

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

Appeal from Florence County
Court of Common Pleas
William H. Seals Jr., Circuit Court Judge

Case No. 2020-CP-21-02290
Appellate Case No. 2021-000586

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SC Court of Appeals

Mary Tisdale
as Personal Representative of the Estate of Earlene Seabrook,

Respondent,

v.

Palmetto Lake City Operating, LLC
d/b/a Lake City-Scranton Healthcare Center
and Jeffrey Gibbs,

Defendants,

Of whom Palmetto Lake City Operating, LLC
d/b/a Lake City-Scranton Healthcare Center is

Appellant.

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP2102290

Mary Tisdale Personal Representative et al
PLAINTIFF(S)

Palmetto Lake City Operating Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Motion/Stay Action and Compel Arbitration denied. Formal order to follow.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 02/09/2021 .

Jeffrey Gibbs

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Florence Common Pleas

Case Caption: Mary Tisdale Personal Representative , plaintiff, et al VS Palmetto
Lake City Operating Llc , defendant, et al
Case Number: 2020CP2102290
Type: Order/Electronic Form 4

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE) C/A No. 2020-CP-21-02290

Mary Tisdale as Personal Representative of the)
Estate of Earlene Seabrook,)

Plaintiff,)

Versus)

Palmetto Lake City Operating, LLC d/b/a Lake)
City-Scranton Healthcare Center and Jeffrey)
Gibbs,)

Defendants.)

**ORDER DENYING DEFENDANT'S
MOTION TO STAY ACTION AND
COMPEL ARBITRATION**

This matter was before the Court on Tuesday, February 9, 2020, at 9:30 a.m., in Florence County, South Carolina, upon Defendants Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center and Jeffrey Gibbs Motion to Dismiss and Compel Arbitration. Oral argument was conducted via Webex. Attorney Bradley H. Banyas of Hughey Law Firm, LLC was present representing the interests of the Plaintiff. Attorney Russell G. Hines of Clement Rivers, LLP was present representing the interests of the Defendant. For the following reasons set forth herein, the Defendants Motion to Dismiss and Compel Arbitration is hereby DENIED.

FACTS

Earlene Seabrook was admitted to the Defendants' skilled nursing facility on or about June 25, 2019. The Defendants operate a skilled nursing facility, licensed by the South Carolina Department of Health and Environmental Control, subject to R.61-17, *Standards for Licensing Nursing Homes*. Plaintiff alleges that while Ms. Seabrook was a resident and under the Defendants' care, she was allowed to develop pressure ulcers which became infected, leading to her decline and eventual death. Ms. Seabrook died on August 31, 2019.

STANDARD OF REVIEW

A parties' right to a jury trial in South Carolina is governed by state law. Pelfrey v. Bank of Greer, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978). While the Federal Arbitration Act (“FAA”) imposes a presumption favoring arbitration, the presumption does not apply to the “identity” of the parties who may be bound to such an agreement. Wilson v. Willis 426 S.C. 326, 335 827 S.E.2d 167, 179 (2019). In fact, there is a presumption against arbitration when enforcement is sought against a non-signatory. Id. The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). It is well established that “where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement to arbitrate exists in the first place...If no agreement is found to exist, the court must deny any application to arbitrate.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) citing S.C. Code Ann. § 15-48-20(a) (2005). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

In determining whether an agreement to arbitrate exists, “the court should apply ‘ordinary state-law principles that govern the formation of contracts.’” Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E. 2d 839, 844 (Ct. App., 1999). Arbitration is available only when the parties involved contractually agree to arbitrate. Id. South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with

regard to all essential and material terms of the agreement. Player v. Chandler, 299 S.C. 101, 105, (1989). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a).

ANALYSIS

I. THERE IS NOT AN ENFORCEABLE ARBITRATION AGREEMENT

a. Earlene Seabrook's Health Care Power of Attorney Did Not Authorize Mary Tisdale to Execute the Arbitration Agreement.

It is undisputed that Earlene Seabrook never signed the arbitration agreement. Mary Tisdale executed documents on behalf of Earlene Seabrook upon her entry to the Defendants' facility, including an Arbitration Agreement and Admissions Agreement. The Court notes the distinctions among the two documents. An admissions agreement sets forth the terms of the resident's admission and scope of healthcare to be provided while at the facility. An arbitration agreement is a legal document which sets forth the terms of resolving potential disputes.

The mere fact that an arbitration exists does not automatically refer any dispute to arbitration. Like any contract, the agreement must be valid to be enforceable, signed by the parties who had the express and legal authority to do so. Mary Tisdale was not the court appointed legal guardian of Earlene Seabrook, nor did she have a durable power of attorney. The only authority that Ms. Tisdale was given by Ms. Seabrook was a health care power of attorney ("HCPOA"), which applies only to healthcare decisions.

The HCPOA's language expressly states Ms. Tisdale's limited authority and did not grant her power to sign the Arbitration Agreement on Ms. Seabrook's behalf. Under South Carolina law,

an action to interpret a power of attorney is similar to a contract interpretation action. Watson v. Underwood, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014). Accordingly, contract interpretation principles apply to determine the HCPOA's scope. Stott v. White Oak Manor, Inc., 426 S.C. 568, 577, 828 S.E.2d 82, 87 (Ct. App. 2019) (citing In re Thames, 344 S.C. 564, 571, 544 S.E.2d 854, 857 (Ct. App. 2001)). Contracts (and powers of attorney) must be interpreted to carry out their parties' intent as determined primarily by the language they chose in the document itself. A court may not read terms into a contract or power of attorney or infer the parties intended a meaning inconsistent with the language they expressed. Radalytic Labs, Inc. v. Culver, 329 S.C. 380, 383, 495 S.E.2d 782, 784 (1997) (citing Blakeley v. Rabon, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976)).

The Defendant facility is a sophisticated business entity frequently interacting with residents and their families during the nursing home admission process. It should be well aware of the differences between a durable power of attorney, a healthcare power of attorney, and other forms of guardianship. Based on the plain language of the agreements, it is abundantly clear that the Plaintiff cannot be bound to arbitration because the decision to agree to arbitrate disputes is not contemplated by the plain language of Ms. Seabrook's HCPOA.

Starting with its title, the clear language of the HCPOA defines its limited scope as a "South Carolina Advance Health Care Directive." Ms. Seabrook chose to create only a health care power of attorney with a specific eye toward her preferences on life-sustaining end of life medical treatments ("Declaration of Desire for a Natural Death"). Ms. Tisdale was appointed not as Ms. Seabrook's general financial or legal representative but only as an "agent to make health care decisions for me as authorized."

Defendants' reliance on section "D" of the "Agent's Powers" listed in the HCPOA is also

misplaced as that section granted Ms. Tisdale only the authority to take actions:

Necessary to making, documenting, and assuring implementation of decisions concerning [Earlene Seabrook's] health care, including, but not limited to, granting any waiver or release from liability required by any hospital, physician, nursing care provider, or other facility against medical advice, and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my agent, or to seek actual or punitive damages for the failure to comply.

Thus, Ms. Tisdale had limited power to take actions necessary only to health care decisions. Defendants' reliance on "pursuing any legal action in my name..." is misplaced. This language, read in the totality of the HCPOA is clearly intended to provide the agent the authority to ensure the principal's health care related wishes are carried out, but the authority ceases outside of the health care arena.

b. South Carolina Courts Define "Health Care" to Exclude Execution of an Arbitration Contract.

South Carolina appellate courts have held that "health care" decisions do not encompass arbitration contracts. In Coleman v. Mariner Health Care, Inc., the South Carolina Supreme Court was tasked with determining whether committing a loved one to arbitration was a "health care" decision. 407 S.C. 346, 755 S.E.2d 450 (2014). Coleman considered this key term as it was defined in South Carolina's Adult Health Care Consent Act ("the Act"), holding that the statutory definition of "health care" includes medical procedures, nursing care, placement in a nursing home, and agreeing to pay for nursing home services. Id. at 352, 755 S.E.2d at 453. However, a separate arbitration contract—like the Arbitration Agreement Daughter signed—was not a "health care" matter because it was (1) not required for the resident's admission to the nursing home; (2) contained no provisions for medical or nursing services; and (3) did not require any financial commitment for medical or nursing services. Id. at 353, 755 S.E.2d at 454. Coleman is directly

on point here because, while it construed the term “health care” in the context of the Act, the statute governing health care powers of attorney instructs courts to apply the Act’s terms to documents like the HCPOA. S.C. Code Ann. § 62-5-502(c) (stating that generally the Act’s provisions “apply to the making of decisions by a health care agent”).

c. Mary Tisdale Lacked Actual or Apparent Authority to Sign the Arbitration Agreement for Earlene Seabrook

The legal consequences of an agent’s actions can only be attributed to the principle when the agent as actual or apparent authority. Charleston Registry v. Young Clement, 359 S.C. 635, 598 S.E.2d 717 (Ct. App. 2004). It is the duty of one dealing with an agent to use due care to ascertain the scope of the agent’s authority. Frasier v. Palmetto Homes of Florence, 473 S.E.2d 865 (Ct. App. 1996). South Carolina law requires that to prove apparent authority, the Defendant must show “... (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party’s detriment.” Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412, S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists. Id.

Defendants have produced no evidence indicating that Mary Tisdale had authority to enter a contract on Earlene Seabrook’s behalf or waive Ms. Seabrook’s right to a jury trial. The issue

of arbitration agreements in skilled nursing facilities has been addressed at the Court of Appeals and Supreme Court, and the case is very similar to Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292, 304 (Ct. App. 2018); and Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d, 679 (Ct. App. 2016). In all three of these cases, South Carolina Courts have found Arbitration Agreements to be unenforceable where a family member signed an Arbitration Agreement near the time of admission to a skilled nursing facility for the Decedent and did not have any actual authority to do the same. In all three cases, the Courts found that no implied authority nor estoppel applied. Presently, a review of the admissions and arbitration documents by the Defendants would have informed them that Mary Tisdale did not have actual authority by way of a Durable Power of Attorney, nor Court Appointed Guardianship to bind her aunt, nor did she ever indicate that she had any apparent authority to enter contracts on behalf of her aunt. The only power conferred upon Mary Tisdale by Earlene Seabrook was limited to the narrow scope provided by the HCPOA.

II. PLAINTIFF IS NOT EQUITABLY ESTOPPED FROM DENYING THE ARBITRATION AGREEMENT.

Defendants also argue that Plaintiff should be equitably estopped from denying enforcement of the Arbitration Agreement. Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements.” Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conduct be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting the estoppel must lack knowledge and the means of knowledge of the truth of the facts

in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on the conduct of the party to be estopped. Id.

Defendant has not met its burden to establish these elements. There is no evidence Ms. Tisdale acted in a way amounting to a false representation to Defendant regarding Ms. Seabrook's status or that Ms. Tisdale intended for Defendants to act in reliance on her conduct. Additionally, the evidence shows Defendants cannot meet possibly its burden to show they lacked knowledge or the means of knowledge of the truth of the facts in question. Ms. Seabrook provided a copy of her health care power of attorney to the Defendants at the time of admission. The plain language of the HCPOA sets forth the scope of authority. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

In this case, the Defendants had the capacity to determine whether Ms. Tisdale had the authority to sign an arbitration agreement on Ms. Seabrook's behalf. Stated again, the Defendants should be familiar with these requirements as they frequently interact with residents and their families during the nursing home admission process. The Defendants are or should be familiar with the legal concepts of guardianship and powers-of-attorney. Since the Defendant has not cited or provided evidence on all required elements of equitable estoppel, Plaintiff is not equitably estopped from denying the arbitration agreement.

III. THE ADMISSION AGREEMENT AND ARBITRATION AGREEMENT ARE SEPARATE CONTRACTS THAT DO NOT MERGE.

The Admission Agreement and Arbitration Agreement are separate contracts that do not merge. See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert. denied Aug. 21, 2018); Thompson v. Pruitt Corp, 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014) (Coleman refused to apply the doctrine of merger because language in the contracts “recognize[d] the ‘separateness’ of the admission and arbitration agreements.” 407 S.C. at 355, 755 S.E.2d at 455. Thompson and Hodge applied Coleman and provided further examples of factors demonstrating “separateness and preventing merger. 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.

As discussed above, there were two separate agreements signed separately, and they were not merged. Since there was no merger here, Defendants’ equitable estoppel argument must be denied. See Coleman, 407 S.C. at 355–56, 755 S.E.2d at 455 (rejecting estoppel argument by finding no merger). South Carolina courts have three times refused merger arguments for nursing home admission and arbitration contracts, and Defendants’ argument should be rejected as well. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 49-52, 784 S.E.2d at 683-84; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

The Klutts Resort Realty, Inc. v. Down’round Development Corp., 268 S.C. 80, 232 S.E.2d20 (1070) “merger” principle cannot apply unless the writings in question were executed “at the same time, by the same parties, for the same purpose, and in the course of the same transaction.” Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts, 268 S.C. at 88, 232 S.E.2d at 24). Even then, merger does not apply if there is “anything indicating a contrary intention.” Id. (emphasis added). Thus, multiple executed writings relating to the same general subject matter will not be viewed as a single or merged agreement if either their language or the

circumstances even hint that the parties actually intended the writings to be distinct, separate contracts. Three nursing homes have previously attempted but failed to meet these requirements, and South Carolina's appellate courts have never applied merger to nursing home admission and arbitration contracts. See generally Coleman, Thompson, and Hodge.

The terms and context of the admissions agreement and arbitration agreement show the parties intended the two to be separate contracts. Hodge is the key precedent here because it builds on Coleman and Thompson to provide the Court's most recent and complete illustration of the type of contract language or structure showing parties do not intend multiple agreements to be interpreted as one. For example, admission and arbitration contracts cannot merge if they contain inconsistent terms, especially provisions related to how each contract may be terminated or the substantive law governing their interpretation. Hodge, 422 S.C. at 562, 813 S.E.2d at 302; Thompson, 416 S.C. at 53, 784 S.E.2d at 685. Moreover, courts look at the way the contracts are structured, finding it is unlikely parties intended two contracts to be treated as one if they chose separate titles and required separate signatures. Hodge, 422 S.C. at 562, 813 S.E.2d at 302; see also Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1. Finally, Hodge held a nursing home cannot argue for merger when it chose to separate arbitration and admission into two agreements while taking the position that agreeing to the former was not required to obtain the benefits of the latter. 422 S.C. at 562-63, 813 S.E.2d at 302.

With no valid underlying contract, there could be no third-party beneficiary. First, Plaintiff's action sounds solely in tort. There is no breach of contract claim asserted. Plaintiff's pleading does not specifically refer to any written contract or necessarily rely upon the language of any written contract. Plaintiff's tort claims presumably are based on common law and statutory or regulatory duties imposed by law. Second, as discussed above, the Arbitration Agreement is a

separate and distinct agreement from the Admission Agreement. Plaintiff does not rely upon the terms of the Arbitration Agreement to establish her tort claims.

IV. THE FEDERAL ARBITRATION AGREEMENT ACT DOES NOT MANDATE ENFORCEMENT OF THIS AGREEMENT.

Under the FAA, arbitration is required when there is a valid arbitration agreement, and a dispute exists which is within the scope of the agreement. Under the arbitration clause, neither prong is satisfied. As discussed above, there is no valid arbitration agreement because Mary Tisdale did not have the legal authority to execute a valid arbitration agreement. Second, Plaintiff's claims include negligence, negligence per se, fraud and misrepresentation, violations of the South Carolina Unfair Trade Practices Act, wrongful death and survivorship. Nowhere in the Defendants' arbitration agreement are those causes of action listed. Accordingly, the FAA does not apply.

V. LIMITED JURISDICTIONAL DISCOVERY IS DENIED

The Defendants' request for limited discovery focusing on the nature of Ms. Tisdale's agency relationship with Ms. Seabrook is denied. I find that the plain reading of the HCPOA is straightforward and limited discovery regarding the facts and circumstances surrounding the signing of the arbitration agreement would serve no useful purpose. Ms. Seabrook granted Ms. Tisdale authority to make health care related decisions only.

CONCLUSION

Pursuant to the South Carolina Uniform Arbitration Act Section 15-48-10(a) for a written agreement to arbitrate to be "valid, enforceable and irrevocable" "[n]otice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed

thereon the contract shall not be subject to arbitration.” It is interesting to this Court that conspicuous notice is required for a person to enter a binding arbitration agreement yet Ms. Seabrook never signed the agreement to arbitrate herself. Further, she did not designate a General/Durable Power of Attorney to enter such type of contracts or make legally binding decisions on her behalf. This one step removed and further remoteness logically supports that under these circumstances the arbitration agreement must not be binding. Based on the reasons set forth above, the Court respectfully DENIES the Defendant’s Motion to Compel Arbitration.

IT IS SO ORDERED.

The Honorable William H. Seals, Jr.

