THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Florence County
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case Nos. 2010-CP-21-00835 & -00836

Ann Coleman, Individually and as Personal Representative of the Estate of Mary Brinson,

Respondent,

v.

Mariner Health Care, Inc. f/k/a Mariner Post Acute Network, LLC, Mariner Health Care Management Company, Mariner Health Central, Inc., Mariner Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC MidAmerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC MidAtlantic Holding Company, Living Centers-Southeast, Inc., Grancare South Carolina, Inc., Individually and d/b/a Faith Health Care Center, SavaSeniorCare Management, LLC, SavaSeniorCare Administrative Services, LLC, SavaSeniorCare, LLC, SavaSeniorCare, Inc., National Senior Care, Inc., Palmetto Health Care, LLC, Palmetto Faith Operating, LLC, Individually and d/b/a Faith Health Care Center, Ask Holdings, LLC, Leonard Grunstein, an Individual, Murray Forman, an Individual, Boyd P. Gentry, an Individual, Abraham Shaulson a/k/a Abraham Shavlson a/k/a A. Shawson a/k/a Abraham Shawson, an Individual, Avi Klein, an Individual, SC Property Holdings, LLC, SC Faith, LLC, and John Does 1-26,

of whom,

Mariner Health Care Management Company, Mariner Health Central, Inc., Grancare South Carolina, Inc., Individually and d/b/a Faith Health Care Center, Mariner Health Care, Inc. f/k/a Mariner Post Acute Network, LLC, Mariner Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC MidAmerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC MidAtlantic Holding Company, Living Centers-Southeast, Inc., SavaSeniorCare Administrative Services, LLC, SavaSeniorCare, LLC, SavaSeniorCare, Inc., National Senior Care, Inc., Leonard Grunstein, an Individual, Boyd P. Gentry, an Individual, and Murray Forman, an Individual, and Palmetto Faith Operating, LLC, Individually and d/b/a Faith Health Care Center are,

Appellants.

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Appellants Mariner Health Care, Inc. f/k/a Mariner Post-Acute Network, LLC, Mariner Health Care Management Company, Mariner Health Central, Inc., Mariner Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC MidAmerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC MidAtlantic Holding Company, Living Centers-Southeast, Inc., Grancare South Carolina, Inc., Individually and d/b/a Faith Health Care Center, SavaSeniorCare Administrative Services, LLC, SavaSeniorCare, LLC, SavaSeniorCare, Inc., National Senior Care, Inc., Leonard Grunstein, an Individual, Boyd P. Gentry, an Individual, and Murray Forman, an Individual ("Defendants"), respectfully submit this brief in support of their appeal from four Orders of the Florence County Court of Common Pleas (Nettles, J.), which denied their motion to compel arbitration and stay the litigation ("Motion to Compel Arbitration" or "Motion") and their subsequent motion to alter or amend said judgment ("Motion to Alter or Amend").

STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erroneously concluded that the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), does not govern the parties' arbitration agreement, where the agreement stipulates that the FAA applies and it evidences transactions involving interstate commerce?

II. Whether the trial court erroneously concluded that the parties' arbitration agreement is unenforceable because Respondent Ann Coleman lacked capacity to sign it on behalf of decedent Mary Brinson, even though Ms. Coleman: (1) had statutory authority to sign the agreement; and (2) is equitably estopped from claiming otherwise?

III. Whether the trial court erroneously concluded that Defendants' prior motion to dismiss for lack of personal jurisdiction judicially estopped them from enforcing the arbitration agreement, when the motion to dismiss: (1) was not inconsistent with the Motion to Compel Arbitration; (2) was unsuccessful; and (3) was not intended to mislead or deceive the trial court?

IV. Whether the trial court erroneously concluded that the parties' arbitration agreement is unenforceable against Ms. Brinson's wrongful-death beneficiaries under South Carolina's Wrongful Death Act, S.C. Code Ann. § 15-51-10, even though the agreement expressly binds these beneficiaries and, moreover, their rights are entirely derivative of Ms. Brinson, who was bound by that agreement at her death?

V. Whether the trial court erroneously concluded that the arbitration agreement is procedurally unconscionable, even though Ms. Coleman acknowledged that she read and understood the agreement, is legally presumed to have done so, and voluntarily consented to its terms?

VI. Whether the trial court erroneously concluded that the arbitration agreement is unenforceable because it may require certain claims to be arbitrated and others to be heard in court, even though controlling law dictates that such inconsistency cannot invalidate an otherwise valid agreement?

VII. Whether the trial court erroneously concluded that Defendants waived their right to arbitrate, when the court applied the wrong legal standard to determine their delay and, in any event, the delay was brief and had no prejudicial impact on Ms. Coleman?

STATEMENT OF THE CASE

I. Nature Of The Case

This is an appeal from (1) two identical Orders of the Florence County Court of Common Pleas entered on March 25, 2011, which denied Defendants' Motion to Compel Arbitration in a wrongful-death action and related survival action ("March Orders"), and (2) two identical Orders entered on June 6, 2011, which denied Defendants' Motion to Alter or Amend the March Orders ("June Orders").

Defendants' Motion to Compel Arbitration was predicated on an arbitration agreement ("Arbitration Agreement" or "Agreement") that Respondent Ann Coleman ("Ms. Coleman") signed, together with an admission contract ("Admission Contract") and other paperwork, when she admitted her sister, Mary Brinson ("Ms. Brinson"), to the Faith Health Care Center ("Facility") in Florence, South Carolina.

This appeal is taken as of right pursuant to the FAA, 9 U.S.C. § 16(a)(1). Defendants timely served Ms. Coleman with their Notice of Appeal on June 24, 2011, and filed said notice with this Court the same day.

II. Course Of Proceedings And Disposition Below

A. Notices Of Intent To Sue/Pleadings

On July 16 and August 3, 2009, Ms. Coleman, in her individual capacity and as the personal representative of the estate of Ms. Brinson, filed Notices of Intent to File Suit against Defendants and others. (Notices of Intent dated July 14, 2009 and July 30, 2009; 1/6/11 Tr. at 113:11-14). Each Notice of Intent attached the proposed complaints and an expert affidavit

alleging that the Facility failed to provide adequate care to Ms. Brinson. (Notices of Intent dated July 14, 2009 and July 30, 2009).

In January 2010, the parties engaged in mediation pursuant to S.C. Code Ann. § 15-79-125, which was unsuccessful. (1/6/11 Tr. at 113:14-15). On March 22, 2010, Ms. Coleman filed the underlying wrongful-death and survival actions ("Complaints"), which were served on Defendants between April 12 and July 9, 2010. (Pl.'s Affidavits of Service). In the Complaints, Ms. Coleman asserted claims for negligence, negligence *per se*, negligent misrepresentation, civil conspiracy, and breach of contract based on the care and treatment that Ms. Brinson allegedly received while she was a resident at the Facility. Ms. Coleman asserted that due to Defendants' negligence, Ms. Brinson suffered injuries that proximately caused her death on April 30, 2007. (Compls. ¶ 49).

Defendants answered the Complaints in May, June, and July 2010. (Defendants' Answers). In their Answers, Defendants asserted that Ms. Coleman's claims were subject to the Arbitration Agreement. (*Id.* at Ninth Defense). In May 2010, Defendants advised Ms. Coleman that they would be filing a Motion to Compel Arbitration and objected to any discovery requests until the Motion was decided. On August 25, 2010, Defendants moved to compel arbitration. (Defs.' Notice of Motion filed Aug. 25, 2010). Subsequently, the parties agreed to engage in discovery limited to the arbitration issue. (1/6/11 Tr. at 53:6-13; 101:21-25).

B. Arbitration Agreement

On June 1, 2006, Ms. Coleman signed the Arbitration Agreement as Ms. Brinson's "Legal Representative." (Defs.' Mem. in Supp., Ex. B). Ms. Brinson was admitted to the

Facility the next day, June 2, 2006. (Dawn Coleman Aff. ¶ 4).[1] The Agreement is a three-page, easy-to-read document that directs Ms. Coleman to "***PLEASE READ CAREFULLY.***" It is divided into three sections. Section I, entitled "EXPLANATION," reads:

> Under federal law two or more parties may agree in writing for the settlement by arbitration of any dispute arising between them. Arbitration is a method for resolving disputes without involving the courts. It is frequently faster and less expensive than using the court system. In these arbitration proceedings, the dispute is heard by private individuals, called arbitrators, who are selected by the Resident and/or the Resident's Legal Representative and the Facility. The decision of the arbitrators binds both parties and [is] final. By agreeing to binding arbitration, both parties waive the right to trial before a judge or jury.

(Defs.' Mem. in Supp., Ex. B).

Section II, entitled "AGREEMENT," recites that the parties entered into "an agreement to arbitrate any dispute that might arise between Mary Brinson ('Resident') . . . and Faith Healthcare ('Facility')," and that they "entered into an Admission Agreement and acknowledge that [it] constitutes the foundation of the relationship between them and all duties and obligations arising between them." (*Id.*). The Arbitration Agreement further states:

> The parties agree that they shall submit to binding arbitration ***all disputes*** against each other and their representatives . . . arising out of or in any way related or connected to the Admission Agreement and all matters related thereto ***including matters involving the Resident's stay and care provided at the Facility, including but not limited to any disputes concerning alleged personal injury to the Resident caused by improper or inadequate care*** including allegations of medical malpractice . . . or any alleged breach, default, negligence, wantonness, fraud, misrepresentation or suppression of fact or inducement.

(*Id.* (emphasis added)).

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[1] On September 16, 2006, Ms. Brinson was discharged to the hospital, and readmitted to the Facility on December 13, 2006. (Compls. ¶¶ 43, 46). In the interim, on September 29, 2006, Defendant Grancare South Carolina, Inc. transferred the Facility to Defendant Palmetto Faith Operating, LLC. (*See id.* ¶ 47). When Ms. Brinson was readmitted, Ms. Coleman signed a second arbitration agreement with the Facility's new licensed operator, Palmetto Faith Operating, LLC. (*See* Defs.' Mem. in Supp., Ex. I). Defendants' Motion to Compel Arbitration was based only on the *first* Arbitration Agreement. (Defs.' Mem. in Supp. at 3 & Ex. B).

The Agreement states that it is "governed by the [FAA]." (*Id.* at 2). The parties also stipulated that "the Admission Agreement involves interstate commerce" because the Facility is affiliated with a foreign corporation with a nationwide network of facilities, and that these facilities, among other things, accept federal funding and use out-of-state goods and services. (*See id.* at 1).

In addition, the Agreement states that the parties "are agreeing to a mutual arbitration, regardless of which party is making the claim," and that the Facility will pay the fees of the arbitrators, and up to $5,000 of the resident's attorney's fees and costs without regard to the outcome of the arbitration. (*Id.*). Further, the Agreement gives the resident or her representative the unilateral right to select the location of the arbitration. (*Id.*). The Agreement also provides that arbitration will be heard before a panel of three arbitrators selected from a nationally recognized arbitration association, one chosen by each party, and the third to be chosen by the other two arbitrators. (*Id.* at 2).

