

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

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SC Court of Appeals

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2019-001413
Circuit Court Case No. 2018-CP-10-01251

Richard Ladson, Jr.,
by and through Richard Miles Ladson, Sr., POA,

Respondent,

v.

THI of South Carolina at Charleston, LLC
d/b/a Riverside Health and Rehab,

Appellant.

RECORD ON APPEAL

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INDEX

Orders

Order [Denying Defendant's Motion to Compel Arbitration], filed February 6, 2019	1
Order [Denying Defendant's Motion to Reconsider], filed July 26, 2019	2

Pleadings

Summons and Complaint, filed March 8, 2018	3
Exhibit A – Affidavit of Carolyn Cuttino	10
Answer, filed June 22, 2018	13

Transcript

Hearing on Defendant's Motion to Compel Arbitration, held November 27, 2018	21
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Other Material

Defendant's Motion to Compel Arbitration, filed August 21, 2018	36
Exhibit A – Arbitration Agreement	(see 71)
Defendant's Memo in Support of Motion to Compel Arbitration, filed November 21, 2018	39
Exhibit 1 – Admission Agreement	59
Exhibit 2 – Arbitration Agreement	71
Exhibit 3 – Other Signed Agreements	72

Plaintiff's Memo in Opposition to Defendant's Motion to Compel Arbitration, filed November 21, 2018	78
Exhibit A – <i>Thompson v. Pruitt Corp.</i>	81
Exhibit B – Admission Agreement	(see 59)
Exhibit C – SCDHHS Screening Form	93
Defendant's Rule 59(e), SCRCP, Motion, filed and served February 8, 2019	94
Notice of Appeal and Proof of Service, filed and served August 20, 2019	97
Certificate of Counsel	99

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2018-CP-10-01251

Richard Ladson, et al.

THI of SC at Charleston d/b/a Riverside
Health and Rehab

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of the court by the Court: Defendant's Motion to Compel Arbitration is DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		

If applicable, describe the property, including tax map information and address, referenced in the order:
N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


Circuit Court Judge

2764
Judge Code

2/5/18
Date

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

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Richard Ladson, Jr., et al

THI of South Carolina at Charleston, LLC, et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

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- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
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NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Defendant THI of South Carolina at Charleston, LLC, d/b/a Riverside Health and Rehab filed a Motion to Alter or Amend this court's ruling entered on February 6, 2019. The Defendant's motion was timely filed on February 8, 2019. The Defendant, however, filed the motion as a Motion to Alter or Amend, instead of a Motion to Reconsider, and never notified the court. The court only learned of the Defendant's filed Motion to Alter or Amend by way of an email from the Plaintiff's attorney to the Charleston County Clerk of Court's Office on June 13, 2019. After careful consideration of the evidence submitted to the court at the initial hearing on November 27, 2018, the record, and briefs from both parties, the Motion to Reconsider is DENIED without a formal hearing.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

2764

Judge Code

7/23/19

Date

SCRPC Form 4C (02/2017)

Page 1 of 4

ROA 002

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

RICHARD LADSON, JR., by and through
RICHARD MILES LADSON, SR., POA,

Plaintiff,

v.

THI OF SOUTH CAROLINA AT
CHARLESTON, LLC d/b/a RIVERSIDE
HEALTH AND REHAB,

Defendant.

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CASE NO.: 2018-CP-10- 1251

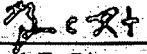
SUMMONS

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JUDGE: CHRISTOPHER
CLERK: COURT

TO: THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to Answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer thereto on the subscribers at their office located at 321 East Bay Street, Post Office Box 22437, Charleston, South Carolina 29413, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will move for entry of Default Judgment and apply to the court for the relief sought therein.

PIERCE, HERNS, SLOAN & WILSON, LLC
321 East Bay Street
Post Office Box 22437
Charleston, SC 29401
(843) 722-7733



Carl E. Pierce, II
Benjamin C. Smoot, II
Attorneys for the Plaintiff

March 8th, 2018
Charleston, South Carolina

4. That upon information and belief, at all times referred to herein, Defendant had the right and/or power to direct and control the physicians, nurses and other medical providers who it employed.

5. That upon information and belief, at all times referred to herein, the persons responsible for the treatment and care of Plaintiff were acting within the scope of their employment with Defendant and therefore Defendant is responsible for the acts or omissions alleged herein.

6. That all acts and omissions complained of herein occurred in Charleston County, South Carolina.

7. That this Court has personal jurisdiction over the parties hereto, subject matter jurisdiction over the causes of action set forth herein and venue is proper in Charleston County.

8. That Plaintiff filed his statutorily mandated Notice of Intent to File Suit pursuant to S.C. Code Ann. § 15-79-125(C) on August 23, 2017 and served the Notice on August 28, 2017. The parties were not able to resolve this matter at pre-suit mediation.

FACTUAL ALLEGATIONS

9. Plaintiff is informed and believes that at all times material to this Complaint Defendant's employees and/or agents were acting on behalf of or, in place of Defendant in making decisions regarding the care of Plaintiff. Additionally, Plaintiff is informed and believes that at all times material to this Complaint that all of the employees of Defendant were acting within the course and scope of their employment in regard to their care and treatment of Plaintiff.

10. At all times relevant hereto Defendant held itself out to Plaintiff, Plaintiff's family, and to the general public that it possessed the expertise necessary to maintain and promote the health and safety of persons unable to adequately care for themselves.

11. These representations combined with the applicable State, Federal and local laws, codes and regulations applicable to the facility established a higher standard of care to which Defendant specifically represented that they operated under and met.

12. Defendant failed to meet these standards in its care of Plaintiff.

13. At the time of his admission to Defendant's care, Plaintiff was complaining of toenail pain and general pain of his right foot and his lower right extremity and was dependent upon the care provided by employees of and agents of Defendant, and Defendant was required to provide care in an appropriate manner, which Defendant failed to do.

14. Defendant had an obligation to employ physicians, nurses and other medical providers who were qualified to render reasonable care to a patient in Plaintiff's condition and in accordance with federal and state laws and regulations.

15. Defendant had an obligation to direct Plaintiff to third party physicians, nurses, and other medical providers who were qualified to render reasonable care to a patient in Plaintiff's condition and in accordance with federal and state laws and regulations.

16. That at the time of Plaintiff's admission to Defendant's facility, Plaintiff was without ulcers on his right foot or right lower extremity.

17. That Defendant failed to adequately assess and/or identify Plaintiff as an at-risk patient, one highly susceptible to the formation of serious physical injury by way of pressure ulcers and other conditions this Defendant should have been aware of.

18. That Defendant failed to implement preventive strategies and/or adequate skin management measures to prevent Plaintiff's development of serious physical injury.

19. That while under Defendant's care, Plaintiff developed multiple preventable pressure ulcers due to Defendant's failure to properly treat him and Plaintiff was unable to heal said pressure ulcers for the same reasons.

20. Upon information and belief, Defendant was licensed under the laws of the State of South Carolina and was required to provide reasonable and prudent hospital care to Plaintiff.

21. That throughout Defendant's treatment of Plaintiff, Defendant failed to meet the necessary standard of care as outlined in the expert Affidavit of Carolyn Cuttino, RN, attached hereto as Exhibit A.

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence)

22. Plaintiff re-alleges and incorporates by reference the allegations of the preceding paragraphs as if fully set forth herein verbatim.

23. Notwithstanding undertaking that duty and while Plaintiff was under the care of Defendant, Defendant departed from the prevailing and acceptable professional standards of care and treatment of Plaintiff and was thereby negligent, careless, grossly negligent, reckless and in violation of the duties owed to Plaintiff, and they are liable for one or more of the following acts of omission or commission, any or all of which are departures from the prevailing and acceptable professional standards of care:

- a. In failing to properly assess and monitor Plaintiff's physical well-being while under Defendant's care;
- b. In failing to properly supervise the personnel and staff and employees at Defendant's facility with regard to Plaintiff's care;
- c. In failing to properly revise and modify plans of care for Plaintiff in response to Plaintiff's needs;
- d. In failing to properly utilize equipment, including medications and devices to prevent and to minimize or reduce injuries resulting from improper care;
- e. In violating state and/or federal regulations requiring actions to protect the safety and health of Plaintiff, so as to constitute negligence *per se*;
- f. In failing to ensure that Defendant's personnel and employees had sufficient, adequate and current training, credentials and skills to properly prevent Plaintiff from suffering from injury and pain;

- g. In failing to have in place proper and adequate policies, procedures, protocols, rules and regulations for the care and treatment of nutritional and infection control issues and pressure ulcer prevention issues at Defendant's facility, or if such policies, procedures, protocols, rules and regulations were in place, in failing to enforce them;
- h. In failing to properly and adequately assess, monitor and update policies, procedures, protocols, rules and regulations in response to knowledge garnered from published guidelines and case reviews relating to proper nutritional and infection control procedures and pressure ulcer prevention procedures;
- i. In failing to ensure that manuals, instructions and warnings relating to appropriate nutrition and infection control procedures and pressure ulcer prevention procedures were available to agents, servants and employees of the Defendant;
- j. In failing to properly train and educate its employees or, if properly trained and educated, in failing to allow its employees to exercise independent skill and judgment;
- k. In failing to ensure that a patient maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical conditions demonstrate that this is not possible;
- l. In failing to provide and/or ensure that Plaintiff had proper care;
- m. In failing to properly report and document significant clinical findings;
- n. In failing to properly document medical records of Plaintiff;
- o. In failing to provide sufficient number of personnel to meet the needs of residents;
- p. In failing to conduct assessments promptly after a significant change in the resident's physical or mental condition;
- q. In failing to notify family members or report to appropriate authorities after incidents; and
- r. In any other such manner that Plaintiff may become aware of through discovery and/or at trial.

All of which acts and omissions, or both, were the actual, direct and proximate cause of the damages and injuries claimed herein.

24. That as a direct and proximate result of the negligence, carelessness, gross negligence, recklessness and departure from the professional standards of care by the Defendant

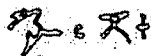
and their agents, servants and/or employees, Plaintiff suffered from severe debilitating injuries which resulted in right above knee amputation, as a result of which Plaintiff has suffered severe and extreme emotional distress, anxiety, physical injuries, and medical bills, the likes of which no person should endure, for which Plaintiff is entitled to recover in an amount to be determined by a jury at the trial of this action.

25. Plaintiff respectfully demands a trial by jury.

WHEREFORE, Plaintiff respectfully prays for the following:

- i. Judgment against Defendant for all actual damages in an amount to be determined by the jury;
- ii. For the costs of this action; and
- iii. For such other and further relief as this court deems just and proper.

PIERCE, HERNS, SLOAN & WILSON, LLC
321 East Bay Street
P.O. Box 22437
Charleston, SC 29413
(843) 722-7733



Carl E. Pierce, II
Benjamin C. Smoot, II
Attorneys for the Plaintiff

March 8TH, 2018
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

RICHARD LADSON, JR.,

Plaintiff,

v.

THI OF SOUTH CAROLINA AT
CHARLESTON, LLC d/b/a RIVERSIDE
HEALTH AND REHAB,

Defendant.

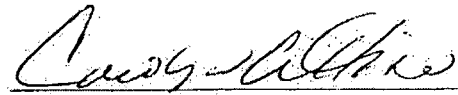
) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CASE NO. ~~2017-CP-~~

2018-CP-10-1251

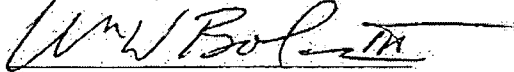
) AFFIDAVIT OF CAROLYN CUTTINO

1. My name is Carolyn Cuttino, and I am over the age of eighteen, of sound mind and otherwise competent to make this Affidavit, which I make based on my background, education, training, experience, and the hospital and medical records pertaining to Richard Ladson reviewed by me to date.
2. I am a Registered Nurse, licensed in the State of South Carolina. My further qualification and background are set forth in the attached CV (Exhibit "A"), which is incorporated herein by reference.
3. I have been provided with the hospital and medical records of Mr. Richard Ladson arising out of a limb-threatening injury sustained by him at Riverside Health and Rehab on August 5, 2016.
4. I am familiar with the standard of care applicable to the Defendant during the time of Richard Ladson's stay in the Defendant's facility, and the standard of care and skill exercised by reasonably prudent medical facilities and other healthcare providers under similar conditions as those involving Richard Ladson.
5. Based on materials I have reviewed, it is my opinion that there was a deviation from the standard of care as it related to the care and supervision of Richard Ladson at Riverside Health and Rehab. The lack of proper and timely care caused Mr. Ladson to develop pressure ulcers and suffer significant injury.
6. On or about August 5, 2016, Richard Ladson developed limb-threatening pressure ulcers on his right heel and lateral foot. These wounds were preceded by bilateral heel ulcers described as stage I and DTT's in the medical records (nutrition notes) in 2015. There was no mention of these wounds in the nursing records (no descriptions, no treatments, no pressure relieving interventions, etc.) in 2015. The records that I have reviewed reveal a significant deviation in the standard of care required for patients at Riverside Health and Rehab in this regard.

