STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Estate of Barbara Owens, by and through her Personal Representative, Mary Jane McCraw, Individually and on behalf of Statutory Beneficiaries, Plaintiff, v. Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina, LLC; THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor – Spartanburg, Defendants.	IN THE COURT OF COMMON PLEAS C.A. No: 2018-CP-42-03447 **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO ALTER, AMEND, AND/OR RECONSIDER**

This matter came before the Court on Defendants' Motion to Alter, Amend, and/or Reconsider the Order entered October 25, 2019. THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor – Spartanburg filed their Motion to Dismiss, Compel Arbitration and Stay Court Proceedings on November 12, 2018. Fundamental Administrative Services, LLC filed their Motion to Stay on November 12, 2018. Fundamental Clinical and Operational Services, LLC filed their Motion to Stay on November 12, 2018. THI of South Carolina, LLC filed their Motion to Stay on November 12, 2018. The first hearing on all of Defendants' Motions was conducted on July 25, 2019. The Court issued a Form 4 Order denying all of Defendants' Motions and instructing Plaintiffs to draft a Proposed Order. On October 25, 2019 the Court issued its Formal Order denying all of Defendants' Motions. Defendants filed the Motion to Reconsider on November 4, 2019. A hearing was held on Defendants' Motion to Reconsider on January 6, 2020. On June 25, 2020, the Court issued a Form 4 Order denying Defendants' Motion to Reconsider in all but two respects—(1) removing and vacating any/all reference to "Hunt Valley Holdings, LLC, formerly known as Fundamental Long Term Care Holdings" ("HVH") in the Court's Prior Order filed

October 25, 2019[1] and (2) confirming that the respective Motions to Stay are denied as moot in consequence of the Court's denial of the Motion to Compel Arbitration—and indicating this Formal Order was to follow.

Now, therefore, having listened to oral arguments from counsel and reviewed the parties' legal memoranda and exhibits, the Court hereby GRANTS in part (i.e., in the two (2) respects above referenced) and DENIES in part (i.e., in all other respects) the Motion to Reconsider and, in so doing, alters its Prior Order filed October 25, 2019, in the two (2) respects above referenced, replacing that Order with the Ruling below.

For the foregoing reasons, the Motion to Dismiss and Compel Arbitration, or Alternatively, to Compel Arbitration and Stay Proceedings is **DENIED**. The claims in this case are not subject to arbitration. Therefore, the respective Motions to Stay are **DENIED** as moot. Defendants should respond to Plaintiffs' discovery requests subject to the Confidentiality Order accompanying this Order.

FACTUAL BACKGROUND

Daughter brought this tort action asserting survival and wrongful death claims and alleging corporate negligence and nursing home neglect resulting in Barbara Owens' ("Decedent") wrongful death. Plaintiff's Complaint names as defendants the Facility as well as, Fundamental Clinical and Operational Services, LLC (which Defendants assert provided "clinical services" to the Facility), and Fundamental Administrative Services, LLC (which Defendants assert provided

[1] The Prior Order referred to HVH as one of the "Corporate Defendants" named in this case. Among the grounds raised in the Motion to Reconsider is Defendants' contention that the reference to HVH is erroneous because HVH is not a party to this case. In response to the Motion to Reconsider, Plaintiff acknowledged that HVH is not a party to the case and expressed her agreement to do away with the Prior Order's mention of HVH.

"administrative services" to the Facility), these latter entities being hereinafter referred to as the "Corporate Defendants." Plaintiff alleges that while the Corporate Defendants did not provide direct care or services to Decedent, they are proper Defendants in this matter because their control over the Facility directly affected the quality of care Ms. Owens received. The Complaint does not include a cause of action for breach of contract and the Claims are not premised on the Admission Agreement. The signing of the Arbitration Agreement was not a condition of admission. Ms. Owens was competent at the time of the admission but did not sign any of the paperwork. Her daughter, Mary McCraw, signed the admission paperwork even though she was not power of attorney and did not have any legal authority to do so. Daughter was appointed personal representative of Ms. Owens' estate on June 20, 2016.

