STATE OF SOUTH CAROLINA COUNTY SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
Betty Nanney, by and through her Attorney-In-Fact, Leslie Nanney, Plaintiffs, vs. THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg, Rusty Flathmann, Laura Anne Winn, and Olishia Gaffney, Defendants.	CIVIL ACTION NO.: 2019-CP-42-03075 Order regarding Defendants' Motion to Compel Arbitration

Hearing Date:	December 16th, 2019, at 2:30 p.m.
Hearing Judge:	Grace Gilchrist Knie
Counsel for Plaintiffs:	Raymond Paul Mullman, Jr., Gary W. Poliakoff, & Edward John Waelde
Counsel for Defendants:	Russell G. Hines
Court Reporter:	Sandy Satterwhite

This matter was before the Court on Monday, December 16th, 2019, at 2:30 p.m., in Spartanburg County, SC, the Seventh Judicial Circuit upon Defendants' Motion to Compel Arbitration. Attorneys Raymond Paul Mullman, Jr., Gary W. Poliakoff, and Edward John Waelde of Poliakoff & Associates, P.A. were present representing the interests of the Plaintiffs. Attorney Russell G. Hines of Young Clement Rivers was present representing the interests of the Defendants. Sandy Satterwhite was the Court Reporter.

PROCEDURAL BACKGROUND:

This matter began with the filing of a Summons and Complaint on September 4th, 2019, asserting the causes of action of negligence/recklessness, neglect of a vulnerable adult, and negligent administration arising from Defendants' failure to monitor and supervise Ms. Nanney's

safety and well-being while at the Facility. An Expert Affidavit was filed September 4th, 2019. A Proof of Service filed September 17th, 2019, certified that a recorded copy of the Summons and Complaint and Expert Affidavit were deposited in the United States Mail to the Registered Agent, Corporation Service Company, for THI of South Carolina at Spartanburg, LLC. An Acceptance of Service was filed September 17th, 2019, acknowledging receipt of the Summons and Complaint by Attorney D. Jay Davis, Jr. on behalf of Defendant Laura Anne Winn. An Acceptance of Service was filed September 17th, 2019, acknowledging receipt of the Summons and Complaint by Attorney D. Jay Davis, Jr. on behalf of Defendant Olishia Gaffney. An Acceptance of Service was filed September 17th, 2019, acknowledging receipt of the Summons and Complaint by Attorney D. Jay Davis, Jr. on behalf of Defendant Rusty Flathmann.

Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg filed an Answer to the Complaint on October 9th, 2019. Defendant Laura Anne Winn filed a Motion to Dismiss the Plaintiff's Complaint on October 11th, 2019. Defendant Rusty Flathmann filed an Answer to Plaintiff's Complaint on October 11th, 2019. Defendant Olishia Gaffney filed an Answer to Plaintiff's Complaint on October 11th, 2019. Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg filed a Motion to Dismiss Plaintiff's Complaint, Motion to Compel Arbitration, and Motion to Stay State Court Proceedings on November 11th, 2019. Defendant Rusty Flathmann filed a Motion to Dismiss Plaintiff's Complaint, Motion to Compel Arbitration, and Motion to Stay State Court Proceedings on November 11th, 2019. Defendant Olishia Gaffney filed a Motion to Dismiss Plaintiff's Complaint, Motion to Compel Arbitration, and Motion to Stay State Court Proceedings on November 11th, 2019. The parties were before the Court on Monday, December 16th, 2019, to take up these Motions.

FACTUAL BACKGROUND:

This matter arises out of a nursing home neglect case where alleging that Ms. Nanney was injured as a result of Defendants' negligence fracturing her hip. Ms. Nanney was admitted into the Facility on October 28, 2016. Defendant has represented that agreeing to arbitrate was not a prerequisite to admission at the Facility or a condition of admission. It is undisputed that Betty Nanney did not sign the Arbitration Agreement, despite being lucid and competent. No power of attorney existed at the time of the admission into the nursing home on October 28, 2016. Leslie Nanney is Ms. Nanney's daughter. Betty Nanney granted Power of Attorney to Leslie Nanney on June 23, 2017, approximately eight months after admission. Neither Betty nor Leslie Nanney signed the Arbitration Agreement. Kaileb Horn (Kaileb), Ms. Nanney's son, signed the Arbitration Agreement. At no point in time did Kaileb Horn have Power of Attorney or any other legal authority that would have given Kaileb the legal authority to bind Ms. Nanney to arbitration. Plaintiff's provided an affidavit from Kaileb that stated: "My mother was not in the room and could not and did not make any indication or statement that I was her agent or power of attorney during the admission process. The admission process was quick and occurred while my mother was already transferred into her room." Defendants did not offer any evidence to contradict the affidavit. Defendants did not provide an affidavit from Kris Milner, the signatory for the nursing home, to support the Motion to Dismiss. The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. In this case, there is no evidence of apparent authority and Defendants did not rely on any representation as a condition of admission.