- a. Failure to provide adequate and consistent wound identification, assessments, management, and documentation of various wounds acquired at the facility;
 - b. Failure to recognize and report potential wound infection to ensure appropriate management;
 - c. Failure to ensure adequate, accurate, and timely assessment of vascular status to ensure appropriate interventions & management of wounds:
 - i. PVD dx by DPM multiple times throughout stay with documentation of no pedal pulses; nurse's assessments routinely stated that pulses were present. Prevention interventions were not implemented that would have been appropriate for patients with poor perfusion to lower extremities.
 - ii. On the day of discharge, October 11, 2016, because of severe wound deterioration, MD finally documented no pulses and ordered a vascular diagnostic study. A vascular consult was originally ordered on August 18, 2016.
 - d. Failure to provide timely referral to a certified wound practitioner. Wound Clinic appointments were mentioned but I saw no evidence in records provided that patient visited a wound practitioner.
 - e. Failure to communicate among staff members that wounds were present (weekly skin assessments documented black eschar on lateral foot on August 5, 2016 and this was not noted again by nursing staff until August 18-19, 2016).
 - f. Failure to follow orders for weekly skin assessments (no assessments noted from June 24, 2016 to August 5, 2016 and it was on August 5th that the heel ulcer and lateral foot wound were first described with eschar present. Eschar takes days/weeks to develop so wound was more likely than not present a while before wound documented as being present)
 - g. Failure to monitor wounds and recognize worsening status and need for urgent attention when bony structures, eschar, slough, and foul odor were documented on September 28, 2016. This was the last assessment noted in the medical record. On October 11, 2016, assessment done by Geriatric Specialist who ordered some diagnostics and wound clinic appointment; however, family insisted that patient be transferred out of facility to the hospital for wound management.
7. In my opinion, more probably than not, proper care, evaluation, and treatment may have prevented the wound deterioration which caused Richard Ladson to suffer injury while he was a patient at Riverside Health and Rehab.
8. I reserve the right to alter, amend, add, or delete opinions as new information becomes available.


Carolyn Cuttino, BSN, RN, CWCN, CWS

Sworn to and subscribed before me:



Notary Public:

My Commission Expires:

Date: MARCH 17 2017

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South Carolina and is the sole licensee of the Facility referenced in the Complaint. Any and all allegations inconsistent with the above response are hereby denied and strict proof is demanded thereof.

4. Responding to the allegations set forth in Paragraph 3 of Plaintiff's Complaint, Defendant admits it is the sole licensee of the skilled nursing facility at issue in Plaintiff's Complaint located in Charleston County, South Carolina. Further responding, Defendant admits it employs nurses and other medical care providers to provide services related thereto. Defendant denies that it employs physicians. Any and all allegations inconsistent with the above response are hereby denied and strict proof is demanded thereof.

5. The allegations set forth in Paragraphs 4 and 5 of Plaintiff's Complaint call for pure legal conclusions and therefore no response is required. To the extent the allegations set forth in the above Paragraphs are intended to allege liability and/or damages against Defendant, they are denied and strict proof is demanded thereof.

6. Responding to the allegations set forth in Paragraph 6 of Plaintiff's Complaint, Defendant admits it is the sole licensee of the skilled nursing facility at issue located in Charleston County, South Carolina where Plaintiff Richard Miles Ladson, Sr. ("Resident Plaintiff") was a resident during the time period at issue in Plaintiff's Complaint. Any and all allegations inconsistent with the above response are hereby denied and strict proof is demanded thereof.

7. Defendant denies the allegations set forth in Paragraph 7 of Plaintiff's Complaint. Rather, Defendant and Resident Plaintiff entered into an arbitration agreement prior to Resident Plaintiff's admission to the Facility that covers all allegations raised in Plaintiff's Complaint. As

such, Plaintiff's Complaint should be dismissed and compelled to arbitration pursuant to the contract.

8. Responding to the allegations set forth in Paragraph 8 of Plaintiff's Complaint, Defendant admits Plaintiff filed a NOI applicable to this matter and thereafter the parties participated in unsuccessful pre-suit mediation.

9. The allegations set forth in Paragraph set forth in Paragraph 9 of Plaintiff's Complaint call for pure legal conclusions and therefore no response is required. To the extent the allegations set forth in the above Paragraph are intended to allege liability and/or damages against Defendant, they are denied and strict proof is demanded thereof.

10. Responding to the allegations set forth in Paragraphs 10 and 11 of Plaintiff's Complaint, Defendant admits it represents that it is a licensed skilled nursing facility which provides skilled nursing care in compliance with the governing standard of care. Defendant would affirmatively assert that the care and treatment provided to Resident Plaintiff during his residency was at all times in compliance with the standard of care. Any and all allegations inconsistent with the above response are hereby denied and strict proof is demanded thereof. Further responding, Defendant admits its skilled nursing facility is regulated by various state and federal statutes and regulations, but denies the scope and nature of the duty of care alleged by Plaintiff.

11. Defendant denies the allegations set forth in Paragraphs 12 and 13 of Plaintiff's Complaint and demands strict proof thereof.

12. Responding to the allegations set forth in Paragraphs 14 and 15 of Plaintiff's Complaint, Defendant admits it had a duty to provide skilled nursing care to Resident Plaintiff in compliance with the governing standard of care. Further responding, Defendant would

affirmatively assert that the care and treatment provided to Resident Plaintiff during his residency was at all times in compliance with the standard of care. Any and all allegations inconsistent with the above response or intended to allege liability and/or damages against Defendant are denied.

13. Responding to the allegations set forth in Paragraph 16 of Plaintiff's Complaint, Defendant craves reference to the Resident Plaintiff's skilled nursing records, including the admissions paperwork, relevant to Plaintiff's claims for their content. Defendant denies any and all allegations inconsistent with those contents or intended to allege liability and/or damages against Defendant.

14. Defendant denies the allegations set forth in Paragraphs 17, 18, and 19 of Plaintiff's Complaint and demands strict proof thereof.

15. Responding to the allegations set forth in Paragraph 20 of Plaintiff's Complaint, Defendant admits it is the sole licensee of the skilled nursing facility at issue in this action located in South Carolina and had a duty to provide Resident Plaintiff with skilled nursing care in compliance with the governing standard of care. Defendant would affirmatively assert that the care and treatment provided to Resident Plaintiff during his residency was at all times in compliance with the standard of care. Any and all allegations inconsistent with the above response or intended to allege liability and/or damages against Defendant are denied.

16. Defendant denies the allegation set forth in Paragraph 21 of Plaintiff's Complaint and demands strict proof thereof.

17. In responding to the allegations set forth in Paragraph 22 of Plaintiff's Complaint, Defendant would restate its answers set forth in the above Paragraphs as if stated verbatim herein.

18. Defendant denies the allegation set forth in Paragraphs 23, 24, and 25 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

19. Defendant denies the allegations set forth in Plaintiff's Prayer for Relief.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

20. This Court lacks jurisdiction over this matter because Plaintiff's claims against Defendant should be submitted to arbitration pursuant to a valid arbitration agreement entered into between the parties hereto, and therefore this matter should be dismissed pursuant to Rule 12(b)(1) and Rule 12(b)(2) of the South Carolina Rules of Civil Procedure and compelled to arbitration.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

21. This action must be stayed until the validity of the Plaintiff's arbitration agreement is determined by the appropriate court.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

22. A claim for punitive damages and an award of punitive damages would violate those clauses of the Constitutions of the United States and South Carolina related to privileges and immunities, due process and equal protection and Defendant would further assert the protections and defenses set forth in S.C. Code Ann. § 15-32-510, et. seq.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

23. The Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action and fails to state a claim upon which relief can be granted against Defendant and should be dismissed pursuant to South Carolina Rules of Civil Procedure 12(b)(6).

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

24. Plaintiff's recovery in the matter, if any, is limited by and subject to the provisions of the South Carolina Noneconomic Damages Awards Act of 2005 which is codified at SC Code §15-32-200 et seq., which is pled as a limitation or partial bar to the Plaintiff's claims and alleged damages.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

25. Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserves the right to amend its Answer to assert any such defenses.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

26. Defendant would affirmatively assert that it would be entitled to any and all benefits, joint and several liability protections, emergency situations limitations on liability, any and all monetary limitations or caps of liability and/or damages under the South Carolina Medical Malpractice Reform Law and other applicable acts including, but not limited to, §15-38-15; §15-32-200; §15-32-210; §15-32-220; §15-32-230; §15-32-240; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

27. The Defendant would affirmatively assert the defense of intervening and superseding negligence of third parties not a party to this action.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

28. To the extent Defendant is required to raise the affirmative defense of comparative negligence under applicable South Carolina law in order to avoid an argument of waiver by Plaintiff, Defendant would assert Plaintiff's damages, if any, should be

proportionately barred or reduced under the doctrine of comparative fault if such evidence is found as the case proceeds.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

29. Defendant would assert that some, or all, of the state and federal laws cited or alluded to by the Plaintiff do not create a standard of care applicable to Plaintiff's claims or private right of action in this matter.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

30. The Defendant would allege, upon information and belief, that some of the injuries or damages sustained by the Plaintiff were due to, caused and occasioned by a natural disease process over which these Defendants had no control and, as such, these Defendants plead such a natural disease process as a complete or partial bar to this action.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

31. Some or all of the Plaintiff's claims are barred by the applicable Statute of Limitations.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

32. To the extent applicable, Plaintiff's injuries (if any) were caused or occasioned by a natural occurrence, force majeure, or Act of God, and, as such, Defendant pleads such a natural occurrence as a complete or partial bar to this action.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

33. Defendant would affirmatively assert that at all times the care and treatment it provided to Resident Plaintiff was in compliance with the governing standard of care.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

34. Defendant would affirmatively assert that it was not to proximate cause of any injuries allegedly suffered by Plaintiff.

WHEREFORE, having fully answered the Plaintiff's Complaint, Defendant prays the Court issue an order dismissing Plaintiff's Complaint and that it be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

YOUNG CLEMENT RIVERS, LLP

By: 

D. Jay Davis, Jr.

Perry M. Buckner, IV

J. Joseph Owens

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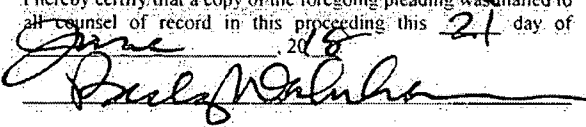
Attorneys for the Defendant

Charleston, South Carolina

Dated: 6-21-18

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 21 day of June, 2018



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON) 2018-CP-10-00087 and 01251

RICHARD LADSON, JR.,)

Plaintiff,)

vs.)

Transcript of Record

November 27, 2018

THI OF SOUTH CAROLINA AT)
CHARLESTON, LLC, D/B/A)
RIVERSIDE HEALTH AND)
REHAB,)

Defendant.)

and)

RICHARD LADSON, JR., BY)
AND THROUGH RICHARAD)
MILES LADSON, SR., POA,)

Plaintiff,)

vs.)

THI OF SOUTH CAROLINA AT)
CHARLESTON, LLC, D/B/A)
RIVERSIDE HEALTH AND)
REHAB,)

Defendant.)

B E F O R E:

Honorable Jennifer B. McCoy
Charleston County Courthouse
Charleston, South Carolina

A P P E A R A N C E S:

Benjamin C. Smoot, II, Esquire
Attorney for Plaintiff

Buckner, Esquire
Attorney for Defendant

Kay H. Richardson
Circuit Court Reporter

I N D E X

NOVEMBER 27, 2018

Pg.