Marion, South Carolina



Florence Common Pleas

Case Caption: Mary Tisdale Personal Representative , plaintiff, et al VS Palmetto Lake City Operating Llc , defendant, et al

Case Number: 2020CP2102290

Type: Order/Form 4

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	C/A No. 2020-CP-21-02290
Mary Tisdale as Personal Representative of the	)	
Estate of Earlene Seabrook,	)	
	)	
Plaintiff,	)	ORDER DENYING DEFENDANT'S
	)	MOTION TO ALTER, AMEND, AND/OR
Versus	)	RECONSIDER ARBITRATION
	)	
Palmetto Lake City Operating, LLC d/b/a Lake	)	
City-Scranton Healthcare Center and Jeffrey	)	
Gibbs,	)	
	)	
Defendants.	)	

This matter came before the Court on Defendant Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center's Motion to Alter, Amend, and/or Reconsider filed March 11, 2019. After careful consideration of the record, as well as the various interests balanced by the Court at the time of the ruling, the Defendants' Motion to Reconsider is heard and respectfully Denied.

STANDARD OF REVIEW

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original). "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Memorial Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993)); See also Arnold v. State, 309 S.C. 157, 172–73, 420

S.E.2d 834, 842 (1992).

CONCLUSIONS OF LAW

The Court finds that this Court's Order filed March 1, 2021, sufficiently addresses all issues that were raised by both parties' written submissions, as well as those issues raised at oral argument.

CONCLUSION

Based on the reasons set forth above, the Court respectfully denies the Defendant's Motion to Reconsider. Defendant's Motion to Compel Arbitration is Denied.

IT IS SO ORDERED.

The Honorable William H. Seals, Jr.

Marion, South Carolina



Florence Common Pleas

Case Caption: Mary Tisdale Personal Representative , plaintiff, et al VS Palmetto Lake City Operating Llc , defendant, et al

Case Number: 2020CP2102290

Type: Order/Amend

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	
	)	
Mary Tisdale as Personal Representative of the	)	C/A No. 2020-NI-
Estate of Earlene Seabrook,	)	
	)	
Plaintiff,	)	NOTICE OF INTENT TO FILE SUIT
	)	
Versus	)	
	)	
Palmetto Lake City Operating, LLC d/b/a Lake	)	
City-Scranton Healthcare Center and Jeffrey	)	
Gibbs,	)	
	)	
Defendants.	)	

Pursuant to S. C. Code Ann. § 15-79-125, Plaintiff above files this Notice of Intent to File Suit.

Attached hereto as Exhibit A, and incorporated herein by reference, is a Complaint that sets for factual allegations and legal claims. Exhibit A is Plaintiff's "short and plain statement of the facts showing the party is entitled to relief." Attached as Exhibit B are answers to the Standard Interrogatories as set forth in S.C.R.C.P. 33(b). Attached as Exhibit C is an expert affidavit specifying at least one negligent act. Please take notice that pursuant to the South Carolina Court ADR Rules you are advised that this dispute is subject to pre-suit mediation within 120 days.

s/ D. Nathan Hughey

D. Nathan Hughey (SC Bar #68409)

A. Stuart Hudson (SC Bar #71691)

Bradley H. Banyas (SC Bar #101668)

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Attorneys for the Plaintiff

May 18, 2020

Mt. Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	C/A No. 2020-NI-
Mary Tisdale as Personal Representative of the	)	
Estate of Earlene Seabrook,	)	
	)	
Plaintiff,	)	SUMMONS
	)	(Jury Trial Demanded)
Versus	)	
	)	
Palmetto Lake City Operating, LLC d/b/a Lake	)	
City-Scranton Healthcare Center and Jeffrey	)	
Gibbs,	)	
	)	
Defendants.	)	

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is hereby served upon you, and to serve a copy of your Answer to the said Complaint to said Plaintiff's attorneys D. Nathan Hughey, A. Stuart Hudson and Bradley H. Banyas, at their office located at 1311 Chuck Dawley Blvd, Suite 201, Post Office Box 348, Mt. Pleasant, South Carolina 29465-0348, within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

HUGHEY LAW FIRM, LLC

s/ D. Nathan Hughey
D. Nathan Hughey (SC Bar #68409)
A. Stuart Hudson (SC Bar #71691)
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Attorneys for Plaintiff

October 8, 2020
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	C/A No. 2020-NI-
Mary Tisdale as Personal Representative of the	)	
Estate of Earlene Seabrook,	)	
	)	
Plaintiff,	)	COMPLAINT
	)	(Jury Trial Demanded)
Versus	)	
	)	
Palmetto Lake City Operating, LLC d/b/a Lake	)	
City-Scranton Healthcare Center and Jeffrey	)	
Gibbs,	)	
	)	
Defendants.	)	

The Plaintiff, Mary Tisdale as Personal Representative of the Estate of Earlene Seabrook, complaining of the Defendants, Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center and Jeffrey Gibbs ("Defendants"), alleges as follows:

1. The Plaintiff is a citizen and resident of Williamsburg County, South Carolina.
2. Upon information and belief, the Defendant, Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center, is a business corporation organized and existing pursuant to the laws of the State of Delaware which conducts business in Florence County, South Carolina at 1940 Boyd Road, Scranton, South Carolina.
3. Upon information and belief, the Defendant, Jeffrey Gibbs, is a citizen and resident of Florence County, South Carolina and is the administrator of Lake City-Scranton Healthcare Center.
4. The Defendants had the right and/or power to direct and control its employees and/or agents in the business of delivering care for a fee through skilled nursing facilities and they are personally, jointly and severally liable for the acts and omissions committed.
5. The Defendants delivered care for a fee and had authority, express or implied, to control the means and agents employed to execute care at the Defendants' facilities at all times during the residency of Earlene Seabrook.
6. Attached as Exhibit A is an expert affidavit specifying at least one negligent act.

7. This Court has personal and subject matter jurisdiction over this case and venue is proper in this Court.

GENERAL FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

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

9. On the application for the license in effect at the time of Earlene Seabrook's injury, Lake City-Scranton Healthcare Center, being sworn under oath, acknowledged that it was required to comply with the standards set forth in South Carolina Regulation 61-17 and further that understood in order to maintain a license to operate, it was required to comply with applicable State, Federal, and local laws, codes, and regulations applicable to the facility prior to Earlene Seabrook's injury.

10. The State of South Carolina required that Lake City-Scranton Healthcare Center have policies and procedures that accurately reflected actual practice regarding care, treatment, procedures, and services - including nursing services, the operation of the facility, and how Lake City-Scranton Healthcare Center was going to meet the specialized needs of the residents with Alzheimer's disease and/or related dementia such as Earlene Seabrook - and the State of South Carolina required that Lake City-Scranton Healthcare Center make the policies and procedures available be accessible to staff. Lake City-Scranton Healthcare Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

11. The State of South Carolina required that Lake City-Scranton Healthcare Center have a documented regimen of appropriate care, treatment, services or written action plan prepared by the facility for Earlene Seabrook, based on assessment data, e.g., social services, which was to be implemented for the

benefit of Earlene Seabrook as well as other residents. Lake City-Scranton Healthcare Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

12. The State of South Carolina required that Lake City-Scranton Healthcare Center keep a record of each incident involving residents or staff members or volunteers, occurring in the facility or on the facility grounds, and directed that it was required to be reviewed, investigated if necessary, evaluated in accordance with facility policies and procedures. Lake City-Scranton Healthcare Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

13. Earlene Seabrook's injuries constituted reportable incidents.

14. The State of South Carolina required that Lake City-Scranton Healthcare Center keep a legible and complete medical record, to include and any all incidents involving Earlene Seabrook as well as other residents. Lake City-Scranton Healthcare Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

15. The State of South Carolina required Lake City-Scranton Healthcare Center to describe in its care plan for Earlene Seabrook as well as other residents the services that Lake City-Scranton Healthcare Center was going to furnish to her, *i.e.*, what assistance Lake City-Scranton Healthcare Center was going to provide to her, how much assistance Lake City-Scranton Healthcare Center was going to provide to her, who at Lake City-Scranton Healthcare Center was going to provide the assistance, how often, and when. Lake City-Scranton Healthcare Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

16. The State of South Carolina required that Lake City-Scranton Healthcare Center to

administer treatment and services to Earlene Seabrook as well as other residents in a caring and humane manner, *effectively* and *safely*, and staff were required to respond to a signal system call from a resident to provide care or assistance in a prompt manner. Lake City-Scranton Healthcare Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

17. The State of South Carolina required Lake City-Scranton Healthcare Center to assure that Earlene Seabrook did not develop pressure-related wounds unless the resident's clinical condition demonstrates that they were unavoidable and to address treatment of existing pressure-related wounds. Lake City-Scranton Healthcare Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

18. The State of South Carolina required Lake City-Scranton Healthcare Center to take an interdisciplinary approach to decrease the risk of pressure-related wounds, and institute measures to prevent and treat wounds that are consistent with each resident's clinical condition, risk factors, and goals. Such actions were required to include but not be limited to: body position of bed or chair bound residents changed in accordance with the ICP; proper skin care provided for bony prominences and weight bearing parts to prevent discomfort and the development of pressure areas, unless contraindicated by physician's orders; and soiled or wet bed linen replaced promptly with clean, dry linen and clothing after being soiled. Lake City-Scranton Healthcare Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

19. The State of South Carolina required Lake City-Scranton Healthcare Center to provide appropriate staff members in numbers and training to perform those duties that result in compliance with 61-17, to suit the needs and condition of the residents, and to meet the demands of effective emergency on-site action that might arise, and to provide training and qualifications for the tasks performed in

compliance with all State, Federal, and local laws, and current professional organizational standards. Lake City-Scranton Healthcare Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

20. The State of South Carolina required Lake City-Scranton Healthcare Center to ensure that staff members Direct care staff members, in addition to meal service staff have at least the following qualifications: ability to render care and services to residents in an understanding and gentle manner; sufficient education to be able to perform their duties and have a working knowledge of regulations applicable to their scope of work. Lake City-Scranton Healthcare Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

21. The State of South Carolina required Lake City-Scranton Healthcare Center to have direct care staff adequate in number and skill in the facility at all times to provide nursing and related care and services to attain or maintain the highest practicable physical, mental, and psychosocial health and safety of each resident, as determined by resident assessments and ICPs and that direct care staff be assigned only duties for which they are trained. Further, the State of South Carolina required Lake City-Scranton Healthcare Center to have licensed nurse staff members currently and continuously licensed to practice nursing in South Carolina during the period they are staff members, and that only individuals appropriately licensed may perform duties requiring a registered or licensed practical nurse. Lake City-Scranton Healthcare Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

22. The State of South Carolina required Lake City-Scranton Healthcare Center to have an adequate number of licensed nurses be on duty to meet the total nursing needs of residents. Licensed nursing staff were required to be assigned to duties consistent with their scope of practice as determined

through their licensure and educational preparation. Lake City-Scranton Healthcare Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

23. The State of South Carolina required Lake City-Scranton Healthcare Center to ensure staff members were provided the necessary training to perform the duties for which they were responsible and that, before performing any duties, all newly-hired staff members were to be oriented to the facility organization and physical plant, specific duties and responsibilities of staff members, and residents' needs. All staff members were to be instructed in the provisions of S.C. Code Ann. Section 43-35-5 *et seq.* (1976, as amended), "Omnibus Adult Protection Act" and S.C. Code Ann. Section 44-81-10 *et seq.* (1976, as amended), "Bill of Rights for Residents of Long-Term Care Facilities" as well as other rights and assurances as required in 61-17. Lake City-Scranton Healthcare Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

24. The State of South Carolina required Lake City-Scranton Healthcare Center to ensure all staff were provided inservice training programs that identify training needs related to problems, needs, care of residents and infection control and were sufficient to assure staff's continuing competency. Lake City-Scranton Healthcare Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

25. The State of South Carolina required Lake City-Scranton Healthcare Center to acknowledge its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

26. The State of South Carolina required Lake City-Scranton Healthcare Center to ensure all entries in the resident record were legible and complete, and separately authenticated and dated promptly

by the individual, identified by name and discipline, responsible for providing or evaluating the service or care furnished. Lake City-Scranton Healthcare Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

27. The State of South Carolina required Lake City-Scranton Healthcare Center to admit only individuals identified as appropriate for the level of care, services, or assistance offered. The facility was required to establish admission criteria that are consistently applied and comply with State, Federal, and local laws and regulations, and permitted to admit and retain only those individuals whose needs could be met by the accommodations and services for which the facility is licensed. Anyone who had a need for medical care for acute illness or injury that was beyond the scope of the facility to provide, and where hospitalization was consistent with the individual's condition was not permitted to be retained as a resident. Lake City-Scranton Healthcare Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

28. The State of South Carolina required Lake City-Scranton Healthcare Center to have practices that promote conditions that prevent the spread of infectious, contagious, or communicable diseases and provide for the proper disposal of toxic and hazardous substances. These preventive measures and practices were required to be in compliance with applicable regulations and guidelines of the Occupational Safety and Health Administration, *e.g.*, the Bloodborne Pathogens Standard; the Centers for Disease Control and Prevention, *e.g.*, Immunization of Health-Care Workers: Recommendations of the Advisory Committee on Immunization Practices and the Hospital Infection Control Practices Advisory Committee; the Department's South Carolina Guidelines For Prevention and Control of Antibiotic Resistant Organisms in Health Care Settings, and R.61-105; and other applicable State, Federal and local laws and regulations. The State of South Carolina required Lake City-Scranton Healthcare Center to have an infection control/QI committee that meets at least annually to address infection control issues consisting

of the medical director and representatives from at least administration, nursing, dietary, and housekeeping staff to assure compliance with 61-17 regarding infection control. Lake City-Scranton Healthcare Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

29. The State of South Carolina required Lake City-Scranton Healthcare Center to have a written, implemented quality improvement program that provided effective self-assessment and implementation of changes designed to improve the care, treatment and services provided by the facility. Lake City-Scranton Healthcare Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

30. Earlene Seabrook was admitted to the Defendants' facility, Lake City-Scranton Healthcare Center, on or about August 7, 2019.

31. While at the facility, the Defendants allowed Ms. Seabrook to develop preventable injuries which the Defendants had a duty to prevent, caused by a breach of that duty, including but not limited to pressure sores, and suffer horrific, painful, disfiguring, permanent and life threatening injuries which caused great pain and suffering.

32. Upon information and belief, the Defendants were licensed under the laws of the State of South Carolina and were required to provide reasonable and prudent nursing home care to Earlene Seabrook.

33. The Defendants had an obligation to employ nursing assistants, nurses and orderlies who were qualified to render reasonable care to a patient in the condition of Earlene Seabrook and in accordance with federal and state regulations as well as the representations made by the Defendants.

34. Additionally, pursuant to South Carolina law, the Defendants had a duty to ensure that care/services were rendered effectively and safely and precautions taken for residents with special conditions,

e.g., Alzheimer's disease and/or related dementia, etc. and to provide appropriate assistance in activities of daily living were required to be provided to residents, as needed.

35. Furthermore, without limitation, the Defendants had a duty to comply with all current federal, state, and local laws and regulations concerning resident care, resident rights and protections, and privacy and disclosure requirements, e.g., Section 44-81-10, et seq., of the S.C. Code of Laws, 1976, as amended, Resident's Bill of Rights, Alzheimer's Special Care Disclosure Act, and the Omnibus Adult Protection Act notice, Section 43-35-5, et seq. as well as all local, state, and federal laws and current professional organizational standards.

36. Upon information and belief, the Defendants failed to assign sufficient and qualified staff to ensure that all necessary care was delivered to Earlene Seabrook.

37. Upon information and belief, the Defendants failed to ensure that the proper treatment and standard of care was delivered to Earlene Seabrook.

38. Upon information and belief, the Defendants failed to properly train, monitor and supervise the staff necessary to provide a reasonably prudent standard of care to Earlene Seabrook.

39. In particular, while at the Defendants' facility, the Defendant acquired a stage IV wound.

FOR A FIRST CAUSE OF ACTION
(Negligence)

40. The Plaintiff realleges and reiterates all previous paragraphs as fully as if set forth in this paragraph and in their entirety.

41. The Defendants undertook the duty to render nursing home care to Earlene Seabrook in accordance with the prevailing and acceptable professional standards of care for nursing homes and their employees and agents in the national community and as further required by the state and federal laws applicable to the same.