Additionally, the parties made clear that:

> It is the intention of the Facility and the Resident that this Agreement shall inure to the benefit of and bind the Facility . . . the Resident, his/her ***successors***, assigns, agents, attorneys, insurers, ***heirs***, trustees, and representatives, ***including the personal representative or executor of his or her estate***; and the ***Legal Representative***, his/her successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives or executor of his or her estate.

(*Id.* (emphasis added)).

Section III of the Agreement, entitled "ACKNOWLEDGEMENTS," states that "[t]he execution of this Agreement is **not** a precondition to receiving medical treatment or for admission to the Facility." (*Id.* at 3 (emphasis in original)). Ms. Coleman acknowledged that she "understand(s) that []she has the right to consult with an attorney of []her choice, prior to

signing this [A]greement, to receive explanations or clarification of any of the terms of this Agreement." (*Id.*). The Agreement affords the resident or her representative the unilateral right to rescind the Agreement within 30 days for any reason or no reason at all. (*Id.*). If not rescinded, the Agreement states that it "shall remain in effect for all claims arising out of the Resident's stay at the Facility." (*Id.*).

Finally, the parties stipulated in the Agreement that: "**THE UNDERSIGNED ACKNOWLEDGE THAT EACH OF THEM HAS READ THIS ENTIRE AGREEMENT AND UNDERSTANDS THAT BY SIGNING THIS AGREEMENT EACH HAS WAIVED HIS/HER RIGHT TO A TRIAL, BEFORE A JUDGE OR JURY, AND THAT EACH OF THEM VOLUNTARILY CONSENTS TO ALL OF THE TERMS OF THE AGREEMENT**." (*Id.* (emphasis in original)).

C. Admission Contract

Ms. Coleman signed the Admission Contract as the "Responsible Party" for Ms. Brinson. (Defs.' Mem. in Supp., Ex. A; Ann Coleman Aff. ¶ 9). The Admission Contract specifically identifies Ms. Brinson as the resident to whom treatment and services will be provided, and addresses myriad other services attendant to nursing-home admission. (Defs.' Mem. in Supp., Ex. A at 1). In the "Entirety of the Agreement" section, the Admission Contract contains a merger clause that reads: "This Agreement, including all Exhibits hereto, *and the Arbitration Agreement between the Facility and the Resident*, if the parties sign one, supersede all other agreements, either oral or in writing, between the parties, and contain all of the promises and agreements between the parties." (*Id.* at 7 (emphasis added)).

Ms. Coleman also exercised her authority to sign other documents on behalf of Ms. Brinson, including a "Laundry Authorization" form, in which she agreed to take care of Ms.

Brinson's laundry services; a "Resident Fund Management Service" contract in which she authorized the Facility to establish and manage an interest-bearing resident account for Ms. Brinson's personal expenses; and a "Consent to Photograph" form in which she authorized the Facility to photograph Ms. Brinson for identification purposes. (Defs.' Mem. in Supp., Ex. F). When Ms. Coleman signed these documents, she was employed as a nurse in the Facility. (1/6/2010 Tr. at 69:20-24). However, she denied any knowledge of the admissions process. (Ann Coleman Aff. ¶ 5).

D. Defendants' Motion To Compel Arbitration

On August 25, 2010, Defendants moved to compel arbitration. (Defs.' Notice of Motion filed Aug. 25, 2010). Defendants asserted that the Arbitration Agreement was valid and enforceable, and that Ms. Coleman's claims against them were within its scope because they related to care that Ms. Brinson received at the Facility. (Defs.' Mem. in Supp. at 15-19).

In the Motion, Defendants argued that the Arbitration Agreement was governed by the FAA because the parties had stipulated that the FAA applied and because the Admission Contract (of which the Arbitration Agreement was a part) involved interstate commerce. (*Id.* at 18-19). Defendants showed that the Facility engages in interstate commerce by purchasing goods and services from out-of-state vendors, treating patients who live outside of South Carolina, and accepting federal funds from the Medicare and Medicaid programs as well as out-of-state private insurers. (*Id.*; Swinton-Mickens Aff. ¶¶ 6-19).

Defendants argued that Ms. Coleman bound Ms. Brinson to the Arbitration Agreement because the South Carolina Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10 *et seq.* ("AHCCA" or "Act"), empowered her to make "decisions concerning [Ms. Brinson's] health care." (Defs.' Mem. in Supp. at 9-11). They also argued that Ms. Coleman was equitably

estopped from denying the validity of the Arbitration Agreement because she could not assert that the Facility had breached the Admission Contract and, at the same time, refuse to honor the Arbitration Agreement, which was integrated into the Admission Contract. (*Id.* at 6-9).

In opposing the Motion, Ms. Coleman asserted that she lacked authority to sign the Arbitration Agreement on Ms. Brinson's behalf. (Pl.'s Mem. in Opp'n at 4-10). Ms. Coleman argued that the AHCCA authorized her to make only "healthcare decisions" for Ms. Brinson, but did not empower her to bind Ms. Brinson to a contract that waives her right to a jury trial. (*Id.* at 5-6). Ms. Coleman also argued that even if the Agreement were enforceable, it did not bind Ms. Brinson's wrongful-death beneficiaries because they did not sign the Agreement. (*Id.* at 10-12). In addition, Ms. Coleman claimed that the Agreement was procedurally unconscionable because she signed it when she was "emotionally upset and concerned about [her] sister's condition," and because no one at the Facility explained the Agreement to her. (*Id.* at 12-15; Ann Coleman Aff. ¶ 12). Ms. Coleman also argued that, because not all of the Defendants had moved to compel arbitration, the possibility that some of Ms. Coleman's claims would be arbitrated while others are litigated in court made the Agreement unconscionable due to the danger of conflicting rulings in different proceedings. (Pl's. Mem. in Opp'n at 15-17).

Ms. Coleman further contended that Defendants had waived their arbitration rights by not "advis[ing] Plaintiff of the existence of an Arbitration Agreement" (*id.* at 17-18)—even though Ms. Coleman herself had signed it—and by not demanding arbitration when Ms. Coleman served her Notices of Intent to File Suit. (*Id.* at 17-20). Finally, Ms. Coleman claimed that all of the Defendants (except the Facility) lacked standing to enforce the Arbitration Agreement because they had filed a motion to dismiss for lack of personal jurisdiction in which they argued they had no ties to the operations of the Facility. (*Id.* at 21-22).

E. Trial Court's Orders Denying Motion To Compel Arbitration

In its March Orders, the trial court denied Defendants' Motion to Compel Arbitration. *First*, the trial court ruled that the Arbitration Agreement was unenforceable because Ms. Coleman lacked authority to sign it. (March Orders at 3-4). The court rejected Defendants' argument that the AHCCA authorized Ms. Coleman to bind Ms. Brinson to the Agreement because, in the court's view, consenting to arbitrate is not a "decision[] concerning [] health care" within the meaning of the Act. (*Id.* at 4). The court concluded that the AHCCA empowered Ms. Coleman to execute the Admission Contract because the Act accorded her "the authority to make 'healthcare decisions' on behalf of her sister," which includes the power to "consent for medical treatment for someone unable to consent." (*Id.*). In effect, the trial court permitted Ms. Coleman to assert the AHCCA as a defense to the Arbitration Agreement based on the rationale that "consent for medical treatment for someone unable to consent is not the same as binding an incompetent person to a legally binding contract such as an arbitration agreement . . . ." (*Id.*). The court opined that "Defendants [] assume that the Arbitration Agreement and Admissions [Contract] are on the same footing. . . . [T]hey are not. An agreement concerning the provision of health care is a far different matter than an agreement to waive legal and constitutional rights." (*Id.* at 17). For the same reason, the court ruled that Ms. Coleman was not equitably estopped from challenging the Agreement.

Second, the court determined that the Arbitration Agreement was unenforceable against Ms. Brinson's wrongful-death beneficiaries because they are not covered by the terms of the Agreement. (*Id.* at 8). Moreover, the court determined that the Arbitration Agreement did not bind Ms. Brinson's wrongful-death beneficiaries in any event because "South Carolina law is

clear that a wrongful death claim exists for the statutory beneficiaries," and Ms. Brinson's beneficiaries did not sign the Agreement. (*Id.*).

Third, the court determined that the Arbitration Agreement was procedurally unconscionable because the Facility had violated its own policy by not explaining the Agreement to Ms. Coleman, and by failing to make clear to her "that the Arbitration Agreement was voluntary and not a requirement for Ms. Brinson's admission to the [F]acility." (*Id.* at 9, 12). The court also concluded that because only some of the Defendants had moved to compel arbitration, if their Motion were granted, some of Plaintiff's claims would be arbitrated, while others would be litigated in court, thus raising the prospect of conflicting rulings on common issues of law and fact. On that basis, the trial court concluded that the potential mix of arbitrable and non-arbitrable claims made the Agreement unenforceable. (*Id.* at 10).

Finally, the court found that Defendants waived their arbitration rights because they did not seek to enforce the Arbitration Agreement until more than a year after Ms. Coleman served her Notices of Intent to File Suit. (*Id.* at 12-14). Further, the court held that because Defendants had filed a motion to dismiss for lack of personal jurisdiction, they were estopped from enforcing the Agreement. The court reasoned that "[i]t cannot be rationally argued that all of these Defendants are parties to this contract, while at the same time argue that they have never contracted in South Carolina, never conducted business in South Carolina or are not tied in with the operation of the nursing facility." (*Id.* at 15).

F. Trial Court's Orders Denying Motion To Alter Or Amend

The trial court also denied Defendants' Motion to Alter or Amend the March Orders. In its June Orders, the court concluded that because the Arbitration Agreement was invalid due to Ms. Coleman's lack of authority to sign it, the FAA did not apply. (June Orders at 4). The court

ruled, alternatively, that even if the Arbitration Agreement were enforceable, the FAA did not apply because the Agreement itself did not "involv[e] commerce." (*Id.* at 4-6 (citing *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993)).

SUMMARY OF ARGUMENT

First, the court's determination that the FAA does not apply was wrong because: (1) the parties contractually agreed that the FAA would control the Agreement, and (2) stipulated that the Agreement involves transactions in interstate commerce. Moreover, uncontested evidence demonstrated that the Facility actually transacts in interstate commerce because it relies heavily on goods, services, and payments from out-of-state entities. Defendants also showed that a portion of these interstate activities were directly tied to the care and treatment that was provided to Ms. Brinson.

Second, the trial court erroneously concluded that Ms. Coleman lacked authority to sign the Arbitration Agreement on Ms. Brinson's behalf. In fact, Ms. Coleman had authority to sign the Agreement because the AHCCA permitted her to make "decisions concerning [Ms. Brinson's] health care." There is no question that the Arbitration Agreement "concerns" Ms. Brinson's health care because it establishes the mechanism by which disputes regarding her care and treatment would be resolved. Indeed, the Act afforded Ms. Coleman broad authority to sign all of the paperwork relating to Ms. Brinson's admission to the Facility, and Ms. Coleman invoked that authority to do so. Moreover, the trial court's conclusion that the Act permitted Ms. Coleman to sign the Admission Contract but not the Arbitration Agreement, because the latter involved the waiver of a jury trial, impermissibly disfavored arbitration agreements in violation of the FAA.