Ms. Owens was admitted to the Facility on July 23, 2015 under the terms of the Admission Agreement governing the care Ms. Owens would receive at the Facility as well as Ms. Owens' financial obligation to pay for those services. The admission contract contains a section titled "Entire Agreement"[2] provision indicating this contract constituted "the entire agreement and understanding between the parties" concerning admission to the Facility.

Daughter signed a contract entitled "Arbitration Agreement" on July 23, 2015 after Mrs. Owens was already admitted to the facility. This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate entity (labeled "Page 1 of 1") with its own signature blocks. The Arbitration Agreement, purportedly a contract between the Facility and Ms. Owens, provides for alternative dispute resolution for any claim a party may bring against another

[2] "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."

arising out of Ms. Owens care at the Facility. The Facility admits that agreeing to the Arbitration Agreement was not a prerequisite or condition to admission at the Facility.

On March 1, 2018, Daughter initiated this lawsuit alleging Defendants failed to monitor and supervise Ms. Owens' safety and well-being while at the Facility. On November 12, 2018, the Facility filed a Motion to Dismiss, Compel Arbitration and Stay State Court Proceedings. On October 25, 2019 the Court issued its Order Denying Defendants' Motions to Dismiss, Compel Arbitration, and Stay. Defendants' filed their Motion to Reconsider on November 4, 2019. A hearing on Defendants' Motion to Reconsider was held on January 6, 2020.

LEGAL STANDARD

In order to compel arbitration, the Facility bears the burden to prove a valid and enforceable arbitration contract. Not all arbitration clauses are per se enforceable. Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). Courts interpret a jury trial waiver narrowly and construe contract ambiguities against the Facility as the party that drafted the Arbitration Agreement. WDI Meredith & Co. v. Am. Telesis, Inc., 359 S.C. 474, 480, 597 S.E.2d 885 (Ct. App. 2004). Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (2007). Whether the parties agreed to arbitrate is a question of substantive state law. In Chassereau v. Global Sun Pools, Inc., the Supreme Court stated:

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

373 S.C. 168, 644 S.E.2d 718, 720-21 (2007) (emphasis added).

While the Federal Arbitration Act ("FAA") includes a presumption favoring arbitration, it only applies *after* the court finds there is a valid, enforceable arbitration agreement. 9 U.S.C. § 4 ("The court shall make an order directing the parties to proceed to arbitration" but only "upon being satisfied that the making of the agreement…is not in issue").[3] The FAA looks to state law to decide the threshold questions of contract formation.[4] Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts.[5] The judicial inquiry may include an examination of contractual defects such as lack of mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability.[6]

LEGAL ANALYSIS

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

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

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

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

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

without the mutual assent of its proposed parties. Ms. Owens never assented to the Arbitration Agreement and did not empower Daughter or anyone else to assent on her behalf.

A. Daughter Had No Legal Authority.

The Facility concedes Ms. Owens did not sign the Arbitration Agreement but argues Daughter's signature as Ms. Owens' "representative" was sufficient to bind Ms. Owens and her estate to the Arbitration Agreement's terms. However, the Court finds Daughter lacked authority to enter an arbitration contract on Ms. Owens' behalf.

Defendant argues Daughter acted as Ms. Owens' agent when signing the Arbitration Agreement. An agency may not, however, be established solely by the declarations and conduct of an alleged agent. Cowburn v. Leventis, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). Moreover, the Facility has failed to provide any evidence beyond Daughter's signature to suggest she was Ms. Owens' agent. The fact that Daughter signed documents enabling Ms. Owens' admission to the Facility receipt of medical care in no way indicates Ms. Owens conferred authority on Daughter for purposes of a dispute resolution contract. The Court finds Ms. Owens never manifested any form of assent establishing Daughter as her agent.

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

Daughter was not Ms. Owens' power of attorney and the medical records suggest Ms. Owens was competent to sign contracts on her own behalf when she was admitted to the Facility.

Additionally, the typical case where admission and arbitration contracts are presented simultaneously, Daughter signed the arbitration agreement *after* Ms. Owens was already admitted to the facility. Our Supreme Court has held that a surrogate without proper legal authority cannot bind a person to arbitration.