42. Notwithstanding undertaking that duty and while Earlene Seabrook was under the care of the Defendants, the Defendants departed from prevailing and acceptable professional standards of care and treatment of Earlene Seabrook and were thereby negligent, careless, grossly negligent, reckless and in

violation of the duties owed to Earlene Seabrook, and they are liable for one or more of the following acts of omission or commission, any or all of which are departures from the prevailing and acceptable professional standards of care:

- a. In failing to comply with those provisions of 61-17 recited above and to which the Defendants' swore under oath subject to penalty of perjury that they would comply;
- b. In failing to properly monitor the resident's physical well-being while residing at the Defendants' facility;
- c. In failing to properly supervise the personnel and staff and employees at the Defendants' facility with regard to Earlene Seabrook's care;
- d. In failing to properly revise and modify plans of care for Earlene Seabrook in response to Earlene Seabrook's needs;
- e. In failing to properly utilize equipment, including medications and devices to prevent and to minimize or reduce injuries resulting from improper care;
- f. In violating state and/or federal regulations requiring actions to protect the safety and health of Earlene Seabrook, so as to constitute negligence per se;
- g. In failing to ensure that the Defendants' personnel and employees had sufficient, adequate and current training, credentials and skills to properly prevent Earlene Seabrook from suffering from injury and pain;
- h. In failing to have in place proper and adequate policies, procedures, protocols, rules and regulations for the care and treatment of nutritional and infection control issues and fall prevention issues at the Defendants' facility, or if such policies, procedures, protocols, rules and regulations were in place, in failing to enforce them;
- i. In failing to properly and adequately assess, monitor and update policies, procedures, protocols, rules and regulations in response to knowledge garnered from published guidelines and case reviews relating to proper nutritional and infection control procedures and pressure ulcer prevention procedures;
- j. In failing to ensure that manuals, instructions and warnings relating to appropriate nutrition and infection control procedures and pressure ulcer prevention procedures were available to agents, servants and employees of the Defendants;
- k. In failing to properly train and educate its employees or, if properly trained and educated, in failing to allow its employees to exercise independent skill and judgment;
- l. In failing to ensure that Earlene Seabrook had proper care;
- m. In failing to properly document significant clinical findings;
- n. In failing to properly document the medical records of Earlene Seabrook;

- o. In failing to follow and ensure that its employees follow the South Carolina Residence Bill of Rights for Long Term Care Facilities, South Carolina Department of Health and Environmental Control Regulation 61-84;
- p. In failure to provide sufficient number of personnel to meet the needs of residents;
- q. In failure to ensure that a resident maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical conditions demonstrates that this is not possible;
- r. In failing to ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source are reported immediately to the administrator of the facility and to other officials in accordance with State Law through established procedures (including to the State survey and certification agency);
- s. In failing to conduct assessments promptly after a significant change in the resident's physical or mental condition;
- t. In failing to conduct assessments promptly after a significant change in the resident's physical or mental condition;
- u. In failing to notify family members or authorities after incidents;
- v. In failing to transfer Earlene Seabrook to a higher level of care as needed, and
- w. In such other particulars as may be ascertained through discovery or shown at trial.

43. As a direct and proximate result of the negligence, carelessness, gross negligence, recklessness and departure from the professional standards of care by the Defendants and their agents, servants and/or employees, Earlene Seabrook suffered from severe debilitating injuries which resulted in permanent decline, as a result of which Earlene Seabrook has suffered severe and extreme emotional distress, anxiety, physical injuries, medical bills, the likes of which no person should endure, for which Earlene Seabrook is entitled to recover in an amount to be determined by a jury at the trial of this action.

FOR A SECOND CAUSE OF ACTION
(Negligence per se)

44. The Plaintiff realleges and reiterates all previous paragraphs as fully as if set forth in this paragraph in their entirety.

45. The Defendants are a long term health care providers who have a duty to abide by certain federal and state regulations in the care and treatment of their residents.

46. The federal and state regulations combine to form minimum standards of care which the Defendants must meet and exceed in order to ensure proper treatment of patients, including, specifically, Earlene Seabrook.

47. The Defendants failed to abide by the standards, rule and regulations promulgated by the United States Government and the State of South Carolina in their treatment and care of Earlene Seabrook.

48. The standards, rule and regulations promulgated by the United States Government and the State of South Carolina were specifically enacted for the benefit of the class of persons for which Earlene Seabrook was a member.

49. As a direct and proximate result of the Defendants' negligence, recklessness, willfulness and wantonness in failing to abide by the standards of care, rules and regulations standards, rule and regulations promulgated by the United States Government and the State of South Carolina, Earlene Seabrook suffered severe injuries as described above, constituting negligence per se.

FOR A THIRD CAUSE OF ACTION
(Fraud and Misrepresentation)

50. The Plaintiff realleges and reiterates all previous paragraphs as fully as if set forth in this paragraph in its entirety.

51. The Defendants, through deception, artifice, and circumvention, successfully defrauded Plaintiff, who trustingly submitted to care at the Defendants' facilities on the basis of explicit and implicit representations:

- a. That the Defendants would comply on a continuing basis with those licensure requirements, regulations, laws and professional standards designed to assure the Plaintiff received safe and adequate care;
- b. That the Defendants would adequately staff the skilled nursing facility and he would enjoy confident and adequately trained employees;
- c. That the Defendants would provide high quality professional care and would accurately and truthfully document the condition of the Plaintiff and the care rendered to her;

- d. Such other misrepresentations as may be set forth above in this Complaint or as may later be set forth;

52. At the time of the Plaintiff's admission to care, the Defendants promoted and disseminated the above representations and information which would lead the Plaintiff, her family, and other similarly situated consumers to believe the above representations were true.

53. The Defendants purposefully disseminated such representations and promotions in order to induce the Plaintiff, her family, and others like them into placing themselves or their relatives in the exclusive control and custody of the Defendants, and once there, allowing such persons to remain.

54. The Defendants fraudulently concealed its inability to care for the Plaintiff according to acceptable standards required by law and represented by the Defendants, and the representations made were false.

55. The representations made and concealments done by the Defendants were material to the Plaintiff and her family.

56. At the time the Defendants made such representations, they knew such affirmative claims of service were false.

57. The Plaintiff and her family were unaware of the falsity of the representations made by the Defendants.

58. The Plaintiff and her family had a right to rely on the representations and concealments made by the Defendants.

59. As a result of the Defendants' fraud, misrepresentations and concealments, the Plaintiff subsequently suffered damages and injuries while a patient/resident at the Defendants' facilities.

60. As a proximate cause of the Defendants' fraud and misrepresentation, the Plaintiff suffered physical injuries, pain and suffering as previously alleged.

FOR A FOURTH CAUSE OF ACTION
(Violation of the South Carolina Unfair Trade Practices Act)

61. The Plaintiff realleges and reiterates all previous paragraphs as fully as if set forth in this paragraph in its entirety.

62. The Plaintiff and Defendants are “persons” within the meaning of Section 39-5-10(a), Code of Laws of South Carolina, 1976, as amended.

63. The Defendants, by conducting business in the state of South Carolina, are engaged in commerce within the meaning of Code Section 39-5-10(b).

64. The Defendants' actions described in this Complaint constitute unfair and deceptive practices within the meaning of Code Section 39-5-20(a), including but not limited to:

- a. Representing to the general public and to the Plaintiff and her family: that the Defendants would comply on a continuing basis with those licensure requirements, regulations, laws and professional standards designed to assure the Plaintiff received safe and adequate care; that the Defendants would adequately staff the skilled nursing facility and she would enjoy confident and adequately trained employees; that they would provide high quality professional care and would accurately and truthfully document the condition of the Plaintiff and the care rendered to her; and such other particulars as are set forth above in this Complaint or may be shown through discovery or trial;
- b. Further, at the time of the Plaintiff's admission to care, the Defendants promoted and disseminated the above representations and information which would lead the Plaintiff, her family, and other similarly situated consumers to believe the above representations were true. The Defendants purposefully disseminated such representations and promotions in order to induce the Plaintiff, his family, and others like them into placing himself or his relatives in the exclusive control and custody of the Defendants, and once there, allowing such persons to remain.
- c. The Defendants fraudulently concealed their inability to care for the Plaintiff according to acceptable standards required by law and represented by the Defendants, and the representations made were false.
- d. The representations made and concealments done by the Defendants were material to the Plaintiff and her family.
- e. At the time the Defendants made such representations, they knew such affirmative claims of service were false.
- f. The Plaintiff and her family were unaware of the falsity of the representations made by the Defendants.

g. The Plaintiff and her family had a right to rely on the representations and concealments made by the Defendants.

h. As a result of the Defendants' fraud, misrepresentations and concealments and deceptive and unfair representations, the Plaintiff subsequently suffered damages and injuries while a patient/resident at the Defendants' facilities.

65. The Defendants' acts are capable of repetition, and, upon information and belief, have been repeated with other residents.

66. The Defendants' conduct adversely affects the public interest of South Carolina.

67. The Defendants knew or reasonably should have known their conduct violated the Unfair Trade Practices Act.

68. As a direct, foreseeable, and proximate result of Defendants' unfair and deceptive practices, the Plaintiff have suffered an ascertainable loss of money, physical injuries, pain and suffering as previously alleged.

69. The Plaintiff is entitled to recover her actual damages, which amount should be trebled, pursuant to South Carolina law, together with interest and attorneys' fees.

FOR A FIFTH CAUSE OF ACTION
(Negligence - Wrongful Death)

70. The Plaintiff realleges and reiterates all previous paragraphs as fully as if set forth in this paragraph in its entirety.

71. As a direct and proximate result of the negligence, carelessness, gross negligence, recklessness and departure from the professional standards of care by the Defendants and their agents, servants and/or employees, Earlene Seabrook suffered from severe debilitating injuries which resulted in her death, as a result of which Earlene Seabrook's statutory beneficiaries have lost the aid, comfort, support, society and companionship of the decedent, and have suffered severe and extreme emotional distress, anxiety, grief and sorrow, the likes of which no person should endure, for which the Plaintiff is entitled to recover on behalf of statutory beneficiaries, actual and punitive damages pursuant to section 15-51-10, et.

seq., Code of Laws of South Carolina (1976, as amended) in an amount to be determined by a jury at the trial of this action.

FOR A SIXTH CAUSE OF ACTION
(Negligence - Survivorship)

72. The Plaintiff realleges and reiterates all previous paragraphs as fully as if set forth in this paragraph in its entirety.

73. Earlene Seabrook's estate, as a direct and proximate result of the negligence, carelessness, gross negligence, and recklessness of the Defendants, has incurred expenses in the form of funeral and burial expenses. The Plaintiff is further informed and does believe that as a direct and proximate result of the negligence, carelessness, gross negligence, and recklessness of the Defendants, as stated, Earlene Seabrook suffered fear, physical pain, and suffering, medical expense and mental and emotional distress and anguish in the time before her death, for which Earlene Seabrook's estate is entitled to an award of actual and punitive damages pursuant to section 15-5-90, Code of Laws of South Carolina (1976) in an amount to be determined by a jury at the trial of this action.

WHEREFORE, the Plaintiff respectfully prays for judgment against the Defendants for actual damages, punitive damages, special damages and consequential damages, in an amount to be determined by the jury at the trial of this action, fees, the costs and disbursements of this action, and for such other and further relief as this Court deems proper.

HUGHEY LAW FIRM, LLC

s/ D. Nathan Hughey

D. Nathan Hughey (SC Bar #68409)

A. Stuart Hudson (SC Bar #71691)

Bradley H. Banyas (SC Bar #101668)

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Attorneys for Plaintiff

October 8, 2020

Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	
	)	
Mary Tisdale as Personal Representative of the Estate of Earlene Seabrook,	)	C/A No. 2020-NI-
	)	
	)	
Plaintiff,	)	AFFIDAVIT OF TABITHA NOLEN, MSN, RN,
	)	PCCN, SCRN
Versus	)	
	)	
Palmetto Lake City Opearing, LLC d/b/a Lake City-Scranton Healthcare Center and Jeffrey Gibbs,	)	
	)	
	)	
Defendants.	)	

1. My name is Tabitha Nolen, MSN, RN, PCCN, SCRN and I am over the age of eighteen, of sound mind and otherwise competent to make this Affidavit, which I make based upon my background, education, training, and experience. This affidavit is also based upon my own personal knowledge.

2. I am a Registered Nurse, licensed in the State of South Carolina. My further qualifications and background are set forth in the attached CV (Exhibit "A"), which is incorporated by reference.

3. I have actual professional knowledge and experience in my area of practice, Registered Nursing. In addition to the above, I have been in the active practice of the area of Registered Nursing in the State of South Carolina for at least three of the last five years preceding this opinion.

4. I am familiar with the standard of care applicable to the Defendants during the time of Earlene Seabrook's admittance in the Defendants' facility, commonly known as Lake City-Scranton Healthcare Center, and the standard of care and skill exercised by reasonably prudent skilled nursing facilities, management companies, operating companies, and other healthcare providers under similar conditions as those involving Earlene Seabrook.

5. I have reviewed records and / or documents relating to Earlene Seabrook from the skilled nursing facilities, as well as hospitals where Earlene Seabrook was treated. Based on my review of these records, I find that there is at least one deviation from the standard of care on behalf of the Defendants during her residency at Lake City-Scranton Healthcare Center.

6. Without limitation, my review of records and/or documents relating to Earlene Seabrook show the following:

- Earlene Seabrook was admitted to Lake City-Scranton Healthcare Center on or about August 7, 2019.
- During Earlene Seabrook's residency, she was allowed to develop pressure sores.

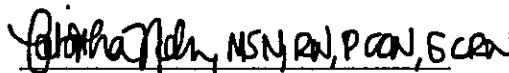
7. In my professional opinion, the Defendants deviated from the standard of care and skill exercised by nurses generally and under similar conditions and like surrounding circumstances as those presented by Earlene Seabrook. In particular, in my opinion, without limitation, they deviated from the standard of care in the following particulars:

- Failing to prevent pressure ulcers.
- Failing to monitor for skin breakdown and promote healing.
- Failing to turn and reposition Earlene Seabrook.

- Failing to develop and maintain an appropriate interim care plan.
- Failing to recognize treat and heal pressure ulcers.
- Failing to meet the standard care of reasonably prudent skilled nursing facilities, management companies, nurses, owners and operators.

8. Additionally, it is my opinion that Earlene Seabrook's injuries were proximately caused by the Defendants' deviations.

9. This is not a complete list of all deviations from the standard of care which I have found in reviewing these records. As a result, I reserve the right to modify, change or supplement these opinions in the future.


Tabitha Nolen, MSN, RN, PCCN, SCRNP

Sworn to me this 9th day of April, 2020.


Annika Wilson
Notary Public for South Carolina
My commission expires: 4/4/2022

SUMMARY OF QUALIFICATIONS

- Experience of 15 years as an Excellent Registered Nurse with the last 5 years being quality and management focused roles specific to stroke and neuroscience care.
- Joint Commission Disease Specific Advanced Primary Stroke Center Expert with multiple successful Joint Commission recertification surveys
- Enthusiastic Stroke Education instructor
- Management/Oversight experience with Get With The Guidelines (GWTG) – Stroke Registry
- Management experience with National Surgical Quality Improvement Program (NSQIP)
- Stroke Certified Registered Nurse
- Advanced Stroke Life Support certified
- Program Management experience for a large healthcare system including four hospitals and two free standing emergency departments
- Experience as a Clinical Data Abstractor
- Telemedicine management experience
- Grant Writing experience -Accepted grant proposal for Stroke Nurse Navigator role 2019
- Proficient in leading Root Cause Analysis teams to assist with improving patient safety
- System-wide Team for Organizational Patient Safety (STOPS) team member March 2017-January 2019
- RSFH Clinical Excellence Council Committee member since 2016 – currently co-chair
- Co-Facilitator/Coordinator of South Carolina Stroke Coordinator Alliance Committee
- Department Manager of NeuroDiagnostic Department
- Institute for Healthcare Improvement Open School - Basic Certification
- Progressive Care Certified Nurse
- Permanent Charge Nurse Role for 9 years on Progressive Care - Cardiac Stepdown Unit
- Basic Life Support certified
- EKG telemetry monitoring including 12 & 18 lead EKG reading
- Efficient knowledge in healthcare computer systems: Cerner, Epic, Kronos Scheduler, Pyxis, McKesson, HED HSM, Marsh Clear Sight, Care Organizer, Star, Horizon Physician Portal, eClinical Works, HEO, Med Query, Visio and Microsoft Outlook
- Proficient in Excel I, II and III levels including Pivot Tables
- Sound knowledge of working and operating advanced equipment including but not limited to EKG machine, audiometer, spirometer, and pulse oximeter
- In-depth knowledge of the medical terminology, health care treatment and medication policies
- Profound ability of management, critical thinking, and assessment skills

LICENSES / CERTIFICATIONS

- Lean Six Sigma Green Belt Certified
- Current South Carolina Registered Nurse (RN) License
- Institute for Healthcare Improvement Open School Basic Certification
- Stroke Certified Registered Nurse (SCRNP)
- Advanced Stroke Life Support (ASLS)
- Progressive Care Certified Nurse (PCCN)
- Basic Life Support (BLS)

Member of Walden Chapter of The National Society of Leadership and Success
 Member of RSFH Clinical Excellence Council – Co-Chair 2019 / Chair 2020
 Member of Sigma Theta Tau International Honor Society of Nursing
 Member of Alpha Beta Kappa Honor Society
 Member of American Association of Neuroscience Nurses
 Member of American Association of Critical Care Nurses
 Member of American Heart Association/American Stroke Association
 Member of AHA/ASA Heart and Stroke Quality Summit Planning Committee 2018 to present
 Member of South Carolina Stroke Coordinator Alliance Committee – Co-Facilitator

PROFESSIONAL EXPERIENCE

Stroke Program Manager / Neurodiagnostic Department Manager, Roper Saint Francis Healthcare System
 Charleston, SC
 September 2016-Present

Duties

- Responsible for the management and coordination of evidence-based, high quality stroke care in collaboration with medical and clinical staff across the Roper St. Francis Healthcare system which includes four hospitals and two freestanding emergency departments.
- Serves as mentor/educator for units involved in stroke care across the system (including ED, inpatient floors, ICU, rehab) and completes chart reviews to ensure adherence to evidence-based guidelines for stroke care, with coordination of education with health care team. Ensures patient education material meets standards for health literacy and cultural competence.
- Responsible for the management and compliance of The Joint Commission Disease Specific Care Primary Stroke Center certification/designation system wide.
- Maintain knowledge of guidelines from American Stroke Association, Brain Attack Coalition, and Joint Commission (related to Disease-Specific Certification) and plan/implement training and/or education needed to ensure staff and facility compliance with requirements for stroke certification/designation.
- Acts as stroke expert and resource to professional staff at RSFH.
- Oversight of GWTG Stroke Data Registry with data abstraction as needed
- Management of telemedicine services offered to our stroke patients in collaboration with our large academic comprehensive stroke center hospital
- Coordinates a multi-disciplinary approach to stroke care through quality improvement teams and meetings throughout the system.
- Guides and facilitates the development and implementation of stroke protocols, educational activities, and community involvement that perpetuates and strengthens the system's position in the State of SC's stroke system of care.
- Partners with physicians, rehab, nursing, radiology, the Center for Quality, Innovation, and Patient Safety, local and regional EMS providers, and community resources to further the delivery of stroke care within Roper St. Francis Healthcare.
- Ensures staff provides high quality, evidence-based care while maintaining a safe, and patient centered environment.
- Leads a quarterly stroke committee to target performance improvement, stroke program data and regulatory updates.
- Responsible for the management and improvement of clinical outcomes in accordance with current evidence based practice guidelines
- Assists senior leadership to implement patient care improvement strategies.
- Policy and procedure development related to the RSFH System Stroke program to maintain evidenced-based stroke care throughout RSFH facilities.
- Collaborates with medical staff to assure appropriate diagnostic tests and medications are included in patient's plan of care.
- Monitors and performs analysis of facility and aggregated system data related to stroke clinical and process measures.