BURDEN OF PROOF:

Defendant carries the burden to prove a valid and enforceable arbitration contract. Not all arbitration clauses are per se enforceable.[1] Courts interpret a jury trial waiver narrowly and construe contract ambiguities against Defendant who drafted the Arbitration Agreement.[2] Whether the parties agreed to arbitrate is a question of substantive state law.[3] In Chassereau v. Global Sun Pools, Inc., 644 S.E.2d 718 (S.C. 2007), the Supreme Court stated:

> Although we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis. While actions taken in an arrangement such as the one entered into by these parties might have the potential to generate several legal claims and causes of action, we have no doubt that Chassereau did not intend to agree to arbitrate the claims she asserts in the instant case. Accordingly, we hold that these claims are not covered by the arbitration agreement at issue in the instant case.

Thus, the presumption favoring arbitration only applies after this Court finds there is a valid, enforceable arbitration agreement.[4] The mandatory language in the Federal Arbitration Act ("FAA") only applies in instances where a valid arbitration agreement has been well established. This is self-evident from the FAA provisions: "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. The FAA looks to state law to decide the threshold questions of contract formation.[5] Therefore, arbitration agreements guided by the FAA are subject to the same defenses

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[1] See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008).

[2] Nat'l Acceptance Co., 381 F.Supp. at 271).

[3] Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007)("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

[4] EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler's Cove Homeowners Ass'n v. Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 S.E.2d 581 (2003).

[5] Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'").

applicable to all other contracts.[6] The judicial inquiry may include an examination of contractual defects such as lack of mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability.[7] In short, pro-arbitration policy does not validate a contract lacking the building blocks of a binding contract.

LEGAL ANALYSIS:

Defendants' motion to compel arbitration is effectively a motion to enforce a contract. Defendants had no such contract with Ms. Nanney. The "Arbitration Agreement" on which Defendants' motion relies is invalid because there can be no contract without the mutual assent of its proposed parties. Ms. Nanney never assented to the Arbitration Agreement and did not empower anyone else to assent on her behalf.

A. Signatory Had No Legal Authority.

"The first element of a contract is that the parties have the capacity to contract... Further, capacity to contract relates to the status of the person rather than to circumstances surrounding the contract." (17 C.J.S. Contracts §32). Kaileb Horn did not have that authority. Defendants have produced no evidence indicating that Kaileb Horn had authority to enter a contract on Ms. Nanney's behalf or to waive Ms. Nanney's right to a jury trial.

For agency situations, the legal burden is on the party asserting that an agency exists.[8] In this case, Defendant must show 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. Id. An agency may not, however, be established solely

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[6] Rent-A-Center, West. Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

[7] See Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir.2001).

[8] Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996).

by the declarations and conduct of an alleged agent.[9] South Carolina law requires that to prove apparent authority the Defendants must show: 1) that the purported principal consciously or impliedly represented to another to be his agent, 2) that there was reliance upon the representation, and 3) that there was a change of position to the relying party's detriment. Cownburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412, S.E.2d 425 (Ct. App. 1991). Defendant has failed to provide any evidence beyond Kaileb Horn's signature to suggest he was Ms. Nanney's agent. The fact that Kaileb signed documents so that Ms. Nanney could be admitted to the facility and receive medical care in no way indicates a manifestation of authority by Ms. Nanney to waive her right to a jury trial or agree to arbitration. There has been no evidence that Ms. Nanney ever manifested any form of assent establishing Kaileb as her agent.

Kaileb was one of Ms. Nanney's children. He was not Ms. Nanney's attorney-in-fact. He had no legal authority to enter contracts on Ms. Nanney's behalf. The Supreme Court of South Carolina has held that a surrogate without proper legal authority cannot bind a person to arbitration.

