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| **STATE OF SOUTH CAROLINA**<br>**COUNTY OF SPARTANBURG**<br>**PLEAS** | **IN THE COURT OF COMMON** |
| **ESTATE OF Maggie McCraw, through the appointed Personal Representative, Ruby Knight,**<br><br>**Plaintiffs**<br><br>**vs.**<br><br>**Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina at Magnolia Place at Spartanburg LLC d/b/a Physical Rehabilitation and Wellness Center of Spartanburg f/k/a Magnolia Place at Spartanburg; Vohra Post-Acute Care Physicians of the East, P.A.; and David Violette, M.D.,**<br><br>**Defendants.** | **C. A No. 2019-CP-42-02449**<br><br>**ORDER** |



This matter came before the Court on Defendants' Motion to Alter, Amend, and/or Reconsider the Order filed July 16, 2020. 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 August 21, 2019. Fundamental Administrative Services, LLC filed their Motion to Stay on August 21, 2019. Fundamental Clinical and Operational Services, LLC filed their Motion to Stay on August 21, 2019. The first hearing on all of Defendants' Motions was conducted on January 9, 2020. The Court issued a Form 4 Order denying all of Defendants' Motions and instructing Plaintiffs to draft a Proposed Order. On July 16, 2020, the Court issued its Formal Order denying all of Defendants' Motions. Defendants filed the Motion to Reconsider on July 27,

2020. A hearing was held on Defendants' Motion to Reconsider on September 8, 2020. On October 16, 2020, the Court issued a Form 4 Order denying Defendants' Motion to Reconsider Arbitration—and indicating this Formal Order was to follow.

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.

## FACTUAL BACKGROUND

This matter arises out of two civil actions --- a Survival Action and a Wrongful Death action. Both actions involve allegations of corporate negligence, professional negligence, and custodial neglect resulting in injuries and the wrongful death of Maggie McCraw ("Ms. McCraw"). The claims are brought against the nursing home 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 "administrative services" to the facility), these previous two related entities being referred to as the "Corporate Defendants", and Vohra Post-Acute Care Physicians of the East, and David Violette, M.D. Plaintiffs allege that while the Corporate Defendants did not provide direct care or services to Ms. McCraw, they are indispensable parties and proper Defendants in this matter because their control over the Facility directly affected the quality of care Ms. McCraw received.

Ruby Knight was Ms. McCraw's daughter and now serves as the personal representative of her estate. Ms. McCraw was admitted into the Fundamental facility on **October 14, 2011**. There were two separate agreements signed on **October 14, 2011**. The separate and distinct Admission Agreement allowing Ms. McCraw to become a resident governed the type of care Ms. McCraw would receive at the Facility and Ms. McCraw's financial obligation to pay for those services. The

Admission Contract contains a section titled "Entire Agreement"[1] provision indicating this Contract constituted "the entire agreement and understanding between the parties" concerning admission to the Facility.

Another document called "Arbitration Agreement" was signed by Ruby Knight. 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. McCraw, provides for alternative dispute resolution for any claim a party may bring against another arising out of Ms. McCraw's care at Facility. Defendant has represented that agreeing to arbitrate was not a prerequisite to admission at the Facility or a condition of admission.

## LEGAL STANDARD

The Facility seeks to compel arbitration. Defendant carries the burden to prove that a valid and enforceable arbitration agreement exists. The party seeking to establish contractual waiver of jury trial bears the burden of proof to establish that the waiver was signed in a "knowing, voluntary and intentional" capacity. Of those courts that have decided this question, most have held that it is the proponent of the waiver who bears the burden, reasoning that the jury trial right is fundamental, and should not be waived absent clear evidence.[2] In interpreting a jury trial waiver narrowly, some

[1] "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."

