moved with no rational purpose, seemingly oblivious to needs or safety) (Proceed to Care Plan for elopement prevention management) (Complete Fall Risk Evaluation) ☐ Places resident at significant risk of getting to a potentially dangerous place? (e.g., stairs, outside of the facility) ☐ Significantly intrudes on the privacy or activities of others?
- ☐ PHYSICAL BEHAVIOR SYMPTOMS were directed toward others? (e.g., hitting, kicking, pushing, scratching, grabbing, abusing others sexually)
- ☐ VERBAL BEHAVIOR SYMPTOMS were directed toward others? (e.g., threatening others, screaming at others, cursing at others)
- ☐ BEHAVIORAL SYMPTOMS NOT directed toward others? (e.g., physical symptoms such as hitting or scratching self, pacing, rummaging, public sexual acts, disrobing in public, throwing or smearing food or bodily wastes, or verbal/vocal symptoms like screaming, disruptive sounds)
- ☐ REJECTION OF CARE or evaluation (e.g., bloodwork, taking medications, ADL assistance) that is necessary to achieve the resident's goals for health and well-being?
- ☐ HALLUCINATIONS ☐ DELUSIONS ☒ None of the above per history and/or observation

Resident Name: *Strong Isaac*Attending Physician: *Jewell*Record #: *310821*Room/Bed: *27-1*

SECTION 8: PHYSICAL EVALUATION (continued)**BEHAVIOR (continued)****2) Psychotropic Medications**

(Check all that are used and document supporting diagnosis)

(Complete Fall Risk Evaluation if new medication)

- ☒ Antidepressant Diagnosis: Depression
- ☐ Antipsychotic Diagnosis: _____
- ☐ Hypnotic Diagnosis: _____
- ☐ Anxiolytic Diagnosis: _____
- ☒ None of the above

3) Comments: Resident takes celsa xmg daily**MUSCULOSKELETAL**

(Check all that apply)

1) Modes of Locomotion

- ☐ Wheeled self ☐ Walker/Cane/Crutch
- ☐ Wheelchair ☐ Cane/Quad cane
- ☐ Other person wheeled

2) Functional Limitation in ROM

Does the resident have any limitation that interferes with daily functions or places resident at risk of injury?

- ☐ Upper Extremity (shoulder, elbow, wrist, hand)
- ☐ No ☒ Impairment One Side -- ☐ L ☒ R
- ☐ Impairment Both Sides
- ☐ Lower Extremity (hip, knee, ankle, foot)
- ☐ No ☒ Impairment One Side -- ☐ L ☒ R
- ☐ Impairment Both Sides

3) Prior Falls

- ☐ Fell in the past 30 days (Complete Fall Risk Evaluation)
- ☐ Fell in the past 31-180 days (Complete Fall Risk Evaluation)
- ☐ Fracture related to a fall in the past 30-180 days?

4) Balance (If not steady, complete Fall Risk Evaluation)

- How does the resident move from a seated to a standing position?
- ☐ Steady at all times ☒ Not observed
- ☐ Not steady, but able to stabilize without human assistance
- ☐ Not steady, only able to stabilize with human assistance

How does the resident walk? (with assistive device if used)

- ☐ Steady at all times ☒ Not observed
- ☐ Not steady, but able to stabilize without human assistance
- ☐ Not steady, only able to stabilize with human assistance

How does the resident turn around and face the opposite direction while walking?

- ☐ Steady at all times ☒ Not observed
- ☐ Not steady, but able to stabilize without human assistance
- ☐ Not steady, only able to stabilize with human assistance

How does the resident move on and off toilet?

- ☐ Steady at all times ☒ Not observed
- ☐ Not steady, but able to stabilize without human assistance
- ☐ Not steady, only able to stabilize with human assistance

How does the resident transfer between bed and chair or wheelchair?

- ☐ Steady at all times ☒ Not observed
- ☐ Not steady, but able to stabilize without human assistance
- ☐ Not steady, only able to stabilize with human assistance

5) Devices and Restraints (Complete Siderail/Restraint Evaluation as needed)

- ☐ Bed rails per patient/resident request
- ☐ Full bed rails on all open sides of bed
- ☐ Other types of side rails used (e.g., hall rail, one side)
- ☐ Trunk restraint (Complete Fall Risk Evaluation)
- ☐ Limb restraint (e.g., mitts, wrists)
- ☐ Chair prevents rising (e.g., merrywalker)