> The scope of Sister's authority to consent to "decisions concerning Decedent's health care" extended to the admission agreement, which was the basis upon which Facility agreed to provide health care and Sister agreed to pay for it. The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution between Facility and Decedent or Sister should issues arise in the future. Under the Act, Sister did not have the capacity to bind Decedent to this voluntary

[9] Muller v. Myrtle Beach Golf & Yacht Club, 303 S.C. 137, 142-143,399 S.B.2d at 433 (Ct. App. 1990) overruled on other grounds by Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000)).

> arbitration agreement. We therefore affirm the circuit court's holding that the Act did not confer authority on Sister to execute a document which involved neither health care nor financial terms for payment of such care.

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 353-54, 755 S.E.2d 450, 454 (2014).

In Coleman, the circuit court refused to compel arbitration because the sister of a nursing home resident who signed the arbitration and admission agreements lacked authority to bind her sister to the arbitration agreement. In affirming the circuit court's order, the Supreme Court found that, although the South Carolina Adult Healthcare Consent Act gave the sister authority to make 'healthcare decisions' on behalf of her sister, consent for medical treatment is not the same as binding an incompetent person to a legally binding contract such as an arbitration agreement. Coleman, 407 S.C. at 352, 755 S.E.2d at 453-54. The court reasoned that the Act extends authority to surrogates to make traditional healthcare decisions and financial decisions that arise out of those decisions. Id. Kaileb had no legal authority to sign the Arbitration Agreement, and Defendant knew or should have known this fact. Since Kaileb lacked legal authority to enter into a contract; the arbitration agreement is void and unenforceable.

B. Equitable estoppel, ratification and third-party beneficiary theories do not apply.

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").

Defendants argued that Ms. Nanney should be estopped from denying the validity of the Arbitration Agreement because Ms. Nanney accepted the benefits of the Admission Agreement and, therefore, should not be able to repudiate the alleged Arbitration Agreement. However, Defendant's argument fails because it depends on Defendants' faulty merger argument, and Ms. Nanney did not receive a benefit from the Arbitration Agreement.

Defendants 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 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.

In the case at hand, Defendants have not established the elements required to prove equitable estoppel. First, there is no evidence Defendants lacked knowledge Kaileb was not authorized to bind Ms. Nanney to the Arbitration Agreement. Additionally, Kaileb did not have power of attorney over Ms. Nanney nor did Defendant produce evidence that Ms. Nanney represented the same to Defendant. The affidavit of Kaileb Horn states that Ms. Nanney, while lucid, was unable to make verbal representation. Defendants have produced no evidence that Ms. Nanney made any representation of any agency of Kaileb.

Defendants argued Ms. Nanney created an agency relationship to support arbitration because she accepted admission. Defendants then argued Kaileb is estopped from denying authority to bind Ms. Nanney to arbitration because he does not deny authority to admit Ms. Nanney to the Facility. Finding merger would be a prerequisite to accepting Defendant's arguments, but Coleman and its progeny rejected similar merger arguments.

The Admission Agreement and Arbitration Agreement are separate contracts that do not merge. See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 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) (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.

As discussed above briefly, there were two separate agreements signed on the day of the admission, and they were not merged. By their own terms, the Admission Agreement indicated an intent that the common law doctrine of merger not apply. The Admission Agreement's "Entire Agreement"[10] provision shows that one contract constituted "the entire agreement and understanding between the parties" concerning admission to the Facility and prohibits merging the two separate agreements. An admission contract with an "Entirety of Agreement" provision is separate "on its face" from an arbitration contract where the provision identifies the two contracts

[10] "I/we hereby acknowledge that I/we have read this page and all preceding pages and acknowledge 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 may not be amended except by written agreement of the parties."

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). Even if the "Entire Agreement" clause creates an ambiguity as to merger, the law is clear that any ambiguity must be construed against the drafter, in this case, Defendants.[11] Since there was no merger here, Defendants' equitable estoppel argument must be denied. See Coleman, 407 S.C. at 355–56, 755 S.E.2d at 455 (rejecting estoppel argument by finding no merger).

As in Hodge, the separate contracts here have separate signature pages and separate pagination—i.e. the Admission Agreement ends with "Page 12 of 12" while the Arbitration Agreement is a separate document. As in Thompson, the arbitration agreement announces its independence with its "Arbitration Agreement" title.

The arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has "Arbitration Agreement" at the top its first page, these factors further indicate 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.

The Facility cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit. So long as the admission and arbitration contracts are separate documents, any alleged misrepresentations made by a resident's family member when signing the contracts would not equitably estop the resident's attorney-in-fact from challenging the family member's authority to bind the resident to arbitration.