[2] See e.g., Leasing Serv. Corp. v. Crane, 804 F.2d 828, 833 (4th Cir. 1986) ("Where waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed."); Nat'l Equip. Rental Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977) (implying that party defending waiver bears burden of proof); Luis Acosta, Inc. v. Citibank, N.A., 920 F.Supp. 15, 18 (D.P.R. 1996) (rejecting a waiver, after concluding that "the burden of proving the waiver of such a fundamental right properly rests upon the party seeking to enforce such a waiver"); Phoenix Leasing Inc. v. Sure Broadcasting, Inc., 843 F.Supp. 1379, 1384 (D.Nev. 1994) ("An informal survey indicates the majority of courts having considered this question followed the approach in Leasing Service [and placed burden of proof on proponent of waiver]."); Smyly v. Hyundai Motor Am., 762 F.Supp. 428, 429

courts have also emphasized "the basic principle that ambiguities in a contract are construed against the drafting party."[3] Whether the parties agreed to arbitrate is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 668 (S.C. 2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause."). In Chassereau v. Global Sun Pools, Inc., 644 S.E.2d 718 (S.C. 2007), the Supreme Court stated:

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

While there is a presumption in favor of arbitration agreements, this presumption only applies *after* the court finds there is a valid enforceable arbitration agreement. 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). When parties dispute the existence of a valid arbitration agreement, the presumption in favor of arbitration disappears. Dumais v. American Golf Corp., 299 F.3d 1216, 1220 (10th Cir. 2002). While the Federal Arbitration Act ("FAA") imposes a presumption favoring arbitration, the presumption does not apply to the "identity of the parties who may be bound to such an agreement." Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167, 172 (2019). In fact, there is a presumption against arbitration when enforcement is sought against a non-signatory. Id.

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(D.Mass. 1991) (concluding that "since it is a waiver of a constitutional right," proponent of waiver bears burden of showing agreement was made knowingly and intentionally).

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

Plaintiff does not dispute the mandatory language in the Federal Arbitration Agreement ("FAA"). However, it is important to note that this mandatory language only applies in instances where a valid arbitration agreement has been established. This is evident from the FAA provisions: "The court shall make an order directing the parties to proceed to arbitration" but only "upon being satisfied that the making of the agreement…is not in issue." 9 U.S.C. § 4. While it is true that the U.S. Supreme Court has held that the FAA "leaves no place for the exercise of discretion," the Court also cited the FAA's savings provision that denies enforcement of agreements susceptible to the general contract defenses of fraud, duress, and unconscionability. See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985); 9 U.S.C. § 2.

However, not all arbitration clauses are enforceable. While federal law preempts state laws that would invalidate arbitration agreements on most public policy grounds, the FAA looks to state law to decide the threshold questions of contract formation. Munoz v. Green Tree Fin. Corp., 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'"). Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts. Rent-A-Center, West. Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) Simpson, 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.").

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. See Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir.2001). The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp.

of S.C., 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 659 S.E.2d 209 (S.C. Ct. App. 2008). Pro-arbitration policy does not validate a contract that lacks the building blocks of a binding contract.

## LEGAL ANALYSIS

### A. The Arbitration Agreement is not a valid and enforceable agreement because it was not signed by the party seeking its enforcement.

At the onset, a dispute to whether parties are bound by an arbitration agreement is for the court to decide. Howsam v. Dean Witter Reynolds., 537 U.S. 79, 84 (2002). An agreement to arbitrate is fundamentally a matter of consent. Nestle Waters N. Am., Inc. v. Bollman, 505 F.3d 498, 504 (6th Cir. 2007); 4 Am. Jur. 2d *Alternative Dispute Resolution* § 48 (1998) ("[B]ecause arbitration involves a waiver of the right to pursue a case in a judicial forum, the courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent."). Arbitration cannot be compelled in the absence of an express agreement to arbitrate. EEOC v.Waffle House, Inc., 534 U.S. 279 (2002); Emlenton Area Municipal Authority v. Miles, 548 A.2d 623, 625 (Pa. Super. 1988).

As the Pennsylvania Superior Court noted in the seminal case of Bair v. Manor Care of Elizabethton, PA, LLC, et al., 108 A3d 94 (Pa. 2015), the issue is not necessarily just whether or not the arbitration agreement was signed by the parties sought to be bound but whether there was a meeting of the minds, that is, whether the parties agreed in a clear and unmistakable manner to arbitrate their disputes. Id. at 97. As the Pennsylvania Court noted, "it is not just the lack of the signature of the nursing home facility that is problematic but the fact that there was not mutual assent of the parties to the alleged contract. It is not the resident's consent that is the problem, it is Manor Care's failure to fill in essential terms and sign the agreement that fell short in manifesting its consent to arbitrate". Id. at 98.