Motions	4
Certificate of Court Reporter	16

E X H I B I T S

No.

ID

EV

(No exhibits were marked or admitted.)

1 NOVEMBER 27, 2018 - 2:27 P.M.

2 THE COURT: Okay. Let's see. Defendant has filed a
3 motion to be held to arbitration; is that correct?

4 MR. BUCKNER: Correct.

5 THE COURT: All right. I'll be happy to hear that. Is
6 that the only motion before the Court today?

7 MR. SMOOT: Yes, Your Honor. We've exchanged motions to
8 compel underlying discovery in the case subject to your ruling
9 upon the ---

10 THE COURT: Yes, sir. All right. We'll start with this.

11 MR. BUCKNER: The sole defendant in this case is THI of
12 South Carolina, a Charleston LLC which does business as
13 Riverside Health and Rehab and has filed a motion to compel
14 arbitration to stay this action. The arbitration agreement at
15 issue in this case was signed by the nursing home resident's
16 sister back in 2010 when he was first admitted to my client's
17 skilled nursing facility. The action that we're here today to
18 discuss was actually filed, I believe, by his son, a different
19 one. But Julia Wright, his sister, is the signatory on the
20 at-issue arbitration agreement. The sole ground of opposition
21 here today to enforcement of the arbitration agreement is not
22 unconscionability or lack of consideration or the
23 unavailability of the arbitral forum or anything of that
24 nature, it's solely an issue of authority to bind her, and in
25 this case, brother at the time of the admission in 2010. As I

1 understand Plaintiff's opposition, their legal argument is
2 based entirely on the Court of Appeals holding in *Thompson*,
3 and the South Carolina Supreme Court's holding in *Coleman*,
4 stating that the Adult Health Care Consent Act does not give
5 authority to a nursing home residence level, whether it be a
6 mother or father, brother or sister to waive someone's right
7 to a jury trial. And unfortunately, my firm was involved in
8 *Coleman*, not on the good side, this is a different arbitration
9 agreement, different client, not an identical one. And what
10 *Thompson* and *Coleman* have established is not a -- that nursing
11 home pre-dispute arbitration agreements are no longer
12 enforceable unless there's a power of attorney. They
13 certainly could've done that. I think that might've run afoul
14 of the United States Supreme Court and the FAA but that has
15 not happened. What has happened is that they have made a
16 distinction under the Doctrine of Merger, presumption of
17 merger by operation of law and said that we are no longer
18 going to find that documents executed at the same time by the
19 same parties during the course of the same transaction should
20 be deemed merged. And the reason they did that was because
21 they've started this separateness analysis. And in *Coleman*,
22 that separateness analysis was really driven by the fact that
23 there was disclaimer language in the arbitration -- excuse me
24 -- the admissions agreement actually referenced directly the
25 arbitration agreement. So, the Court sort of developed this

1 notion, this idea, that you know if we find that these
2 documents are sufficiently distinct and separate -- now
3 obviously, Your Honor, there are two separate documents. The
4 Doctrine of Merger inherently recognizes that if you have a
5 deed and a promissory note or anything like that, you can see
6 they're gonna be separate documents. What the Court has
7 seemed to carve out in the nursing home arbitration world is
8 that we see on the face of the document a recognition of the
9 separate agreement, we're gonna find that it's sufficiently
10 separate such that merger shouldn't apply. And so in *Coleman*,
11 there was that reference to the agreement in the disclaimer
12 language. And in *Thompson* it was a little bit different
13 because they found that there were citations to conflicting
14 law as to when the agreement or what laws controlled the
15 agreement. And in *Hodge*, another case that will be addressed
16 in our brief and I'm sure Plaintiff's counsel will discuss as
17 well, there was the idea that one agreement can be revoked
18 within 30 days the other one could not. So, the Court has to
19 undertake -- and we would ask the Court to undertake some sort
20 of factual analysis and we think that all of these appellate
21 opinions that are distinguishable in our agreement, which
22 doesn't have conflicting law, which doesn't have conflicting
23 revocation provisions, and which doesn't have any reference
24 within the agreement itself to one another. And there is not
25 sufficient separateness, so that estoppel and equitable

1 estoppel by merger is still a viable argument even in light of
2 all of these appellate opinions. Now, obviously, we -- in a
3 lot of these cases you're arguing about agency, when you're
4 arguing about authority, here we have a nursing home resident
5 who had dementia. Obviously, there is no capacity to make
6 someone their agent by implied authority or by apparent
7 authority, so those arguments aren't before the Court. But,
8 there are arguments about agency by estoppel and inherent
9 agency. A lot of the South Carolina Courts has called agency
10 by estoppel federal estoppel. I think the Courts have sort of
11 distinguished between state law estoppel and federal estoppel.
12 And we think those are still very much viable theories because
13 here we can show a benefit that was received by the nursing
14 home resident in entering the arbitration agreement. That was
15 recognized in *Dean v. Heritage Corp.*, that entering into the
16 arbitration agreement, that was a ratification argument, gave
17 the family of the nursing home a benefit by having a less
18 expensive, more streamlined alternative to the court process.
19 There is a argument in *Thompson*, which has been addressed by
20 Plaintiff's counsel that that benefit is not viable when
21 someone loses their right to a jury trial. But since that
22 opinion in 2017, the United States Supreme Court in the -- I
23 think it's *Kindred Nursing Home* case, that said that clear-cut
24 policies that state courts have enacted that say we're gonna
25 place arbitration agreements on different footing are invalid

1 per se. And we think that the Court's holding in *Thompson* to
2 say that the arbitration provides no benefit to each side or
3 one side or the other, is no longer valid in light of the
4 *Kindred* case.

5 And then lastly regarding inherent agency, is Ms. Wright,
6 who signed this agreement, expressly, you know, recognized the
7 very first page above the admissions agreement and the
8 arbitration agreement itself, that she was authorized to enter
9 into this agreement. She never gave any indication whatsoever
10 to the contrary that she didn't have any sort of power of
11 attorney or didn't have some sort of legal right. And one of
12 the cardinal rules of any doctrine of agency, is a third party
13 should not be disadvantaged for dealing with an agent rather
14 than the principal. That's why we have apparent authority,
15 agency by estoppel, and inherent agency. And the doctrine of
16 inherent agency gives someone the footing to say if you have
17 the right to come into this nursing home and admit your loved
18 one for long-term care, then you have the right to handle all
19 business coextensive with that, especially when you give no
20 indication to anyone because the last thing you would want the
21 admissions director at Riverside to do is to have Mr. Ladson
22 sign this agreement because we'd be right back here in this
23 courtroom having it attacked because he was demented and
24 without capacity. So, they did exactly what they should have,
25 they presented for consideration to Ms. Wright, someone who

1 could make that decision and Ms. Wright, if she did have a
2 lack of authority, which we now have learned Plaintiffs claim
3 she does, concealed that authority, and they dealt with her
4 because of her representations. And so we think inherent
5 agency covers that.

6 For everything else, Your Honor, I'm happy to rest on our
7 brief and answer any questions you may have, but if there's
8 anything specific, I'll ---

9 THE COURT: Did you bring an extra copy of your brief
10 with you?

11 MR. BUCKNER: I did.

12 THE COURT: I lost my law clerk this afternoon, just for
13 the afternoon, so ---

14 MR. BUCKNER: Yes, I think it was filed on either Tuesday
15 or Wednesday of last week.

16 THE COURT: Perfect. Thanks.

17 THE COURT: Okay, Mr. Smoot?

18 MR. SMOOT: All right, Your Honor. Thank you. Ben Smoot
19 for the plaintiff, Mr. Ladson. Do you have a copy of my brief
20 as well or would you like to ---

21 THE COURT: I do have yours right here.

22 MR. SMOOT: Okay. Very good.

23 Your Honor, Mr. Buckner raises some interesting points.
24 Although I will sort of get to the crux of our opposition to
25 their motion to compel arbitration, which is that simply this

1 arbitration agreement is invalid and unenforceable, and here's
2 why. The South Carolina Adult Health Care Consent Act is the
3 only means by which authorities confer on another person next
4 of kin, whoever else it may be to bind a long-term care
5 resident to an arbitration agreement. Those cases *Thompson*,
6 *Coleman*, *Hodge*, that Mr. Buckner all references looked at this
7 exact same issue and they all came down to the same side in
8 saying, no, next of kin does not have authority to bind a
9 long-term care resident to an arbitration agreement, whereas
10 like here there is no financial consideration in the
11 arbitration agreement, there's no health care provision, and
12 the arbitration agreement isn't a precondition to admission at
13 the facility.

14 With respect to the estoppel agreement that's been
15 raised, you know, if you look at the admission agreement,
16 which I've made an exhibit to my brief, Your Honor, it
17 indicates -- it shows that separateness of the documents which
18 would preclude any sort of merger situation here and
19 establishes in its own words that it constitutes the entire
20 agreement among the parties. You know, with respect to the
21 argument made under agency, again, it's our position that like
22 the Supreme Court, like the Court of Appeals, that Adult
23 Health Care Protection Act is the exclusive means through
24 which authority can be inferred to a representative. And so,
25 you know, with that we would ask that you rely on those

1 opinions from the Supreme Court and Court of Appeals. The
2 defendant has failed to distinguish the admission agreement as
3 well as the arbitration agreement. In this case, from those
4 agreements in that case, which were all clearly decided by our
5 higher court were not enforceable.

6 THE COURT: Okay. Where is the arbitration agreement in
7 here?

8 MR. SMOOT: I believe it is included in the defendant's
9 memorandum, Your Honor. That's Exhibit 2.

10 THE COURT: Okay.

11 MR. SMOOT: And it's a one-page document there.

12 THE COURT: I see it.

13 MR. SMOOT: I will also add, Your Honor, if I may, the
14 admission agreement fails to reference or incorporate in any
15 place this arbitration agreement.

16 THE COURT: Right, that's why I asked about that. I
17 didn't see it -- all right. Anything else? You want to
18 respond, Mr. Buckner?

19 Was this -- I think you might've touched on this, was
20 this arbitration agreement something that had to be signed in
21 order for him to be admitted?

22 MR. BUCKNER: Not at all, Your Honor. This is not a
23 precondition for admission at all -- the Medicare rule has
24 gone out the door; I don't think they can do that. There were
25 some brief changes to that. This facility does not require --

1 I've got cases, you know, I guess about four or five years ago
2 for this facility where it's refused to sign, so that's
3 perfectly acceptable.

4 In brief response, Your Honor, I just wanted to say that
5 yes, that the admission agreement contains an entire agreement
6 also known as a merger clause to kind of further confuse
7 things since we're talking about merger by operation of law
8 ---

9 THE COURT: Right.

10 MR. BUCKNER: That in and of itself, having an entire
11 agreement clause is not what *Coleman* found to be sufficient
12 separateness. It was the fact that the entire agreement said
13 and referenced the arbitration in which ours does not do. So,
14 that is under *Coleman* not controlling whatsoever. And of
15 course, the fact that it's not referenced, as Mr. Smoot
16 pointed out, is a good thing, because if it did then we might
17 have a whole 'nother argument of separateness. The fact that
18 it doesn't, we think is good and falls back into the
19 traditional documents executed at the same time by the same
20 parties and, of course, the same transaction should be merged
21 by operation of law. Because I think if it did say, oh by the
22 way, here's an arbitration agreement that contains this,
23 that's what *Coleman* would say would be sufficient
24 separateness.

25 THE COURT: Okay.

1 MR. SMOOT: Your Honor, if I may?

2 THE COURT: Uh-huh, (affirmative response).

3 MR. SMOOT: You know, it really falls back -- our
4 position is that the Adult Health Care Consent Act, which is
5 what both the Court of Appeals and the Supreme Court look to
6 when they ask why is there authority for this arbitration
7 agreement ---

8 THE COURT: Uh-huh, (affirmative response).

9 MR. SMOOT: Both recognize that that act only recognizes
10 authoritative representation from next of kin and whoever else
11 it may be escalates to financial matters and health care
12 matters. This arbitration agreement deals with neither. This
13 is a person's waiving their right to a jury trial. And so,
14 you know, for that reason, we'd ask that you follow the
15 Supreme Court and Court of Appeals in looking at this exact
16 issue.