[11] See Davis v. KB Home of S.C., Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct.App.2011) fn. 4.

A family member who signs an arbitration contract without legal authority to bind the resident acts in her individual capacity and his misrepresentations, if any, would have no bearing on claims against the home by the resident even if the misrepresenting family member is also the attorney-in-fact for the resident. 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").

Therefore, Defendants cannot prove merger of the Admission Agreement and Arbitration Agreement. Defendants can also not claim to have been misled and cannot rely on equitable estoppel if they, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in questions.[12] Furthermore, Defendants had the capacity to determine whether Kaileb had authority to sign the Arbitration Agreement on Ms. Nanney's behalf. Defendants are a sophisticated business entity frequently interacting with residents and their families during the nursing home admission. Defendants are familiar with the legal concepts of guardianship and powers-of-attorney and had the ability to ask Kaileb for any power of attorney documentation.

Defendants then argued Ms. Nanney's admission to the Facility was the required "direct benefit." In doing so, Defendant tied its estoppel argument to the 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

[12] See Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-909 (Ct. App. 2001).

outlined above, the two contracts are separate, they do not merge, and Ms. Nanney's admission does not support equitable estoppel.

Precedent is decisive on this point. Citing International Paper, the Court of Appeals 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. Since admission is unavailable as a "direct benefit" to support estoppel, Defendants would be required to point to some benefit Ms. Nanney received from the Arbitration Agreement alone. However, Ms. Nanney 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"). 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.

Defendants then argued ratification of her continued residency in Defendants' facility. To establish a ratification of the Arbitration Agreement Defendants must show (**1**) acceptance by the principal of the benefits of the agent's acts, (**2**) the principal's full knowledge of the facts, and (**3**) circumstances or an affirmative election demonstrating the principal's intent to accept the unauthorized arrangement. Lincoln v. Aetna Gas. & Sur. Co., 300 S.C 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989).

This argument fails for several reasons. First, Ms. Nanney's presence alone cannot constitute an affirmative representation. See Hodge where the court rejected the notion that a nursing home resident represents her/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 argued Ms. Nanney accepted the benefits of the contracts. It is doubtful that the resident received a benefit from the Arbitration Agreement. Hodge was 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").

However, the only alleged benefit Defendants cited 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 Ms. Nanney derived during her time as a resident in Defendants' facility. The Court of Appeals' ruling in Thompson speaks directly on this point, i.e., "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.

Defendants then made a broader argument that it would be manifestly inequitable for Plaintiff to pursue a tort claim based on the Admission Agreement while denying Kaileb's authority to sign the Arbitration Agreement. The Adult Health Care Consent Act does provide 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).

Lastly, Defendants claimed that the agreement is enforceable under a theory of third-party beneficiary. *See* Thompson, 416 S.C. at 57, 784 S.E.2d at 687 (holding as to the arbitration agreement between the appellants and Son in his individual capacity, a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement.) With no valid underlying contract, there could be no third-party beneficiary. First, Plaintiff's action sounds solely in tort. There is no breach of contract claim asserted. Plaintiff's pleading does not specifically refer to any written contract or necessarily rely upon the language of any written contract. Plaintiff's tort claims presumably are based on common law and statutory or regulatory duties imposed by law. Second, as discussed above, the Arbitration Agreement is a separate and distinct agreement from the Admission Agreement. Plaintiff does not rely upon the terms of the Arbitration Agreement to establish her tort claims.

C. Lack of consideration and mutuality.

The Arbitration Agreement is not a valid and enforceable agreement due to a lack of consideration and mutuality. Every contract must contain an offer, acceptance, and valuable consideration.[13] "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."[14] Where a contract lacks valuable consideration, the contract must fail. Courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. However, in determining whether adequate consideration exists in a contract, the Court must examine and stay within the confines of the four corners of the

[13] Sauner v. Pub. Serv. Auth. of S.C., 581 S.E.2d 161, 166 (S.C. 2003).
[14] Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998).

instrument.[15] Therefore, the Court must assess whether the contract itself contains sufficient consideration in the form of a mutual exchange of promises to arbitrate. Here, the Arbitration Agreement does not contain the required consideration. There is no direct benefit to nursing home residents from a pre-admission arbitration contract separate from the Admission Agreement. Admission can be the direct benefit that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same contract. In this case, even assuming Kaileb had authority, there is no valuable consideration in agreeing to the Arbitration Agreement. The one-page agreement contains no benefit or detriment to the parties. Therefore, the Arbitration Agreement lacks consideration. Moreover, Defendant was prohibited from asking or receiving any consideration from Ms. Nanney. "Facilities must "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the state plan...any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay at the facility." 42 U.S.C. § 1396r(c)(5)(A)(iii). Any nursing home facility that accepts Medicare or Medicaid funds for resident care is expressly forbidden from accepting any other money, benefit or other consideration as a precondition for admitting a patient to the facility or as a requirement for continued stay in a facility.