South Carolina courts have further made it clear that mutual assent and meeting of the minds is necessary for an enforceable arbitration agreement. South Carolina law requires that "in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement". Grant v. Magnolia Manor-Greenwood, Inc., 678 S.E.2d 435 (2009) citing Player v. Chandler, 382 S.E.2d 891 (1989). Parties cannot be said to have had a meeting of the minds on matters which are indefinite, vague, uncertain, and even incomprehensible. Additionally, our Courts have stated, "Vagueness of expression, indefiniteness, and uncertainty as to any of the essential terms of an agreement have often been held to prevent the creation of an enforceable contract". Reed v. Boykin, 320 S.E.2d 68 (Ct. App. 1984).

The arbitration agreement is a separate document from the Admission Agreement with the Facility. At the top of the Arbitration Agreement there were lines provided for the facility to identify itself. The facility identified in the Arbitration Agreement in question is "Magnolia Place" whereas the facility in the current matter is identified as Physical Wellness and Rehabilitation Center. As previously noted, the Facility bears the burden of proving that a valid arbitration agreement exists and was executed. Because the Facility failed to correctly identify itself the arbitration agreement is unenforceable.

**B. Equitable estoppel does not apply.**

Defendant alleges that Plaintiffs are equitably estopped from opposing enforcement of the Arbitration Agreement. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired

knowledge to determine the truth of facts in question. See Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

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 is a contract defense for which the asserting party "bears the burden of establishing all the elements."[4] "Equitable estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly." Wilson v. Willis, 827 S.E.2d 167 (2019). In Wilson, our Supreme Court held that a claim must be premised or arise based on the contract and a nonsignatory resident must "knowingly exploit" the benefits of the arbitration agreement to be estopped from denying enforcement. Wilson, supra. Plus, Wilson refused to compel arbitration against a non-signatory, holding there is a presumption *against* forcing someone to arbitrate based on a contract she did not sign. 426 S.C. at 338, 827 S.E.2d at 173. Wilson even went on record to say equitable estoppel is rarely appropriate to force arbitration. Id. at 345, 827 S.E.2d at 177 (finding equitable estoppel "should be used sparingly").

Equitable estoppel does not apply in this case, and if it did equity would be in favor of the Plaintiff. 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). No proof exists in this case. Further, the party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id. Defendants do not meet this evidentiary burden.

[4] Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009).

South Carolina's appellate courts have been here before and four times rejected the merger and estoppel theories Defendant needs to prevail. Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018); Weaver v. Brookdale Senior Living, Inc., Op. No. 5782, 2020 WL 4342679 (S.C. Ct. App. filed July 29, 2020)( a nursing home resident is not equitably barred from suing the home for negligent care based on a family member's signature on an admission contract). However, Defendants do not cite or attempt to apply the elements of equitable estoppel imposed by South Carolina law.[5]

For a party to be estopped in these circumstances the Court in Hodge and reaffirming its stance in Thompson stated that the elements for a 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. *See* Hodge v. Unihealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813, S.E.2d. 292 (Ct. App. 2018).

Another major flaw in Defendant's equitable estoppel argument is that it is premised on a faulty merger argument. In Coleman, the South Carolina Supreme Court rejected a nursing home's equitable estoppel argument because it was based on the home's faulty assertion

[5] As Wilson recognized, whether a non-signatory may be bound to an arbitration contract is a state law issue. 426 S.C. at 348, 827 S.E.2d at 174 (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630-31 n. 5 (2009)). 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.

that an admission agreement merged with a separate and independent arbitration agreement. 407 S.C. at 354-55, 755 S.E.2d at 455. Defendant makes similar arguments. Defendant argues Plaintiffs are not free to selectively enforce portions of the Admission Agreement. Id. However, Plaintiffs have not chosen to "enforce" any portion of the Admission Agreement. Her Complaint alleges wrongful death and survival claims premised on statutory and common law duties owed by a nursing home to its resident. For the same reason, Defendant errs when they claim Plaintiff seeks to repudiate any agreement. Plaintiff's Complaint does not reference and is not based on any contract.

However, even if Plaintiffs had based a claim on an alleged breach of the Admission Agreement, such conduct would not equitably estop her from opposing enforcement of the separate and independent Arbitration Agreement. However, the Admission Agreement does not reference arbitration at all. Defendant assumes a merger. Evidence does not support this assumption.