The court also disfavored arbitration because it refused to apply the generally applicable common-law rule of merger, under which the Admission Contract and Arbitration Agreement became a single document. Because Ms. Coleman had the authority to enter into the Admission Contract, she necessarily was bound by the Arbitration Agreement that was expressly incorporated into it. And because Ms. Coleman alleges that Defendants breached the Admission Contract, she is estopped from denying her authority to sign the Arbitration Agreement.

Third, the trial court erroneously concluded that the Arbitration Agreement is unenforceable against Ms. Brinson's wrongful-death beneficiaries. The Arbitration Agreement expressly binds Ms. Brinson's beneficiaries, including Ms. Coleman. Moreover, the Wrongful Death Act claims are subject to arbitration because they are entirely derivative of the decedent. Ms. Coleman's wrongful-death suit, by statute, depends solely on the rights that Ms. Brinson had at the time of her death. Because Ms. Brinson was bound to arbitrate her claims, her beneficiaries must arbitrate their claims, too.

Fourth, the trial court erroneously concluded that the Arbitration Agreement was procedurally unconscionable. Ms. Coleman entered into the Agreement *voluntarily* the day *before* Ms. Brinson was admitted to the Facility, had ample time to review the document, consult with counsel, and ask for clarification—which she never did. Ms. Coleman acknowledged that she had read and understood the Agreement and, in any event, is legally *presumed* to have done so. In short, there nothing unfair—much less procedurally unconscionable—about her agreement to arbitrate. In addition, the trial court erred in holding that the Agreement was unconscionable because it may require that certain claims be referred to arbitration and others to be litigated in court. The FAA requires arbitration of arbitrable claims even if related non-arbitrable claims must be heard by a court.

Finally, the trial court erroneously concluded that Defendants waived their arbitration rights because they did not file their Motion to Compel Arbitration when Ms. Coleman served her Notices of Intent to File Suit. For waiver purposes, delay is measured from commencement of the action, not from the service of Plaintiff's Notices of Intent. In any event, there was no waiver because any delay by Defendants in invoking their arbitration rights was minimal and resulted in no prejudice to Ms. Coleman.

ARGUMENT

I. THE FAA GOVERNS THE ARBITRATION AGREEMENT

The FAA applies to arbitration agreements that are part of a written contract "evidencing a transaction involving commerce." 9 U.S.C. § 2. The trial court's ruling that the FAA is inapplicable was incorrect in several respects. (June Orders at 4-6).

A. The Parties Stipulated That The FAA Governs The Arbitration Agreement

First, the Arbitration Agreement stipulates that it is "governed the [FAA]" (Defs.' Mem. in Supp., Ex. B at 2), and that the Admission Contract (of which the Arbitration Agreement is a part) "evidences a transaction involving interstate commerce" (*id.* at 1). The parties' choice-of-law provisions in the Arbitration Agreement must be respected, as they would be in other types of contracts. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001) ("[T]he arbitration agreement, which applies to 'this contract and the relationships which result from this contract,' provides it shall be governed by the FAA. Arbitration agreements, like other contracts, are enforceable in accordance with their terms.") (quoting *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989)); *see Osteen v. T.E. Cuttino Constr. Co.*, 315 S.C. 422, 426, 434 S.E.2d 281, 283 (1993) ("In our view, the trial judge correctly ascertained that the dispositive question is whether the parties intended to be bound by

federal or state arbitration law."); *see also Team IA, Inc. v. Lucas*, 395 S.C. 237, 248, 717 S.E.2d 103, 108 (Ct. App. 2011) ("Choice of law clauses are generally honored in South Carolina."); *see also Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 875 n.5 (11th Cir. 2005); *Staples v. Money Tree, Inc.*, 936 F. Supp. 856, 858 (M.D. Ala. 1996); *Primerica Fin. Servs., Inc. v. Wise*, 456 S.E.2d 631, 633, 217 Ga. App. 36, 37 (Ga. Ct. App. 1995) ("[T]he intentions of the parties were that arbitration would be governed by the FAA. Thus, as with any other contract, the parties' intentions control.") (internal quotations and citation omitted); *cf. Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001) ("Parties are free to enter into a contract providing for arbitration under rules established by state law rather than rules established by the FAA."). Indeed, "when there is an express agreement to arbitrate under the FAA, courts have upheld such choice-of-law provisions even though the transaction at issue does not involve interstate commerce." *Teel v. Beldon Roofing & Remodeling Co.*, 281 S.W.3d 446, 449 (Tex. App. 2007) (citing cases). The trial court erred in failing to apply the FAA for this reason alone.

B. The Arbitration Agreement Affects Interstate Commerce

Second, the Arbitration Agreement unquestionably affected interstate commerce. "The FAA has an expansive reach, similar to that of the Commerce Clause . . . ." *THI of S.C. at Columbia, LLC v. Wiggins*, No. 3:11-888-CMC, 2011 WL 4089435, at *1 n.3 (D.S.C. Sept. 13, 2011) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995)); *Blanton v. Stathos*, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002). "Congress' Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if *in the aggregate* the economic activity in question would represent a general practice . . . subject to federal control." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57

(2003) (per curiam) (internal quotations and citation omitted) (emphasis added). To determine whether a transaction involves interstate commerce under the FAA, the court examines the agreement, complaint, and surrounding facts. *See Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117.

The U.S. Supreme Court has long held that the FAA's application to agreements "involving interstate commerce" reflects Congress' intent to exercise power to the fullest extent permitted by the Commerce Clause. *Citizens Bank*, 539 U.S. at 56 ("We have interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power."). For example, in *Citizens Bank*, the Court concluded that a debt restructuring agreement executed in Alabama between an Alabama bank and an Alabama construction company involved interstate commerce because the debt was secured by an inventory of goods assembled from out-of-state materials. 539 U.S. at 57. In *Preston v. Ferrer*, 552 U.S. 346, 354 (2008), the Court determined that a personal services contract between a California agent and client involved interstate commerce because the client worked as a nationally-syndicated TV personality. In other contexts, the Court has held that "interstate commerce" has a similarly wide reach. *See, e.g.*, *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 329-30 (1991) (holding that defendants' services to non-resident patients, receipt of Medicare reimbursements, and sending of peer review reports across state lines satisfied the interstate commerce requirement under the Sherman Act); *Katzenbach v. McClung*, 379 U.S. 294, 299-300 (1964) (holding that a restaurant's purchase of approximately $70,000 worth of goods that had moved in interstate commerce affected interstate commerce under the Civil Rights Act of 1964). Read together, these cases "stand for the proposition that the FAA reaches the broadest amount of commercial activity allowed by the Constitution—which can include a local business buying

supplies from a company procuring those supplies from out of state." *Rainbow Health Care Ctr., Inc. v. Crutcher*, No. 07-CV-194-JHP, 2008 WL 268321, at *4 (N.D. Okla. Jan. 29, 2008). Indeed, just recently, the Supreme Court, in the particular context of an arbitration agreement relating to nursing-home care, reversed the West Virginia Court of Appeals, finding the subject arbitration agreement rightly enforceable under the FAA. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) ("State and federal courts must enforce the [FAA] with respect to all arbitration agreements covered by that statute. Here, the Supreme Court of Appeals of West Virginia, by misreading and disregarding the precedents of this Court interpreting the FAA, did not follow controlling federal law implementing that basic principle.").

South Carolina courts follow this approach and construe the term "involving interstate commerce" under the FAA expansively. *See, e.g.*, *Zabinski*, 346 S.C. at 594-96, 553 S.E.2d 110, 117-18 (holding that a real-estate partnership involved interstate commerce because it utilized out-of-state materials, contractors, and investors); *Munoz*, 343 S.C. at 539, 542 S.E.2d at 360 (2001) (holding that an installment contract involved interstate commerce where the builder was domiciled in South Carolina but assigned rights to a Delaware creditor, the contract was prepared in Minnesota, and proceeds were disbursed from Minnesota); *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 651-52 (1977) (holding that a construction contract involved interstate commerce where materials, equipment, and supplies were produced and manufactured out of state), *aff'd*, 273 S.C.181, 255 S.E.2d 451 (1979); *see also McCollum v. Tenet HealthCare Corp.*, No. 0:06-1934-JFA-BM, 2006 WL 3373096, at *3-4 (D.S.C. Nov. 20, 2006) (holding that an employment agreement involved commerce where the employee contracted with the out-of-state defendant, was paid by an out-of-state entity, and his employment involved treatment of out-of-state patients and the use of out-of-state products);

Circle S. Enters., Inc. v. Stanley Smith & Sons, 288 S.C. 428, 343 S.E.2d 45 (Ct. App. 1986) (holding that a construction contract involved commerce where the equipment, materials, and subcontractors were furnished from out of state).

The FAA's interstate commerce requirement is satisfied here. The Arbitration Agreement is subject to the FAA because the care and treatment that the Facility provides to its residents, in the aggregate, affects interstate commerce. *See Citizens Bank*, 539 U.S. at 57 ("Only that general practice need bear on interstate commerce in a substantial way" to satisfy the FAA). Defendants adduced unchallenged evidence that during Ms. Brinson's residency, the Facility received referrals with respect to prospective out-of-state residents. (Swinton-Mickens Aff. ¶ 7). Moreover, the Facility's employees and staff regularly communicated with existing and prospective patients and their families who lived outside of South Carolina. (*Id.* ¶ 6). The Facility had 104 licensed beds that were certified by, and participated in, the Medicare and Medicaid programs, and the annual average occupancy rate in 2006 was 96%. (*Id.* ¶ 17). In 2006, Medicare paid approximately $287,000 to the Facility, which constituted 20% of the Facility's annual revenue. (*Id.* ¶¶ 10-11). In 2006, the South Carolina Medicaid program (a portion of which is funded by the federal government) paid approximately $438,000 to the Facility, which constituted 44% of the Facility's annual revenue. (*Id.* ¶¶ 12-14).

The Facility also made requests for coverage via the mail to private insurance companies located outside of South Carolina. (*Id.* ¶ 15). These private insurers transferred payments to the Facility in interstate commerce, which constituted 14% of the Facility's revenue in 2006. (*Id.* ¶ 16). The Facility also had numerous affiliates in out-of-state offices, as Ms. Coleman alleged in her Complaints. (Defs.' Mem. in Supp., Ex. B; Compls. ¶¶ 2-38). And the Facility purchased

essential supplies and services from out-of-state vendors and businesses. (Swinton-Mickens Aff. ¶ 19). On this record, the FAA's interstate commerce requirement is satisfied.