- Prepares and delivers reports and develops action plans related to the data as needed.
- Lead and coordinate communication and education efforts with external customers, including EMS, local/state/national agencies, and referring facilities on system capabilities related to stroke and efforts to coordinate stroke care and prevention within the system.
- Serves as a scribe for Joint Commission surveys at all RSFH facilities as needed
- Leads and manages the Neurodiagnostic Department/team to ensure that the team is trained, supported, and able to meet deadlines and contribute to success of the department and goals.
- Ensures that all Neurodiagnostic Department manager functions such as hiring, evaluating performance, providing feedback, and addressing disciplinary issues are managed effectively.
- Effectively delegates requests to Neurodiagnostic Department team members.
- Cross trains Neurodiagnostic Department team to ensure that all functions are supported.

Quality Improvement Specialist, Roper Saint Francis Healthcare
Charleston, SC
August 2014-September 2016

Duties

- National Surgical Quality Improvement Program Surgical Clinical Reviewer
- Responsible for reviewing patient charts pre-operatively, intra-operatively and post-operatively
- Responsible for measuring and improving clinical outcomes
- Assists management to implement improvement strategies
- Responsible for the promotion of the use of statistical processes
- Interacts continually with clinical and medical staff to provide data and solution development processes
- Assist with Joint Commission preparation with TJC Tracers

Intensive Care Unit Nurse, Roper Saint Francis Healthcare
Charleston, SC
June 2013-May 2017

Duties

- Provide excellent service to patients and their families.
- Perform assessments for patients and develop patient specific plan of care.
- Accurately administrate medication and treatments to patients while adhering to policy.
- Assist medical doctors with patient examinations and treatments.
- Educating patients on their illness and medications.
- Responsible to monitoring patients for any change in condition.
- Able to respond to patients experiencing life-threatening emergencies.

Charge Nurse, Preoperative Ambulatory Clinic, Medical University of South Carolina
Charleston, SC
July 2013-June 2014

Duties

- Manages the daily operational oversight of the pre-op clinic under general supervision of manager
- Ensures the effective delivery of patient care by providing excellent service to patients and their families
- Consistently models excellence in patient care and contributes to unit leadership
- Interacts with members of the healthcare team to achieve desired results
- Coordinates the daily staff assignment
- Performs daily rounding to ensure the effectiveness of our healthcare delivery and patient satisfaction
- Prepare staff schedule
- Perform assessments for patients and develop patient specific plan of care.

- Assist medical doctors with patient examinations and treatments.
- Educating patients on their illness, medications and preoperative instructions.

Occupational Health Nurse, Boeing Clinic, Roper St Francis Healthcare
North Charleston, SC
July 2011-December 2012

Duties

- Provide excellent service to employees and post offer applicants
- Case Manager for employees with workers compensation claims
- Perform assessments for patients and developing patient specific plan of care
- Accurately administrate medication and treatments to patients while adhering to policy
- Injury and Illness Care
- Hearing Conservation Program
- Bloodborne Pathogen Education
- Occupational Physical Examination Program
- Worker's Compensation Case Management
- Drug Free Workplace Program
- Occupational Disability Management
- Return to work evaluations
- Travel Immunizations
- Vision Testing Program
- Health Education

Cardiac Nurse, Progressive Care Unit, Roper Hospital, Charleston, SC
June 2004-Present

Duties

- Provide excellent service to patients and their families.
- Perform assessments for patients and develop patient specific plan of care.
- Accurately administrate medication and treatments to patients while adhering to policy.
- Assist medical doctors with patient examinations and treatments.
- Educating patients on their illness and medications.
- Responsible to monitoring patients for any change in condition.
- Able to respond to patients experiencing life-threatening emergencies.
- Clinical Coach to new registered nurse graduates as needed.
- Serves as one of the permanent charge nurses on the 25-bed unit.

PRECEPTORSHIP EXPERIENCE

Walden University-MSN Practicum Experience-Specialization Leadership and Management
Associate Senior Nurse Executive
Roper Saint Francis Healthcare
August 2015-November 2015

- Worked with to learn and apply knowledge and skills in a practice setting
- Reports to Senior Nurse Executive
- 368 bed community hospital
- Responsible for 616 FTE's
- Responsible for Operating Budget of \$38 million
- Directs and Manages Clinical Outcomes in accordance with current evidence based practice guidelines.

Kaplan University-BSN Practicum Experience
Clinical Nurse Manager-Neurosurgery Intensive Care Unit
Medical University of South Carolina
December 2013-February 2014

- Worked with to learn and apply knowledge and skills in a practice setting
- 700 bed medical center/teaching hospital
- Responsible for 40 FTE's
- Directs and Manages the operation, marketing, customer service, clinical outcomes and financial responsibilities of the unit
- Responsible for planning, organization, implementation and control of resources needed
- Accountable for the delivery of high quality care of the unit

EDUCATION

Master of Science Degree in Nursing, Walden University, 2015
Specializing in Leadership and Management
Graduated with GPA 4.0
Member of Sigma Theta Tau International Honor Society of Nursing

Bachelor of Science Degree of Nursing, Kaplan University, 2014
Graduated with GPA 4.0
Honor Society
Presidents List Award every semester

Associates Degree of Nursing, Trident Technical College, 2004

High School Diploma, Hanahan High School, 1998

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	TWELFTH JUDICIAL CIRCUIT
	)	
MARY TISDALE AS PERSONAL	)	CASE NO. 2020-CP-21-02290
REPRESENTATIVE OF THE ESTATE	)	
OF EARLENE SEABROOK ,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	DEFENDANT PALMETTO LAKE CITY
	)	OPERATING, LLC D/B/A LAKE CITY-
PALMETTO LAKE CITY OPERATING,	)	SCRANTON HEALTHCARE CENTER'S
LLC D/B/A LAKE CITY-SCRANTON	)	ANSWER TO PLAINTIFF'S COMPLAINT
HEALTHCARE CENTER AND	)	
JEFFREY GIBBS ,	)	
	)	
DEFENDANTS.	)	

TO: D. NATHAN HUGHEY ESQUIRE, A. STUART HUDSON, ESQUIRE, AND
BRADLEY H. BANYAS, ESQUIRE, ATTORNEYS FOR THE PLAINTIFF:

The Defendant Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center (hereinafter “the Facility” or “this Defendant”), by and through its undersigned counsel and *without waiving and hereby expressly reserving all defenses, including any and all rights to compel this matter to arbitration*, respond to the allegations set forth in Plaintiff’s Complaint as follows:

1. Any and all allegations of Plaintiff’s Complaint not hereinafter admitted, denied, qualified, or otherwise explained are hereby expressly denied and strict proof thereof is demanded.

2. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations contained in Paragraph 1 of Plaintiff’s Complaint and therefore denies the same and demands strict proof thereof.

3. In responding to the allegations in Paragraph 2 of the Plaintiff’s Complaint, this Defendant admits only that it is a Delaware limited liability company and was the sole entity licensed to operate the skilled nursing facility doing business as Palmetto Lake City Scranton at

the address stated. Any and all allegations inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

4. The allegations in Paragraph 3 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant admits Jeffery Gibbs was the Administrator at the Facility during the time period at issue in Plaintiff's Complaint.

5. This Defendant denies the allegations set forth in Paragraph 4 of Plaintiff's Complaint and demands strict proof thereof.

6. Responding to the allegations set forth in Paragraph 5 of Plaintiff's Complaint, this Defendant admits that it provides skilled nursing care and treatment to its residents in compliance with the standard of care, and a fee is provided for services related thereto. The remainder of the allegations in the above Paragraph call for legal conclusions to which no response is required. To the extent a response is required, those allegations are denied to the extent they assert or imply liability and/or damages as to this Defendant. Any allegations inconsistent with this response are denied.

7. In responding to the allegations set forth in Paragraph 6 of Plaintiff's Complaint, this Defendant admits only that Plaintiff has attached a photocopied affidavit of Tabitha Nolen, MSN, RN, PCCN, SCRNP to the Complaint. This Defendant denies the sufficiency of the affidavit and denies any and all allegations and assertions contained therein to the extent they allege liability or damages against this Defendant.

8. This Defendant denies the allegations set forth in Paragraph 7 of Plaintiff's Complaint and affirmatively states that this matter should be submitted to arbitration pursuant to a valid arbitration agreement entered into between the parties to this litigation.

9. The allegations set forth in Paragraph 8 of Plaintiff's Complaint call for legal conclusions to which no response is required. To the extent a response is required, those allegations are denied to the extent they allege liability and/or damages against this Defendant.

10. In responding to the allegations set forth in Paragraphs 9, 10, 11, and 12 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, it is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. This Defendant further affirmatively asserts that the care and treatment provided to Ms. Seabrook was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages as against this Defendant are denied and strict proof is demanded thereof.

11. The allegations set forth in Paragraph 13 of Plaintiff's Complaint call for legal conclusions to which no response is required. To the extent a response is required, those allegations are denied to the extent they allege liability or damages against this Defendant.

12. In responding to the allegations set forth in Paragraphs 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, it is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. This Defendant further affirmatively asserts that the care and treatment provided to Ms. Seabrook was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with

this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

13. In responding to the allegations in Paragraph 30 of Plaintiff's Complaint, this Defendant admits that Ms. Seabrook was a resident at the Facility at times relevant to this action, but would crave reference to the skilled nursing chart and records to confirm the dates of her admission. This Defendant denies any and all allegations inconsistent with those records or intended to assert liability or damages against this Defendant.

14. This Defendant denies the allegations set forth in Paragraph 31 of Plaintiff's Complaint and demands strict proof thereof.

15. In responding to the allegations set forth in Paragraphs 32, 33, 34, and 35 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, it is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. This Defendant also admits that the facility had a duty to provide skilled nursing care and treatment to Ms. Seabrook in compliance with the governing standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Seabrook was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability and/or damages against this Defendant are denied and strict proof is demanded thereof.

16. This Defendant denies the allegations set forth in Paragraphs 36, 37, 38, and 39 of Plaintiff's Complaint and demands strict proof thereof.

17. In responding to the allegations set forth in Paragraph 40 of Plaintiff's Complaint, this Defendant would restate its answers to the Paragraphs above as if set forth herein verbatim.

18. Responding to the allegations set forth in Paragraph 41 of Plaintiff's Complaint, this Defendant admits the Facility had a duty to provide skilled nursing care and treatment to Ms. Seabrook during her residency in compliance with the governing standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Seabrook was at all times in compliance with the appropriate standard of care. Any and all allegations contained in the above Paragraph inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

19. This Defendant denies the allegations set forth in Paragraphs 42 and 43 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

20. In responding to the allegations set forth in Paragraph 44 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

21. In responding to the allegations set forth in Paragraphs 45 and 46 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, it is subject to certain applicable rules and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. This Defendant further affirmatively states that at all times, care was provided to Ms. Seabrook within the appropriate standard of care. To the extent the allegations in Paragraphs 45 and 46 are intended to allege liability or damages as to this Defendant, those allegations are denied and strict proof is demanded thereof.

22. This Defendant denies the allegations set forth in Paragraph 47 of Plaintiff's Complaint and demands strict proof thereof.

23. The allegations set forth in Paragraph 48 of Plaintiff's Complaint call for legal conclusions to which no response is required. To the extent those allegations are intended to allege liability against this Defendant, those allegations are denied and strict proof is demanded thereof.

24. This Defendant denies the allegations set forth in Paragraph 49 of Plaintiff's Complaint and demands strict proof thereof.

25. In responding to the allegations set forth in Paragraph 50 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

26. This Defendant denies the allegations set forth in Paragraphs 51, 52, 53, 54, 55, 56, 57, 58, 59, and 60 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

27. In responding to the allegations set forth in Paragraph 61 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

28. The allegations set forth in Paragraphs 62 and 63 of Plaintiff's Complaint call for legal conclusions to which no response is required. To the extent the allegations contained in Paragraphs 62 and 63 of Plaintiff's Complaint are intended to allege liability or damages as against this Defendant, those allegations are denied and strict proof is demanded thereof.

29. This Defendant denies the allegations set forth in Paragraphs 64, 65, 66, 67, 68, and 69 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

30. In responding to the allegations set forth in Paragraph 70 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

31. This Defendant denies the allegations set forth in Paragraph 71 of Plaintiff's Complaint and demands strict proof thereof.

32. In responding to the allegations set forth in Paragraph 72 of Plaintiff's Complaint, this Defendant would restate its answers contained in the above paragraphs as if stated verbatim herein.

33. This Defendant denies the allegations set forth in Paragraph 73 of Plaintiff's Complaint and demands strict proof thereof.

34. This Defendant denies the allegations set forth in Plaintiff's Prayer for Relief and demands strict proof thereof.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

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

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

36. The Complaint fails to state facts sufficient to constitute a cause of action in several regards and fails to state a claim upon which relief can be granted against this Defendant and should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

37. This Defendant would assert that it complied with the applicable standard of care at all times during the timeframe alleged in Plaintiff's Complaint and did not proximately cause damage to the Plaintiff.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

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

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

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

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

40. This Defendant would affirmatively assert that, to the extent it is liable to Plaintiff, which is vehemently denied, it would be entitled to any and all benefits, joint and several liability protections, emergency situations limitations on liability, any and all monetary limitations or caps of liability and/or damages under the Uniform Contributions Among Tortfeasors Act, Noneconomic Damages Award Act, and Medical Malpractice Reform Bill, including but not limited to §15-38-15; §15-32-200 et. seq.; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

41. This Defendant would affirmatively assert the defense of intervening and superseding negligence of third parties not a party to this action. This Defendant reserves the right to withdraw this defense at a later time as discovery progresses.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

42. This Defendant would allege, upon information and belief, that any injuries or damages sustained by the Plaintiff were due to, caused and occasioned by a natural disease process over which the Defendant had no control and, as such, this Defendant pleads such a natural disease process as a complete or partial bar to this action.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

43. This Defendant would assert that some, or all, of the state or federal laws cited by the Plaintiff do not create a standard of care applicable to Plaintiff's claims in this matter.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

44. To the extent this Defendant is required to raise the affirmative defense of comparative negligence under applicable South Carolina law in order to avoid an argument of waiver by Plaintiff, this Defendant would assert Plaintiff's damages, if any, should be proportionately barred or reduced under the doctrine of comparative fault if such evidence is found as the case proceeds.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

45. A claim for punitive damages and an award of punitive damages would violate those clauses of the Constitutions of the United States and South Carolina related to privileges and immunities, due process and equal protection and this Defendant would further assert the

protections, defenses, and statutory rights set forth in S.C. Code Ann. §§ 15-32-510, 15-32-520, 15-32-530, and 15-32-540 *et. seq.*

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

46. Plaintiff's claims of fraud fail to meet the standards imposed by Rule 9(b) of the South Carolina Rules of Civil Procedure.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

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

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

48. This Defendant hereby raises election of remedies as an affirmative defense to Plaintiff's claims.

**FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE**

49. This Defendant hereby asserts that the Plaintiff lacks legal standing to pursue the instant claims.

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice or in the alternative, staying this matter until the validity of the arbitration agreement is judicially resolved, and that they be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Matthew O. Riddle

Gaillard T. Dotterer, III

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; jdavis@ycrlaw.com,

mriddle@ycrlaw.com, gdotterer@ycrlaw.com

*Attorneys for the Defendant Palmetto Lake City
Operating, LLC d/b/a Lake City-Scranton
Healthcare Center*

Charleston, South Carolina

Dated: November 23, 2020

State of South Carolina	)	Court of Common Pleas
	)	Twelfth Judicial Circuit
County of Florence	)	Case No. 2020-CP-21-02290
	)	
Mary Tisdale as PR of the	)	
Estate of Earlene Seabrook,	)	
	)	
Plaintiff,	)	
	)	
-VS-	)	Transcript of Record
	)	
Palmetto Lake City Operating	)	
LLC d/b/a Lake City-Scranton	)	
Healthcare Center, and	)	
Jeffrey Gibbs,	)	
	)	
Defendants.	)	
	)	

February 9, 2021
Via WebEx

B E F O R E:

The Honorable William H. Seals, Jr., Judge

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

Bradley Hunter Banyas, Esquire
Attorney for the Plaintiff

Russell Grainger Hines, Esquire
Attorney for the Defendant

Krystal J. Smith
Official Circuit Court Reporter

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I N D E X

<u>WITNESS/DESCRIPTION</u>	<u>PAGE NUMBER</u>
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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
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(No Exhibits Presented)

COURT REPORTER LEGEND

dashes	--	intentional or purposeful interruption
		or change in thought
ellipses	. . .	trailing off
[ph]		phonetically written
[sic]		written as said

1 FEBRUARY 9, 2021

2 (WHEREUPON, the proceedings began at 11:51 a.m.)