Defendant argues that the Admission Agreement and Arbitration Agreement somehow merge, and Plaintiff is bound by the latter by seeking to enforce the former. Yet, evidence proves that Plaintiffs do not seek to enforce either agreement and, Defendant cannot meet their burden of proving merger because the agreements express language indicates that they are not to merge.

The language and circumstances of the Admission Agreement and Arbitration Agreement show the parties intended they be construed as separate contracts. The separate contracts have different purposes. These two contracts cannot have the same purpose because the Arbitration Agreement was not a pre-condition for admission. Coleman, Thompson, and Hodge are the key precedent here because they illustrate the type of contract language or structure showing parties do not intend multiple agreements to be interpreted as one. For example, an arbitration contract does not merge with an admission contract in which a nursing home and its resident chose to insert

an "entire agreement" or integration provision (aka "merger clause") limiting its parameters and excluding other writings. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. Coleman held one such provision proved "on its face" that merger does not apply. Id. Also, admission and arbitration contracts cannot merge if they contain inconsistent terms, especially provisions related to how each contract may be terminated or the substantive law governing their interpretation. Id.; Thompson, 416 S.C. at 53, 784 S.E.2d at 685. Moreover, courts look at the way the contracts are structured, finding it is unlikely parties intended two contracts to be treated as one if they chose separate titles, required separate signatures, and numbered each contract's pages differently. Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Finally, Hodge held a nursing home cannot argue for merger when it chose to separate arbitration and admission into two agreements while taking the position that agreeing to the former was not required to obtain the benefits of the latter. 422 S.C. at 562-63, 813 S.E.2d at 302.

The Admission Agreement concludes with an "Entire Agreement" provision identifying the contract's limited scope. Specifically, this provision states "this Agreement represents the entire . . . understanding between the parties." "Agreement" is capitalized because it is a defined term, which the Admission Agreement's opening line limits to "THIS ADMISSION AGREEMENT." (emphasis in original). Thus, the Admission Agreement's "Entire Agreement" provision is similar to the admission contracts in Coleman, Thompson, and Hodge and is just as probative against merger as those in earlier cases. It specifically limits the contract's interpretation to the "Agreement" and then defines that term narrowly in a way that does not include the Arbitration Agreement or any other writing. In this sense, the "Entire Agreement" provision is consistent with the fundamental purpose an integration provision serves in a contract. See Palmetto State Sav. Bank of S.C. v. Barr, 293 S.C. 252, 253-54, 359 S.E.2d 531, 532 (Ct. App. 1987)

(finding purpose of integration provision is to create "implication the whole intentions of the parties has been expressed" in the writing containing the clause); Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984) (citing Armour Fertilizer Works v. Hyman, 120 S.C. 375, 113 S.E. 330 (1922) (the terms of a completely integrated contract "cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing")).

Plus, there is contract language here that tracks Coleman and progeny almost verbatim. In Coleman, the court focused on the fact that the admission contract's "Entire Agreement" provision referenced "[t]his Agreement . . . and the Arbitration Agreement." Referencing the two writings distinctly was "the admission agreement's recognition of the arbitration agreement as a separate document." Thompson, 416 S.C. at 52, 784 S.E.2d at 684 (citing Coleman, 407 S.C. at 355, 755 S.E.2d at 455). Hodge applied the same principle using language from an arbitration contract that referenced an admission contract in distinct terms. 422 S.C. at 562, 813 S.E.2d at 302. If an arbitration contract explains its scope extends to disputes arising from "this Agreement or the . . . Admission Agreement," then the parties "recognized a separateness" between the two contracts. Id. The Arbitration Agreement in this case does exactly what Coleman, Thompson, and Hodge identify as proof against merger. In describing its term, the Arbitration Agreement states that its effect will continue even after the termination of "this Agreement ***or the Admission Agreement***." (Arbitration Agreement) (emphasis added).