> The scope of Sister's authority to consent to "decisions concerning Decedent's health care" extended to the admission agreement, which was the basis upon which Facility agreed to provide health care and Sister agreed to pay for it. **The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution between Facility and Decedent or Sister should issues arise in the future. Under the Act, Sister did not have the capacity to bind Decedent to this voluntary arbitration agreement**. We therefore affirm the circuit court's holding that the Act did not confer authority on Sister to execute a document which involved neither health care nor financial terms for payment of such care.

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

Coleman is directly on point here. In Coleman, the circuit court refused to compel arbitration because the sister of a nursing home resident who signed arbitration and admission contracts lacked authority to bind the resident to the arbitration agreement. In affirming the circuit court's order, the Supreme Court found that, although the South Carolina Adult Healthcare Consent Act (S.C. Code Ann. § 44-66-10 to -80) gave the sister authority to make 'healthcare decisions' on behalf of the resident, consent for medical treatment is not the same as binding an incompetent person to a contract concerning arbitration. Coleman, 407 S.C. at 352, 755 S.E.2d at 453-54. The court reasoned that the Act extends authority to surrogates to make traditional healthcare decisions and financial decisions that arise out of those decisions. Id. Coleman compels this Court to find Daughter had no legal authority to sign the Arbitration Agreement.

B. Equitable estoppel does not apply.

Defendants also argue Daughter is estopped from denying authority to bind Ms. Owens to arbitration because Daughter does not deny authority to admit Ms. Owens to the Facility. Similarly, the Facility argues Ms. Owens created an agency relationship to support arbitration because she "accepted" admission. Both arguments require the admission contract and Arbitration Agreement to be interpreted as a single agreement. However, Coleman and its progeny rejected similar merger arguments. Coleman refused to apply the merger doctrine because language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 407 S.C. at 355, 755 S.E.2d at 455. The Court of Appeals has since applied Coleman and provided further examples of factors demonstrating "separateness" and preventing merger. Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014) (refusing to apply the merger doctrine because language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." Thompson and Hodge applied Coleman and provided further examples of factors demonstrating "separateness" and preventing merger. 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.

An admission contract with an "Entirety of Agreement" provision is separate "on its face" from an arbitration contract especially where the provision identifies the two contracts distinctly—i.e. "this [Admission] Agreement *or* in the Arbitration Agreement." Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). In fact, when the arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has "Arbitration Agreement" atop its first page, these factors further "indicate the parties' intent for it to stand by itself as an independent contract." Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge,

422 S.C. at 562-63, 813 S.E.2d at 302. Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home. Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

Like in Hodge, the separate contracts here have separate signature pages and separate pagination—i.e. the Admission Agreement ends with "Page 12 of 12" while the Arbitration Agreement is "Page 1 of 1." As in Thompson, the arbitration agreement announces its independence with its "Arbitration Agreement" title. The Facility was in sole control of the language chosen for these form contracts of adhesion and it was their responsibility to make merger clear if they so desired. In sum, the Facility cannot meet its burden to prove merger.

The Facility then argues Daughter should be estopped from denying the validity of the Arbitration Agreement because Ms. Owens accepted the benefits of the Admission Agreement and, therefore, should not be able to repudiate the Arbitration Agreement. However, this argument also depends on Defendant's faulty merger argument. Since the admission contract and Arbitration Agreement identify themselves as distinct contracts, they do not merge. The Admission Agreement's "Entire Agreement"[7] provision shows that one contract constituted "the entire agreement and understanding between the parties" concerning admission to the Facility and prohibited merging the two distinct agreements. By including this clause, the drafter indicated an intent that the common law doctrine of merger among the discrete documents cannot apply. Even if the "Entire Agreement" clause creates an ambiguity as to merger, any ambiguity must be construed against the Facility as the contracts' drafter. Davis v. KB Home of S.C., Inc., 394 S.C. 116, 129 n. 4, 713 S.E.2d 799, 805 n. 4 (Ct. App. 2011). Since there was no merger here,

[7] "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."

Defendant's equitable estoppel argument must be denied. See Coleman, 407 S.C. at 355–56, 755 S.E.2d at 455 (rejecting estoppel argument by finding no merger).