3 THE COURT: All right. Do we have everybody we need?

4 MR. BANYAS: There we go.

5 THE LAW CLERK: Okay. He's muted.

6 THE COURT: All right. Now we can hear you.

7 MR. HINES: Thank you so much. One of these days I'm
8 going to get this right. Hopefully, by that time the
9 pandemic will have ended, but if you are ready for me to
10 proceed, I'll be happy to do it or otherwise I'll wait.

11 THE COURT: I'm ready when you are. I'm ready.

12 MR. HINES: Thank you, Your Honor. Again, my name is
13 Russ Hines, and I'm here for the -- for the defendant. I'm
14 with the other lawyers at Clement Rivers. I think you'll see
15 Jay Davis is actually of record, but I'm covering for him,
16 and may it please the Court.

17 Our client is Palmetto Lake City Operating LLC and it's
18 a d/b/a. It's Lake City-Scranton Healthcare Center. Your
19 Honor, this is our motion to compel arbitration.

20 The basic setup of this case is it's a nursing home, a
21 neglect case. It's a wrongful death and survival action, and
22 the -- and the premise of it is that the decedent -- that's
23 Ms. Seabrook, Earlene Seabrook. This action is being brought
24 by her personal representative, whose name is Ms. Tisdale,
25 and the claim is that because of various deficient care or

1 treatment that was provided to Ms. Seabrook during her
2 residency at our facility -- I'll just call us the facility
3 -- that that led to her decline and eventually her death.

4 And again, the motion that we're making today is asking
5 for the claims, the plaintiff's claims against the facility,
6 to be compelled to arbitration. The basis for that is an
7 arbitration agreement that was signed by Ms. Tisdale.

8 Now, I would be clear to say that although it is the
9 same person, Ms. Tisdale who has brought this suit is the
10 personal representative of the -- of the estate. Obviously,
11 she was not the personal representative of the estate at the
12 time she signed the agreement because it was during the
13 decedent's lifetime, but she did.

14 We have, I guess, a pretty good bit of ground that we
15 cover in terms of various arguments about authority and the
16 very basis for that in our -- in our memo and I'll -- well,
17 I'll let that speak specifically for itself in its entirety,
18 but what I would like to focus on, if I can, Your Honor, is,
19 number one, the healthcare power of attorney.

20 When Ms. -- when Ms. Seabrook was admitted, Ms. Tisdale
21 signed on her behalf, on behalf of Ms. Tisdale that is, an
22 admission agreement and also an arbitration agreement. We
23 are moving to compel arbitration based on the arbitration
24 agreement, which is -- well, it's Exhibit 3 to our memo and
25 the admission agreement is Exhibit 2.

1 Now, my understanding from plaintiff's memo in
2 opposition is that they say, well, she had authority based
3 upon the healthcare power of attorney to sign the admission
4 agreement for Ms. Tisdale, but not the arbitration agreement.
5 And the extension there is that the healthcare power of
6 attorney, according to plaintiff's argument, does not cover
7 the waiver of a legal right to a jury trial and the -- you
8 know, and the -- well, it doesn't cover the ability to enter
9 into an arbitration agreement.

10 One of the arguments that the plaintiff makes in that
11 regard or part of the plaintiff's argument has to do with a
12 case called *Coleman v. Mariner Health Care*. In that case,
13 the Supreme Court said that the statutory scheme called the
14 Adult Healthcare Consent Act did not allow someone who was a
15 surrogate for an -- for an incapacitated person to enter into
16 an arbitration agreement. It made a distinction between what
17 was healthcare and what was not healthcare, healthcare being
18 the admission to the facility and just different decisions
19 made about treatment and so forth, and what you might call
20 legal rights being something that's different.

21 The key here, Your Honor, and what makes this different
22 is because our argument is not under the Adult Healthcare
23 Consent Act. It is under the healthcare power of attorney.

24 We have provided as an exhibit to our memo -- this as
25 Exhibit 4 -- the case with -- well, it was called *Arredondo*

1 -- and it's got sort of a long name -- *v. SNH SE Ashley River*
2 *Tenant*. It's provided, again, as Exhibit 4 to our memo.

3 And I would make clear right off the bat that it is an
4 unpublished decision from the Court of Appeals, which means
5 that I am not able to cite it to you for its precedential
6 value and -- but I do believe it's fair game and appropriate
7 to cite it for the strength for its persuasive authority
8 because it actually does get into the question of whether or
9 not under South Carolina statutory healthcare power of
10 attorney, which is what we're dealing with here, the
11 statutory -- under that statutory scheme, which is found in
12 Title 62, in particular 62-5-504 of the Code sets forth a
13 form document that forms a healthcare power of attorney,
14 which is the same doc -- same form that was used in this
15 case. That document is provided with our memo as Exhibit 1.

16 Well, in that *Arredondo* case, the Court of Appeals went
17 and actually was examined whether or not there was the
18 ability to enter into an arbitration agreement on the basis
19 of a -- both a general power of attorney and a health -- a
20 statutory healthcare power of attorney and found that in both
21 cases there was such authority by that, by virtue of that
22 document.

23 Now, you may be wondering how is that so when we're --
24 when we have, as the plaintiff pointed out, the language of
25 the *Coleman* decision which indicates that the reach of the

1 term healthcare under the Adult Healthcare Consent Act is not
2 so expansive as to get to arbitration agreements. Again, the
3 difference there, Your Honor, is the -- it's simply we're
4 dealing -- it's not apples to apples because under the
5 language -- this is what the *Arredondo* Court cited from the
6 statutory healthcare power of attorney.

7 And I don't know that Your Honor would have even the
8 ability to have this in front of you right now, but it's
9 Exhibit 1, which again is the power. It's not paginated, but
10 on the bottom when I'm writing page number 10 for myself a
11 moment ago, on the fourth page of that exhibit, there is a
12 heading that says agent powers, and when I flip to the next
13 page, which would be the fifth page, it begins at the very
14 top: accordingly, unless specifically limited by the
15 provisions specified below, agent is authorized as follows.
16 And it includes items A through E.

17 Under D of that -- and again, this is all following the
18 language from the statutorily prescribed form, 62-5-504 from
19 the South Carolina Healthcare Power of Attorney, in section D
20 it indicates: take any other action necessary to making,
21 documenting, ensuring implementation of decisions concerning
22 my healthcare, including but not limited to -- and here's
23 where it's important -- granting any waiver or release from
24 liability on the part of any hospital, physician, nursing
25 care provider or other healthcare provider, signing any

1 documents relating to refusals of treatment or leaving a
2 facility against medical advice, and pursuing any legal
3 action in my name and the expense of my -- excuse me -- and
4 at the expense of my estate to force compliance with my
5 wishes as determined by my agent or to seek actual or
6 punitive damages for the failure to comply.

7 And that language, Your Honor -- I'm going to come back
8 to this *Arredondo* case, which again, I'm not suggesting it's
9 a self-binding precedent, but I am suggesting it is worthy or
10 worthwhile persuasive authority, given that it is our Court
11 of Appeals, and it's expressly the express analysis of this.

12 It says, referring to the healthcare power of attorney,
13 also authorized Arredondo to pursue legal action to grant any
14 waiver required by healthcare providers, such as appellants,
15 and it goes on to conclude that it granted legal authority to
16 waive the jury trial right and to execute an agreement
17 selecting the forum in which the dispute would be resolved.

18 Accordingly, Your Honor, it's to say that that's why
19 that's different from the *Coleman* case. I know this could
20 get maybe a bit complicated, but the plain language of a
21 healthcare power of attorney, which is a statutory power,
22 includes the ability for the attorney-in-fact, the person
23 holding the power, to grant waivers or releases from
24 liability and to pursue legal action and to seek actual or
25 punitive damages.

1 And I would make clear the point that -- I don't know
2 that this would even be argued. I don't know that it's in
3 plaintiff's brief specifically, but it is not the case that
4 the -- for a power of attorney to include the right or the
5 power of an agent or the attorney-in-fact to -- to enter into
6 an arbitration agreement.

7 That does not have to be specifically spelled out in the
8 power, and that actually goes to -- there's a Supreme Court
9 case called *Kindred Nursing Centers v. Clark*, and I mean it's
10 a United States Supreme Court case and the reason why that
11 federal law is important is because we have -- this is a --
12 an arbitration agreement that's covered by the FAA, the
13 Federal Arbitration Act, and the main point about the FAA is
14 that it provides a rule of equal treatment for arbitration
15 agreements, equal treatment meaning that they are treated on
16 equal footing with any other contract under state law.

17 So -- and so in Kentucky when that *Kindred* case came out
18 by ruling from the state of Kentucky, that required an
19 express statement that arbitration was something that could
20 be agreed to under the power, and the Supreme Court struck
21 that down as violating the FAA because it -- it was different
22 treatment of arbitration. It treated it different than other
23 contracts would be treated.

24 So my point is to say this is a -- this is broad
25 language anyways where -- excuse me -- the language in what I

1 just read to Your Honor, and I won't belabor the point by
2 reading it again, but I would note that it has the language
3 "including but not limited to" before it even begins to speak
4 of a waiver or release of liability or pursuing actions.

5 And here's maybe the clearest way I could say it is that
6 when you -- when a principal in any power of attorney
7 document vests in the agent the ability to pursue litigation,
8 inherent in that is the -- is the -- is the ability to waive
9 the right to a jury trial. And I say that like this. If the
10 -- if you can't do that, you couldn't settle a case because
11 obviously to settle a case is to forgo a jury trial.

12 So I mean, you know, it's -- I just want to make the
13 point that it would be -- well, I mean, obviously, my -- our
14 position is that that language consistent with the reasoning
15 in the *Arredondo* decision, which we provided, allows for this
16 -- the -- Ms. Tisdale here to have authority to execute the
17 arbitration agreement.

18 And that's one complete independent basis, Your Honor,
19 for this motion to be granted. If you happen to have any
20 questions about that, I will be happy to address them. It's
21 also, of course, briefed.

22 If I may very quickly try to move to it, there is an
23 independent basis that I wanted to argue to you that is even
24 if we -- you were not persuaded that there was actual
25 authority by virtue of the healthcare power of attorney, we

1 argue that under the doctrines of merger and equitable
2 estoppel that the plaintiff in this case should be estopped
3 from denying enforceability of the arbitration agreement.
4 Again, this is all set forth in our brief, and I'll try to
5 condense it to the high points because it's basically a two-
6 pronged attack.

7 The first part of it is the doctrine of merger, and the
8 doctrine of merger -- and I mentioned that *Coleman* case
9 earlier, Your Honor. That *Coleman* case, what's it's most
10 known for is its analysis of the statutory question as to
11 whether or not the Surrogacy Act, the Adult Healthcare
12 Consent Act, provided or was a basis for authority to -- to
13 -- for the surrogate to enter into an arbitration agreement,
14 but the proponent of arbitration in that case and what
15 *Coleman* was another case involving a nursing facility and an
16 arbitration agreement and an admission agreement.

17 Another argument that was made was an argument for a
18 merger and estoppel. While in the *Coleman* case the *Coleman*
19 Court found on the facts of that case that it was not a
20 winning argument, it nonetheless provided the legal
21 justification to win the argument in the appropriate case.

22 And what it is is it recognized the law. It said when
23 you have two documents, two instruments, that were executed
24 at the same time by the same parties for the same purposes
25 and in, of course, the same transaction, then you -- the law

1 presumes there to have been a merger and that the two
2 instruments will be deemed to be -- to be one and to be
3 construed as one.

4 And what the *Coleman* Court indicated is that, yes,
5 indeed, when you have arbitration agreements and admission
6 agreements that are executed at the same time, they are --
7 that is, indeed, the same time, the same parties, purpose
8 and, of course, the same transaction and, therefore, you have
9 a presumption of merger unless that presumption is upset by
10 some indication that the parties intended the instruments to
11 remain separate and not to merge.

12 Our position is that there -- contrary to the *Coleman*
13 case where the Court found that there was an intention to
14 remain what they call the separatedness of the instruments,
15 there is no such intention here.

16 Your Honor, again, I know this is -- again, it's a lot
17 of ground to cover, but the separatedness brings up a
18 situation where the -- there is no reason for the arbitration
19 agreement to exist other than for in the -- without the
20 admission agreement, meaning that it is true that in this
21 case that the arbitration agreement is not required for
22 admission. It can be -- it does not have to be agreed to,
23 but it is nonetheless a document that is signed in
24 conjunction with the admissions process and, once it is
25 signed in conjunction with that process, then it is a part of

1 the admissions documents.

2 One of the key points that the *Coleman* Court made and in
3 some other cases based off *Hodge* and a case called *Thompson*
4 where they found facts were not in favor of merger was that
5 the -- the -- there was an entire agreement clause in the --
6 in the admission agreement that made reference to the
7 arbitration agreement as being a separate contract.

8 We don't have that here. In fact, there is an entire
9 agreement clause in the admission agreement, but not only
10 does it not reference the arbitration agreement as a separate
11 contract, it specifically indicates that other admissions
12 materials are a part of that -- that contract.

13 And so there's two things. Number one, it recognizes
14 that, you know, it's an express recognition that it's
15 contrary to this idea of separatedness that the *Coleman* Court
16 relied on and, of course, as I was trying to explain, the
17 arbitration agreement is -- once signed, it's a part of the
18 admissions documents. And so it's actually accounted for via
19 that language for other admissions agreements or other
20 admissions documents and materials in the entire agreement
21 clause.

22 The other thing I would mention, Your Honor, is that if
23 the documents are, indeed, merged and are to be treated as
24 one, then the equitable estoppel component comes in like
25 this. In a case called *Wilson v. Willis*, our Supreme Court

1 endorsed the application in arbitration cases in equitable
2 estoppel tests or the direct benefits test, and the long
3 story short on that is that you cannot receive direct
4 benefits under a contract and then accept those and then deny
5 some other part of the contract that you don't like.

6 And so, Your Honor, we believe that properly viewing the
7 arbitration agreement and the admission agreement as merged,
8 that Ms. Seabrook's receipt of various benefits, her
9 admission and room and care and board and various things that
10 she received in conjunction with her admission would treat as
11 that direct benefits test and, therefore, she should be or
12 her estate rather should be estopped to deny the
13 enforceability of the arbitration agreement.

14 Your Honor, thank you for your patience. Should you
15 have any questions, I'd be happy to answer them. If I can
16 have just a moment after Mr. Banyas makes his argument, I
17 would appreciate a little bit of -- just a brief bit of reply
18 time. Otherwise, I would rely on our memo.

19 And in the fall -- in the alternatives for a fallback
20 argument at the very end where we ask for leave to conduct
21 some targeted discovery should Your Honor not be inclined to
22 grant our motion on the -- on the arguments for that, that
23 we're able to make today because we do not have at our
24 disposal discovery to argue, for instance, you know, actual
25 agency, although I would note that in the arbitration

1 agreement Ms. -- Ms. Tisdale expressly represents that she
2 had -- she, indeed, had authority to sign and bind Ms. -- Ms.
3 Seabrook.

4 Again, Your Honor, I know -- well, I know it's been a
5 long morning for you and these motions have been -- have been
6 fairly detailed. So I think it's fairly well covered in our
7 -- in our brief materials and the -- just allow us a little
8 bit of reply and I'll stop for now. Thank you.

9 THE COURT: Thank you.

10 I'll be glad to hear from you.

11 MR. BANYAS: Thank you, Judge. May it please the Court.
12 Brad Banyas of the Hughey Law Firm on behalf of the
13 plaintiff. I will be pretty brief and try and just get it to
14 the core of everything here.

15 One thing that I will say, when we're looking at
16 arbitration agreements in the context of a nursing
17 home/assisted living facility, our appellate courts and
18 Supreme Court have ruled on this with some degree of
19 frequency within the last five or six years. There have been
20 several opinions that are cited in my brief, but one thing
21 that's important to look at is the standard of review.