Explain: _____

6) Comments: _____

GASTROINTESTINAL**1) Height/Weight**

Measured height: _____ Usual weight: _____

Measured weight: _____

2) Weight Change

- ☐ Weight loss in last 30 days, amount: _____
- ☐ Weight gain in last 30 days, amount: _____
- ☐ No weight change per history

3) Appetite

- ☐ Good ☐ Fair ☐ Poor ☐ Unknown

4) Nutritional Approaches

- ☐ Parenteral feeding/TPN
- ☐ Peg ☐ GT ☐ G ☐ JT
- Size: _____ ☐ Placement verified
- ☐ Mechanically altered diet
- ☐ Therapeutic diet
- ☐ Dietary supplement between meals
- ☐ Plate guard, stabilized/built-up utensil
- ☐ On a planned weight change program
- ☐ Fluid restriction, specify: _____
- ☐ Vegetarian diet
- ☐ Ethnic diet
- ☐ None of above

5) Oral Problems

- ☐ Loss of liquids/solids from mouth when eating or drink
- ☐ Holding food in mouth/cheeks or residual food in mouth after meals
- ☐ Coughing or choking during meals or when swallowing medications
- ☐ Complaints of difficulty or pain with swallowing
- ☐ None of the above

6) Conditions of Mouth/Gums

- ☒ Tissues pink & moist (normal) ☐ Open area: _____
- ☐ Reddened gums ☐ Swollen/Bleeding gums
- ☐ Reddened lips ☐ Odorous
- ☐ Darkened gums ☐ Tongue coated
- ☐ Drainage from mouth/gums ☐ Tissue sticky/no saliva

7) Teeth/Dentures

- ☐ All teeth present ☐ Partial dentures
- ☐ Jagged ☐ Upper dentures
- ☐ Carious ☐ Lower dentures
- ☒ Some missing ☐ Ill-fitting dentures
- ☐ All missing ☐ Able to function with or without natural teeth or dentures
- ☐ No dentures
- ☐ Full dentures
- ☐ Dentures present but does not wear, why: _____

8) Last dental exam, if known: _____**9) Bowel Elimination Pattern**

- ☒ Bowel elimination pattern regular - at least once every 3 days
- ☐ Constipation ☐ Enema
- ☐ Diarrhea ☐ Ostomy present
- ☐ Fecal impaction ☐ Fissures/Fistula
- ☐ Hemorrhoids ☐ None of above per history and/or observation

10) Bowel Continuity Program (i.e., suppository, prune juice)

- Specify: Dulcolax Supp PRN
- ☐ Not used

11) Bowel Continence

- ☐ Always continent
- ☐ Occasionally incontinent (one episode of bowel incontinence)
- ☐ Frequently incontinent (two or more episodes of bowel incontinence, but at least one continent bowel movement)
- ☒ Always incontinent (no episodes of continent bowel movements)
- ☐ Not rated (resident had an ostomy or did not have a bowel movement for entire 7 days)

12) Comments: Last BM 12/21/14Resident Name: Stacy IsaacAttending Physician: Tevel

Record #: _____

Room/Bed: 216

ROA 230

Macholia Manor 0090
NURSING DATA COLLECTION TOOL

SECTION 8: PHYSICAL EVALUATION (continued)

GENITOURINARY

(Check all that apply)

- Urinary Continence (Complete Bowel & Bladder Evaluation if resident has episodes of incontinence)**
 - ☐ Always continent
 - ☐ Occasionally incontinent (less than 7 episodes of incontinence)
 - ☐ Frequently incontinent (7 or more episodes of urinary incontinence, but at least one episode of continent voiding)
 - ☒ Always incontinent (no episodes of continent voiding)
 - ☐ Not rated, resident had a catheter (indwelling, condom), urinary ostomy
- Bladder Symptoms**
 - ☐ Urgency to void
 - ☐ Pain
 - ☐ Burning
 - ☐ Hematuria
 - ☐ Nocturia
 - ☐ None of above per history and/or observation
- Bladder Appliances/Programs**
 - ☐ 3-day bladder diary
 - ☐ Bladder retraining (prompted voiding)
 - ☐ Scheduled toileting (habit training)
 - ☐ Routine toileting (ADL schedule)
 - ☐ Check and change (perineal care)
 - ☐ External (Condom) catheter
 - ☐ Internal catheter

Size: _____ Date: _____

Diagnosis: _____

 - ☐ Intermittent catheter
 - ☐ None of above
- Urinary Incontinence management response?**
 - ☐ No change
 - ☐ Decreased wetness
 - ☐ Completely dry (continent)
 - ☐ Unable to determine or trial in progress
- Date of last menstrual cycle (if applicable):** _____
- Vaginal Discharge** ☐
- Penile Discharge** ☐
- Comments:** _____