C. *Timms v. Greene* Is Not Controlling

The trial court wrongly relied on *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993), in concluding that the Arbitration Agreement did not involve interstate commerce. In *Timms*, the Court held that a contract between a nursing home and a resident lacked a sufficient connection to interstate commerce to trigger the FAA. In *Timms*, the nursing home alleged that it was a division of a Delaware limited partnership, marketed its services to out-of-state persons, hired out-of-state employees, purchased a majority of its supplies outside the state, and "contemplate[d]" payment by Medicare or Medicaid. 310 S.C. at 473, 427 S.E.2d at 644. Notwithstanding this nexus to interstate commerce, the Court held that "[a]lthough these factors could evidence the [facility]'s involvement in interstate commerce, we find that their relationship to the *agreement between the [facility] and the [resident]* is insufficient to form the basis of the contract between the parties." *Id.* (emphasis added). In short, *Timms* acknowledged that the facility's operations in the aggregate affected commerce, but the Court did not apply the FAA because there was no specific nexus between interstate commerce and the parties' agreement.[2]

Timms no longer is viable given the U.S. Supreme Court's recent jurisprudence applying the "involving interstate commerce" standard, *Citizens Bank*, 539 U.S. 52,[3] and our courts' adoption of the same approach. *See Thornton v. Trident Med.. Ctr., LLC*, 357 S.C. 91, 95-96, 592 S.E.2d 50, 52-53 (Ct. App. 2003); *see also Grohn v. Sisters of Charity Health Servs. Colo.*,

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[2] It also should be noted that the parties in *Timms* expressly agreed to be governed by the South Carolina Uniform Arbitration Act, not the FAA (310 S.C. at 472-73, 427 S.E.2d at 644), and the Court would have had to improperly disregard the parties' intent to apply the FAA in that case.

[3] *See also Marmet Health Care*, 132 S. Ct. 1201.

98 Colo. J. 2722, 960 P.2d 722, 725 (Colo. Ct. App. 1998) (rejecting *Timms*). *Citizens Bank* effectively overruled the *Timms* Court's view of the applicability of the FAA, as the interstate commerce indicated in *Timms* meets the requirements set forth in *Citizens Bank*, and the recent *Marmet Health Care* decision bolsters this conclusion. This Court also should view *Timms* against the weight of contemporary authority in other jurisdictions recognizing that nursing-home arbitration agreements, by their nature, involve interstate commerce under the FAA.[4]

Even under a *Timms*-based analysis, Defendants have nonetheless demonstrated a nexus between interstate commerce and the Arbitration Agreement. Defendants established that during Ms. Brinson's residency, *her* expenses *in fact* were paid by Medicaid. (Swinton-Mickens Aff. ¶ 18). Thus, federal funds were used directly to pay for "a substantial portion" of Ms. Brinson's care and treatment. (*Id.* ¶ 18). In addition, the Facility purchased from out-of-state suppliers a host of good and services—e.g., food, medical equipment, and telephone service—that were used specifically for Ms. Brinson's care. (*Id.* ¶ 19). In short, these facts create a specific nexus between interstate commerce and the Arbitration Agreement that was absent in *Timms*.

Lastly, unlike in *Timms*, the Arbitration Agreement triggers the FAA because, as noted above, (1) the parties stipulated that the FAA applies, and (2) the Agreement expressly evidences

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[4] *See, e.g.*, *Canyon Sudar Partners, LLC v. Cole*, No. 3:10-1001, 2011 WL 1233320, at *10 (S.D.W. Va. Mar. 29, 2011); *Carter v. SSC Odin Operating Co., LLC*, 353 Ill. Dec. 422, 428-29, 955 N.E.2d 1233, 1239-40 (Ill. App. Ct. 2011); *Estate of Ruszala v. Brookdale Living Cmtys., Inc.*, 415 N.J. Super. 272, 290-93, 1 A.3d 806, 817-18 (N.J. 2010); *Triad Health Mgmt. of Ga., III, LLC v. Johnson*, 298 Ga. App. 204, 205-06, 679 S.E.2d 785, 787-88 (Ga. Ct. App. 2009); *Rainbow Health Care Ctr., Inc.*, 2008 WL 268321, at *2-6; *Miller v. Cotter*, 448 Mass. 671, 678, 863 N.E.2d 537, 544 (Mass. 2007); *Washburn v. Beverly Enters.-Georgia, Inc.*, No. CV 106-51, 2006 WL 2728627, at *2 (S.D. Ga. Aug. 3, 2006), *rev'd on other grounds*, 2006 WL 3404804 (S.D. Ga. Nov. 14, 2006); *In re Nexion Health at Humble, Inc.*, 48 Tex. Sup. Ct. J. 805, 173 S.W.3d 67, 69 (Tex. 2005); *Briarcliff Nursing Home v. Turcotte*, 894 So. 2d 661, 667-68 (Ala. 2004); *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983, 987-88 (Ala. 2004);*Toledo v. Kaiser Permanente Med. Grp.*, 987 F. Supp. 1174, 1180 (N.D. Cal. 1997).

commerce on its face. *See McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575, at *5 (D.S.C. Dec. 15, 2011); *see also Jenkins*, 400 F.3d at 875 n.5; *Primerica Fin. Servs.*, 217 Ga. App. at 37, 456 S.E.2d at 633. In sum, there is no question that the FAA governs the Arbitration Agreement and the trial court erred in concluding otherwise.[5]

II. MS. COLEMAN HAD AUTHORITY TO SIGN THE ARBITRATION AGREEMENT ON MS. BRINSON'S BEHALF

The trial court's determination that Ms. Coleman lacked authority to sign the Arbitration Agreement on Ms. Brinson's behalf was wrong for at least three reasons. (March Orders at 3-8).

A. The AHCCA Authorized Ms. Coleman To Sign The Arbitration Agreement Because It Was A "Decision Concerning Health Care"

The AHCCA authorized Ms. Coleman to sign the Arbitration Agreement. *See* S.C. Code Ann. § 44-66-10 *et seq.* Under the Act, "**[1]** [w]here a patient is unable to consent, **[2]** decisions concerning h[er] health care may be made by . . . **[3]** an adult sibling . . . ." S.C. Code Ann. § 44-

[5] Although the time for petitioning for rehearing has not yet expired and the decision is therefore not yet final, Defendants are aware of this Court's recently published opinion in *Flexon v. PHC-Jasper, Inc. d/b/a Coastal Carolina Medical Center*, No. 4950, 2012 WL 720294 (S. C. Ct. App. Mar. 7, 2012). In *Flexon*, the Court affirmed the circuit court's denial of a motion to compel arbitration with respect to a dispute arising out of an employment agreement, finding that the subject employment agreement did not involve interstate commerce, and the FAA did not apply. Assuming, *arguendo*, and most respectfully, that *Flexon* was correctly decided, it is nonetheless distinguishable from the present case. And, of course, as this Court has recognized, "[i]n all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case." *Thornton*, 357 S.C. at 95-96, 592 S.E.2d at 52 (citing *Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117 ("To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts.")). As an initial matter, here, unlike in *Flexon*, there is an express agreement that the FAA applies. Further, the subject agreement for the admission, care, and treatment of Ms. Brinson is, with respect to the effect on interstate commerce, broader, both on its own and in the aggregate as a general practice, than the agreement between the employer and employee at issue in *Flexon*, which agreement was there found by the circuit court to "call[] [merely] for local medical services to be performed by a Hardeeville [(i.e., local)] resident at a medical facility located in Hardeeville." 2012 WL 720294, at *2.

66-30(A)(6) (brackets and numbers added). Ms. Coleman satisfied all of the statutory predicates to act as Ms. Brinson's surrogate under the Act.

In denying Defendants' Motion, the trial court determined that only the second requirement had not been met.[6] But the court was wrong because the Arbitration Agreement (both standing alone and as incorporated into the Admission Contract) plainly was a "decision[] concerning [Ms. Brinson's] health care." S.C. Code Ann. § 44-66-30(A).

Under the Act, the definition of "health care" includes "the provision of intermediate or skilled nursing care; services for the rehabilitation of injured, disabled, or sick persons; and *the placement in or removal from a facility that provides these forms of care*." *Id.* § 44-66-20(1) (emphasis added). The trial court construed the Act to mean that Ms. Coleman had authority to make only "healthcare decisions," which meant "consent for medical treatment." (March Orders at 4). Based on this narrow reading, the court concluded that such authority "does not confer legal authority to enter into contracts for another person." (*Id.*).

The court's interpretation fails to give effect to the Act's text and contravenes established canons of statutory construction. "Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning." *S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control*, 390 S.C. 418, 425, 702 S.E. 246, 250 (2010). Moreover, it is presumed that legislatures use each word for a reason, and courts must endeavor to interpret every statute to give effect to those words. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotations and citation omitted) ("It is a cardinal

[6] It is undisputed that Ms. Brinson was unable to consent to her admission to the Facility (Defs.' Mem. in Supp., Ex. E), and that Ms. Coleman was her biological sister (Ann Coleman Aff. ¶ 2).

principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.").

The word "concerning" is broad in scope—and its inclusion in the AHCCA was no accident. The term "concerning" naturally expands the Act's coverage to include decisions "in connection with" or "relating to,"[7] *inter alia*, "placement in or removal from a facility that provides . . . [health] care."[8] S.C. Code Ann. § 44-66-20(1). Any other interpretation would render the word "concerning" surplusage and undermine the legislature's intent to confer broad authority enabling the surrogate to make all decisions "relating to" and "in connection with" the incapacitated person's health care. Indeed, by authorizing the surrogate to make decisions *concerning* health care for the incapacitated person, the legislature appears to have envisioned that the surrogate stands in the shoes of the incapacitated person and is vested with the same authority that the incapacitated person might have exercised but for her disability. Any other

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[7] Merriam Webster Online Dictionary, *available at* http://www.merriam-webster.com (last visited Mar. 9, 2012); Oxford English Online Dictionary, *available at* http://www.oed.com (last visited Jan. 15, 2012).

[8] The term "concerning" is expansively construed in other contexts as well. *See, e.g.*, *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal. 4th 524, 531, 246 P.3d 612, 616 (2011) (internal quotations and citation omitted) (interpreting "information concerning the cardholder" to include a credit card holder's ZIP code, because a ZIP code "is certainly information that pertains to or regards the cardholder"); *Morley v. C.I.A.*, 508 F.3d 1108, 1118 (D.C. Cir. 2007) (internal quotations and citation omitted) (interpreting "information concerning . . . the specific subject matter of an investigation" to include information that is not necessarily the subject of the investigation because "Congress chose to use the word 'concerning' . . . [as] a 'broadly inclusive term"); *Bloomberg, L.P. v. U.S. Food & Drug Admin.*, 500 F. Supp. 2d 371, 377 (S.D.N.Y. 2007) (interpreting "inform the public concerning actual or alleged Federal Government activity" to include more than just information that originates from the government, explaining that "'concerning' in this context is significant because it does not suggest an exclusive or definitive source of the information that might shed light on the relevant government activity . . . . [and] in its ordinary meaning is much more broadly understood").

conclusion ignores the reality that, as evident here, admission to any health care facility involves a myriad of decisions, not just whether to consent to care.[9]

Thus, the AHCCA applies to the Arbitration Agreement, which requires the parties to arbitrate all disputes, "including matters involving [Ms. Brinson's] stay and care provided at the Facility . . . ." (Defs.' Mem. in Supp., Ex. B at 2). Indeed, there is no denying that the Arbitration Agreement was a "decision[] *concerning* [Ms. Brinson's] health care" because it establishes the mechanism pursuant to which disputes regarding the Facility's provision of care and treatment to Ms. Brinson would be resolved.[10]

Finally, the trial court's determination that the Act confers no "legal authority to enter into contracts for another person" was incorrect because the statute contemplates—both expressly and by necessary implication—a surrogate's authority to enter into contracts. To be sure, the Act *expressly* permits the surrogate to make "decisions" concerning a patient's care. Ms. Coleman does not claim that she lacked authority to sign the Admission Contract—nor

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[9] For example, during the admission process, Ms. Coleman exercised her authority to make decisions on Ms. Brinson's behalf regarding personal property, use of photographs of Ms. Brinson, and her laundry service. (Defs' Mem. in Supp., Ex. F) Moreover, the Admission Contract itself applies to more than just consent to care. For example, the Admission Contract addresses the resident's room and board, room furnishings, and maintenance of personal belongings. (Defs' Mem. in Supp., Ex. A at 3).