Finally, Appellants argue the "Entire Agreement" provision supports merger because it incorporates "other Admissions materials." "Admissions materials" is not a defined term and there is nothing to suggest the Arbitration Agreement was intended to be included within it. Plus, since Defendant admits that agreeing to arbitration was not required for admission, it would be

counterintuitive to conclude the Arbitration Agreement was an "Admissions material." Thompson rejected a similar argument when a nursing home claimed its admission contract's "entire agreement" provision incorporated a separate arbitration contract by referring broadly to "exhibits." Since "exhibit" was undefined and not referenced elsewhere in either contract, the term was ambiguous and must be interpreted against the nursing home who drafted it. 416 S.C. at 53-54, 784 S.E.2d at 685 (citing Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455).

The separateness of the two contracts in this case is an important fact further distinguishing the "direct benefit" cases on which Defendant relies. Defendant omits the fact that the "direct benefits estoppel" discussed in Wilson could only apply if Respondent has "consistently maintained that other provisions of the same contract should be enforced to benefit" her. 426 S.C. at 340, 827 S.E.2d at 175 (quoting Pearson, 400 S.C. at 290, 733 S.E.2d at 601).

Finally, as this Court recently reaffirmed in Weaver, Defendant cannot meet the "direct benefits" test considered in Wilson because Ms. McCraw's claims in no sense rely on the Arbitration Agreement's terms, and Appellants' argument to the contrary expressly links their estoppel claim to their fatally flawed merger argument. Weaver applied this principle to reject the argument that a nursing home resident receives the required "direct benefit" through her admission or "exploits" either the admission or arbitration contracts by suing for poor nursing home care. Op. No. 5752, at 5-6. In Weaver, a granddaughter brought a wrongful death and survival claims based on a nursing home's failure to supervise a resident who wandered away from the home and was killed by an alligator. Id. at 1, 6-7. Equitable estoppel did not apply because the granddaughter's claims "rely on general tort duties . . . not any provision of the residency agreement." Id. at 6. Weaver did not create new law; it followed Hodge's lead in holding that a nursing home resident

or her family members do not "exploit" an admission contract by alleging common law negligence claims. Id. (citing Hodge, 422 S.C. at 563, 813 S.E.2d at 302).

Thompson also rejected a nursing home's attempt to use direct benefits estoppel to compel a non-signatory nursing home resident to arbitrate. Thompson, 416 S.C. at 58-59, 784 S.E.2d at 687-88; After surveying state and Fourth Circuit precedent, Thompson rejected this form of estoppel because it generally requires proof of some benefit to the party opposing estoppel in "*the contract that includes the arbitration provision.*" 416 S.C. at 59, 784 S.E.2d at 688 (emphasis added). Defendant, therefore, cannot build an estoppel argument by citing benefits Ms. McCraw supposedly gained in the Admission Agreement. Thompson also rejected any effort to argue Ms. McCraw gained a "direct benefit" from the Arbitration Agreement. Id. at 60, 784 S.E.2d at 688 ("any possible benefit emanating from the [Arbitration Agreement alone is offset by the [Arbitration Agreement's] requirement that Mother waive her right of access to the courts . . .").

In sum, the court rejects the equitable estoppel argument because Appellants have not cited or applied the proper elements, cannot show Ms. McCraw obtained a "direct benefit," and base their estoppel claim on their flawed merger argument. As precedent in Thompson, Hodge, and Weaver dictates, this Court must reject Defendant's equitable estoppel argument.

International Paper notes that equitable estoppel may only apply to bar refusal of arbitration when the refusing party "receives a direct benefit from a contract containing an arbitration clause." 206 F.3d at 418 (quoting Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999)). The Fourth Circuit opinion does not fully list the equitable estoppel elements for South Carolina law provided in Strickland. Additionally, International Paper considered a single contract in which a party was suing to enforce some terms while seeking to avoid the same contract's arbitration provision.

The same is true for Jackson v. Iris.com, 524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007). In Jackson, a musician was estopped from refusing a contract's mandatory arbitration provision when he sought to enforce the same contract's liquidated damages provision. Id. at 750-51. In sum, Appellants' equitable estoppel argument is only potentially viable if this Court finds the Admission Agreement and Arbitration Agreements merge. However, as in Coleman, the evidence shows the contracts are separate, and Appellants cannot meet their burden to prove merger.

In the end, Defendant's pursuit of arbitration should fail for the same reason as the nursing homes in Coleman, Thompson, Hodge, and Weaver: Ms. McCraw did not agree to arbitrate and have taken no action to prevent her from insisting on a judicial forum for her claims.