17 MR. BUCKNER: And Your Honor, I don't have any --
18 stipulate that the Adult Health Care Consent Act does not give
19 someone the right to waive someone's right to a jury trial.
20 What I am arguing is that once a person has sufficient
21 authority under the Adult Health Care Consent Act to admit
22 someone into a nursing home and sign the admissions agreement,
23 that they have authority for that and then merger and
24 equitable estoppel come into play for the collateral
25 documents. Obviously, I'm not arguing actual or statutory

1 authority, just equitable estoppel and merger, and then also
2 the doctrine of inherent agency and agency by estoppel.

3 THE COURT: Okay.

4 MR. BUCKNER: Thank you, Your Honor.

5 THE COURT: I -- the agreement in and of itself deems the
6 person -- let's see, Julia Wright would be the inherent --
7 dual power of attorney/legal guardian/responsible party.
8 Though I'm gonna go out on a limb and think they're gonna
9 change that language probably as a result of some of this, but
10 I don't think that's -- and then they don't really make you
11 choose one but it looks like they let you go on and just kind
12 of sign away. So, anyway -- all right. Well, I'll take a
13 look at y'all's briefs which are fully incorporated into the
14 record for purposes of appeal as well as your arguments.

15 If there's nothing else, expect a decision by the next 10
16 to 15 days. All right?

17 MR. BUCKNER: Thank you, Judge.

18 MR. SMOOT: Thank you, Judge.

19 THE COURT: Absolutely.

20 **ADJOURNED - 2:43 P.M.**

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23

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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Richard Ladson v. THI of Charleston, et al., held in the Court of Common Pleas for Charleston County, Charleston County Courthouse, Charleston, South Carolina, on November 26, 2018.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

Kay H. Richardson
Official Court Reporter

March 26, 2019.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
RICHARD LADSON, JR., BY AND	)	CASE NO. 2018-CP-10-1251
THROUGH RICHARD MILES	)	
LADSON, SR., POA,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	DEFENDANT'S MOTION TO COMPEL
	)	ARBITRATION AND PETITION TO STAY
	)	STATE COURT PROCEEDINGS
THI OF SOUTH CAROLINA AT	)	
CHARLESTON, LLC D/B/A	)	
RIVERSIDE HEALTH AND REHAB,	)	
	)	
DEFENDANT.	)	

FILED
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 CLERK OF COURT

TO: BENJAMIN CATLETT SMOOT II, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab (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: 

D. Jay Davis, Jr.

Perry M. Buckner, IV

J. Joseph Owens

P.O. Box 993, Charleston, SC 29402

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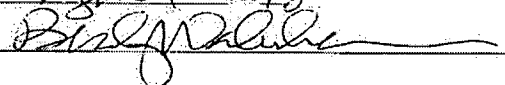
*Attorneys for the Defendant THI of South Carolina
at Charleston, LLC d/b/a Riverside Health and
Rehab*

Charleston, South Carolina

Dated: 8/21/18

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to
all counsel of record in this proceeding this 21 day of

August 2018


STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
RICHARD LADSON, JR., BY AND	)	CASE NO. 2018-CP-10-1251
THROUGH RICHARD MILES	)	
LADSON, SR., POA,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	DEFENDANT'S MEMORANDUM IN
	)	SUPPORT OF MOTION TO DISMISS AND
	)	COMPEL ARBITRATION
THI OF SOUTH CAROLINA AT	)	
CHARLESTON, LLC D/B/A	)	
RIVERSIDE HEALTH AND REHAB,	)	
	)	
DEFENDANT.	)	

INTRODUCTION

COMES NOW the Defendant, THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab (hereinafter referred to as "Riverside", "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 the South Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6).

Plaintiff has sued this Defendant for Negligence and Gross Negligence based upon his residency at this Defendant's skilled nursing facility. However, this Defendant and Plaintiff entered into an Arbitration Agreement prior to his admission at the Facility, which covers 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.

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CLERK OF COURT

FACTUAL BACKGROUND

The Plaintiff in this action, Richard Ladson, was admitted to Riverside on September 20, 2010. Prior to his admission, Mr. Ladson entered into a number of contracts with the Facility. The contracts were each signed by Mr. Ladson's sister, Julia Wright, as representative of Mr. Ladson during his admission on September 20, 2010. (**Exhibit 1**, Admission Agreement; **Exhibit 2**, Arbitration Agreement; **Exhibit 3**, Other Signed Agreements). 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. Ladson was admitted to Riverside and received skilled nursing care for the treatment of his multiple, serious comorbidities. During his stay at Riverside, Mr. Ladson accepted the benefits of the contracts entered into on his behalf by his representative, Julia Wright, including his admission to the Facility and his receipt of the skilled nursing care provided therein. Furthermore, Mr. Ladson was also entitled to an expeditious and less costly mechanism for addressing any and all present or future complaints against the Facility by virtue of the Arbitration Agreement, which Plaintiff's agent now seeks to revoke on his behalf.

The Arbitration Agreement at issue defines Riverside as the "Facility," Mr. Ladson as the "Resident," and Ms. Wright 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. Wright's authority to sign on behalf of her brother, 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. Wright as "Representative" and Leslie Solomon, the Admissions Director of the Facility, on behalf of Riverside. 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. Ladson’s sister, Julia Wright, represented herself to staff and admissions personnel at Riverside as her brother’s representative, with the authority to sign documents on Mr. Ladson’s behalf and bind Mr. Ladson and the Facility pursuant to those documents. It was clearly Ms. Wright’s intention to bind Mr. Ladson according to the terms of the Admissions Agreement and Arbitration Agreement, and the agreements clearly set forth that Ms. Wright was signing the document in her capacity as Mr. Ladson’s authorized representative. Consequently, Plaintiff is bound under the Arbitration Agreement and his claims must be dismissed and compelled to arbitration.

B. The Arbitration Agreement and Admission Agreement Must be Construed Together Pursuant to the Doctrine of Merger

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. Wright on behalf of Mr. Ladson on the same day, at the same time, upon Mr. Ladson’s admission to the Facility.

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. *Kluttz 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).

Accordingly, Mr. Ladson, by and through the acts of his representative, Ms. Wright, and the Facility both contemplated that the terms of the agreement to admit Mr. Ladson were contained in the Admissions Agreement and Arbitration Agreement. Mr. Ladson's sister 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. Ladson's residency at the Facility); the Arbitration Agreement and Admissions Agreement were executed by the same parties; the Arbitration 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, such that the Arbitration Agreement is valid and enforceable.

a. Plaintiff is Equitably Estopped from Denying the Existence of an Enforceable Arbitration Agreement

In the instant case, the agreements at issue were executed by Ms. Wright, Mr. Ladson's sister and representative, on behalf of Mr. Ladson. 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).

Plaintiff alleges in his Complaint that the Facility breached its duty to provide adequate skilled nursing care to Mr. Ladson during his residency. Among other allegations, Plaintiff alleges the Facility failed to develop an appropriate care plan for Mr. Price and otherwise failed to provide skilled nursing care in accordance with certain alleged State and Federal law. As such, Plaintiff argues that his liability claims against the Facility in part are based upon the Admissions Agreement and admits Mr. Ladson resided at the Facility under the terms of the Admissions

Agreement. Should Plaintiff now seek to deny the validity of the Arbitration Agreement, which Ms. Wright signed and executed contemporaneously with the Admissions Agreement on behalf of her brother, he should be equitably stopped from doing so.

“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 & Anlaen 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).¹

In the present case, Mr. Ladson received the benefit of all aspects of the Admission Agreement and other contracts entered into with the Facility. As such, it would be 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 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 his advantage and repudiating the Arbitration Agreement when it works to his disadvantage.

¹ See also *THI of S.C. at Columbia, LLC v. Wiggins*, CIA 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).

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 cited above, numerous courts hold that where a plaintiff receives the benefits of the contract, which Mr. Ladson did, the non-signatory is estopped from denying an arbitration agreement merely because he did not sign the contract (or have someone with proper authority sign on his behalf) under which he received all of the benefits.

i. **Coleman, Hodge, and Thompson 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), *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), 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.*

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.

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*, *Thompson*, and *Hodge*, the Arbitration Agreement and Admissions Agreement in the case at bar should not be considered “separate” for purposes of denying merger. The Arbitration Agreement does not contain any conflicting disclaimer language similar to that found in *Thompson*. 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. Wright, on Mr. Ladson’s behalf, and by Riverside’s authorized agent on September 20, 2012. The documents were signed by the exact same people: Julia Wright as representative for Plaintiff and Leslie Solomon for the Facility. The documents were signed for the same purpose and transaction of establishing Richard Ladson’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*, *Coleman*, or *Thompson* to indicate the parties desired the documents be considered as separate contracts. As such, *Coleman*, *Hodge*, and *Thompson* are not controlling and this Honorable Court should compel Plaintiff’s claims to arbitration pursuant to the contract.

C. Arbitration Agreement is Valid in its Own Right and Regardless of Doctrine of Merger under Doctrine of Estoppel

This Defendant would also assert that the Plaintiff should still be estopped from denying the validity of the Arbitration Agreement in its own right and regardless of the doctrine of merger. Equitable estoppel applies “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.’” *Thompson*, 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.*² As such, Plaintiff should be denied from arguing that the Arbitration Agreement in its own right is not enforceable because Mr. Ladson received a direct benefit pursuant to its terms and application.

D. Julia Wright Possessed Inherent Agency Powers to Bind Richard Ladson to the Arbitration Agreement

Assuming arguendo that Ms. Wright, on behalf of her brother, 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

² Ultimately, however, 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 estoppel argument remains valid despite the law as promulgated in *Thompson* due to Mr. Ladson’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.

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 Riverside, 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. Wright was authorized to admit her brother to Riverside. To the extent Richard Ladson takes issue with his sister's authority to bind him to the Admissions Agreement and the specific terms therein, such actions merely accompanied and were incidental to Ms. Wright's authority to admit Plaintiff as a resident at Riverside. Riverside should not be disadvantaged for acting in accordance with the express representations of Ms. Wright regarding her authority.

E. Julia Wright Possessed Statutory Authority under the S.C. Bill of Rights for Residents of Long-Term Care Facilities to Bind Richard Ladson under the Arbitration Agreement

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

Julia Wright possessed statutory authority as Mr. Ladson'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. Ladson (upon information and belief) did not have a legally appointed guardian at the time of his admission, Ms. Wright was his representative and agent pursuant to the Bill of Rights. This is evidenced by the fact that Ms. Wright, as Mr. Ladson’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. Ladson’s agent under the Bill of Rights, Julia Wright signed the Arbitration Agreement as Plaintiff’s “Representative,” binding Mr. Ladson to arbitration in the event of any and all claims against the Facility based on his residency.

In accordance with the foregoing, Ms. Wright possessed the actual authority, pursuant to statute, to make health care decisions on behalf of Mr. Ladson as his agent, and this included executing the Arbitration Agreement as part of Mr. Ladson’s admission to Riverside.

F. The Arbitration Agreement is Not Unconscionable

Should Plaintiff contend this Arbitration Agreement is unenforceable because it is unconscionable, the law and facts surrounding Mr. Ladson 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*.

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. Ladson's representative and agent, Julia Wright, had a duty to read and

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

III. FEDERAL AND STATE LAW FAVOR THE ARBITRATION AGREEMENT

As initially set forth, the FAA establishes "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983); *Dockser v. Schwartzberg*, 433 F.3d 421, 423 (4th Cir. 2006). The purpose behind Congress' passage of the FAA "was to reverse the longstanding traditional hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Dockser*, 433 F.3d at 425 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S. Ct. 1647 (1991)). Moreover, by its terms and by case law interpreting the

same, the FAA “requires courts to place arbitration agreements ‘on equal footing with all other contracts.’” *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1424, 197 L. Ed. 2d 806 (2017)(quoting *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463, 465, 193 L.Ed.2d 365 (2015)); *see also* 9 U.S.C. § 2. Accordingly, any doubts concerning the “scope of arbitrable issues” should be resolved in favor of arbitration. *Moses H. Cone*, 460 U.S. at 24-25, 103 S. Ct. at 941.