PAIN EVALUATION

Resident Record Review (Complete for all residents, regardless of current pain level)

- At any time in the last 5 days has:**
 - ☐ The resident been on a scheduled pain medication regimen
 - ☐ The resident received PRN pain medications
 - ☐ The resident received non-medication intervention for pain
- Does the resident have a current diagnosis/condition which may indicate pain? (i.e., wounds, end-stage disease)**

Diagnosis/Condition: _____
- Resident Interview (If resident unable to be interviewed, then complete Resident Pain Observation)**

Have you had pain or hurting at any time in the last 5 days?

☐ No ☐ Yes

How much of the time have you experienced pain or hurting over the last 5 days?

☐ Almost constantly ☐ Occasionally ☐ NA

☐ Frequently ☐ Rarely

Over the past 5 days, has pain made it hard for you to sleep at night?

☐ No ☐ Yes

Over the past 5 days, have you limited your day-to-day activities because of pain?

☐ No ☐ Yes

Rate your worst pain over the last 5 days on a zero to ten scale, with zero being no pain and ten as the worst pain you can imagine: _____

Using the above scale, please rate the level at which your pain/discomfort interferes with your quality of life, (i.e., ambulation, bathing, sleeping, activities, mood): _____

PAIN EVALUATION (continued)

(Check all that apply)

- Resident Pain Observation (Complete for all residents)**
 - ☐ Non-verbal sounds (crying, whining, gasping, moaning, or groaning)
 - ☐ Vocal complaints of pain (that hurts, ouch, stop)
 - ☐ Facial expressions (grimaces, winces, wrinkled forehead, furrowed brow, clenched teeth or jaw)
 - ☐ Protective body movements or postures (bracing, guarding, rubbing or massaging a body part/area, clutching or holding a body part during movement)
 - ☐ None of these signs observed or documented

If pain is present, check all sites that apply:

 - ☐ Back pain
 - ☐ Bone pain
 - ☐ Chest pain while doing usual activities
 - ☐ Headache
 - ☐ Hip pain
 - ☐ Incisional pain
 - ☐ Joint pain (other than hip)
 - ☐ Soft tissue pain (e.g., lesion, muscle)
 - ☐ Stomach pain
 - ☐ Other: _____
 - Comments:** Resident in pain
- Proceed to care plan for pain management if resident currently receiving pain medication, reports pain and/or pain symptoms observed.

CARDIOVASCULAR

(Check all that apply)

- Dizziness** ☐ (Complete Fall Risk Evaluation)
- Pulses**
 - ☐ Present ☐ Not Present
 - ☐ R ☐ L
 - ☐ Radial ☐ Radial
 - ☐ Pedal ☐ Pedal
- Edema** ☐ No ☐ If yes: ☐ Pitting ☐ Non-Pitting
- Location:** _____
- Pacemaker** ☐ If yes, last pacemaker check date: _____
- Comments:** _____

RESPIRATORY

(Check all that apply)

- Respirations**
 - ☒ Even unlabored
 - ☐ Labored
 - ☐ Pursed lip breather
 - ☐ Shortness of breath or trouble breathing with exertion (e.g., walking, bathing, transferring)
 - ☐ Shortness of breath or trouble breathing when sitting at rest
 - ☐ Shortness of breath or trouble breathing when lying flat
- Breath Sounds** ☐ R ☐ L
 - ☐ Clear ☐ Rales/Crackles
 - ☐ Wheezes
- Cough**
 - ☐ Dry cough
 - ☐ No cough observed
 - ☐ Productive cough, describe: _____
- Tuberculosis Risk/Screen**
 - ☐ Fatigue
 - ☐ Anorexia
 - ☐ Night sweats
 - ☐ Low grade fever
 - ☐ None of above per history and/or observation
 - ☐ Persistent cough (> 2 weeks)
 - ☐ Chest X-Ray, Date: _____
 - ☐ Mantoux, Date: 12/5/14
- Smoking History**
 - ☐ Never
 - ☐ Currently, packs per day: _____
 - ☐ Formerly, date stopped: _____

(Complete Smoking Evaluation)

 - ☐ Information not available
- Special Treatments and Procedures**
 - ☐ Oxygen therapy
 - ☐ Suctioning
 - ☐ Respiratory trmts.
 - ☐ Other: _____
 - ☐ Tracheostomy
 - ☐ Ventilator
 - ☐ CPAP/BIPAP
 - ☐ O₂ Sat: _____
 - ☐ None of above per history and/or observation
- Comments:** _____