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

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

The Facility does not attempt to apply these elements to this case. Instead, the Facility suggest an alternative equitable estoppel standard and relies on federal cases. Defendants contend

their contract-based argument is subject to federal law rather than the law of South Carolina, the state where the alleged contract was signed and its alleged parties resided. This argument is at odds with U.S. Supreme Court precedent. Wilson v. Willis, 426 S.C. 326, 338, 827 S.E.2d 167, 173-74 (2019) (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630-31 (2009) ("Whether an arbitration agreement may be enforced against nonsignatories, and under what circumstances, is an issue controlled by state law")). By looking past South Carolina contract law, the Facility stands in the untenable position of asking the Court to ignore the U.S. Supreme Court's interpretation of a federal statute.

Moreover, the Court finds the Facility cannot establish the elements required to prove equitable estoppel. There is no evidence Defendant lacked knowledge Daughter was not authorized to bind Ms. Owens to the Arbitration Agreement. Additionally, Daughter did not have power of attorney for Ms. Owens and the Facility did not produce evidence to suggest Daughter made any such represented to the Facility. The Facility cannot claim to have been misled and cannot rely on equitable estoppel if it, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in questions. Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-909 (Ct. App. 2001). Furthermore, the Facility had the ability to determine whether Daughter had authority to sign the Arbitration Agreement on Ms. Owens behalf. The Facility is a sophisticated business entity frequently interacting with residents and their families during the nursing home admission process. The Facility is familiar with the legal concepts of guardianship and powers-of-attorney and had the ability to ask Daughter for power of attorney documentation. Further, equity does not favor Defendants under the circumstances in this case. Therefore, Defendant cannot argue merger or estoppel and the Court denies Defendant's motion based on the same.

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

Unmoored from the legal tests for equitable estoppel, the Facility then makes a broader argument that it would be "manifestly inequitable" for Ms. Owens' estate to pursue a tort claim based on the Admission Agreement while denying Daughter's authority to sign the Arbitration Agreement. This argument misunderstands the legal distinction between health care and dispute resolution decisions. It is not at all unusual for a family member to have authority to admit a loved one to a nursing home while lacking authority to waive the loved one's jury trial right. That is precisely what the Adult Health Care Consent Act does. It provides statutory authority for family members to make an incapacitated loved one's "health care" decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code. Coleman, 407 S.C. at 353, 755 S.E.2d at 454 (finding statutory power to make "health care" decisions limited to nursing home admission and related financial decisions). Plus, the Facility's

argument does not accurately state the estate's claims. Ms. Owens' estate is not asserting any claim based on the Admission Agreement; she alleges only common-law negligence claims. See Hodge, 422 S.C. at 563, 813 S.E.2d at 302 ("because [resident and estate] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement" and are not estopped from challenging the Arbitration Agreement).

In sum, the Court rejects the Facility's arguments that Daughter was Ms. Owens' agent or that Ms. Owens' estate is equitably estopped from opposing Daughter's purported authority to sign the Arbitration Agreement on Ms. Owens' behalf.

C. The Facility's Request for Discovery is Denied.

The Facility argued in its filings and at the hearing that the Court should order or sanction limited discovery on factual issues bearing on the presentment and signing of the Arbitration Agreement. The Court denies this request for two reasons. First, the Facility could have chosen to conduct discovery before it affirmatively brought this issue to the Court's attention by filing its motion. See Rule 30(a)(1), SCRCP (permitting depositions "[a]fter commencement of an action"); Rule 33(a), SCRCP (same for serving interrogatories); Rule 34(b), SCRCP (same for serving requests for production). Second, the Court finds the discovery requested, including Daughter's deposition, would not affect the legal arguments concerning agency at issue in this motion. Citing long-standing South Carolina law, Hodge held this type of deposition was not required to rule on a family member's apparent authority to sign an arbitration contract because agency may not be formed by the purported agent's representations on their own. Id. at 577, 813 S.E.2d at 310 (quoting Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996)).

CONCLUSION

For the foregoing reasons, the Motion to Reconsider is GRANTED in part and DENIED in part, and the Motion to Dismiss and Compel Arbitration, or alternatively, to Compel Arbitration and Stay Proceedings is **DENIED** and the respective Motions to Stay are **DENIED** as moot.

IT IS SO ORDERED!

Spartanburg Common Pleas

Case Caption: Barbara Owens , plaintiff, et al VS Fundamental Clinical And Operational Services, Llc , defendant, et al

Case Number: 2018CP4203447

Type: Order/Other

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132