**C. The Arbitration Agreement is not a valid and enforceable agreement because a lack of consideration and mutuality exists under the circumstances.**

The Admission Agreement and Arbitration Agreement are separate contracts that do not merge. See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 813 S.E.2d 292, 308 (Ct. App. 2018); Thompson v. Pruitt Corp., 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 755 S.E.2d 450 (2014) (Coleman refused to apply the merger doctrine because language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 407 S.C. at 355, 755 S.E.2d at 455. Thompson and Hodge applied Coleman and provided further examples of factors demonstrating "separateness" and preventing merger. 784 S.E.2d at 684; 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, 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, 784 S.E.2d at 685 n. 1; Hodge, 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, 784 S.E.2d at 685; Hodge, 813 S.E.2d at 302.

The "Admission Agreement" presented contains an "Entire Agreement" provision stating that "this Agreement represents the entire agreement" related to admission to the Facility. Thus, "Agreement" is a defined term in this contract and, as stated in the contract's opening paragraph, is limited to the "Admission Agreement," not the separate Arbitration Agreement. Like in Hodge, the separate contracts have separate signature pages and separate pagination—i.e. the Admission Agreement ends with "Page 12 of 12" while the Arbitration Agreement is "Page 1 of 1." As in Thompson, the arbitration agreement states its independence with its "Arbitration Agreement" title. To the extent there are any ambiguities in this contract language, they must be resolved against merger. Coleman, 755 S.E.2d at 455; Thompson, 784 S.E.2d at 685 (citing Coleman). 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 does not meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit.

The necessary elements of a contract are an offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 581 S.E.2d161, 166 (S.C. 2003) "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."

Plantation A.O., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)). Where a contract lacks valuable consideration, the contract will be deemed unenforceable. No valuable consideration exists in this case.

Our courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. See Riedman Corp. v. Jarosh, 349 S.E.2d 404, 405 (1986); see also O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274-5 (4th Cir. 1997). However, in determining whether adequate consideration exists in a contract, or arbitration agreement under the FAA guided by principles of contract law, our courts must examine and stay within the confides of the four corners of the instrument. State Acc. Fund v. S.C. Second Injury Fund, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 33 S.E.2d 501, 509 (1945)). Therefore, our courts must assess whether the arbitration agreement itself contains sufficient consideration in the form of a mutual exchange of promises to arbitrate. There is no direct benefit to nursing home residents from a pre-admission arbitration contract separate from the admission agreement. Admission can be the "direct benefit" that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same contract. In sum, Defendants do not meet their burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and are not construed as a unit.

There exists a lack of mutuality that makes the Arbitration Agreement unenforceable. An agreement may lack mutuality where it permits one party to seek relief through the courts, but does not allow the same relief for the other party. The agreement provides that claims primarily brought by patients, such as those for medical malpractice, claims arising from the provision of services by Defendant, and elder abuse claims are to be arbitrated. Defendants argue that the Agreement requires both sides to be bound by arbitration. That is exactly the problem: the only party that is

going to bring a "dispute over care" is the patient. It is virtually inconceivable that Defendants would sue its patient regarding a dispute over care. Since admission is unavailable as a "direct benefit" to support estoppel, Defendants would be required to point to some benefit Ms. McCraw received from the Arbitration Agreement alone. Any such attempt to find a benefit would have been futile given the Court of Appeals' unambiguous ruling in Thompson, which held that "any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement's] requirement that [resident] waive her right to access the courts and her right to a jury trial." 784 S.E.2d at 688 (emphasis added). Therefore, there is a lack of mutuality present in the Arbitration Agreement making it unenforceable.

**D. The Arbitration Agreement does not govern the wrongful death claim.**

Arbitration does not apply to wrongful death claims because no one with legal authority could enter into an agreement that waives the right to a jury trial on behalf of the statutory beneficiaries. No person other than the court-appointed personal representative can waive the rights of the statutory beneficiaries. The wrongful death claims are separate claims apart from the survival action claim. According to South Carolina's Wrongful Death Act:

> Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued shall be liable to an action for damages.
>
> South Carolina Code Annotated §15-51-10 (1997).