Resident Name: Strong, Isaac
 NURSING DATA COLLECTION TOOL

Attending Physician: Jewell
 ROA 231

Record #: 308921
 Room/Bed: 27-1
 Magnolia Manor 0091

SECTION 8: PHYSICAL EVALUATION (continued)**SKIN CONDITION**

(Check all that apply)

1) Wounds☒ Wound(s) present (If checked, complete Wound Treatment & Progress for each wound)☐ Previous pressure ulcer that has been resolved or cured in last 90 days per history☐ Suspected deep tissue injury, location: _____**2) Other Skin Conditions**☐ Lesions ☐ Scabies ☐ Lice ☐ Rash☐ Incision - free of redness/swelling/drainage☐ Staples/Sutures intact☐ Reddened area/Blanchable☐ Reddened area/Non-blanchable (If checked, complete Wound Treatment & Progress)☐ Bruising☐ Skin tear:☐ Infection of the foot (e.g., cellulitis, purulent drainage)☐ Diabetic foot ulcer(s)☐ Other open lesion(s) on the foot☐ Open lesion(s) other than ulcers, rashes, cuts (e.g., cancer lesion)☐ Surgical wound(s) - Describe site: _____☐ Burn(s) (second or third degree)☐ Scar over bony prominence; location: _____☐ Non-removable dressing/device; location: _____☐ None of the above were present**3) Skin Color/Condition**☐ Cool☒ Dry☐ Cyanotic☐ Pruritus☐ Diaphoretic☐ Warm☐ Clammy☐ Pale☐ Jaundiced☐ Flushed☐ Other: _____**4) Comments:** _____**HEMATOLOGICAL/ENDOCRINE**

(Check all that apply)

1) Bleeding/Transfusion☐ History of bleeding problems☐ History of transfusions☐ History of transfusion reactions

Type: _____

☐ Anticoagulant therapy - Lab orders verified? ☐ Yes ☐ No☒ None of above**2) Endocrine**☒ Type 1 Diabetes☐ Type 2 Diabetes☐ Oral hypoglycemic☐ Diet controlled☐ Insulin☐ None of above**3) Comments:** _____**PARTICIPATION IN EVALUATION**☐ Patient/Resident able to participate☐ Family able to participate☐ Significant other able to participate**MEDICAL NECESSITY DOCUMENTATION**

Please summarize any medical condition that would exceed routine care and require the skills of a licensed nurse. Documentation should include assessment, planning and any interventions required to administer care:

Due to the resident having a knowledge deficit related to the tasks below or being unable to complete these tasks safely on their own, the following must occur in the nursing facility and the nurse must use empiric knowledge and specific nurse training to complete the following.

Check the boxes for the following:

☒ Nurse must administer medications☒ Nurse must monitor for side effects and adverse reactions related to medications☒ Nurse must monitor B/P and other vital signs☒ Nurse must monitor blood sugar and assess for signs of hyper and hypoglycemia☒ Nurse must administer injections☒ Nurse must provide wound care and skin monitoring and assessment☒ Nurse must monitor O₂ administration and/or sat/s and assess for signs of hypoxia☒ Nurse must monitor labs for abnormal values and notify physician☐ Nurse must ensure correct splint, brace, orthotic and prosthetic compliance☒ Nurse must monitor for dementia, anxiety or depression**NURSES COMMENTS/DOCUMENTATION**

56 y/o black male in bed - resident tries to answer question movement of hips noted i no sound - rt side of face drooping - Resident was able to raise rt arm and rt leg - squeeze nurse hand on command - resident abt oriented to self. resident is NPO - G-tube placement receives Glucerna - Resident dx of DKA - HYN - PM P/P - COP - requires extensive assist of one x turning/positioning resident during intact to prevent decubitus. Resident on Insulin for diabetes also takes metformin - 4500 mg - no cough or congestion noted - bowel sound present x4

MB

Resident Name:

Ston Isaac

Attending Physician:

Jewel

Record #:

30171

Room/Bed:

27-1

ROA 232

Magholia Manor 0092

NURSING DATA COLLECTION TOOL

Certificate of Counsel

The undersigned counsel for Appellants certifies that, in accordance with Rule 210(c), SCACR, this **Record on Appeal** contains all material proposed to be included by any party and not any other material. The undersigned also certifies that this **Record on Appeal** complies with the Supreme Court of South Carolina's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

Respectfully submitted,

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Dated: 11/13/19

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