South Carolina courts similarly favor arbitration. “It is the policy of this state to favor arbitration of disputes.” *Toler’s Cove Homeowners Ass’n v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003). “The policy of the United States and this State is to favor arbitration of disputes.” *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). Accordingly, the Arbitration Agreement at issue in the present action should be enforced by the this Court and Plaintiff’s claims should be dismissed and compelled to arbitration.

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:

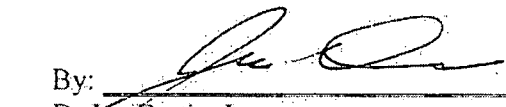
By its terms, the [FAA] leaves no room for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on the issues as to which an arbitration agreement has been signed.

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. Ladson 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.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

YOUNG CLEMENT RIVERS, LLP

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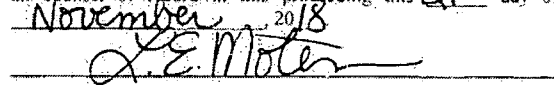
Dated: 11/21/18

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to
all counsel of record in this proceeding this 21st day of

November

2018



**DEFENDANT'S
EXHIBIT**

1

ADMISSION AGREEMENT - SOUTH CAROLINA

RESIDENT NAME: Richard Ladson
RESIDENT NUMBER: 300187
DATE OF ADMISSION: 9/20/10

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among Driftwood Rehabilitation & Nursing Center ("Facility"), Richard Ladson ("Resident") and/or Julie Wright ("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 agree(s) 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.

Original: Business File • Photocopy: Resident/Representative

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's 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 as 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.

Original: Business File • Photocopy: Resident/Representative

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 actual 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 secured 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 \$ 1125.00 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 this 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 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 terminate 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.

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 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, 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,

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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.

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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:

Driftwood Rehab + Nursing
2375 Baker Hospital Blvd
NChas. SC
29405

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 as 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 other 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/or the license is transferred such that a new licensee operates Facility. This Agreement, at Facility's option and without notice to Resident and/or Representative, may be automatically assigned to the new licensee and will be fully binding upon Resident and the new licensee.

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.

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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, in its sole discretion.

XVIII. ENTIRE AGREEMENT

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.

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 this 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 of Representative, if any

Date

Printed Name of Representative

Witness Signature

Date

Printed Name of Witness

Representative Social Security No. (Voluntary Info.)

Signature of Facility Official

Printed Name of Facility Official & Title

Date

Original: Business File • Photocopy: Resident/Representative

**DEFENDANT'S
EXHIBIT**

2

PLEASE READ CAREFULLY

**FACILITY - RESIDENT/REPRESENTATIVE
ARBITRATION AGREEMENT**

This Agreement is made between Dr. Edward Rehab Nursing Centre ("Facility"), its agents, employees and servants, and Richard Carlson ("Resident") or Julia Wright ("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 deriving 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 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.

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 any 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.

Julia Wright 9/20/10
Resident/Representative Signature Date

Leslie Solomon 9/20/10
Authorized Agent of Facility Date

Julia Wright
Printed Name of Resident/Representative

Leslie Solomon D. Admissions
Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

ROA 071

DEFENDANT'S EXHIBIT

3

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.W.

A written copy of Facility's Admission Agreement

☒ J.W.

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.W.

A written copy of resident's rights under applicable state laws.

☒ J.W.

A written copy of facility's policy on Advance Directives.

☒ J.W.

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.W.

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.W.

A separate listing of all medical professionals available to provide on-site services.

☒ J.W.

A written copy of facility's policy on the use of physical or chemical restraints, including bed rails.

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

[Signature] 9/20/10

Printed Name of Resident

[Signature]

Legal Representative Signature, if any

Date

Printed Name of Representative

☒

Witness Signature

[Signature]

Date

☒

Printed Name of Witness

Facility Representative Signature

Date

[Signature] 9/20/10

Printed Name and Title

[Signature] Leslie Solomon D. Admissions

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

☒ JSW
(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

☒ JSW
(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

☒ JSW
(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

☒ JSW
(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:

Timothy Fischer

Address:

Phone:

849 8800

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.

☒

(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.W.
(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.W.
(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.W.
(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:

☒ J.W.
(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: _____

☐ _____
(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.W. (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

☒ J.W. (initial) ☐ No (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 ☒ J.W. (initial) ☐ No (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 JW ☐ 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 JW ☐ 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

x Julia Wright 9/20/10
Legal Representative Signature, if any Date

Printed Name of Resident

x Julia Wright
Printed Name of Representative

Witness Signature

Date

NONE

Printed Name of Witness

Facility Representative Signature

Date

Leslie Solomon 9/20/10

Printed Name and Title

Leslie Solomon D. Admissions

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

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

RICHARD LADSON, JR., BY AND
THROUGH RICHARD MILES LADSON,
SR., POA,

Plaintiff,

v.

THI OF SOUTH CAROLINA AT
CHARLESTON, LLC d/b/a RIVERSIDE
HEALTH AND REHAB,

Defendant.

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CASE NO.: 2018-CP-10-0087
) 1251

2018 NOV 21 PM 1:13
CLERK OF COURT
JULIA WRIGHT
2

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO
COMPEL ARBITRATION AND PETITION TO STAY STATE COURT PROCEEDINGS**

Comes Now Plaintiff Richard Ladson, Jr. by and through Richard Miles Ladson, Sr. POA ("Ladson") and the undersigned counsel who respectfully request that this Honorable Court deny Defendant THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab ("Facility") Motion to Compel Arbitration and Petition to Stay State Court Proceedings.

Because Ladson's sister, Julia Wright, lacked authorization to sign the Arbitration Agreement under the Adult Health Care Consent Act ("Act") and lacked actual or apparent authority to bind Ladson who suffered from dementia at the time Wright signed the AA on September 20, 2010, Defendant's motion must be denied. This Court should follow the reasoning of our Supreme Court in Thompson v. Pruitt Corp.¹ and deny Defendant's motion to dismiss or compel this case to arbitration on the following grounds:

¹ 416 S.C. 43, 56, 784 S.E.2d 679, 686 (Ct. App. 2016), reh'g denied (Apr. 21, 2016), cert. denied (Dec. 2, 2016) and attached to this Memorandum as "Exhibit A."

A. The Adult Health Care Consent Act did not give Julia Wright authority or capacity to bind Ladson to the Arbitration Agreement.

The Arbitration Agreement was separate from the Admission Agreement to admit Ladson to the Facility and concerned neither healthcare nor payment. Instead, the Arbitration Agreement only provides for an alternative method of dispute resolution. The Act does not confer authority with respect to and Arbitration Agreement. See Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014). As the Arbitration Agreement does not deal with healthcare decisions, the provisions of the Act do not apply to establish the necessary principal-agent relationship between Ladson and his sister, Julia Wright. Furthermore, the terms of Ladson's Admission Agreement signed by Ms. Wright do not reference, incorporate, or merge the Arbitration Agreement into it in any way. September 20, 2010 Admission Agreement, "Exhibit B." There is no requirement in the Admission Agreement that the execution of the Arbitration Agreement was a condition to Ladson's admission to the Facility.

B. No common law agency existed to bind Ladson to the Arbitration Agreement.

Ladson's incapacity in 2010 prevented him from consciously or impliedly representing Julia Wright to be his agent for purposes of entering into the Arbitration Agreement. While Ms. Wright handled a number of Ladson's finances in the years leading up to his admission to the Facility, it is evident Ladson suffered from dementia prior to being admitted to the Facility. September 17, 2010 South Carolina Dept. of Health and Human Services Screening Form, "Exhibit C." He therefore lacked the requisite capacity to consciously or impliedly represent Julie Wright as his agent for purposes of consenting to the Arbitration Agreement. See Froneberger v. Smith, 406 S.C. 37, 47, 748 S.E.2d 625, 630 (Ct. App. 2013)([H]olding that to establish apparent authority, the proponent must show, among other things, "the purported principal consciously or impliedly represented another to be his agent").

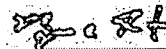
Further, any authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial. See Thompson, 416 S.C. at 55, 784 S.E.2d at 686.

Based on the foregoing, the evidence does not show that Julia Wright had authority either under the Adult Health Care Consent Act or by actual or apparent authority to execute the Arbitration Agreement on Ladson's behalf. Argument by Defendant that Ladson is equitably estopped from refusing to comply with the Arbitration Agreement must also necessarily fail because the Arbitration Agreement was not incorporated into the Admission Agreement. Facility's assertion that Ladson received benefits under the Admission Agreement, i.e. being admitted to the Facility and receiving medical care, is of no moment. The two agreements are independent of one another and the execution of the Arbitration Agreement was not expressed as a condition to admission at Facility.

Accordingly, Plaintiff respectfully requests that this Court adopt the law and reasoning set forth in Thompson v. Pruitt Corp. and deny Defendant's Motion to Compel Arbitration and Petition to Stay State Court Proceedings.

Respectfully Submitted,

PIERCE|SLOAN LLC
321 East Bay Street
Post Office Box 22437
Charleston, SC 29401
(843) 722-7733



Carl E. Pierce, II
Benjamin C. Smoot, II
Attorneys for the Plaintiff

01/26, 2018
Charleston, South Carolina

 KeyCite Yellow Flag - Negative Treatment
Distinguished by Hodge v. UniHealth Post-Acute Care of Bamberg,
LLC, S.C.App., March 7, 2018

416 S.C. 43

Court of Appeals of South Carolina.

Mae Ruth Davis THOMPSON, individually and
as the appointed Personal Representative of the
Estate of Eula Mae Davis, deceased, Respondent,

v.

PRUITT CORPORATION d/b/a UHS-Pruitt
Corporation; UHS-Pruitt Holdings, Inc.;
UHS of South Carolina-East, LLC; United
Health Services of South Carolina, Inc.; United
Clinical Services, Inc.; United Rehab, Inc.;
Rock Hill Healthcare Properties, Inc.; Uni-
Health Post Acute Care-Rock Hill, LLC d/b/a
UniHealth Post Acute Care-Rock Hill, Appellants.

Appellate Case No. 2014-001624.

No. 5384.

Heard Feb. 2, 2016.

Decided March 2, 2016.

Rehearing Denied April 21, 2016.

Certiorari Denied Dec. 2, 2016.

Synopsis

Background: Daughter of nursing home resident, who died
as a result of falling out of a bed with a malfunctioning
side rail, filed a wrongful death and survival action against
nursing home. Nursing home filed motion to compel
arbitration of daughter's claims. The Circuit Court, York
County, S. Jackson Kimball, III, J., denied the motion to
compel arbitration, and nursing home appealed.

Holdings: The Court of Appeals, Geathers, J., held that:

[1] arbitration agreement was separate from the admission
agreement, which resident's son was authorized to execute
under the Adult Health Care Consent Act, and therefore,

any authority son had to sign the arbitration agreement
on patient's behalf could not come from the Act;

[2] son had neither actual nor apparent authority to
execute arbitration agreement on resident's behalf; and

[3] estate of nursing home resident was not estopped from
asserting that the lack of resident's signature precluded
enforcement of arbitration agreement.

Affirmed.

West Headnotes (22)

[1] Alternative Dispute Resolution

➤ Presentation and reservation of grounds
for review.

Nursing home's claim that arbitration
agreement merged with the admission
agreement, which resident's son was
authorized to execute under the Adult Health
Care Consent Act, thereby making both
agreements one and the same, was waived for
appeal since nursing home did not raise this
issue below. Code 1976, § 44-66-30(A).

Cases that cite this headnote

[2] Health

➤ Substituted judgment; role of guardian
or others in general

Health

➤ Substituted judgment; role of courts,
physicians, guardians, family or others

Health

➤ Contracts for services

Adult Health Care Consent Act confers
authority on a health care surrogate to
consent on the patient's behalf to the provision
or withholding of medical care and to make
financial decisions obligating the patient to
pay for the medical care provided. Code 1976,
§ 44-66-10.

Cases that cite this headnote

[3] **Alternative Dispute Resolution**

↔ Persons affected or bound

Health

↔ Substituted judgment; role of guardian or others in general

Arbitration agreement signed by nursing home resident's son was separate from the admission agreement, which resident's son was authorized to execute under the Adult Health Care Consent Act, and therefore, any authority son had to sign the arbitration agreement on patient's behalf could not come from the Act. Code 1976, § 44-66-30(A).