[10] The trial court cited *Munn v. Haymount Rehab. & Nursing Ctr., Inc.*, 704 S.E.2d 290, 296-97 (N.C. App. 2010), in support of its ruling (March Orders at 5), but *Munn* is inapposite because it interpreted and applied a far narrower statute. Indeed, comparison of the North Carolina and South Carolina statues disproves the trial court's cramped reading of the South Carolina Act. The North Carolina law is more limited than its South Carolina counterpart, because it pertains only "to consent to *medical treatment* on behalf of a patient who is comatose or otherwise lacks capacity to make or communicate health care decisions." N.C. Gen. Stat. § 90-21.13(c) (emphasis added). Nothing in the North Carolina statute affords the broader authority that the South Carolina Act grants to a surrogate to make any "decisions *concerning* . . . health care." (Emphasis added).

could she do so, given that she has asserted a claim against Defendant for breaching the Admission Contract. (*See* Point II.C, *infra*). This agreement is itself a legally binding contract that undoubtedly concerns "the placement in or removal from a facility." S.C. Code Ann. § 44-66-20(1). Given the court's recognition that the Act authorizes a surrogate to execute a nursing-home admission agreement, the court's conclusion that the Act does not grant authority to enter into contracts is plainly wrong.

The Act also *implicitly* permits a surrogate to sign health care contracts. The distinction drawn by the court allowing a surrogate to make "healthcare decisions," but precluding a surrogate from forming a legally binding contract, is the paradigm of a distinction without a difference. Every decision to receive health care is a contract. The health care provider offers care; the patient (or surrogate) accepts (or declines) the offer. If the offer to provide care is accepted, the implicit obligation of due care imposed by the contract and by law is enforceable in an action for breach of contract—precisely one of the claims Ms. Coleman raises here.

The court's perceived distinction between a "legally binding contract" and a "healthcare decision" would erect formidable obstacles for surrogates seeking treatment. In an environment where decisions often need to be made quickly, the validity of each provision of a contract signed—or decision made—by a surrogate could be undermined by post-hoc questions as to whether it was an unauthorized legal contract or a healthcare decision. Introduction of uncertainty into the patient-healthcare provider relationship could impair a surrogate's ability to obtain services. This result would leave the patient in "legal limbo," where she lacks capacity to enter into a contract for health care, and her surrogate's authority to do so is questionable at best. *See Necessary v. Life Care Ctrs. of Am., Inc.*, No. E2006-00453-COA-R3-CV, 2007 WL 3446636, at *4-5 (Tenn. Ct. App. Nov. 16, 2007) (holding that a plaintiff who had authority to

enter into an admission contract had authority to enter into an arbitration agreement, even in the absence of a power of attorney, to avoid "legal limbo").

The legislature plainly conferred upon surrogates explicit authority to make it easier for them to obtain care for incompetents. In large measure, this objective is achieved by eliminating uncertainty about who may authoritatively speak for a prospective patient and by conferring broad authority to make decisions "concerning" health care. The trial court's ruling thoroughly frustrates the legislature's intentions and makes the Act largely an empty promise. *See State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.").

The Arbitration Agreement "concern[ed]" Ms. Brinson's health care in the same way that the other contracts signed by Ms. Coleman—none of which she disavows—"concern[ed]" Ms. Brinson's health care. For example, during the admissions process, Ms. Coleman signed a "Laundry Authorization" form, in which she assumed control of Ms. Brinson's laundry services. (Defs' Mem. in Supp., Ex. F at 4). She also signed a "Resident Fund Management Service" contract, in which she authorized the Facility to establish and manage an interest-bearing resident fund to handle Ms. Brinson's payments for her stay. (Defs' Mem. in Supp., Ex. F at 10). In addition, Ms. Coleman entered into a "Consent to Photograph," in which she agreed to allow the Facility to take Ms. Brinson's photograph for identification purposes. (Defs' Mem. in Supp., Ex. F at 11). Even the Admission Contract itself covered far more than mere resident treatment—it also covers room and board, among other things. (Defs' Mem. in Supp., Ex. A at 3).

Arguably, none of these agreements would satisfy the trial court's overly narrow definition of a "healthcare decision" as "consent for medical treatment for someone unable to

consent," and yet there is no question that they related to Ms. Brinson's admission. An agent with authority to complete documents concerning the logistics of the resident's care, clothing, and monies is likewise permitted to decide whether future disputes with the facility arising from these items should be arbitrated. All of the documents in the admissions packet were part of the overall decision-making process concerning Ms. Brinson's care and treatment, and they were all within Ms. Coleman's authority as a surrogate to execute.

B. The Arbitration Agreement Cannot Be Disfavored

The trial court's conclusion that the AHCCA authorized Ms. Coleman to sign the Admission Contract and all of the other admission paperwork executed, but not the Arbitration Agreement because it "remov[ed] . . . Ms. Brinson's rights under the law" (March Orders at 16), was error in two further respects.

First, because Ms. Coleman relied upon her authority under the AHCCA to sign all of the Facility's admission paperwork for Ms. Brinson, the court's decision to single out and invalidate the Arbitration Agreement violated § 2 of the FAA. Section 2 provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exists at law or in equity for the revocation of any contract*." 9 U.S.C. § 2 (emphasis added). Thus, a court may set aside arbitration agreements by state-law defenses that govern the validity, revocability, and enforceability of contracts generally, but not "by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1742-43 (2011). In short, "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (internal quotations and citation omitted).

It follows that an arbitration agreement is voidable "if and only if the party resisting arbitration can point to a generally applicable principle of contract law under which the agreement could be revoked." *Fitz v. Islands Mech. Contractor, Inc.*, No. 08-cv-00060, 2010 WL 2384585, at *6 (D.V.I. June 9, 2010) (internal quotations and citation omitted); *see also Bradley v. Harris Res., Inc.*, 275 F.3d 884, 890 (9th Cir. 2001) ("[A] state law that invalidates arbitration agreements is not preempted by the FAA only if the law is 'generally applicable,' or applies to 'any contract'" (internal citation omitted)).

The Supreme Court time and again has set aside state laws that place arbitration agreements in a class apart from other contracts and limit their validity. The Court has done so even when a state law did not expressly mention arbitration, but as applied, disfavored arbitration. *See Preston*, 552 U.S. at 346 (FAA preempts state law that lodges primary jurisdiction in a non-arbitral forum even though the parties have agreed to arbitrate); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (FAA preempts state statute that required judicial resolution of disputes arising out of franchise agreements). Other courts also have recognized that the FAA preempts state laws that disfavor arbitration. *See, e.g.*, *Bradley*, 275 F.3d at 890 (FAA preempts statute that applies only to forum-selection clauses in franchise agreements, and not all contracts generally); *KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 50-51 (1st Cir. 1999) (FAA preempts statute applicable only to venue clauses in franchise agreements, and not all contracts); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (FAA preempts judicial ruling that applies only to forum-selection clauses in franchise agreements); *cf. Carter v. SSC Odin Operating Co., LLC*, 237 Ill. 2d 30, 46, 927 N.E.2d 1207, 1218 (2010) (FAA preempts the anti-waiver provisions of nursing-home law that does not "target" arbitration agreements explicitly).

Here, the trial court's disregard of this basic rule is evidenced by its interpretation of the AHCCA to authorize Ms. Coleman to execute the Admission Contract but not the Arbitration Agreement. (March Orders at 16 ("[W]hile Ann Coleman did have the right under the [Act] to consent to medical treatment, she did not have the right to commit her sister to a legally binding contract that agreed to the removal of Ms. Brinson's rights under the law.")). The court so construed the Act only because the Arbitration Agreement waived Ms. Brinson's right to a jury trial. The court made this crystal clear by stating that the Arbitration Agreement and Admission Contract are "[not] on the same footing," because "[a]n agreement concerning the provision of health care is a far different matter than an agreement to waive legal and constitutional rights." (*Id.* at 17). Yet the FAA provides that the Arbitration Agreement and Admission Contract must be on precisely the same footing. Indeed, the FAA was adopted to place "[a]n arbitration agreement . . . upon the same footing as other contracts, where it belongs." H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924).

Second, by distinguishing between Ms. Coleman's authority to enter into the Arbitration Agreement and her authority to enter into the Admission Contract, the trial court impermissibly disfavored the Arbitration Agreement by refusing to apply the generally applicable, common-law rule of merger. Under South Carolina law, two contracts executed at the same time, relating to the same subject matter, and entered into by the same parties, are to be construed as one contract and are considered as a whole. *See Café Assocs., Ltd. v. Gerngross*, 305 S.C. 6, 10, 406 S.E.2d 162, 164-65 (1991). "Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement

as actually made may be effectuated." *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88-89, 232 S.E.2d 20, 24 (1977).

Here, Ms. Coleman executed the Admission Contract and Arbitration Agreement at the same time and both documents related to Ms. Brinson's admission. Moreover, the singular treatment given below to the Arbitration Agreement by refusing to apply general contract laws is exacerbated because the documents expressly incorporate the other by reference. To be sure, the Admission Contract contains a merger provision entitled "Entirety of Agreement," which states that the Admission Contract, "including all Exhibits hereto, and the Arbitration Agreement between the Facility and [Ms. Brinson] . . . supersede all other agreements . . . and contain all of the promises and agreements between the parties." (Defs.' Mem. in Supp., Ex. A at 7). In the Arbitration Agreement, Ms. Brinson "acknowledge[d] that [the] Admission Agreement constitutes the foundation of the relationship between them and all duties and obligations arising between them," and agreed to "submit to binding arbitration all disputes . . . arising out of or in any way related or connected to the Admission Agreement." (Defs.' Mem. in Supp., Ex. B at 1, 2). The Arbitration Agreement—both by its terms and by operation of the common law—was merged into the Admission Contract, and the two documents are a single contract that contains an arbitration provision. Because Ms. Coleman had the authority to enter into the Admission Contract, she is subject to its arbitration provision. *See Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 338 S.E.2d 631 (1985) (holding that a contract between a builder and developer requiring payment of construction costs and a separate contract requiring payment of overhead and profits were a single, integrated contract subject to arbitration even though only the former required arbitration, where each agreement incorporated the other, and the purpose of each was compensation for a construction project).