In the instant case, it is undisputed Ms. Nanney was a Medicare and Medicaid beneficiary while residing at the Facility and the Facility was billing and accepting payment from Medicare and Medicaid for Ms. Nanney's care. Therefore, the question of enforceability turns, in part, on whether the jury waiver provision was a mandatory part of the Admission Agreement and a required pre-condition to admission. Defendant has admitted the Arbitration Agreement was not a

[15] State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)).

condition of admission, thus, there is no separate consideration offered for the arbitration agreement.

D. No meeting of the minds due to missing material terms.

A valid contract under South Carolina law requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement.[16] The forum chosen for the arbitration to take place is an essential and material term. A contract lacking material terms may be found unenforceable for indefiniteness.[17] Here there was no meeting of the minds as to (1) the choice of arbitrator; (2) the rules of evidence; or (3) allowance of pre-hearing discovery. The choice of an arbitrator is an important, essential, and material term of an agreement to arbitrate. No rules for arbitration were included in or attached to the Arbitration Agreement. The parties cannot now arbitrate this dispute without the presence of an agreed-upon arbitrator chosen by this Court. But, "ordinarily, a court will not supply omitted terms to an agreement, and an agreement where the parties did not agree to essential terms will simply not be enforced."[18] As a result, the promise that the dispute "shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules" is moot and ineffective. The choice of arbitral forum also dictates the rules of arbitration and the rights of the parties including, but not limited to, presentation of evidence, scheduling, deadlines, discovery issues, costs, expenses, and appeals. None of this was negotiated or discussed by the parties. No agreement or meeting of the minds to material terms exists.

[16] Player v. Chandler, 299 S.C. 101, 105, 1989 (citing Hughes v. Edwards, 265 S.C.529 (1975).
[17] Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997).
[18] Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997).

E. **The Arbitration Agreement should not be enforced because it is both procedurally and substantively unconscionable.**

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If the Court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the Court may refuse to enforce the agreement. S.C. Code Ann.§ 36-2-302(1) (2003). In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. See Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir.1999). It is under this general rubric that courts must determine whether a contract is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. See Carlson v. General Motors Corp., 883 F.2d 287, 295 (4th Cir.1989). In determining whether a contract was "tainted by an absence of meaningful choice," Id. at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id. at 293. See also Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular

case." (quoting 17A Am.Jur.2d Contracts§ 279 (2004))); see also Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007).

CONCLUSION:

The Court acknowledges and appreciates the amount of research and preparation for the hearing by all parties, as well as, the professionalism of all parties in their presentations to the Court. In conclusion, in order to prevail in its motion, the Defendant Facility must show a valid and enforceable arbitration agreement between Ms. Nanney and the Facility to prevail on its motion. After consideration of the record, arguments of the parties, and the applicable law, the Court finds that Defendants did not meet this burden. After reviewing the parties' submissions and arguments, the Court finds no valid arbitration contract between Ms. Nanney and the Facility exists because: (1) Kaileb Horn did not have legal authority to bind Betty Nanney to the Arbitration Agreement; (2) there is a lack of consideration and mutuality under the circumstances; and (3) the affirmative defenses of equitable estoppel, ratification, and third-party beneficiary do not apply under the circumstances. Accordingly, for the foregoing reasons, Defendants' Motions to Dismiss and Compel Arbitration, or Alternatively, to Compel Arbitration and Stay Proceedings, are denied.

IT IS SO ORDERED.

/s/Grace Gilchrist Knie
Honorable Grace Gilchrist Knie
Resident Judge, Seventh Judicial Circuit

January 5th, 2020
Spartanburg, South Carolina

Spartanburg Common Pleas

Case Caption: Betty Nanney , plaintiff, et al VS Thi Of South Carolina At Spartanburg, Llc , defendant, et al

Case Number: 2019CP4203075

Type: Order/Other

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760