Cases that cite this headnote

[4] **Alternative Dispute Resolution**

↔ Persons affected or bound

Resident's right to disclaim the arbitration agreement without having to terminate her residency at the nursing home facility indicated the parties' intent to keep the arbitration agreement separate from the admission agreement; this was consistent with arbitration agreement's statement that its execution was not a condition precedent for being admitted to the nursing home.

Cases that cite this headnote

[5] **Alternative Dispute Resolution**

↔ Persons affected or bound

Although admission agreement incorporated by reference all exhibits to the agreement, the admission agreement was ambiguous as to whether admission agreement incorporated the arbitration agreement, which was one of the exhibits, and therefore, the admission agreement's provision incorporating all "exhibits" would be construed against nursing home, which sought to arbitrate resident's claim.

Cases that cite this headnote

[6] **Alternative Dispute Resolution**

↔ Persons affected or bound

Health

↔ Substituted judgment; role of guardian or others in general

Nursing home's arbitration agreement did not require the type of decision for which the Adult Health Care Consent Act conferred authority on a surrogate, i.e., health care or payment for health care; arbitration agreement was separate from the admission agreement. Code 1976, § 44-66-30(A).

Cases that cite this headnote

[7] **Alternative Dispute Resolution**

↔ Persons affected or bound

Parent and Child

↔ Agency of child for parent

Nursing home resident's son had neither actual nor apparent authority to execute arbitration agreement on resident's behalf, and therefore, son did not have the authority to bind resident to the arbitration agreement; incapacity of nursing home resident, who had dementia, prevented her from consciously or impliedly representing another to be her agent.

Cases that cite this headnote

[8] **Principal and Agent**

↔ Implied and Apparent Authority

To establish apparent authority, the proponent must show (1) the purported principal consciously or impliedly represented another to be his agent; (2) the proponent relied on the representation; and (3) there was a change of position to the proponent's detriment.

1 Cases that cite this headnote

[9] **Principal and Agent**

↔ Implied and Apparent Authority

Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe the principal consents

to have the act done on his behalf by the person purporting to act for him.

Cases that cite this headnote

[10] **Principal and Agent**

↔ Declarations and Acts of Agent

Agency may not be established solely by the declarations and conduct of an alleged agent.

Cases that cite this headnote

[11] **Alternative Dispute Resolution**

↔ Persons affected or bound

Principal and Agent

↔ Submission to arbitration

Authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial.

1 Cases that cite this headnote

[12] **Contracts**

↔ Agreement for Benefit of Third Person

Third-party beneficiary is a party that the contracting parties intend to directly benefit.

Cases that cite this headnote

[13] **Contracts**

↔ Agreement for Benefit of Third Person

There can be no third-party beneficiary unless a valid contract exists.

Cases that cite this headnote

[14] **Alternative Dispute Resolution**

↔ Persons affected or bound

Because nursing home resident's son was not authorized to execute the arbitration agreement on resident's behalf, resident could not be the third-party beneficiary of the alleged arbitration agreement between herself and nursing home.

Cases that cite this headnote

[15] **Alternative Dispute Resolution**

↔ Persons affected or bound

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.

1 Cases that cite this headnote

[16] **Alternative Dispute Resolution**

↔ Validity of assent

Nursing home resident's diminished mental capacity prevented her from assenting to terms of arbitration agreement, and therefore, resident's estate could not be bound by the arbitration agreement.

Cases that cite this headnote

[17] **Corporations and Business Organizations**

↔ Nature of Relation

Agency is inherent in the nature of a relationship between a corporation and its shareholders.

Cases that cite this headnote

[18] **Alternative Dispute Resolution**

↔ Waiver or Estoppel

Doctrine of equitable estoppel was not applicable, and thus, estate of nursing home resident was not estopped from asserting that the lack of resident's signature precluded enforcement of arbitration agreement; admission agreement and arbitration agreement were independent of each other, any possible benefit emanating from the arbitration agreement alone was offset by the agreement's requirement that resident waive her right to access to the courts and her right to a jury trial, and resident had dementia, and her incapacity prevented her from forming the intent or having the requisite knowledge

to mislead nursing home or to assent to the arbitration agreement's terms.

2 Cases that cite this headnote

[19] Alternative Dispute Resolution

⇒ Waiver or Estoppel

In the arbitration context, the doctrine of equitable estoppel recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.

1 Cases that cite this headnote

[20] Alternative Dispute Resolution

⇒ Waiver or Estoppel

When a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine of equitable estoppel 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.

1 Cases that cite this headnote

[21] Estoppel

⇒ Essential elements

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.

2 Cases that cite this headnote

[22] Estoppel

⇒ Essential elements

Elements of equitable estoppel as to the party claiming the estoppel 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.

2 Cases that cite this headnote

Attorneys and Law Firms

**682 Monteith Powell Todd, Robert E. Horner, John Michael Montgomery, and Alexander Erwin Davis, all of Sowell Gray Stepp & Laffitte, LLC, of Columbia, for appellants.

John Gressette Felder, Jr., of Columbia, and Jordan Christopher Calloway, of Rock Hill, both of McGowan, Hood & Felder, LLC, for respondent.

Opinion

GEATHERS, J.

*48 In this wrongful death and survival action, Appellants, Pruitt Corporation d/b/a UHS-Pruitt Corporation, UHS-Pruitt Holdings, Inc., UHS of South Carolina-East, LLC, United Health Services of South Carolina, Inc., United Clinical Services, Inc., United Rehab, Inc., Rock Hill Healthcare Properties, Inc., and Uni-Health Post Acute Care-Rock Hill, LLC d/b/a UniHealth Post Acute Care-Rock Hill, challenge the circuit court's order denying their motion to compel arbitration. We affirm.

FACTS/PROCEDURAL HISTORY

On January 11, 2011, Respondent, Mae Ruth Davis Thompson (Daughter), and her brother, Andrew Phillip Davis (Son), had their mother, Eula Mae Davis (Mother), transferred from Piedmont Medical Center to a nearby nursing home facility owned or operated by Appellant UniHealth Post Acute Care-Rock Hill (UniHealth). A UniHealth employee presented an Admission Agreement, an Arbitration Agreement (AA), and several other documents to Son for his signature on behalf of Mother, who suffered from dementia. Mother was not present at

this time as she was in the process of being transported to UniHealth.

Within five hours of being admitted to UniHealth, Mother died as a result of falling out of a bed with a malfunctioning side rail. Subsequently, Daughter filed a wrongful death and survival action against Appellants. Appellants later filed a motion to dismiss Daughter's action and to compel arbitration of Daughter's claims or, in the alternative, to compel arbitration and stay Daughter's action.

The circuit court denied the motion to compel on the ground that Son did not have authority to execute the AA on Mother's *49 behalf under either common law agency principles or the Adult Health Care Consent Act, S.C.Code Ann. §§ 44-66-10 to -80 ((2002 & Supp.2012)). Appellants filed a motion for reconsideration; however, the circuit court denied the motion. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in concluding Mother's estate could not be bound by the AA under the Adult Health Care Consent Act?
2. Did the circuit court err in concluding Mother's estate could not be bound by the AA under common law agency principles?
- **683 3. Did the circuit court err in concluding Mother's estate could not be bound by the AA under a third-party beneficiary theory?
4. Did the circuit court err in concluding Mother's estate could not be equitably estopped from refusing to comply with the AA?

STANDARD OF REVIEW

"Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct.App.2012).

LAW/ANALYSIS

I. Merger

[1] Appellants contend the circuit court erred in concluding Mother's estate could not be bound by the AA under the Adult Health Care Consent Act (the Act). Appellants argue the AA "merged" with the Admission Agreement, which Son was authorized to execute under the Act, making both agreements one and the same. We disagree.

Initially, we note this issue is not preserved for our review. Appellants did not raise this issue below; rather, Daughter raised the issue during both motions hearings, citing our *50 supreme court's recent opinion in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 350, 755 S.E.2d 450, 453 (2014), and its interpretation of the Act. Appellants addressed the merger concept in the second motions hearing only to respond to Daughter's argument that she could be not be equitably estopped because under the analysis provided by *Coleman*, the AA and the Admission Agreement had not been merged. Appellants attempted to distinguish *Coleman* as follows: "[I]t doesn't discuss equitable estoppel other than to basically discuss merger and say if your argument is premised on merger, we found no merger; therefore, this argument must fail. My argument is not premised upon a merger...."

Based on the foregoing, Appellants are precluded from arguing the doctrine of merger in this appeal. *See Richland Cty. v. Carolina Chloride, Inc.*, 382 S.C. 634, 656, 677 S.E.2d 892, 903 (Ct.App.2009) (holding the appellant was barred on appeal from asserting its argument concerning governmental estoppel because it expressly waived this argument during trial), *aff'd in part, rev'd in part on other grounds*, 394 S.C. 154, 714 S.E.2d 869 (2011). Even if Appellants' merger argument had been properly preserved, we would affirm on the merits.

[2] The Act confers authority on a health care surrogate to consent on the patient's behalf "to the provision or withholding of medical care" and to make financial decisions obligating the patient to pay for the medical care provided. *Coleman*, 407 S.C. at 351-52, 755 S.E.2d at 453.

Where a patient is unable to consent, decisions concerning his health care may be made by the following persons in the following order of priority:

- (1) a guardian appointed by the [Probate Court], if the decision is within the scope of the guardianship;

(2) an attorney-in-fact appointed by the patient in a durable power of attorney executed pursuant to [section 62-5-501 of the South Carolina Code (2009 & Supp.2015)], if the decision is within the scope of his authority;

(3) a person given priority to make health care decisions for the patient by another statutory provision;

(4) a spouse of the patient unless the spouse and the patient are separated pursuant to one of the following:

*51. (a) entry of a pendente-lite order in a divorce or separate maintenance action;

(b) formal signing of a written property or marital settlement agreement;

(c) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;

(5) a parent or adult child of the patient;

(6) an adult sibling, grandparent, or adult grandchild of the patient;

**684 (7) any other relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient;

(8) a person given authority to make health care decisions for the patient by another statutory provision.

S.C.Code Ann. § 44-66-30(A) (2002).

In *Coleman*, our supreme court held an arbitration agreement signed by the surrogate in that case was separate from the agreement to admit the patient to a health care facility and “concerned neither health care nor payment, but instead provided an optional method for dispute resolution between [the facility] and [the patient or her surrogate] should issues arise in the future.” 407 S.C. at 353-54, 755 S.E.2d at 454. The court further held, “Under the Act, [the surrogate] did not have the capacity to bind [the patient] to this voluntary arbitration agreement.” *Id.* at 354, 755 S.E.2d at 454.

Here, in its order denying Appellants' motion to compel arbitration, the circuit court stated,

The manifest purpose of the Act is to enable contracting parties in a healthcare situation to enter into a binding agreement when express authority has not been conferred upon an agent for that purpose. It further eliminates the need to deal with questions of apparent agency or authority in order to make such a contract binding.

However, the Act does not confer such authority with respect to an Arbitration Agreement[] such as the one in issue in this case. See *Coleman v. Mariner Health Care, Inc.*, Supreme Court, Opinion No. 27362 [407 S.C. 346, 755 S.E.2d 450], filed March 12, 2014. As the Arbitration *52 Agreement does not deal with healthcare decisions, the provisions of the Act do not apply to establish the necessary principal-agent relationship. *Id.*

(emphasis added). We agree with the circuit court's analysis.

[3] Like the arbitration agreement in *Coleman*, the AA signed by Son in the present case was separate from the Admission Agreement. Therefore, any authority Son had to sign the AA on Mother's behalf could not come from the Act. See *id.* at 353-54, 755 S.E.2d at 454 (holding that under the Act, the patient's surrogate did not have authority to bind the patient to a voluntary arbitration agreement that was separate from the agreement to admit the patient to a health care facility and “concerned neither health care nor payment”).

Appellants argue the terms of the Admission Agreement indicate it either incorporated, or merged with, the AA and thus, Son's authority to execute the Admission Agreement covered the terms of the AA as well. We disagree.