C. Ms. Coleman Is Equitably Estopped From Denying Her Authority To Sign The Arbitration Agreement

South Carolina law also prohibits disfavoring obligations under a provision of a contract while seeking to enforce obligations imposed by another provision in the same contract. *See Jones v. Massingale*, 251 S.C. 456, 461-62, 163 S.E.2d 217, 219 (1968) ("This general proposition is based on the idea that it would be inconsistent and unjust to allow one to attack a contract that he has executed and at the same time to retain the benefits granted him thereunder."). This rule applies in the context of arbitration provisions. *See United States v. Bankers Ins. Co.*, 245 F.3d 315, 323 (4th Cir. 2001) ("[N]o party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision contained therein."); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000) (internal quotations and citation omitted) ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the [Federal] Arbitration Act.").

In this case, Ms. Coleman wants to hold the Facility liable for the alleged breaches of obligations that the Facility owed to Ms. Brinson under the Admission Contract, while simultaneously denying that contract's arbitration requirement. This is precisely what equitable estoppel prohibits. *See Wiggins*, 2011 WL 4089435, at *6 ("[W]here [nursing home] performed in reliance on the terms of the [Admission] Contract and [the resident] received the benefit of the Contract, it would be inequitable for [the resident's] estate (through its personal representative, Wiggins) to avoid the Contract's Arbitration Provision.").

Even if the Arbitration Agreement and Admission Contract were treated as separate, independent contracts, Ms. Coleman takes inconsistent positions regarding their validity which

requires application of equitable estoppel principles. To be sure, Ms. Coleman relied on the same authority under the AHCCA to sign both the Admission Contract and Arbitration Agreement. Thereafter, Ms. Brinson enjoyed the benefits of care and treatment at the Facility.[11] Under the circumstances, equitable estoppel bars Ms. Coleman from "assert[ing] that [she] had authority to sign the Admission [Contract], on behalf of [Ms. Brinson], but lacked such authority to sign the Arbitration Agreement." *McCutcheon*, 2011 WL 6318575, at *2-3. The trial court below erred in concluding otherwise.

III. DEFENDANTS ARE NOT JUDICIALLY ESTOPPED FROM ENFORCING THE ARBITRATION AGREEMENT

The trial court erroneously concluded that Defendants were precluded from compelling arbitration due to "inconsistent and irreconcilable positions" they asserted in their previously filed motion to dismiss for lack of personal jurisdiction. (March Orders at 15, 19). Citing no supporting authority, the court concluded that "[i]t cannot be rationally argued that all of these Defendants are parties to this [Arbitration Agreement], while at the same time argue [in their motion to dismiss] that they have never contracted in South Carolina, never conducted business in South Carolina or are not tied in with the operation of the nursing facility." (*Id.*). Although the trial court did not say so expressly, its ruling sounds in the doctrine of judicial estoppel.[12]

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[11] The benefits of admission were more palpable because Ms. Coleman worked at the Facility. Thus, she obtained care and treatment for Ms. Brinson in a familiar and easily accessible setting that Ms. Coleman knew firsthand provided good care. (Ann Coleman Aff. ¶ 5).

[12] The elements of judicial estoppel are: (1) two inconsistent positions taken by the same party or parties in privity; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Carrigg v. Cannon,* 347 S.C. 75, 83, 552 S.E.2d 767, 771-72 (Ct. App. 2001).

The trial court erred in several respects. *First*, there was nothing inconsistent with Defendants' claim that they had no minimum contacts with this forum to permit the court to exercise personal jurisdiction over them, and their contention that they may enforce the Arbitration Agreement. Defendant's positions in these motions posed no conflict because they involved different issues that must be adjudicated separately and, notably, neither addressed the merits of Ms. Coleman's underlying claims. *See Cothran v. Brown*, 357 S.C. 210, 216, 592 S.E.2d 629, 632 (2004) (noting that judicial estoppel requires that "the two positions must be totally inconsistent"); *see also New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("[A] party's later position must be 'clearly inconsistent' with its earlier position") (citations omitted).

Second, even if Defendants had asserted inconsistent positions, Defendants' motion to dismiss has no preclusive effect because the trial court denied it. *See Cothran*, 357 S.C. at 216 , 592 S.E.2d at 632 (noting that judicial estoppel requires that "the party taking the position must have been successful in maintaining that position and have received some benefit"); *see also Maine*, 532 U.S. at 750-51 ("Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations.") (internal quotations and citation omitted); *Whitten v. Fred's, Inc.*, 601 F.3d 231, 241 (4th Cir. 2010) ("[T]he prior inconsistent position must have been accepted by the court.") (internal quotations and citation omitted).

Finally, there is no judicial estoppel because Ms. Coleman did not (and could not) adduce any evidence, nor did the trial court find, that Defendants' purported inconsistencies were "part of an intentional effort to mislead the court." *Cothran*, 357 S.C. at 216, 592 S.E.2d at 62; *Whitten*, 601 F.3d at 241 ("[T]he party against whom judicial estoppel is to be applied must have

intentionally misled the court to gain unfair advantage."). Accordingly, judicial estoppel does not preclude Defendants from enforcing their arbitration rights.

IV. THE ARBITRATION AGREEMENT IS ENFORCEABLE AGAINST MS. BRINSON'S STATUTORY BENEFICIARIES

A. The Arbitration Agreement Expressly Covers Statutory Beneficiaries

The trial court erroneously concluded that the Arbitration Agreement does not cover Ms. Brinson's statutory beneficiaries. (March Orders at 8). Section II of the Agreement provides as follows:

> It is the intention of the Facility and the Resident that this Agreement shall inure to the benefit of and bind . . . the Resident, his/her ***successors***, assigns, agents, attorneys, insurers, ***heirs,*** trustees, and representatives***, including the personal representative or executor of his or her estate***; and the ***Legal Representative***, his/her successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives or executor of his or her estate.

(Defs.' Mem. in Supp., Ex. B at 2 (emphasis added)). By its terms, the Arbitration Agreement binds Ms. Coleman (who signed it herself) in her capacity as Ms. Brinson's "Legal Representative" and as the "personal representative" of her estate. The Agreement also covers Ms. Brinson's "successors" or "heirs" whose beneficiary interests Ms. Coleman represents. In the Agreement, the parties agreed to submit to arbitration "*all* disputes against each other *and their representatives*" that are "in any way related or connected" to Ms. Brinson's care at the Facility. (*Id.* (emphasis added)). Accordingly, the Agreement's plain language applies to Ms. Brinson's statutory beneficiaries.[13]

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[13] This language from the Arbitration Agreement shows that Ms. Brinson's "Legal Representative," "successors," and "heirs" also must arbitrate because they are third-party beneficiaries of the Agreement. "Under South Carolina law, '[a] third-party beneficiary is a party that the contracting parties intend to directly benefit.'" *Wiggins*, 2011 WL 4089435, at *6 (citation omitted)). The Arbitration Agreement expressly states that it "shall inure to the benefit"

B. The Arbitration Agreement Binds Ms. Brinson's Wrongful-Death Beneficiaries As A Matter of Law

The trial court ruled that, as a matter of law, the Arbitration Agreement is inapplicable to Ms. Coleman's wrongful-death claims. (March Orders at 8-9). This appears to be an issue of first impression in South Carolina, but this Court need only read the Wrongful Death Act, S.C. Code Ann. § 15-51-10, to see that the trial court was mistaken:

> [w]henever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, ***if death had not ensued, have entitled the 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. (Emphasis added).

In South Carolina, a wrongful-death right of action derives exclusively from the Wrongful Death Act. *See Green v. Southern Ry. Co.*, 319 F. Supp. 919, 920 (D.S.C. 1970). Thus, resolution of disputes in wrongful-death suits requires examination of the Wrongful Death Act, which is strictly construed. *See Hemingway v. Shull*, 286 F. Supp. 243, 249 (D.S.C. 1968). As always, "[c]ourts should ascertain the legislature's intent primarily from the plain language of the statute." *Ranucci v. Crain*, No. 4935, 2012 WL 243332, at *2 (Ct. App. Jan. 25, 2012) (internal quotations and citation omitted).

In the March Orders, the trial court did not consider the text of the Wrongful Death Act in concluding that wrongful-death beneficiaries are not bound by a decedent's agreement to arbitrate. (March Orders at 8-9). If the trial court had done so, it would have been compelled to reach the opposite conclusion.

First, the trial court noted that the Wrongful Death Act provides a cause of action that exists for a decedent's beneficiaries (*id.* at 8), but that is beside the point. The Act requires, as a

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Ms. Brinson's Legal Representative and beneficiaries. The third-party beneficiary doctrine is thus an independent basis to enforce the Agreement against Ms. Coleman.

condition of any suit, that the decedent herself, had she lived, could have "maintain[ed] an action and recover[ed] damages." S.C. Code Ann. § 15-51-10. By definition, a suit under the Wrongful Death Act is entirely derivative of the decedent's rights; and for more than a century, South Carolina courts have construed the statute accordingly. *See, e.g., Estate of Stokes v. Pee Dee Family Physicians, LLP*, 389 S.C. 343, 347, 699 S.E.2d 143, 145 (2010) ("[O]ur law has remained steadfast to the principle of limiting the right of recovery under the wrongful death statute to those cases in which the party injured would have been entitled to recover if death had not ensued." (cataloguing cases)); *Rish v. Seaboard Air Line Ry.*, 106 S.C. 143, 145, 90 S.E. 704, 704-05 (1916) ("The [Wrongful Death Act] gives a right of action where none existed before, and limited the right of recovery to those cases in which the party injured would have been entitled to recover if death had not ensued." (reaffirming *Price v. Richmond & D.R. Co.*, 33 S.C. 556, 560, 12 S.E. 413, 413-14 (1890) ("[T]he capacity of the deceased to maintain an action based upon the injury which caused his death is made the test of the right of the administrator to maintain the action provided for by the [Wrongful Death Act]; hence if the deceased has debarred himself, by his contributory negligence, ***or by any other cause***, from maintaining his action based upon the injury which caused his death, it follows necessarily that his administrator is likewise barred of his right of action, which would otherwise be secured to him by the statute. In all cases, . . . the controlling question [] is whether the deceased, if he had not died, could have maintained the action.") (Emphasis added))).

Second, a beneficiary thus stands in the shoes of the decedent and is subject to all defenses or limitations that could have been asserted against her—including limitations imposed by the decedent prior to death that vitiate or constrain a beneficiary's ability to assert a wrongful-death cause of action. *See Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 942 (D.S.C.

1988) ("[A]nything that would have defeated the decedent's recovery had he survived the accident, 'such as contributory negligence, a valid release, or similar acts on his part,' would defeat the right of recovery in behalf of his family in case of his death." (quoting *Reed v. Northeastern R.R.*, 37 S.C. 42, 53, 16 S.E. 289, 291 (1892)); *see also Stokes*, 389 S.C. at 349, 699 S.E.2d at 146 (holding that if the decedent failed to timely sue for malpractice that was the cause of death, such that he would have had no right of recovery on his time-barred claim, his estate has no right of action under the Wrongful Death Act). The Wrongful Death Act admits no other conclusion—and neither Ms. Coleman nor the trial court contended otherwise.