The wrongful death beneficiaries are as follows:

> Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs or the person whose death shall have been so caused
>
> South Carolina Code Annotated §15-51-20 (1977)

As this Honorable Court decided in Young v. NHC, 2014-CP-23-00878 (Order dated June 26, 2014) the wrongful death cause of action should not be included in the arbitration proceeding if a valid and enforceable arbitration agreement is found by the Court for the survival cause of action:

> It appears that the question of whether a wrongful death action is subject to mandatory arbitration pursuant to the terms of a contract is one of first impression in South Carolina. Case law across many jurisdictions within the United States is split as to whether an arbitration agreement covers a wrongful death claim brought by the estate's statutory beneficiaries who were not a party to the contract. [cite omitted]
>
> This Court finds persuasive the reasoning of those jurisdictions that have held that an arbitration agreement executed by a decedent cannot bind the statutory beneficiaries who were not parties to the agreement. South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries, and that such claims are distinct and separate claims from those that are brought under the survival statute. *See* Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914).
>
> However, this Court agrees with the Supreme Court of Kentucky which said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises, "[A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third party are appropriately subjected to the contract's arbitration provisions, at least where the tort and the contract are significantly intertwined. It is something else entirely, however, to say that incidental beneficiaries of a contract individuals or entities with no substantive rights under the contract and no direct benefits may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants."
>
> Ping, 376 S.W.3d at 599-600.

A similar analysis and holding can be found in Wilson v. NHC, 2018-CP-23-00119 (Order dated June 21, 2018) by the Honorable Judge Michael Nettles which held:

> [T]the Arbitration Agreement is unenforceable against the estate's wrongful death statutory beneficiaries under South Carolina contract law defenses. The Arbitration Agreement

neither covers the wrongful death statutory beneficiaries' claims within the scope of the agreement nor was the Arbitration Agreement signed by an individual who had authority to bind the statutory beneficiaries.

South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914). The alleged Arbitration Agreement by its own terms is an agreement between "Kenneth Wilson ('patient')" and "NHC Healthcare/Mauldin, LLC ('center')". While at some point during Decedent's admission to the facility, he might have had the authority to bind himself and his claims to arbitration but was never given the chance. However, even if Decedent had agreed to arbitration, he did not have the legal authority to bind his statutory beneficiaries who are not parties to the Arbitration Agreement. The signatories to the agreement are\ Daughter on behalf of decedent and NHC Healthcare/Mauldin, LLC. No other persons are parties to this agreement. The scope of the agreement does not include the statutory beneficiaries' claims.

However, even if the Arbitration Agreement did contemplate the wrongful death statutory beneficiaries' claims, decedent and/or Daughter had no authority to waive the statutory beneficiaries' claims. Daughter signed the Arbitration Agreement in her *individual capacity*. However, as the Hodge court noted, actions taken by Daughter in her *individual capacity* will not be held against the estate as the estate has other beneficiaries and may have other creditors.

Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, a Federal District Court in South Carolina has analyzed this issue under the South Carolina Non-Economic Awards Act of 2005. Diane Boyle as Personal Representative of the Estate of John Francis Boyle v. United States of America, 944 F.Supp.2d 577 (D.S.C. 2012). In Boyle, the Court concluded that the wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. This analysis supports the contention that the wrongful death claimants have separate and distinct claims apart from that of the survival action.

Further, at least one other South Carolina Court has come to the same conclusion as the Federal District Court. *See* Wilson v. Amisub, 2006-CP-46-02891 (Order dated March 25, 2009). These orders from a South Carolina Circuit Court Judge as well as a Federal District Court Judge for the District of South Carolina when read together evince a growing trend by the courts to recognize that wrongful death claims are not derivative from a survival action. Following this, arbitration does not apply to wrongful death claims.