After holding the Act did not authorize the surrogate to sign an arbitration agreement on the patient's behalf, the court in *Coleman* addressed the health care facility's alternative argument that the surrogate was equitably estopped to deny the arbitration agreement's enforceability because that agreement merged with the admission agreement:

The general rule is that, in the absence of anything indicating a contrary intention, where

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 consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

407 S.C. at 346, 355, 755 S.E.2d at 455 (emphasis added) (quoting *Kluttz Resort Realty, Inc. v. Down Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). The court then explained the evidence of the parties' intent to keep the two agreements separate by highlighting the admission agreement's recognition of the arbitration agreement as a separate document, i.e., "This Agreement, including all Exhibits hereto, and the Arbitration Agreement ... supersede all other agreements ... and contain all of the promises and agreements between the parties." *Id.* The court also highlighted the arbitration agreement's provision allowing it to be disclaimed *53 within thirty days and noted the admission agreement did not include such a provision, "evidencing an intention that each contract remain separate." *Id.* Finally, the court stressed that even if the language of the admission agreement created "an ambiguity. **685 as to merger, the law is clear that any ambiguity in such a clause is construed against the drafter, in this case, [the facility]." *Id.* at 355-56, 755 S.E.2d at 455 (emphasis added).

[4] Here, as in *Coleman*, the AA contained language that provided it could be disclaimed within thirty days, yet the Admission Agreement did not include such a provision. Appellants argue the Admission Agreement could have been "disclaimed" at any time by Mother leaving the facility and thus, the right to disclaim the AA does not show the parties intended for the AA to be separate from the Admission Agreement. This is not a valid comparison. Because there are no provisions in the Admission Agreement allowing Mother to disclaim it, leaving the facility would be the only way she could "disclaim" the agreement, whereas the AA allows the patient to disclaim the AA unconditionally. Therefore, Mother's right to disclaim the AA without having to terminate her residency at the facility indicates the parties' intent to keep the AA separate from the Admission Agreement. This is consistent with the AA's statement that its execution was not a condition precedent for being admitted to the nursing home: "The signing of this Agreement is not a precondition to admission, expedited

admission, or the furnishing of services to the Patient/Resident by the Healthcare Center[.]" This demonstrates the parties' intent that the two agreements retain their separate identities.

[5] Appellants also argue the Admission Agreement incorporates by reference all exhibits to the agreement and the AA is one of the exhibits. However, the Admission Agreement is ambiguous on this point because (1) it does not define the term "exhibit" or cross-reference any specific exhibits and (2) the AA does not include any labels or other language indicating it serves as an exhibit or addendum to the Admission Agreement.¹ Therefore, the Admission Agreement's provision *54 incorporating all "exhibits" must be construed against Appellants. See *Coleman*, 407 S.C. at 355-56, 755 S.E.2d at 455 (holding any ambiguity in the patient's admission agreement as to its merger with the arbitration agreement was to be construed against the health care facility); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 94, 594 S.E.2d 485, 493 (Ct.App.2004) ("A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear."). As to Appellants' contention they relied on Son's written representation he was authorized to sign the AA, we see no true reliance. Appellants represented the AA to be a voluntary agreement that was not a condition to Mother's admission to the facility and was unconditionally revocable within thirty days of execution.

[6] Based on the foregoing, we affirm the circuit court's conclusion that the particular AA in the present case did not require the type of decision for which the Act confers authority on a surrogate, i.e., health care or payment for health care.

II. Common Law Agency

[7] Appellants maintain the circuit court erred in concluding no common law agency relationship existed between Son and Mother when Son executed the AA. Appellants argue Son had apparent authority to execute the AA on Mother's behalf. We disagree.

[8] [9] [10] To establish apparent authority, the proponent must show (1) "the purported principal consciously or impliedly represented another to be his agent," (2) the proponent relied on the representation, and (3) "there was a change of position to the [proponent's] detriment." *Froneberger v. Smith*, 406 S.C. 37, 47, 748

S.E.2d 625, 630 (Cl.App.2013) (quoting *Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991)).

Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him.

Id. (emphasis added) (quoting **686 *Frasier v. Palmietto Homes of Florence, Inc.*, 323 S.C. 240, 244-45, 473 S.E.2d 865, 868 (Cl.App.1996)). "Either the principal must intend to cause the *55 third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." *Id.* (quoting *Frasier*, 323 S.C. at 245, 473 S.E.2d at 868). "Moreover, an agency may not be established solely by the declarations and conduct of an alleged agent." *Id.*

Here, Appellants assert Mother "allowed, passively or otherwise, [Son] to not only sign her into [UniHealth], but also to handle multiple other financial affairs for her." While the evidence indicates Son handled Mother's finances in the years leading up to her admission to UniHealth, the evidence also indicates Mother had dementia prior to being admitted to UniHealth. Therefore, her incapacity prevented her from "consciously or impliedly" representing another to be her agent. *See id.* at 47, 748 S.E.2d at 630 (holding that to establish apparent authority, the proponent must show, among other things, "the purported principal consciously or impliedly represented another to be his agent"); *id.* ("Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief."); *see also Cook v. GGNSC Ripley, LLC*, 786 F.Supp.2d 1166, 1171 (N.D.Miss.2011) (holding a patient's daughter could not bind the patient through apparent authority because the patient was incapacitated and unable to acquiesce in her daughter's actions).

[11] Further, the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial. *See*

Dickerson v. Longoria, 414 Md. 419, 995 A.2d 721, 736-37 (2010) ("[T]he decision to enter into an arbitration agreement primarily concerns the signatory's decision to waive his or her right of access to the courts and right to a trial by jury."); *id.* at 739 ("The decision to sign a free-standing arbitration agreement is not a health care decision if the patient may receive health care without signing the arbitration agreement."); *id.* at 736 (concluding the medical and financial decisions of the patient's companion on the patient's behalf suggested the patient may have conferred on his companion "the authority to make health care and financial decisions on his behalf, but no more than that"); *id.* at 735 (holding the patient's companion was the patient's *56 "agent for purposes of health care and financial decisions, but that the scope of this consensual relationship did not include the authority to bind [the patient] to the arbitration agreement in this case"); *id.* at 735 (holding an agent's statement will bind the principal only if the statement is within the scope of the agency and, therefore, an agent may not enlarge the actual authority by his own acts without the principal's assent or acquiescence); *see also Cook*, 786 F.Supp.2d at 1171 ("An arbitration agreement is not considered to be a health-care decision when admission is not contingent upon its execution."); *cf. Coleman*, 407 S.C. at 354, 755 S.E.2d at 454 ("The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution between [the health care facility] and [the patient] or [surrogate] should issues arise in the future. Under the Act, [the surrogate] did not have the capacity to bind [the patient] to this voluntary arbitration agreement."); *id.* ("We therefore affirm the circuit court's holding that the Act did not confer authority on [the surrogate] to execute a document which involved neither health care nor financial terms for payment of such care.").

Based on the foregoing, the evidence does not show that Son had either actual or apparent authority to execute the AA on Mother's behalf. Therefore, the circuit court properly concluded Son did not have the authority to bind Mother to the AA. *See Pearson*, 400 S.C. at 286, 733 S.E.2d at 599 ("Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings.").

III. Third-Party Beneficiary

Appellants contend the circuit court erred in concluding that Mother's estate was not **687 bound by the AA under a third-party beneficiary theory. Appellants maintain Mother was a third-party beneficiary of the AA as executed by Son in either his representative or individual capacity and Mother's third-party beneficiary status made the AA binding on her estate. We disagree.

*57 [12] [13] [14] "A third-party beneficiary is a party that the contracting parties intend to directly benefit." *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). However, there can be no third-party beneficiary unless a valid contract exists. See *Dickerson*, 995 A.2d at 742 ("Before one can enforce a contract, however, whether as a party to the contract or as a third-party beneficiary, there must be a contract to enforce."). Here, Son was not authorized to execute the AA on Mother's behalf. Therefore, she could not be the third-party beneficiary of the alleged AA between herself and Appellants.

[15] [16] As to the AA between 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." *Id.* Here, Daughter is not attempting to enforce the AA on behalf of Mother's estate. Rather, she has asserted tort claims against Appellants arising out of the patient-provider relationship created by the separate Admission Agreement. Further, Mother's diminished mental capacity prevented her from assenting to the AA's terms. Therefore, her estate cannot be bound by the AA. See *Drury v. Assisted Living Concepts, Inc.*, 245 Or.App. 217, 262 P.3d 1162, 1166 n. 5 (2011) ("[U]nless the third-party beneficiary in some way assents to a contract containing an arbitration clause, the contracting parties have waived the beneficiary's right to a jury trial without her consent.").

Appellants also assert that even if Mother was not a third-party beneficiary of the AA, it is still binding on Mother's estate because "the claims of the other beneficiaries of the Estate are inextricably intertwined with [Son's] claims and the members of the group share a close relationship." Appellants cite *Long v. Silver*, 248 F.3d 309, 320 (4th Cir.2001), in support of this argument. In *Long*, the Fourth Circuit held that the facts and claims against a close corporation and its shareholders were

"so closely intertwined that [the plaintiff's] claims against the non-signatory shareholders of the [c]orporation [were] properly referable to arbitration even though the shareholders [were] not formal parties" to the agreement containing the arbitration clause. *Id.*

*58 [17] Daughter correctly points out that the basis for the Fourth Circuit's holding in *Long* was the "ordinary state-law principles of agency or contract." *Id.* ("A non-signatory may invoke an arbitration clause under ordinary state-law principles of agency or contract."). Further, agency is inherent in the nature of a relationship between a corporation and its shareholders. See *id.* ("In this context, we see little difference between a parent and its subsidiary and a corporation and its shareholders, where, as here, the shareholders are all officers and members of the Board of Directors and, as the only shareholders, control all of the activities of the corporation." (emphasis added)). In contrast, the evidence in the present case does not show Son met the legal requirements for an agency relationship with Mother. See *supra*. Therefore, Appellants' "inextricably intertwined" argument has no relevance to the present case.

IV. Equitable Estoppel

Finally, Appellants assert the circuit court should have concluded that Mother's estate was equitably estopped from refusing to comply with the AA. Appellants argue Mother benefited from the AA because she was admitted to UniHealth, received medical care, and became capable of enforcing the AA. We disagree.

Initially, we note the recent conflict between the United States Supreme Court and our state courts concerning the application of state law in determining whether a non-signatory is bound by an arbitration agreement. Compare *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630, 632, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009) (holding that a nonparty to an agreement is entitled to invoke the **688 Federal Arbitration Act (FAA) "if the relevant state contract law allows him to enforce the agreement"), and *id.* at 631, 129 S.Ct. 1896 ("Because 'traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel,' the Sixth Circuit's holding that nonparties to a contract are categorically barred from [FAA] relief was error." (citation omitted)), with *Pearson*,

400 S.C. at 289–90, 733 S.E.2d at 601 (decided in 2012 and holding “[b]ecause the *59 determination of whether a non[-]signatory is bound by a contract presents no state law question of contract formation or validity, the court looks to the federal substantive law of arbitrability to resolve the question”).

[18] [19] [20] Nonetheless, the doctrine of equitable estoppel does not apply to Mother’s estate under either South Carolina law or federal substantive law concerning arbitrability. We first examine the doctrine as it has been developed under federal substantive law:

In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.

Pearson, 400 S.C. at 290, 733 S.E.2d at 601 (emphasis omitted) (quoting *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir.2000)). In other words, “[w]hen 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.” *Id.* at 295, 733 S.E.2d at 604 (quoting *Jackson v. Iris.com*, 524 F.Supp.2d 742, 749–50 (E.D.Va.2007)).

Notably, in those opinions addressing equitable estoppel in the arbitration context, the nonsignatory’s contractual benefit is not typically an alleged benefit of arbitration such as “avoiding the expense and delay of extended court proceedings” or being “capable of enforcing the [AA],” as touted by Appellants in the present case—rather, the contractual benefit typically arises from another provision of the same contract that includes the arbitration provision. See *Pearson*, 400 S.C. at 296–97, 733 S.E.2d at 605 (ability to work at the defendant’s hospital facility and receive payment for work); see also *Int’l Paper Co.*, 206 F.3d at 418 (warranty provisions); *Jackson*, 524 F.Supp.2d at 750 (entitlement to retain a \$150,000 payment pursuant to the contract’s liquidated

damages provision); *Am. Bureau of Shipping v. Tencura Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir.1999) (lower insurance rates on a yacht *60 and the ability to sail under the French flag); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir.1993) (continuing use of a name).