The South Carolina Wrongful Death Act tracks the language of wrongful death statutes of a majority of other states, including Michigan, Mississippi, Nebraska, and North Carolina. These statutes are based on Britain's Lord Campbell's Act. *See* 12 Am. Jur. Trials 317, § 3 (Updated Apr. 2011) ("[M]ost American [wrongful death] statutes are patterned" on the Lord Campbell's Act); *see also Quattlebaum*, 685 F. Supp. at 940-41 ("South Carolina's wrongful death statute is derived from or modeled after Lord Campbell's Act"). Courts in these states read their statutes—which, like South Carolina's Act, permit a suit only where a defendant's conduct would, if death had not ensued, have entitled the party injured to maintain an action and recover damages—to mean that a wrongful death action is derivative. *See Cleveland v. Mann*, 942 So. 2d 108, 118 (Miss. 2006) (en banc) (Miss. Code Ann. § 11-7-13: "Based on the clear language of the statute, a wrongful death beneficiary is only allowed to bring claims that the decedent could have brought if the decedent had survived."); *Ballard v. Southwest Detroit Hosp.*, 119 Mich. App. 814, 818, 327 N.W.2d 370, 371 (Mich. App. Ct. 1982) (per curiam) (M.C.L. § 600.2922(1): same); *Bales v. Arbor Manor, SSC*, No. 4:08CV3072, 2008 WL 2660366, at *8 (D. Neb. July 3, 2008) (Neb. Rev. Stat. § 30-809: same); *accord Wilkerson v. Nelson*, 395 F. Supp.

2d 281, 288-89 (M.D.N.C. 2005) (N.C. Gen. Stat. § 28A-18-2: same). Accordingly, "[a]ny substantive impediment that would have prevented the decedent from commencing suit will likewise preclude suit by the personal representative." *Ballard*, 119 Mich. App. at 818, 327 N.W.2d at 371.

The U.S. Supreme Court recently held that a decedent's arbitration agreement governs a wrongful-death claim. In 2011, West Virginia's highest court held that the FAA does not protect pre-dispute arbitration agreements covering claims for wrongful death. *See Brown v. Genesis Healthcare Corp.*, No. 35494, 2011 WL 2611327, at *34 (W. Va. June 29, 2011). As a result, the West Virginia court imposed a judge-made rule whereby, "as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence." *Id.* at *29.

The nursing facilities whose agreements had been invalidated by the West Virginia court thereafter filed petitions for writs of certiorari in the U.S. Supreme Court. In granting those petitions and summarily reversing the West Virginia court's decision without requiring full merits briefing or oral argument, the U.S. Supreme Court explained that the FAA provides "no exception for personal-injury or wrongful-death claims. It requires courts to enforce the bargain of the parties to arbitrate." *Marmet Health Care*, 132 S. Ct. at 1202 (per curiam) (internal quotations and citation omitted). "West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes," the Court explained, "is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA." *Id.* at 1203-04.

The Supreme Court of Texas has construed Texas's wrongful-death statute—which, like the South Carolina Act, applies "only if the individual injured would have been entitled to bring an action for the injury if the individual had lived," Tex. Civ. Prac. & Rem. Code § 71.003(a)—to mean that "the right of statutory beneficiaries to maintain a[n] [] action is entirely derivative of the decedent's right to have sued for [her] own injuries immediately prior to [her] death." *In re Labatt Food Serv., L.P.*, 52 Tex. Sup. Ct. J. 352, 279 S.W.3d 640, 644 (Tex. 2009). "Thus, it is well established that statutory wrongful death beneficiaries' claims place them in the exact 'legal shoes' of the decedent, and they are subject to the same defenses to which the decedent's claims would have been subject." *Id.* (quotation marks and citation omitted).

In short, "wrongful death beneficiaries . . . [are] bound by a decedent's contractual agreement that completely disposes of the beneficiaries' claims . . . [and] by a contractual agreement that merely changes the forum in which the claims are to be resolved." *Id.* at 645-46. Persuasive decisions from other jurisdictions have construed other wrongful-death statutes to compel wrongful-death claimants like Ms. Coleman to arbitrate. *See Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661, 664-65 (Ala. 2004) (per curiam); *Sanford v. Castleton Health Care Ctr., LLC*, 813 N.E.2d 411, 421 (Ind. Ct. App. 2004); *Cleveland*, 942 So. 2d at 119; *Ballard*, 119 Mich. App. at 819, 327 N.W.2d at 372; *Bales*, 2008 WL 2660366, at *8; *Laizure v. Avante at Leesburg, Inc.*, 35 Fla. L. Weekly D2180, 44 So. 3d 1254, 1258-59 (Fla. Dist. Ct. App.), *review granted*, 51 So. 3d 465 (Table), 2010 WL 5662965 (Fla. Dec. 14, 2010); *cf. Rizzo v. GGNSC Holdings, LLC*, No. 10-45-HRW, 2011 WL 4565785, at *3 (E.D. Ky. Sept. 29, 2011); *Estate of Eckstein v. Life Care Ctrs. of Am., Inc.*, 623 F. Supp. 2d 1235, 1239-40 (E.D. Wash. 2009).

Section 2 of the FAA compels the same result. If a decedent, prior to death, granted a release to a defendant of future claims based on the defendant's acts that later were the cause of death, any wrongful-death claim would be extinguished. This is so because under the Wrongful Death Act's terms, the decedent no longer could have "maintain[ed] an action and recover[ed] damages." *See Rish*, 106 S.C. at 147, 90 S.E. at 705 (rejecting wrongful-death claim because "[t]he defendant pleaded a release executed by the decedent in his lifetime, as a bar to recovery"); *see also Quattlebaum*, 685 F. Supp. at 942 (noting that under the South Carolina Wrongful Death Act, "a valid release . . . would defeat the right of recovery in behalf of [the decedent's] family"); *Bales*, 2008 WL 2660366, at *8 ("[I]f a personal injury cause of action is settled or reduced to judgment prior to the injured person's death, no wrongful death action can later be brought based on that same injury."). If a decedent's pre-death release or settlement bars a later wrongful death claim, as it must, an arbitration agreement also must be enforced because to do otherwise "would violate the FAA's express requirement that states place arbitration contracts on equal footing with other contracts." *Labatt*, 279 S.W.3d at 645-46. In any event, it would be anomalous if a wrongful-death estate's damages claim could be barred by agreements entered into by the decedent, but the decedent's agreement that any available claims must be decided in an arbitral forum would not bind the estate.

In sum, as explained above, Ms. Brinson was bound by the Arbitration Agreement. Thus, because Ms. Brinson was barred from bringing an "action" in court due to the Agreement, her wrongful-death beneficiaries, including Ms. Coleman, are barred as well.[14]

[14] The trial court made no finding that Ms. Coleman's survivorship claims were not subject to the the Arbitration Agreement—and for good reason. South Carolina's survival statute merely prevents abatement of an injured person's claim and permits their enforcement by a personal representative. *See* S.C. Code Ann. § 15-5-90. Such claims belong exclusively to the decedent's

V. THERE WAS NO PROCEDURAL UNCONSCIONABILITY[15]

Ms. Coleman did not even come close to demonstrating procedural unconscionability. The trial court incorrectly ruled that the Arbitration Agreement was procedurally unconscionable because (1) the Facility deviated from its internal policies by not explaining the Agreement to Ms. Coleman, and (2) not all of the Defendants moved to compel arbitration, thus posing a potential danger of conflicting rulings on common issues if certain of Ms. Coleman's claims are referred to arbitration and others are heard in court. (March Orders at 9-10).

First, even if the Facility did not explain the Arbitration Agreement to Ms. Coleman, that does not prove unconscionability because, if nothing else, Ms. Coleman never claimed that she did not understand the Agreement. (Ann Coleman Aff. ¶¶ 1-14). Nor could Ms. Coleman do so given her representation that she "**UNDERST[OOD] THAT BY SIGNING THIS AGREEMENT EACH HAS WAIVED HIS/HER RIGHT TO A TRIAL, BEFORE A JUDGE OR JURY, AND THAT EACH OF THEM VOLUNTARILY CONSENTS TO ALL OF THE TERMS OF THE AGREEMENT**." (Defs.' Mem. in Supp., Ex. B at 3).

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estate and are subject to any restrictions the decedent placed on them during her lifetime. To be sure, "causes of action made to survive under the statute are those actions which the deceased person could have brought in his lifetime against the wrongdoer for injuries by him." *Gowan v. Thomas*, 237 S.C. 223, 224-25, 116 S.E.2d 761, 761 (1960) (holding that the administrator of decedent's estate could not recover funeral expenses in an action under the survival statute because one cannot sue and recover for his own funeral expenses); *see also Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 97 (2002) ("[A]ny cause of action which could have been brought by the deceased in his lifetime survives to his representative."). Because Ms. Coleman's survival action is equally derivative, it is precluded by Ms. Brinson's agreement to arbitrate.

[15] The March Orders also indicate that the Arbitration Agreement is "substantively unconscionable," but trial court pointed to no provision of the Agreement that makes it substantively unconscionable. (March Orders at 3 (section heading)). *See* 8 Richard A. Lord, *Williston on Contracts* § 18:10 (4th ed. 1998) (explaining that substantive unconscionability "relates to the substantive contract terms themselves").

Moreover, even if Ms. Coleman did not understand the Arbitration Agreement, that is not procedural unconscionability—not by a long shot.[16] *See Day v. Persels & Assoc., LLC*, No. 8:10-CV-2463-T-33TGW, 2011 WL 1770300, at *6 (M.D. Fla. May 9, 2011) ("[Plaintiff's] assertion that she 'did not understand the language regarding arbitration' and that '[t]he arbitration language is not clear to me' is simply too vague and conclusory;" given that the arbitration clause was clearly delineated, "it is not good enough to simply say in general that the language was not clear and [the plaintiff] did not understand it."). To ensure that it could not be overlooked, the Arbitration Agreement was a three-page, stand-alone document that Ms. Coleman was directed to "***PLEASE READ CAREFULLY***" (Defs.' Mem. in Supp., Ex. B at 1), and that clearly explained the arbitral process (*see id.*). Notably, Ms. Coleman never *told* the Facility that she did not understand the Agreement or *asked* the Facility to clarify it for her. Nor did Ms. Coleman make even the bare allegation that the Facility would not have helped her if she had done so.

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[16] The Facility had no duty of clairvoyance to read Ms. Coleman's mind; if she did not understand the Agreement, it was her duty to seek advice. *See Ratliff v. CoStar Realty Info., Inc.*, No. 11-0813, 2011 WL 2680585, at *6 (D. Md. July 7, 2011) ("Plaintiff does not cite any case law suggesting that [Defendant] had an obligation to ensure that she understood each and every term of the [arbitration] agreement prior to signing, nor is the court aware of any."). Nor did the Facility's internal policy relieve Ms. Coleman of her duty to read the Agreement. "[E]very contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it . . . [and] cannot complain of fraud and misrepresentation in the contents of a document if the truth could have been ascertained by reading it." *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 39-40, 340 S.E.2d 789, 789 (1986) (citation omitted)); *see also First Baptist Church of Timmonsville v. George A. Creed & Son, Inc.*, 276 S.C. 597, 599, 281 S.E.2d 121, 123 (1981) ("[I]n the absence of a showing of fraud, mistake, unfair dealing or the like, a party to a contract incorporating an arbitration provision cannot escape the obligation of such a provision by simply declaring: 'But I did not read the whole agreement.'").