22 *Wilson v. Willis* is a 2019 case from the Supreme Court
23 that says that there's a presumption against arbitration when
24 enforcement is sought against a non-signatory. In this case,
25 Ms. Seabrook was a non-signatory in this matter. She did not

1 sign the arbitration agreement.

2 That is the first and foremost most important thing that
3 I think that everybody needs to remember here, and I think
4 it's not disputed that she did not sign it. Ms. Tisdale is
5 Ms. Seabrook's niece. She was with her when she went through
6 the admissions process. She admitted Ms. Seabrook into the
7 facility.

8 The party seeking to enforce an agreement to arbitrate
9 has the burden of establishing the existence of a valid
10 arbitration agreement. So it's not enough just for the
11 defendants to say, well, we have an arbitration agreement and
12 then the burden somehow shifts to the plaintiffs. That's not
13 true. They have to prove that they have a valid arbitration
14 agreement in order for arbitration to be compelled or ordered
15 in this case.

16 There are two distinct things to keep in mind here. Our
17 South Carolina legislature has provided for two separate
18 types of powers of attorneys.

19 You know, a general durable power of attorney, which is
20 often referred to as a financial power of attorney in which
21 somebody is able to grant authority to act, make decisions,
22 make legal decisions, make banking decisions, real estate
23 purchasing decisions, you know, things of that nature in the
24 event that the principal becomes incapacitated or is unable
25 to do that.

1 Likewise, we have a South Carolina statutory form
2 healthcare power of attorney, which is codified at 62-5-504,
3 and since 2007 roughly all -- it's a requirement that all
4 healthcare power of attorneys follow that same exact
5 statutory form.

6 The legislature for good reason has adopted that sort of
7 statutory form because they want -- in the event that
8 somebody becomes unable to make healthcare-related decisions
9 about themselves, life-sustaining treatment, it's also known
10 as what's called a living will in that in the event that
11 somebody becomes incapacitated, the principal becomes
12 incapacitated, they are able to select somebody that they
13 know or they want to be able to make life-sustaining
14 treatment: do you want to be tube fed, do you want to be kept
15 alive on a ventilator, and that sort of thing. And it -- and
16 it deals specifically with healthcare-related decisions.

17 Now, the -- and that's what we have in this scenario.
18 We have a healthcare power of attorney. There is not a
19 durable power of attorney. There is not a power of attorney
20 that says I, Earlene Seabrook, grant my agent, Mary Tisdale,
21 the express authority to carry all financial transactions or
22 to sue or collect or arbitrate any sort of dispute that I
23 myself may be able to do. We don't have that at all. The
24 only thing that we have is a healthcare power of attorney
25 that deals with healthcare-related decisions.

1 If you look at the statute, 62-5-504, it deals with the
2 definitions of healthcare. 62-5-504(3), healthcare means a
3 procedure to diagnose or treat a human disease, ailment,
4 defect, abnormality or complaint, whether of physical or
5 mental origin. It also includes the provision of
6 intermediate or skilled nursing care, services for the
7 rehabilitation of injury, disabled or sick persons, and
8 placement in or removal from a facility that provides these
9 forms of care.

10 So if you look at what the authority of the healthcare
11 power of attorney grants upon the agent, it allows them to
12 make medical decisions, healthcare-related decisions on
13 should this -- should the principal -- should this person be
14 admitted to a nursing home, should it -- should this person
15 have any sort of medical-related procedure done, that sort of
16 thing. That's what that deals with.

17 And our Courts have looked at this in this setting and
18 have -- there's pretty sufficient case law out there that the
19 healthcare power of attorney has -- is limited in its scope.
20 It's only -- Ms. Seabrook only chose to create a healthcare
21 power of attorney with a specific eye towards her preferences
22 on life-sustaining end-of-life medical treatments. She was
23 not appointed as her general financial or legal
24 representative but only as a healthcare agent to make
25 healthcare decisions.

1 The *Coleman* case and the *Thompson* case and the *Hodge*
2 case and all these other plethora of cases that our appellate
3 and Supreme Court have dealt with in relation to arbitration
4 in a skilled nursing setting specifically defines admission
5 to a skilled nursing facility as a healthcare-related
6 decision and that's -- that is by statute true and that's
7 what our Courts have held. However, where they draw the line
8 is that agreeing to arbitrate some dispute, some unknown
9 dispute in the future, is a legal decision and you have to
10 have legal authority to agree to do that, which a healthcare
11 power of attorney does not provide.

12 If Ms. Seabrook herself had signed the arbitration
13 agreement or Ms. Tisdale had a durable power of attorney that
14 expressly stated that she had the ability to sign that --
15 sign the arbitration agreement and waive the right of a jury
16 trial on behalf of Ms. Tisdale, then we wouldn't be here
17 today because that would be -- that would be valid.

18 And what the defendants are trying to do in this case is
19 they're trying to take a healthcare power of attorney and
20 essentially rephrase what sort of authority is granted by way
21 of that healthcare power of attorney. If you look at Section
22 D of the healthcare power of attorney, what it says is my
23 agent is authorized to do as follows. It talks about the
24 consent, treatments, so on and so forth, and in D it's to
25 take any other action necessary.

1 And I think Mr. Hines read through this, but he left out
2 the very end of it, and what this says is you have the -- the
3 agent is authorized to take any other action necessary to
4 making, documenting, ensuring implementation of decisions
5 concerning my health care, including but not limited to
6 granting any waiver or release from liability required by any
7 hospital, physician, nursing care provider or other
8 healthcare provider, signing any documents relating to
9 refusals of treatment or the leaving of a facility against
10 medical advice, and pursuing any legal actions in my name and
11 at the expense of my estate to force compliance with my
12 wishes as determined by my agent or to seek actual or
13 punitive damages for the failure to comply.

14 And what that section D means is that if Ms. -- in this
15 instance, Ms. Tisdale -- or Ms. Seabrook was incapacitated
16 and her power of attorney said that she wanted maximum life-
17 sustaining treatment and the hospital failed to honor that,
18 Ms. Seabrook -- Ms. Tisdale would have the authority to seek
19 some sort of actual or punitive damages for the failure to
20 comply or pursue any sort of legal action to ensure that her
21 healthcare wishes are being honored. That's what that
22 section means. It does not give Ms. Tisdale carte blanche to
23 file any sort of lawsuit on behalf of Ms. Seabrook for
24 whatever reason.

25 If you're -- if we're reading healthcare power of

1 attorneys like that, then there's really not much need for
2 any sort of durable power of attorney, and that's not what
3 Ms. Seabrook -- that's not what sort of power she was trying
4 to confer on Ms. Tisdale by signing this. The Courts have
5 gone through that, I think, as well.

6 Our appellate courts have also held that healthcare
7 decisions do not encompass arbitration contracts. It talks
8 about that in *Coleman, Thompson, and Hodge*. There was
9 another recent case that came out, I think, within the last
10 year, *Stott v. White Oak Manor*, that even found that a
11 durable power of attorney was not valid in the arbitration
12 setting because it had not even been recorded with the
13 register of deeds. You know, I will point out that Ms.
14 Tisdale's and Ms. Seabrook's power of attorney that we have
15 here was not recorded with any county register of deeds or
16 anything like that, but I don't think that we need to go that
17 far because what we're talking about is with a healthcare
18 power of attorney.

19 The defendants are skilled nursing facilities. They
20 deal with admissions, admitting new patients, I'm sure with a
21 very great degree -- a great deal of frequency. They should
22 know what is required when signing arbitration agreements.
23 They should know to ask do you have a durable power of
24 attorney. Are you this person's court-appointed guardian or
25 conservator? If not and they want the arbitration agreement

1 to be valid, I'm sure that they can take it to the resident's
2 room and have the resident sign it.

3 But that kind of gets into the estoppel argument that I
4 was going to make here in just a second. They're sitting by
5 and not -- not -- they're a sophisticated business entity.
6 They deal with this day in and day out. They know what they
7 should need. They should know that, hey, if we've got a
8 healthcare power of attorney and we have a signature on an
9 arbitration agreement, Ms. Tisdale, who is not a lawyer, who
10 is not a sophisticated legal mind or anything like that,
11 she's just a common everyday person admitting her aunt into
12 the nursing home. She doesn't know what she has or what she
13 can -- what she could do and couldn't do, only that she knows
14 that she has the ability to admit her aunt by way of a
15 healthcare power of attorney.

16 So we -- I briefed that in my -- in my memo and I'm
17 trying not to sound some redundant, but again, the burden of
18 establishing agency is on the party asserting that the
19 principle of agency exists. The defendants have failed to
20 meet their burden here because there's -- there's no evidence
21 anywhere that Ms. Tisdale somehow tried to misrepresent what
22 sort of authority that she had or anything like that. She
23 provided the healthcare power of attorney to the defendants
24 at the time of the admissions. She signed that. The
25 healthcare power of attorney very clearly states what powers

1 that Ms. Seabrook gave to Ms. Tisdale, and agreeing to
2 arbitrate a claim is not in there at all.

3 Again, I hate to sound like a broken record, but our
4 Courts have looked at this and found arbitration agreements
5 to be unenforceable where a family member signed an
6 arbitration agreement near the time of admission and this --
7 and they did not have the authority to do so. The *Coleman*,
8 *Thompson*, and *Hodge* cases, all three of those cases deal with
9 somewhat similar fact patterns of what we have here and in
10 all three of those cases the Courts found that there was no
11 implied authority nor estoppel applied in any of those
12 situations.

13 She should not be moving into the estoppel portion of
14 the argument. She should not be equitably estopped from
15 denying the arbitration agreement. Equitable estoppel
16 requires proof that the party being estopped acted in a way
17 amounting to a false representation, which we don't have
18 here, intended that such conduct be acted on by the other
19 party, and had actual or constructive knowledge of the real
20 facts.

21 There's no evidence at all that Ms. Tisdale was trying
22 to in any way, shape or form mislead the facility as to what
23 sort of authority that she had. Being admitted to the
24 facility, it takes Medicare money, which this facility does,
25 it's illegal for the facility to condition the admissions

1 based solely on signing an arbitration agreement. The
2 arbitration agreement is an optional thing. It's not that
3 you have to sign this if you come in. So they can't say,
4 well, you know, you have to sign this arbitration agreement
5 or you're not going to be admitted to our facility. It
6 doesn't work like that.

7 So there's no evidence anywhere that's going to show
8 that Ms. Tisdale amounted to any sort of false
9 representation. She provided the healthcare power of
10 attorney to the defense at the time of admission. A person
11 cannot claim to be misled and cannot rely on equitable
12 estoppel if the party by exercising reasonable diligence
13 could've acquired knowledge to determine the truth of the
14 facts in question.

15 That's been a law for, you know, quite some time now,
16 and here there's no -- nothing anywhere to show that Ms.
17 Tisdale did any sort of thing to misrepresent her authority
18 or anything like that. The defendants have the capacity to
19 determine whether or not she had the authority to sign the
20 arbitration agreement, and they didn't do it. They just
21 accepted her and, you know, eventually she developed a
22 pressure ulcer which became infected and led to her death.

23 So to the extent that it's being alleged that Ms.
24 Seabrook derived some sort of benefit from being within the
25 facility, I think the simple fact that we're even here today

1 filing this lawsuit goes to show that she really didn't get
2 much of a benefit while she was in the facility. The
3 appellate courts have also discussed that sort of benefit in
4 the context of a wrongful death claim against a nursing home.

5 Finally, the admissions agreement and arbitration
6 agreement are separate contracts that do not merge. Again, I
7 don't think that we really even need to get to this point
8 because we don't have a valid arbitration agreement to begin
9 with, given the fact that Ms. Tisdale did not have the
10 authority to bind Ms. Seabrook to arbitration, but to the
11 extent that it warrants some sort of argument or warrants
12 addressing, the admissions agreement and the arbitration
13 agreement are separate contracts that do not merge. They're
14 separately paginated, but this has been addressed, again, in
15 the *Hodge* case, the *Thompson* case, the *Coleman* case. They
16 all provide examples of factors demonstrating separatedness
17 and preventing merger.

18 I don't think that in any case that we have in the
19 context of a skilled nursing home and an arbitration
20 agreement that our Courts have ever found that there was some
21 sort of merger, and it's no different in this case. They are
22 two separate documents signed separately. They're not
23 merged. They're for two separate purposes.

24 The law on merger states that in the event two documents
25 may be merged if they were signed at or near the same time

1 for the same purpose. These don't have anything to do with
2 each other purpose-wise. The admissions agreement sets forth
3 the terms of the healthcare that is to be provided to Ms.
4 Seabrook while she is admitted to the facility, what sort of
5 treatment she's going to get, what level of treatment she's
6 going to get, such as fees and costs, all those sorts of
7 things, and that's what's all set forth in the admissions
8 agreement.

9 And then you have this second arbitration agreement
10 that's stuck in at the very end that just says if we have any
11 sort of disputes, you're going to waive your right to a jury
12 trial. That does not determine anything to do with her
13 healthcare at all. All that does is determine the forum to
14 arbitrate or decide any sort of disputes, should they arise
15 later on in the future.

16 And so looking at that, they serve two separate
17 purposes. Yes, they were dated and signed the same day, but
18 they're for two separate -- separate things.

19 And again, while Ms. Tisdale certainly had the authority
20 by way of the healthcare power of attorney to admit her aunt
21 into the facility, we're not -- we're not talking about any
22 sort of -- you know, there's no breach of contract claim that
23 was filed against the facility for failing to uphold the
24 terms of the residency agreement. What we have filed are
25 negligence, negligence *per se*, wrongful death, survivorship

1 action for her developing a pressure ulcer.

2 So that's -- that's really -- really my -- my big
3 argument here. On multiple occasions, nursing homes have
4 tried to enforce arbitration agreements where there was no
5 authority. It's been discussed pretty succinctly by our
6 Supreme Courts and our Courts of Appeals. That the terms and
7 the context, again, of the admission agreement and the
8 arbitration agreement show that they intended them to be two
9 separate agreements.

10 Finally, the FAA does not mandate enforcement of those
11 agreements under the Federal Arbitration Act. Arbitration is
12 required when there is a valid arbitration agreement and a
13 dispute exists, which is sought in this agreement, but again,
14 there was no valid arbitration agreement; so the FAA would
15 not apply.

16 There should not be any sort of limited discovery or any
17 sort of jurisdictional discovery because there's nothing that
18 is what I'm covering. There's nothing that -- there's no
19 sort of agency or secret sort of conspiracy or agency
20 arguments that is going to be determined by any sort of
21 limited party jurisdiction discovery.

22 It's very clear what sort of authority Ms. Seabrook gave
23 to Ms. Tisdale. She gave her a healthcare power of attorney
24 and said I want you to make healthcare decisions for me. She
25 did not give her a durable power of attorney and did not say

1 I want you to make legal decisions, financial decisions, or
2 anything of that nature.

3 By giving credence to this healthcare power of attorney
4 to agree to make legal decisions, it's really going beyond
5 the bounds of what the healthcare power of attorney was
6 intended to provide. Therefore, we -- there's nothing before
7 the Court, there's nothing that could -- nothing -- no sort
8 of evidence that would show that there was any sort of actual
9 or apparent authority.

10 The limits of Ms. Tisdale's authority given to her by
11 Ms. Seabrook are very clear in a healthcare power of attorney
12 and that's it. She had the opportunity to make a durable
13 power of attorney. She didn't. I don't know what was going
14 through her mind back in November of 2017 when she created
15 this healthcare power of attorney, but she did not create a
16 durable power of attorney. And for that reason alone, as
17 well as everything else that's in my brief, I respectfully
18 request the defendant's motion to compel arbitration be
19 denied.

20 THE COURT: All right. Do you mind emailing me the
21 healthcare power of attorney?

22 MR. BANYAS: Yes, Your Honor. It was also -- I believe
23 it's Exhibit No. 1 of the defendant's brief, but I will
24 certainly email it to you over today.

25 THE COURT: All right. How about a brief reply, Mr.

1 Hines?

2 MR. HINES: Thank you, sir. Very brief.

3 It was mentioned in the first part of that argument
4 about there being a presumption against the enforceability.
5 We had a non-signatory for an arbitration agreement. I want
6 to clarify, and this is from -- this is from that *Stott v.*
7 *White Oak Manor* case that was mentioned earlier in passing,
8 but this proposition is cited in it. The holder of the power
9 of attorney steps into the shoes of the grantor and is
10 basically the alter ego of the grantor.

11 I make that point to say when we're talking about
12 authority based on a power of attorney, that that presumption
13 -- you know, we're really not dealing with the law with a
14 non-signatory. While it was not signed by Ms. Seabrook, that
15 is true, if we are correct that it was indeed signed by her
16 attorney-in-fact, then it's not on all fours with the typical
17 non-signatory case.

18 Now, I also would say in terms of that presumption I
19 don't believe that presumption is actually permissible under
20 the FAA because if the presumption is against -- it's just --
21 if it applies to specifically arbitration agreements, it
22 doesn't place arbitration agreements on equal footing with
23 other contracts and, therefore, it would violate the FAA.

24 It was -- I thought I understood opposing counsel to
25 indicate that this issue of the -- of the scope of authority

1 under the statutory healthcare power of attorney had been
2 litigated and decided against us. Your Honor, respectfully,
3 I'm not aware if that's the case.