Here, the AA is not incorporated into the Admission Agreement; therefore, Appellants’ assertion that Mother received benefits under the Admission Agreement, i.e., being admitted to the facility and receiving medical care, is of no moment. The two agreements are independent of one another, as reflected in the language of the AA indicating its execution is not a condition for being admitted to the nursing home. Further, any possible benefit emanating from the AA alone is offset by the AA’s requirement that Mother waive her right to access to the courts and her right to a jury trial. Therefore, equitable estoppel under federal substantive law has no application to the present case.

[21] [22] 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 **689 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.

Boyd v. BellSouth Tel. Tel. Co., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006) (emphases added).

Here, Mother had dementia prior to being admitted to UniHealth. Therefore, her incapacity prevented her from forming the intent or having the requisite knowledge to mislead Appellants or to assent to the AA's terms. In their brief, Appellants side-step this inconvenient fact by substituting both Daughter, in her individual capacity, and Son for Mother in the estoppel analysis:

*61 [Son] represented in the contract itself that he was authorized to sign it.... [Daughter] was present while the agreements were signed and made no effort to repudiate [Son's] representations that he was authorized to sign the agreements on [Mother's] behalf.... Now, however, [Daughter] seeks to repudiate these agreements on the basis that [Son] was not authorized to sign them on [Mother's] behalf. [Daughter] should be estopped from taking this contrary position. Additionally, ... the very last sentence of the [AA] notes that in signing the [AA], the Patient/Resident Representative binds both the Patient/Resident and the Patient/Resident Representative. [Son], [Daughter], and the Estate should be estopped from denying that [Son] had the authority to sign the [AA], or that they are bound by it....

This argument necessarily implies that Daughter, in her individual capacity, or Son may serve as the legal equivalent of Mother's estate. However, at least one jurisdiction has rejected this type of premise. In *Dickerson*, the Maryland Court of Appeals addressed an argument identical to Appellants' estoppel argument in the present case:

Respondent is attempting to use equitable estoppel against [the patient's] [e]state based on actions that [patient's companion] took in her individual capacity. The fact that [the patient's companion] is now the personal representative for [the patient's] [e]state is of no moment; we will not hold this

circumstance against [the patient's] [e]state. Simply put, [the patient's] [e]state is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] [e]state, or by [the patient's companion] in her capacity as Personal Representative of [the patient's] [e]state, that has affected Respondent's position. This, too, is a necessary element of an equitable estoppel defense.

995 A.2d at 743 (emphases added). The court also noted the absence of evidence that the owner of the nursing home facility had changed its position for the worse based on the assertion of the patient's companion that she was acting on the patient's behalf when she signed the arbitration agreement. *See id.* Like the facility owner in *Dickerson*, Appellants have failed to show how they have changed their position for the worse based on Son's representation that he was acting on Mother's behalf when he signed the AA. As we stated previously, the AA was separate from the Admission Agreement, and Appellants represented the AA to be a voluntary agreement that was not a condition to Mother's admission to the facility and was unconditionally revocable within thirty days of execution.

The *Dickerson* court also addressed the facility owner's argument that the doctrine of unclean hands should apply to the patient's estate because the patient's companion was an heir to the estate:

Respondent notes that [the patient's companion] is 'the heir of [the patient's] [e]state,' suggesting that we should apply the doctrine of unclean hands because [the patient's companion] may benefit if the [e]state's claims against Respondent are successful. We decline to do so. First, as we have explained, we will not hold against the Estate acts that [the patient's companion] may have performed in her individual capacity. Second, the [e]state may well have other beneficiaries or creditors. We will not hold [the patient's companion's] individual acts against these other entities for the same reasons.

**690 *Id.* at 744 n. 23 (emphases added). Likewise, Appellants in the present case may not hold Mother's estate responsible for any possible misrepresentations Son or Daughter may have made in their individual capacities.

Therefore, the circuit court properly rejected Appellants' equitable estoppel theory.

AFFIRMED.

CONCLUSION

HUFF, A.C.J., and KONDUROS, J., concur.

Accordingly, the circuit court's denial of Appellants' motion to compel arbitration is

All Citations

416 S.C. 43, 784 S.E.2d 679.

Footnotes

- 1 In fact, the front page of the AA is labeled "Arbitration Agreement," indicating the parties' intent for it to stand by itself as an independent contract.

End of Document

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SOUTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES

PASARR - Level I
SCREENING FORM

Name: <u>Richard Ladson</u>	Date of Review: <u>9-17-10</u>
SSN: <u>[REDACTED]</u>	Location at assessment: <u>Roper Hospital</u>
Medicaid: <u>5102610101</u> Non-Medicaid:	CLTC#: <u>10</u>
Date of birth: <u>[REDACTED]</u>	Referral source: <u>pt. B MK</u>
All Diagnosis (If dementia diagnosed or suspected, complete and attach the Mini-Mental Form): <u>Urinary retention, PEG tube, Foley, dehydration, dysphagia, dysarthria, CVA, dementia</u>	

I. SCREENING FOR MENTAL RETARDATION INDICATORS:

	YES	NO
1. Diagnosis of mental retardation or related disability made prior to age 22?		☒
2. IQ tested below 70?		☒
3. Was time of test prior to age 22?		☒
4. Does client have 3rd grade education? If not, state reason in Comments Section.	☒	
5. Adaptive behavior: Could client ever perform self care activities?	☒	
- Did he/she help care for spouse/parents/children?	☒	
- Was client ever able to cook and perform household duties?	☒	
- Was client gainfully employed? If not, explain in Comments Section.	☒	
- Did client have driver's license?	☒	
6. Cognitive Functioning:		☒
- Memory: Does client remember what he/she had for breakfast or lunch?		☒
- Simple math: Can client add 12 + 8?		☒
- Concept formation: Can client describe the difference between a fish and dog?		☒

7. Comments: _____

II. SCREENING FOR MENTAL ILLNESS INDICATORS:

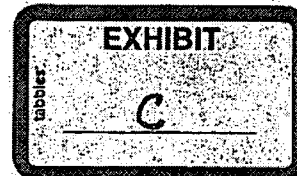
1. Diagnosis of mental illness: No ☐ Yes ☐ Diagnosis: stroke

2. History of psychiatric hospitalization within previous two years. (Give dates of treatment) If no hospitalization, indicate here: _____
 ____/____/____ to ____/____/____ ____/____/____ to ____/____/____

3. Current behavioral indicators:

Attempted suicide	_____	Unrealistic fear of strangers	_____
Assaultive	_____	Self-mutilation	_____
Incessant loud talking	_____	Combative	_____
Uncooperative	_____	Social isolation	_____
Hostile	_____	Destruction of property	_____
		None of these indicators:	_____

4. Comments: (Include explanation of major symptoms): _____



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
RICHARD LADSON, JR., BY AND	)	CASE NO. 2018-CP-10-1251
THROUGH RICHARD MILES	)	
LADSON, SR., POA,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
THI OF SOUTH CAROLINA AT	)	
CHARLESTON, LLC D/B/A	)	
RIVERSIDE HEALTH AND REHAB,	)	
	)	
DEFENDANT.	)	

**DEFENDANT'S MOTION TO
RECONSIDER, ALTER, AND/OR AMEND
PURSUANT TO RULE 59(e), SCRCP**

HEARING REQUESTED

FILED
2019 FEB 8 PM 4:20
JULIA A. HENNING
CLERK OF COURT

TO: THE HONORABLE JENNIFER McCOY, presiding circuit judge, and PLAINTIFF, by and through his counsel of record

NOW COMES Defendant, THI of South Carolina at Charleston, LLC, d/b/a Riverside Health and Rehab, by and through its undersigned counsel, pursuant to Rule 59(e), SCRCP, and hereby moves this Honorable Court to reconsider, alter, and/or amend its decision denying Defendant's Motion to Compel Arbitration and Petition to Stay State Court Proceedings filed August 21, 2018 (the "Underlying Motion"), and vacate its order denying the Underlying Motion¹ in favor of a new order granting the Underlying Motion.

¹ There was some confusion surrounding the filing of the Court's order denying the Underlying Motion. On January 29, 2019, Plaintiff's counsel emailed judicial law clerk Alexandra Heaton inquiring about the status of the Court's ruling on the Underlying Motion. Ms. Heaton promptly replied, "[The Court] ruled on it weeks ago, and I filed a form order denying the [Underlying Motion]. I just checked the system and I don't see it in the file. I will check with the clerk's office first. If they can't locate it, I will draft another one." It is now known that the form order Ms. Heaton referenced was inadvertently filed in another case (specifically, Case No. 2018-CP-10-00087, which Plaintiff filed on January 9, 2018, and dismissed shortly thereafter on March 8, 2018, before any appearance by Defendant therein). An order denying the Underlying Motion was not filed in this case (i.e., Case No. 2018-CP-10-01251) until February 6, 2019. In any event, though, this Rule 59(e) motion is timely, having been made not only within 10 days after the Court's entry of the order denying the Underlying

Defendant respectfully submits that the Court erred in its determination that the subject arbitration agreement is not valid and enforceable. In support of this motion, Defendant incorporates by reference all argument/analysis/exhibits it has already presented to the Court in the Underlying Motion and in support thereof, both via its written memorandum (filed November 21, 2018) and via its counsel at the hearing on the Underlying Motion. Defendant asks the Court to fully reconsider the same in its entirety and—in the event the Court is not persuaded to simply to vacate its order denying the Underlying Motion in favor of a new order granting the Underlying Motion—to specifically address and expressly rule on each and every argument and issue Defendant raised therein.

PLEASE NOTE Defendant reserves all rights to provide further support for this motion via additional briefing/submissions and/or such other means, including oral argument, as the Court may require or allow.

DEFENDANT EXPRESSLY REQUESTS A HEARING ON THIS MOTION.

<SIGNED ON THE FOLLOWING PAGE>

Motion in this case on February 6, 2019, but also within 10 days of Ms. Heaton's January 29, 2019, email, which was the first Defendant had heard of the Court's decision on the Underlying Motion.

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By: 

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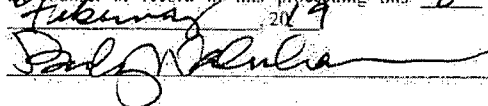
Attorneys for the Defendant

Charleston, South Carolina

Dated: 2/8/19

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to
all counsel of record in this proceeding this 8 day of

February 2019


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

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2018-CP-10-01251

Richard Ladson, Jr.,
by and through Richard Miles Ladson, Sr., POA,

Respondent,

v.

THI of South Carolina at Charleston, LLC
d/b/a Riverside Health and Rehab,

Appellant.

NOTICE OF APPEAL

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JULIE A. HARRIS
CLERK OF COURT
BY AB

Defendant, THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab ("Appellant"), hereby appeals the following orders of the Honorable Jennifer B. McCoy, Circuit Court Judge:

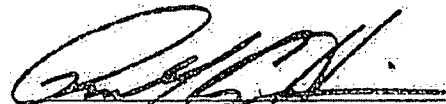
- Form 4 Order filed February 6, 2019 (denying Appellant's motion to compel arbitration), and
- Form 4 Order filed July 26, 2019 (denying Appellant's Rule 59(e), SCRPC, motion concerning the above-referenced Form 4 Order filed February 6, 2019).

Copies of the appealed orders are attached hereto and incorporated herein by reference. Appellant received written notice of entry of the most recent order on July 29, 2019.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By:



Stephen L. Brown (SC Bar No. 66468)

D. Jay Davis, Jr. (SC Bar No. 12084)

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Dated:

8/24/19

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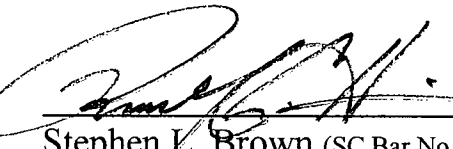
SC Court of Appeals

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 that was presented to the lower court 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,

YOUNG CLEMENT RIVERS, LLP

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Dated: 6/3/20