In addition, while Ms. Coleman professed to being "very emotionally upset and concerned about [Ms. Brinson's] condition" when she admitted her to the Facility, this is not procedural unconscionability either. (Ann Coleman Aff. ¶ 12). There was no allegation that the Facility prevented Ms. Coleman from reading the Arbitration Agreement or improperly pressured or hastened her to sign it without comprehending its terms. Ms. Coleman signed the Agreement and other admission paperwork a full day *before* Ms. Brinson moved into the Facility; thus, there was no emergency that barred her from reading the Arbitration Agreement and other admission forms. *See Rinderle v. Whispering Pines Health Care Ctr.*, No. CA2007-12-041, 2008 WL 3823701, at *3 (Ohio Ct. App. Aug. 18, 2008) (rejecting procedural unconscionability claim because the record "d[id] not indicate that the admission was an emergency").

Further, in an affidavit in opposition to Defendants' Motion to Compel Arbitration, Ms. Coleman attested that "I was simply told that I needed to sign the Arbitration Agreement as a condition to [Ms.] Brinson's admission to the [F]acility." (Ann Coleman Aff. ¶ 8). This post-hoc, self-serving claim cannot be credited, however, because the Arbitration Agreement itself plainly stated that it was *purely voluntary*: "The execution of this Agreement is ***not a precondition*** to receiving medical treatment or for admission to the Facility." (Defs.' Mem. in Supp., Ex. B at 3 (emphasis added)). Moreover, the Admission Contract (into which the Arbitration Agreement was merged) specifically states that it and the Arbitration Agreement "supersede all other agreements, either oral or in writing, between the parties, and contain all of the promises and agreements between the parties." (Defs.' Mem. in Supp., Ex. A at 7).

Regardless of what Ms. Coleman claims the Facility told her, and even if she did not read the Arbitration Agreement or was confused about its contents before she signed it, the

Agreement afforded her *30 days* (after she signed it) to seek advice to clear up her uncertainty and, if she so elected, to cancel the Agreement—which she did not do. (Defs.' Mem. in Supp., Ex. B at 3). *See Ratliff*, 2011 WL 2680585, at *6 (rejecting procedural unconscionability defense where arbitration agreement contained a seven-day revocation provision); *see also THI of N.M. at Hobbs Ctr., LLC v. Patton*, No. 11-537 LH/CG, 2012 WL 112216, at *22 (D.N.M. Jan. 3, 2012) ("[signatory's] mere subjective feeling of not being free to decline the arbitration terms [is not] enough to demonstrate procedural unconscionability"). This is not unconscionability.

Second, the trial court's determination that the Agreement was unconscionable because only some Defendants sought to enforce it—thus posing the prospect of conflicting rulings by different tribunals if Ms. Coleman's arbitral claims were referred to arbitration and her remaining claims were heard by a court (March Orders at 10-11)—was just plain wrong. Under the FAA, "if a dispute presents multiple claims, some arbitrable and some not, *the former must be sent to arbitration even if this will lead to piecemeal litigation.*" *KMPG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011) (per curiam) (emphasis added); *see also Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985) (holding that the FAA requires "arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums."). The same is true under the South Carolina Uniform Arbitration Act. *See Wellman v. Square D Co.*, 366 S.C. 61, 71, 620 S.E.2d 86, 91 (2005) (following *Dean Witter*, holding that "a trial court may not refuse to enforce an otherwise valid arbitration provision on the basis of judicial economy").[17]

[17] The trial court cited *Birl v. Heritage Care, LLC*, 172 Cal. App. 4th 1313, 1321 (Cal. Ct. App. 2009) (March Orders at 10-11), but *Birl* could not be more inapposite because it was based on

In the end, the trial court was wrong—there was nothing unfair, let alone procedurally unconscionable, about the Arbitration Agreement.

VI. DEFENDANTS DID NOT WAIVE THEIR ARBITRATION RIGHTS

Defendants did not waive their right to seek arbitration. In asserting waiver, Ms. Coleman had to show that she was prejudiced by an undue burden caused by Defendants' delay in demanding arbitration. *See Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 131, 713 S.E.2d 799, 806 (Ct. App. 2011). Factors to consider are "(1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration." *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007).

The trial court's finding of waiver was based on undue delay. Specifically, the court concluded that Defendants forfeited their arbitration rights because they did not file their Motion to Compel Arbitration until approximately one year after Ms. Coleman filed her *Notices of Intent to File Suit*. (March Orders at 12-14). The court applied the wrong legal standard. As *Rhodes* makes plain, "a party may waive its right to compel arbitration if a substantial length of time transpires between the *commencement of the action* and the commencement of the motion to compel arbitration." 374 S.C. at 126, 647 S.E.2d at 251 (emphasis added); *see also Davis*, 394 S.C. at 131-32, 713 S.E.2d at 807 (same).

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the California Arbitration Act ("CAA"), not the FAA. This makes all the difference, as the California Court of Appeals later explained in *Valencia v. Smyth*, 110 Cal. Rptr. 3d 180, 182, 185 Cal. App. 4th 153, 156-57 (Cal. Ct. App. 2010) (distinguishing the CAA from the FAA, which "does not permit a trial court to stay or deny arbitration" where a mixture of arbitrable and non-arbitrable claims "could result in conflicting rulings on a common issue of fact or law").

A Notice of Intent to File Suit does not "commence an action;" it is a *prerequisite* to commencing a legal action. *See* S.C. Code Ann. § 15-79-125(A) ("*Prior to filing or initiating a civil action* alleging injury or death as a result of medical malpractice, the plaintiff . . . shall file a Notice of Intent to File Suit . . . ." (emphasis added)); *Ranucci*, 2012 WL 243332, at *5 ("[S]ection 15-79-125 deals specifically with *pre-litigation* requirements for medical malpractice actions."). Thus, a Notice of Intent to File Suit is not the starter's gun for determining whether a party timely invokes arbitration rights. The Notice of Intent to File Suit aims to apprise potential defendants of the plaintiff's claims, and to encourage the parties to resolve their disputes via mandatory mediation *before* they blossom into litigation. *See id.* § 15-79-125(C) (requiring that after "service of the Notice of Intent to File Suit, the parties shall participate in a mediation conference"); *see also Ranucci*, 2012 WL 243332, at *6 ("Section 15-79-125 enables potential litigants to . . . pursue a resolution of their medical malpractice disputes through mediation").

Thus, requiring a party to compel arbitration upon receipt of a Notice of Intent to File Suit, or risk a waiver of arbitration rights, would circumvent the legislature's goal to encourage pre-suit resolution of disputes through mediation. Moreover, demanding arbitration under these circumstances makes no sense because, naturally, litigation may never materialize from a Notice of Intent to File Suit, and there would be no reason to require a defendant to interpose the defense of arbitration when there is no complaint on file.

Ms. Coleman filed her Summons and Complaint in both actions on March 22, 2010, and served Defendants between April 12 and July 9, 2010. (Affidavits of Service). Defendants filed their Answers from May 14, 2010 to July 8, 2010, and asserted their arbitration rights as an affirmative defense in the Answers—thereby putting Ms. Coleman on notice that Defendants had no intention of waiving arbitration. (Defendants' Answers). Shortly thereafter, on August 25,

2010, Defendants filed their Motion to Compel Arbitration. (Defs.' Notice of Motion filed Aug. 25, 2010). Thus, a mere five months elapsed between the filing of these actions and the Motion. This short time span does not constitute waiver. *See Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (thirteen-month delay did not demonstrate waiver); *Rich v. Walsh,* 357 S.C. 64, 72, 590 S.E.2d 506, 510 (Ct. App. 2003) (thirteen-month delay did not demonstrate waiver).

The second factor also counsels against waiver because Defendants engaged in no discovery before filing their Motion to Compel Arbitration. The only discovery conducted in the case was limited to the issue of arbitration, and it began *after* Defendants filed their Motion. (Pl.'s Mem. in Opp'n, Ex. 1, 2; 1/6/11 Tr. at 53:6-13; 101:21-25). Defendants thus never took "advantage of the judicial system by engaging in discovery" that would justify a waiver—and Ms. Coleman never has argued otherwise. *Cf. Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 548, 551, 575 S.E.2d 74, 76, 77 (Ct. App. 2003) (finding waiver because defendant "availed itself of discovery tools unavailable in arbitration, thereby prejudicing [the plaintiff] by obtaining information from her that it might not have been able to otherwise obtain").

Finally, there was no waiver of Defendants' arbitration rights because there was no prejudice to Ms. Coleman. Indeed, the trial court made no specific finding of prejudice and there was no evidence to support such a finding anyway. *See Rich,* 357 S.C. at 69, 590 S.E.2d at 508 ("requir[ing] the party opposing arbitration to demonstrate it has suffered actual prejudice"). At the hearing on Defendants' Motion to Compel Arbitration, Ms. Coleman through counsel argued that she incurred substantial expenses in serving the Complaints and propounding limited discovery requests on Defendants. (1/6/11 Tr. at 55:8-12; 113:21-24). Her counsel also vaguely asserted that his firm had "prepared for numerous other motions." (*Id.* at 113:19-21).

Ms. Coleman conveniently ignores that, under the Arbitration Agreement, which she herself signed, she had no right to sue Defendants in court in the first place. Ms. Coleman may not breach the Arbitration Agreement, and then point to "prejudice" that she has created for herself because of her breach as a basis to defeat Defendants' arbitration rights. The FAA does not countenance such temerity; neither should this Court.

In sum, the passage of five months between commencement of these actions and the Motion to Compel Arbitration does not even come close to a waiver, given that Defendants propounded no discovery during this time and Ms. Coleman suffered no undue prejudice. Courts have rejected waiver defenses in cases involving far more egregious circumstances. *See, e.g.*, *Toler's Cove*, 355 S.C. at 612, 586 S.E.2d at 585 (finding no waiver following a 13-month delay where discovery was "very limited in nature and the parties had not availed themselves of the court's assistance," and "Respondent had not held any depositions"); *Rich*, 357 S.C. at 67, 590 S.E.2d at 507 (finding no waiver following a 13-month delay where "[l]imited discovery was conducted" and the party requesting arbitration took one deposition lasting 15 minutes); *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 557, 544 S.E.2d 643, 645 (Ct. App. 2001) (finding no waiver following a delay of less than eight months where the "litigation consisted of routine administrative matters and limited discovery which did not involve the taking of depositions or extensive interrogatories").

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court reverse the Orders below, and remand the matter for arbitration.[1]

[1] Pursuant to Rule 208(b)(6), SCACR, Appellants adopt and incorporate by reference any argument/analysis that may be set forth in the brief filed by Palmetto Faith Operating, LLC,

Dated: March 20, 2012

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Individually and d/b/a Faith Health Care Center, to the extent that the same is supportive of the Appellants' position in this appeal and is not inconsistent with the argument/analysis presented by Appellants herein.

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