**E. A Stay is moot as the Motion to Compel Arbitration has been Denied.**

The nonsignatory Defendants are not entitled to a Stay. Judge Nettles's Order in Coleman v. Mariner Health Care, Inc., 2010-CP-21-00835 (Order dated March 25, 2011) covers this issue:

> Parties who are not seeking arbitration cannot be forced to arbitrate a matter any more than individuals who are not party to the agreement can. As a result, this Court is faced with the possibility that, if the Arbitration Agreement is deemed valid portions of the claims along with some of the parties would be subject to arbitration while other portions of the claims and different parties to this action would be subject to trial by jury. **Should this be allowed, the very real possibility of conflicting rulings on common issues of law and fact may result.**
>
> Instructive on this issue is the matter of Birl v. Heritage Care, LLC, 172 Cal.App.4th 1313, 91 Cal. Rptr.3d 777. In Birl a case was brought by the family of a deceased patient against a hospital, physicians, and a nursing facility and the nursing facility south to compel arbitration. Of relevance, the Court here noted that "(1) the hospital and physicians with no arbitration agreement were involved in the same transaction as the nursing facility; (2) all defendants were involved in a series of related transactions with the patient; (3) there was a possibility of conflicting rulings on common issues of law or fact; and (4) patient's family members were third parties to the patient's arbitration agreement." In its ruling denying the nursing facility's motion to compel arbitration, California's Appellate Court noted that "the trial court properly noted the possibility of conflicting rulings on common issues of law or fact if defendant Heritage was not joined to the court action with the other defendants… Different triers of fact in different proceedings could come to different conclusions…" Id. at 1321.
>
> While the circumstances of the current actions differ slightly from those of Birl, it remains consistent that compelling arbitration of certain claims but not of others and compelling arbitration with respect to some defendants but not others will result in the conflicting rulings as contemplated in Birl. Furthermore, such a division of the cases would result in an unreasonable hardship for Plaintiff, as she and the other statutory beneficiaries of Ms. Brinson's estate would be effectively forced to litigate claims arising from the same or related events in two separate forums.

Parties that are non-signatories to a contract cannot include themselves in the contract simply because they want to, and arbitration agreements are considered contracts. The other Defendants should have been made parties to the Arbitration Agreement, or should have asked Plaintiff for post-dispute arbitration. As the Motion to Compel Arbitration has been denied, the Motions to Stay are therefore moot and denied.

**F. The outrageous tort exception applies to this case making it non-arbitral.**

The Supreme Court in Aiken recognized an exception to arbitration if the conduct is unforeseeable to the parties and outrageous in nature. Aiken v. World Finance Corporation of South Carolina, 373 S.C. 144, 644 S.E.2d 705 (2007). Just like Aiken the arbitration agreement in this current matter covers any dispute or controversy. The Court in Aiken clearly stated that:

> Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.

Aiken, 373 S.C. at 151.

The Court, cognizant of the body of law regarding arbitration, went on to further explain their opinion stating:

> We only seek to distinguish those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties… Our decision today does not ignore the state and federal policies favoring arbitration as a less formal and more efficient means for resolving disputes. *See* Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 396, 498 S.E.2d 898, 902 (Ct. App. 1998). This Court merely seeks, as a matter of public policy, to promote the procurement of arbitration in a commercially reasonable manner. To interpret an arbitration agreement to apply to actions completely outside the expectations of the parties would be inconsistent with this goal.

In Hatcher v. Edward D. Jones & Co., L.P, 379 S.C. 549, 554, 666 S.E.2d 294, 297 (Ct. App. 2008) the Court of Appeals went further, holding that to interpret a broadly worded arbitration provision to apply to claims wholly unforeseeable at contract formation would be inconsistent with pro-arbitration policy by contravening the parties' intentions. "The mere fact that the dispute would have not arisen but for the existence of the contract relationship between the parties is insufficient by itself to transform a dispute into one 'arising out of relating to' the agreement" Aiken, 373 S.C. at 150.

The outrageous tort exception laid out in Aiken fits squarely with the conduct we see in this current matter. Ms. McCraw contracted Norwegian Scabies while staying in Defendants' facility. Norwegian Scabies is not something a reasonable consumer would expect to contract while under the care of a skilled nursing facility. Furthermore, a reasonable consumer would not expect a skilled nursing facility to fail to treat and diagnose a Norwegian Scabies infection for 164 days. The Norwegian Scabies infection Ms. McCraw suffered fits squarely within the outrageous tort exception laid out in Aiken. The Court finds that the outrageous tort exception does apply in this matter.

## CONCLUSION

For the foregoing reasons, Defendants' Motion to Compel Arbitration and Stay Proceedings, are **DENIED**.

IT IS SO ORDERED.

The Honorable J. Mark Hayes, II

Spartanburg, SC
October 30, 2020