4 The cases of *Coleman* and *Thompson* and *Hodge* have been
5 referenced and I know it might be tough to keep up with these
6 things because, you know, not everyone is necessarily on a
7 first name basis with these -- with these cases, but none of
8 those cases involve powers of attorney of any kind. The
9 question in *Coleman* is sort of the granddaddy of them all.
10 It was the first one and it really dealt with that Adult
11 Healthcare Consent Act, and it absolutely did say, as
12 opposing counsel indicates, that they recognize the limits of
13 what healthcare covered.

14 The thing is that was under a different statute that you
15 did not have in *Coleman*. Any of this issue with the -- with
16 the forum under the South Carolina statutory healthcare power
17 of attorney that gets into the granting of a waiver of
18 release from liability, pursuing legal action, and so forth
19 has been read and, Your Honor, the only appellate decision
20 I'm aware of that squarely addresses this, again, is this
21 *Arredondo* case. It's, therefore, in our memo, if you'll
22 indulge me a moment.

23 Likewise, the healthcare power of attorney was not
24 limited to healthcare decisions, as *Arredondo* contends. It
25 also authorized *Arredondo* to pursue legal action and to grant

1 any waiver required by healthcare providers such as
2 appellants, and it continues: thus, we hold the powers of
3 attorney and was looking at both the general durable power
4 and the healthcare, statutory healthcare power, authorized
5 Arredondo to waive their right to a jury trial and execute
6 agreements like in the forum in which any legal action would
7 be taken.

8 So, Your Honor, while that is not precedent, I would
9 suggest that it's the only indication that we have from one
10 of our Courts -- appellate courts rather as to the scope of
11 the healthcare power is in favor of our argument.

12 The various arguments about any misrepresentations from
13 -- from Ms. -- Ms. Tisdale, I would note that the -- I mean
14 the document itself, the arbitration agreement, and the
15 language in it, by his or her signature below, the executing
16 party represents that he/she has the authority to sign on
17 resident's behalf so as to bind the resident as well as the
18 representative.

19 There's a certain presumption under our law that anybody
20 who signs a document has read it, understood it, and agrees
21 to it. There's obviously no suggestion here. I understand
22 she's not a lawyer, but she is a competent adult or else she
23 would not be holding a healthcare power of attorney for
24 somebody else. And so I think that that argument really is,
25 one, that she made representation of her authority and also

1 provided the healthcare power of attorney.

2 Furthermore, I don't think there's any obligation under
3 the law to require a contracting party, in this case the
4 facility, to undertake the investigative duty that would seem
5 to be required of it by opposing counsel's argument, and to
6 apply that to any case specifically with arbitration
7 agreements would, again, be to violate the FAA by treating it
8 different.

9 On the FAA -- on the -- the equitable estoppel point, I
10 just need to mention that the test for equitable estoppel
11 that plaintiff's counsel refers to in their brief is called
12 the traditional six-factor test. That test was -- in *Wilson*
13 *v. Willis*, our Supreme Court recognized that that test was --
14 was -- really didn't apply in non-arbitration cases, and
15 that's why the direct benefits test was a different test
16 which that Court endorsed as an appropriate test -- was an
17 appropriate test specifically in arbitration cases because
18 this -- these -- the six factors of that test are really a
19 misfit for the context that we're talking about here with
20 arbitration.

21 The idea that she didn't receive any benefit by the way,
22 obviously that is one argument that presupposes the merit of
23 her claim, but not only that, it broadens and expands her
24 claim to something that it is not. Her claim specifically
25 has to do with the allegation that she was allowed to develop

1 a pressure ulcer when she -- when she should not have. It
2 does not mean that she didn't receive any benefit in the form
3 of every and any meal, any treatment, any medicine, any room
4 that she was provided, you know. So the point is she
5 received undoubtedly quite a great number of benefits
6 separate and apart from the allegation of damages this claim
7 is founded upon.

8 And gosh, Your Honor, I thank you so much for your
9 indulgence. And again, we've briefed it too, and we'll stand
10 on that. So with that, I'm going to ask that you grant our
11 motion to compel arbitration on the grounds that we've argued
12 orally and written. And if not that, then we would
13 alternatively ask for the ability to engage in some discovery
14 specifically to get into the question of actual agency.

15 One thing we don't have I need to mention briefly, and
16 this is definitely not to try and catch Mr. Banyas
17 shorthanded. I mean the truth is that the argument of
18 counsel is not evidence and we don't have, like, an affidavit
19 or any evidence from Ms. Tisdale that actually contradicts
20 her representation in the admission or the arbitration
21 agreement that she had authority.

22 So -- and when I say it's not to catch Mr. Banyas
23 shorthanded is I don't doubt for a moment that he could, if
24 need be, procure such an affidavit, and I'm just saying that
25 we might assume for the purpose of this argument that he has

1 done that and what I'm suggesting is that I'd like for my
2 alternative argument to include the ability to -- to take the
3 deposition, for instance, of Ms. Tisdale and explain how she
4 would reconcile the representation that's made in this
5 agreement and the healthcare power of attorney, you know,
6 with the idea now that presumably she's taking the position
7 that she does not -- that she does not, in fact, have the
8 authority she had previously represented that she had.

9 Again, Your Honor, that's an alternative argument and --
10 and I'm not trying to be a stickler on the absence of an
11 affidavit because I'm certain Mr. Banyas could get one this
12 afternoon on that point. I'm simply saying that if Your
13 Honor is not persuaded to grant our motion, we do have the
14 alternative position of some discovery to -- to get into the
15 question of actual authority and to -- and to -- to take a
16 look at that closer and develop that record.

17 But with that, Your Honor, I have nothing further.

18 THE COURT: All right. I don't need anything else
19 unless you would like to respond briefly.

20 MR. BANYAS: No, nothing really, Your Honor. The
21 *Arredondo* case, I will point out that in that case I believe
22 that there was a durable power of attorney, a general durable
23 power of attorney, and a healthcare power of attorney.

24 To the extent that I did say that the Court of Appeals
25 may have resolved this solely on a healthcare power of

1 attorney, I don't think that there is a case out there, not
2 that I'm aware of, other than the case that I currently have
3 pending with the Court of Appeals where Judge Price here in
4 Charleston found that a healthcare power of attorney did not
5 -- well, we haven't had argument on that one yet so I can't
6 -- can't cite to it.

7 THE COURT: All right. Sounds good. I'll let you know
8 something this week. If you would email me the agreement, I
9 would appreciate it.

10 MR. BANYAS: Yes, sir. Will do.

11 THE LAW CLERK: Thanks.

12 THE COURT: Have a good day.

13 MR. BANYAS: You too. Bye-bye.

14 (WHEREUPON, the proceedings ended at 12:43 p.m.)

15

16 --- END REQUESTED TRANSCRIPT ---

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STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF FLORENCE

) C/A No. 2020-CP-2102290

Mary Tisdale as Personal Representative of the
Estate of Earlene Seabrook,

Plaintiff(s),

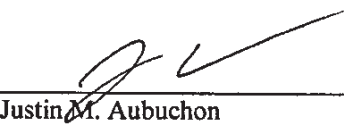
CERTIFICATE OF SERVICE

Versus

Palmetto Lake City Operating, LLC d/b/a Lake
City-Scranton Healthcare Center and Jeffrey
Gibbs,

Defendants.

I, Justin M. Aubuchon, hereby certify that Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center was served on 10/23/20 through its registered agent with a copy of the Filed Summons & Complaint in regards to the above captioned matter by certified mail as shown by the Domestic Return Receipt attached.


Justin M. Aubuchon

11/3, 2020
Mt. Pleasant, South Carolina

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

CT Corporation System
2 Office Park Court, Suite 103
Columbia, SC 29223



9590 9402 6090 0125 4402 27

2. Article Number (Transfer from service label)

7020 2450 0002 0119 4810

PS Form 3811, July 2015 PSN 7530-02-000-9053

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A. Signature

X Line Office

☐ Agent☐ Addressee

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Domestic Return Receipt

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	TWELFTH JUDICIAL CIRCUIT
	)	
MARY TISDALE AS PERSONAL	)	CASE NO. 2020-CP-21-02290
REPRESENTATIVE OF THE ESTATE	)	
OF EARLENE SEABROOK ,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	DEFENDANT PALMETTO LAKE CITY
	)	OPERATING, LLC D/B/A LAKE CITY-
	)	SCRANTON HEALTHCARE CENTER'S
PALMETTO LAKE CITY OPERATING,	)	MOTION TO STAY ACTION AND
LLC D/B/A LAKE CITY-SCRANTON	)	COMPEL ARBITRATION
HEALTHCARE CENTER AND	)	
JEFFREY GIBBS ,	)	
	)	
DEFENDANTS.	)	
	)	

TO: D. NATHAN HUGHEY, ESQUIRE, A. STUART HUDSON, ESQUIRE, AND
BRADLEY H. BANYAS, ESQUIRE, ATTORNEYS FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center (hereinafter referred to as “this Defendant” or “the Facility”), by and through their undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order staying this action and compelling arbitration pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, et seq. and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. This Motion is based on the terms and provisions of a valid and binding Arbitration Agreement executed at the time of Earlene Seabrook’s admission to the Facility. (See Arbitration Agreement attached as **Exhibit A**). The Arbitration Agreement is expressly binding on all parties and requires that Plaintiff’s claims be submitted to arbitration.

This Defendant further requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any motions

or discovery filed or served by Plaintiff while the current motion is pending. This Motion is supported by the attached Arbitration Agreement, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Matthew O. Riddle

Gaillard T. Dotterer, III

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; jdavis@ycrlaw.com,

mriddle@ycrlaw.com, gdotterer@ycrlaw.com

Attorneys for the Defendant Palmetto Lake City

Operating, LLC d/b/a Lake City-Scranton Healthcare
Center

Charleston, South Carolina

Dated: December 30, 2020

PLEASE READ CAREFULLY**FACILITY - RESIDENT/REPRESENTATIVE
ARBITRATION AGREEMENT**

This Agreement is made between LCSHC ("Facility"), its agents, employees and servants, and Earlene Seabrook ("Resident") or Mary Trindle ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative"). It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.

It is understood by Resident/Representative that he/she is not required to use the aforesaid Facility for Resident's healthcare needs and that there are numerous other health care providers in the State where Facility is located that are qualified to provide such care to Resident.

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry. If the parties cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court. The arbitrator shall hear and decide the controversy, and the decision shall be binding on all parties, and may be enforced by a court of competent jurisdiction.

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law.

I understand and agree that I am giving up and waiving my right to a jury trial.

This Agreement shall remain in effect for all care rendered at Facility and shall survive any termination or breach of this Agreement or the Admission Agreement. By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.

Mary Trindle 6/25/19
Resident/Representative Signature Date

Printed Name of Resident/Representative

Wendy Lynn 6/25/19
Authorized Agent of Facility Date

Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

DEFENDANT'S
EXHIBIT

A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	TWELFTH JUDICIAL CIRCUIT
	)	
MARY TISDALE AS PERSONAL	)	CASE NO. 2020-CP-21-02290
REPRESENTATIVE OF THE ESTATE	)	
OF EARLENE SEABROOK ,	)	
	)	
PLAINTIFF,	)	
	)	DEFENDANT PALMETTO LAKE CITY
vs.	)	OPERATING LLC, D/B/A LAKE CITY-
	)	SCRANTON HEALTHCARE CENTER'S
	)	MEMORANDUM IN SUPPORT OF
PALMETTO LAKE CITY OPERATING,	)	MOTION TO STAY ACTION AND
LLC D/B/A LAKE CITY-SCRANTON	)	COMPEL ARBITRATION
HEALTHCARE CENTER AND	)	
JEFFREY GIBBS ,	)	
	)	
DEFENDANTS.	)	

TO: D. NATHAN HUGHEY, ESQUIRE, A. STUART HUDSON, ESQUIRE, AND
BRADLEY H. BANYAS, ESQUIRE, ATTORNEYS FOR THE PLAINTIFF:

COMES NOW the Defendant, Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center (hereinafter “this Defendant” or “Defendant”) and submits the following Memorandum in Support of its Motion to Stay Action and Compel Arbitration pursuant to the Federal Arbitration Act (“FAA”) 9 U.S.C. § 1, et seq., and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. Plaintiff has sued this Defendant for “Negligence”, “Negligence Per Se”, “Fraud and Misrepresentation”, and “Violation of the South Carolina Unfair Trade Practices Act” arising out of Earlene Seabrook’s residency at this Defendant’s skilled nursing facility (hereinafter the “Facility” or “Lake City”). However, this Defendant and Plaintiff entered into an Arbitration Agreement prior to Ms. Seabrook’s admission to the Facility, which covers all allegations raised in the Complaint. Accordingly, and for the reasons set forth herein, this Defendant respectfully requests that Plaintiff’s Complaint be

dismissed and that this matter be compelled to arbitration, or in the alternative, stayed pursuant to 9 U.S.C. §1, et seq.

FACTUAL BACKGROUND

Earlene Seabrook was admitted to this Defendant's Facility for care on June 25, 2019 after a roughly three week stay at Carolinas Hospital in Florence South Carolina. She was 90 years old upon admission and was suffering from a host of medical problems including dementia, end stage renal disease, diabetes, congestive heart failure, gastrointestinal hemorrhage, and acute post hemorrhagic anemia. Ms. Seabrook's niece and the Plaintiff, Ms. Mary Tisdale, assisted Ms. Seabrook during the admission process. Pursuant to a Healthcare Power of Attorney (the "Power of Attorney," attached hereto as **Exhibit 1**) executed on November 2, 2017, Ms. Tisdale possessed the authority to admit Ms. Seabrook to the facility and execute all paperwork in connection with admission. Pursuant to that Authority, Ms. Tisdale entered into a number of contracts with Lake City on her aunt's behalf. The contracts were each signed by the Plaintiff, as representative of Ms. Seabrook, on June 25, 2019 and included an Admission Agreement and Arbitration Agreement (Attached hereto as **Exhibits 2 and 3** respectively), as well as various medical consents and a Do Not Resuscitate Order.¹

The terms of the Admission Agreement provided for Ms. Seabrook's admission to the Facility and the benefits attendant thereto: room, board, skilled nursing care and treatment etc.

¹ To be clear, Ms. Tisdale represented that she was authorized to admit Ms. Seabrook to the Facility and to execute documents on her behalf. Indeed, the very first provision of the Admission Agreement states that all information provided to the Facility is truthful and correct, including Ms. Tisdale's authority to bind her aunt. (See **Ex. 2**). Regarding Ms. Tisdale's authority to sign on behalf of her aunt, the Arbitration Agreement states: "By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative." (See **Ex. 3**).

The Arbitration Agreement is a one-page instrument. It was executed by Ms. Tisdale as “Representative” of Ms. Seabrook and Wendy Lynch, the Facility’s Admissions Director. At the top of the page, in large, bold print, it states:

PLEASE READ CAREFULLY

**FACILITY - RESIDENT/REPRESENTATIVE
ARBITRATION AGREEMENT**

(See Ex. 3.) Near the bottom of the page, in bold print, the Arbitration Agreement states that the parties’ understand that they are “**waiving [their] right to a jury trial.**” (See Ex. 3.) Regarding arbitration and the scope thereof, the Arbitration Agreement provides:

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility’s Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively “Disputes”), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

(See Ex. 3). It expressly states that the FAA applies:

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law.

(See Ex. 3). Moreover, the Arbitration Agreement states, “It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assignees, personal

representatives, guardians, or any persons deriving their claims through or on behalf of Resident.” (See Ex. 3).

ARGUMENT AND CITATION TO AUTHORITY

I. POLICY IN FAVOR OF ARBITRATION

There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir.1997). Indeed, both federal and state policy favor arbitrating disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) (“The policy of the United States and this State is to favor arbitration of disputes.”). “This preference for arbitration has manifested itself in legislation and judicial decisions supporting the expeditious appeal of decisions denying an application to compel arbitration.” *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999). Therefore, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Id.*, 338 S.C. at 41, 524 S.E. 2d at 846 (internal quotations and citations omitted).

II. THE FEDERAL ARBITRATION ACT GOVERNS THE ARBITRATION AGREEMENT AND THE CLAIMS ASSERTED BY THE PLAINTIFF IN THE COMPLAINT

As an initial matter, the Arbitration Agreement, by its terms and by law, is governed by the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16. See Ex. A; *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) (holding that skilled nursing facility admission agreements and residencies implicate interstate commerce, and thus are governed by the FAA). Under the FAA, any written provision in “a contract evidencing a transaction involving commerce” providing that disputes be settled by arbitration is “valid,

irrevocable, and enforceable.” 9 U.S.C. § 2. The language of the Act is mandatory and requires the enforcement of all arbitration agreements. Section 4 of the FAA provides, in pertinent part, as follows:

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.*

9 U.S.C. § 4 (emphasis added). “By its terms, the act leaves no place for the exercise of discretion by a... court, but instead mandates that... courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). While a court a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not invalidate an arbitration agreement on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423, 197 L. Ed. 2d 806 (2017)(citing *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742).

Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving interstate commerce. 9 U.S.C. § 2. As discussed and further described herein, such a binding and enforceable written agreement to arbitrate disputes exists in this case and Plaintiff’s claims should be dismissed and compelled to arbitration.

III. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE

A. **Ms. Tisdale Possessed Actual Authority to Bind Ms. Seabrook to the Arbitration Agreement.**

The Power of Attorney granted Ms. Tisdale *full* authority to make decisions regarding Ms. Seabrook's healthcare upon her mental incompetence.² See **Ex. 1** at p. 4. This broad authority included the power to:

authorize [Ms. Seabrook's] admission to or discharge, even against medical advice, from any hospital, nursing care facility or similar facility or service...To take any other action necessary to making, documenting, and assuring implementation of decisions concerning [Ms. Seabrook's] health care, including, but not limited to, **granting any waiver of release from liability required by any hospital, physician, nursing care provider** or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and **pursuing any legal action in [Ms. Seabrook's] name, and at the expense of my estate to force compliance with my wishes as determined by [Ms. Seabrook's] agent.**

(See *Id.* at p.5, ¶1) (emphasis added).) The Power of Attorney explicitly granted Ms. Tisdale the authority to admit Ms. Seabrook to a skilled nursing facility and to take any actions necessary to assure implementation of Ms. Seabrook's health care decisions, including: (i) pursuing legal actions, (ii) settling legal actions, (iii) waiving claims and liability, and (iv) forcing compliance with decisions as to legal actions as determined by Ms. Tisdale. These broad powers are not limited any way with the Power of Attorney, and when taken individually or construed together, clearly granted Ms. Tisdale the authority to do all things to assure implementation of Ms. Seabrook's health care decisions, including selecting the forum in which any legal action regarding Ms. Seabrook's health care would be taken. See *Arredondo v. SNH SE Ashley River Tenant, LLC*, 2019 WL 3814725 (S.C. Ct. App. August 14, 2019) (unpublished opinion), **attached as Exhibit 4.**

In *Arredondo*, the South Carolina Court of Appeals recently held that the statutory form of the South Carolina Health Care Power of Attorney – which contains the same language to that of

² Ms. Seabrook had dementia and was noted to have impaired cognition after admission.

the instant Power of Attorney – confers actual authority to the attorney agent to bind the principal to an arbitration agreement with a nursing home. *Id.* The *Arredondo* court faced facts substantially similar to the ones at bar. In that case, a nursing home defendant appealed the denial of its motion to compel arbitration, arguing in part that the resident’s daughter had the authority under the statutory Health Care Power of Attorney form to bind her parent, the principal, to arbitration. *Arredondo* at *1 (Ct. App. 2019). The Court of Appeals agreed, holding:

[T]he Health Care Power of Attorney was not limited to health care decisions as *Arredondo* contends. It also authorized *Arredondo* to pursue legal action and to grant any waiver required by health care providers such as Appellants. . . Thus, we hold the Powers of Attorney authorized *Arredondo* to waive the right to jury trial and execute an agreement selecting the forum in which any legal action would be taken. *Id.* at *2 (emphasis added).

In reaching this decision, the South Carolina Court of Appeals relied on the South Carolina case *First S. Bank v. Rosenberg*, 418 S.C. 170, 181, 79 S.E. 2d 919, 925-926 (Ct. App. 2016) for the proposition that an act does not have to be specifically enumerated in a power of attorney in order for the agent to be authorized to perform the act on behalf of the principal. Moreover, the *equal treatment principle* espoused by the United States Supreme Court in *Kindred* requires that a power of attorney be interpreted equally as to arbitration powers as it would be with respect any other powers within its scope. 137 S. Ct. 1421, 1426 (2017) (citing Section 2 of the FAA).

In *White vs. St. Matthews Healthcare, LLC d/b/a Calhoun Convalescent Center*, this Court granted a skilled nursing facility defendant’s motion to compel arbitration where the resident’s daughter executed an arbitration agreement pursuant to health care power of attorney with the same terms as the one at the bar. 2019-CP-09-00220 (November 24, 2020) (attached hereto as **Exhibit 5**).

There, like here, the power of attorney granted the daughter the authority to:

take any other action necessary to making, documenting, and assuring implementation of decisions concerning my health care, including, but not limited to, granting any waiver or release from liability required by any hospital, physician, nursing care provider, or other health care provider; signing any documents relating to refusals of treatment or leaving a facility against medical advice, **and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my agent**, or to seek actual or punitive damages for the failure to comply.

Id. at *7. The Court held that the health care power of attorney conferred on the daughter, the actual authority to execute an arbitration agreement on her mother's behalf when admitting her to the nursing facility. The result should be no different here as the Power of Attorney gave Ms. Tisdale the authority to execute the Arbitration Agreement. Therefore, the Court must compel this matter to arbitration pursuant to the terms of the Arbitration Agreement. *Id.* at *7-8.

B. Ms. Tisdale Possessed the Apparent and Inherent Authority to Execute and Bind Ms. Seabrook to the Arbitration Agreement, and should be Estopped from Denying the Validity of the Arbitration Agreement.

i. Agency Relationship - Apparent Agency Authority

To the extent the Court were to find that the Power of Attorney did not confer actual authority to Ms. Tisdale to enter into Arbitration Agreement on her aunt's behalf, the defense submits that the Power of Attorney is further evidence of Ms. Tisdale's apparent authority, and the Court should find there to be a binding contract on that basis. In addition to representing herself as authorized to enter the Arbitration Agreement on her aunt's behalf by the language of the Power of Attorney, Mr. Tisdale possessed the *apparent authority* to bind Ms. Seabrook under this Agreement. A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the

principal's behalf and subject to the principal's control.” *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)).

Alternatively, “[a]n agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties.” *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145-146, 425 S.E.2d 764, 773 (Ct. App. 1992.) The doctrine of apparent authority provides that a principal may be bound by the acts of its agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

Clearly, in this matter, Ms. Tisdale held herself out as an agent for her aunt without any indication to the contrary when she provided a Power of Attorney to the facility and executed various admission documents on behalf of her aunt, including the Arbitration Agreement. Based on her conduct, Ms. Lynch (the Facility’s Admissions Director) believed Ms. Tisdale possessed the authority to execute all admissions documents on behalf of Ms. Seabrook, including the Arbitration Agreement. The Facility was also provided a copy of the Power of Attorney and Ms. Tisdale signed various admission documents and consents as Ms. Seabrook’s representative. Therefore, it was Ms. Lynch’s and the Facility’s reasonable and justified belief that Ms. Tisdale was her aunt’s authorized representative and had the authority to execute the documents on behalf of her aunt.

Moreover, Ms. Seabrook represented that Ms. Tisdale was her authorized representative to act on her behalf in connection with admission by allowing Ms. Tisdale to procure her

admission to the Facility and, thereafter, by accepting the benefits of the contracts entered into in connection with that admission,. *See R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000) (If a principal holds another out as having the authority to act on his behalf or knowingly permits another to act as his agent, “either **generally** or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances”) (emphasis added).

A holding to the contrary would contradict the fundamental concept of apparent agency: *an agency relationship is based on a third party's understanding of a principal's manifestations and a reasonable belief that the agent has been authorized to act.* Ms. Lynch and the Facility had reason to believe that, by allowing Ms. Tisdale to sign the admissions paperwork, including the documents providing for her aunt's stay and the skilled nursing care provided at the Facility, Ms. Seabrook cloaked her niece with the authority to execute those documents. Indeed, Ms. Seabrook *did* cloak her niece with that authority by the express terms of the Power of Attorney. Ms. Seabrook did not repudiate or attempt to invalidate her niece's actions. Instead, she accepted the benefits of the contracts with the Facility by remaining at the Facility and receiving skilled nursing care and services, thereby ratifying her niece's actions. Because no one attempted to repudiate the Arbitration Agreement or even question it, the Facility was further justified in believing Ms. Seabrook had authorized her niece to execute it. It is clear that an apparent agency relationship existed such that the Arbitration Agreement should be deemed enforceable.

ii. **Inherent Agency Authority**

Even assuming, *arguendo*, Ms. Tisdale somehow lacked the actual or apparent authority to enter into the Arbitration Agreement, she still possessed sufficient inherent agency powers to

render the agreement enforceable. Such powers are recognized by South Carolina courts and are used to enforce agreements where supposed unauthorized actions “accompany or are incidental to transactions which the agent is authorized to conduct” See, §§ 8A, 161 *Restatement (Second) of Agency* (1958); *Smith v. Fitton & Pittman, Inc.*, 264 S.C. 129, 212 S.E.2d 925 (1975) (*abrogated on unrelated grounds*) (examining whether party had properly demonstrated the existence of inherent agency powers); *Chicago Title Ins. Co. v. Washington State Office of Ins. Com’r*, 309 P.3d 372 (Wash. 2013); *Daly v. Aspen Ctr. for Women’s Health, Inc.*, 134 P.3d 450, 452 (Colo. App. 2005); *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210-11 (Ind. 2000); *Cange v. Stotler & Co.*, 826 F.2d 581, 591 (7th Cir. 1987) (“[t]he powers of an agent are, prima facie, coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.”) (*citing Lumbermen’s Mut. Ins. Co. v. Slide Rule & Scale Eng’g Co.*, 177 F.2d 305, 309 (7th Cir. 1949)).

The basis for this doctrine is that, as between an equally innocent principal and third party, the third party should prevail. This well-established legal principle follows from one of the cardinal principles of agency law: that third parties, such as the Facility, should not be disadvantaged because they dealt with an agent rather than a principal. As set forth above, there is no dispute as to whether Ms. Tisdale was authorized to admit her aunt to the Facility. To the extent Plaintiff takes issue with Ms. Tisdale’s authority to bind Ms. Seabrook to the Arbitration Agreement and the specific terms therein, such actions merely accompanied and were incidental to her authority to admit her aunt to the Facility. The Facility should not be disadvantaged for acting in accordance with the express representations of Ms. Tisdale regarding her authority.

iii. Agency by Estoppel

“When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances.” *R & G, supra*, 343 S.C. at 433, 540 S.E.2d at 118. To properly show estoppel in South Carolina, a party must show: “(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.” *Boyd v. Bellsouth Tel.Co.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006).

In *Macie Price v. THI of South Carolina at Magnolia Manor Inman, LLC et. Al*, 2018-CP-42-01054 (S.C. Com. Pls. August 7, 2018) (attached hereto as **Exhibit 6**), this Court ruled that the Plaintiff was estopped from denying that she was her sister’s authorized agent during the latter’s admission to the skilled nursing facility:

In the case at the bar, [the facility] had no knowledge or reason to believe that Plaintiff was not [her husband’s] authorized agent for purposes of executing the Arbitration Agreement or and other admissions paperwork. [The facility] relied on the affirmative representations of Plaintiff in admitting her husband to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by [the facility] for years only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, agency by estoppel is present based upon the record before this Court such that the arbitration agreement is similarly enforceable.

(See **Ex. 6**, p. 9). Accordingly, the court concluded that the arbitration agreement was valid and enforceable.

Similarly, in *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011) the Court concluded the plaintiff was estopped from denying he had authority to bind his wife to arbitration. (Attached hereto as **Exhibit 7**). As in the present case, the husband in *McCutcheon* executed a number of documents on his wife's behalf upon her admission to a nursing home facility, including an admissions agreement and an arbitration agreement. Similar to this case, the admissions agreement in *McCutcheon* provided that the husband was his wife's legal representative for the purposes of admission, as he was her next-of-kin and represented himself as authorized to make health care decisions on her behalf. The court held:

Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, plaintiff takes inconsistent positions regarding these contracts, which were executed by the same parties under the same purported authority. [Accordingly,] [i]t would be inequitable [] to allow plaintiff to assert that Elijah McCutcheon had authority to sign the Admissions Agreement on behalf of [his wife], but lacked such authority to sign the Arbitration Agreement. For these reasons, the court finds that plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

(*Id.* at *5.)

Like in *Price* and *McCutcheon*, it would be disingenuous and inequitable to allow the Plaintiff in this case to assert that she was her aunt's authorized agent as to the Admissions Agreement, but not the Arbitration Agreement. In the case at bar, the Facility had no knowledge or reason to believe that Ms. Tisdale was not Ms. Seabrook's authorized agent for purposes of executing the Arbitration Agreement and other admissions paperwork. The Facility relied on the affirmative representations of Ms. Tisdale in admitting her aunt to the Facility for the provision of the skilled nursing care. Indeed, Ms. Tisdale provided an executed power of attorney to the Facility, affirmatively representing to the facility that she was her aunt's agent for purposes of

signing all agreements incidental to Ms. Seabrook's admission, including the Arbitration Agreement. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by the Facility, only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, Plaintiff should be estopped from denying the validity of the Arbitration Agreement.

C. **The Arbitration Agreement and Admission Agreement Must be Construed Together, and Plaintiff Should Be Estopped from Denying the Parties' Mutual Right to Arbitration**

i. Merger

As additional grounds to compel arbitration and in the alternative, the Admissions Agreement and Arbitration Agreement should be construed together and Plaintiff should be required to arbitrate her claims against the Facility. The Arbitration Agreement and Admission Agreement were executed by Ms. Tisdale on behalf of Ms. Seabrook. The validity of these agreements, including the Arbitration Agreement, must be determined in accordance with the general principles of contract law and agency law that would apply to any other contract. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010).

The Arbitration Agreement provides that "any controversy or dispute between the parties *arising out of or relating to Facility's Admission Agreement . . . or relating in any way to Resident's stay at Facility*" shall be resolved by arbitration pursuant to the terms of the Arbitration Agreement. See **Ex. 3** (emphasis added). As described, the Arbitration Agreement and the Admissions Agreement were both signed by Ms. Tisdale on behalf of her aunt on the same day, at the same time, upon Ms. Seabrook's admission to Lake City.

Courts in South Carolina construe contemporaneous instruments together; if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated. *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977). Absent some evidence indicating a contrary intention, when instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will generally consider and construe them together on the theory that the instruments are effectively one instrument or contract. *Id.* See also *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994) (holding that promissory notes and a mortgage agreement executed contemporaneously on the same date, must be construed together). Furthermore, even when instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. See *Plaza Development Services v. Joe Hardin Builder, Inc.*, 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988); accord *Cafe Associates, Ltd v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991).

As indicated previously, the court in *McCutcheon* determined that the arbitration agreement and admissions agreement had merged for the purposes of equitable estoppel. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011WL6318575 (See **Ex. 7**). Indeed, this Court has cited to *McCutcheon* on numerous occasions in holding that a nursing home arbitration agreement merged with the admission agreement for purposes of equitable estoppel under precisely the same circumstances. See *Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v.*

Fundamental Long-Term Care Holdings, LLC et al, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012). (See *Abrams*, *Campsen* attached hereto as **Exhibits 8 and 9**, respectively).

Accordingly, Ms. Seabrook, by and through the acts of her representative, Ms. Tisdale, and the Facility, both contemplated that the terms of the agreement to admit Ms. Seabrook were contained in the Admissions Agreement and Arbitration Agreement. Plaintiff executed the Arbitration Agreement at the same time as the Admissions Agreement; the Arbitration Agreement and the Admissions Agreement both covered the same subject matter and transaction (Ms. Seabrook's residency at the Facility and her receipt of residential and skilled nursing services); the Arbitration Agreement and Admissions Agreement were executed by the same parties; the Arbitration Agreement specifically makes citation to and incorporates the Admission Agreement; and thus the Arbitration Agreement and Admission Agreement should be construed as part and parcel of the same agreement between the parties.

ii. Equitable Estoppel of Merged Agreement

"Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." *Int'l Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). "A nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause.'" *Id.* (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)); see also *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290–297, 733 S.E.2d 597, 601–605 (Ct. App. 2012) (applying the direct benefits test as set forth in *International Paper Co.* to reverse the circuit court's denial of a motion to compel arbitration);

Wilson v. Willis, 426 S.C. 326, 339–345, 827 S.E.2d 167, 174–177 (2019) (discussing direct benefits test).

Because of the doctrine of merger referenced above, this legal principle is properly applied in this case. The doctrine of equitable estoppel “exists to prevent a litigant from unfairly receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the contract, namely the contractual arbitration provision.” *S. Ill. Bev., Inc. v. Hansen Bev. Co.*, 2007 U.S. Dist. LEXIS 76229 (S.D. Ill. 2007). Moreover, the Fourth Circuit has held that “no party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein.” *United States v. Bankers Ins. Co.*, 245 F.3d 315, 323 (4th Cir. 2001).

“Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.” *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates. S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001)(citing *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)). As noted by the Federal District Court in *Jackson v. Iris.com*:

It is an axiomatic rule of contract law that a party may not rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.

....

[W]here . . . a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a direct benefit from a contract containing an arbitration clause.

524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007) (quoting in part *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bide. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981) (citing in part *Int'l Paper Co.*, 206 F.3d at 416) (internal quotations omitted)).³

Of note, this Court applied this precise reasoning in *Josephine Spears v. Rehab Center of Cheraw, LLC et al.* 2019-CP-13-00308 (January 10, 2020) (attached hereto as **Exhibit 10**). In that case, a woman admitted her husband to a skilled nursing facility and in connection with his admission, executed admission and arbitration agreements *identical* to the ones here. The agreements were both executed by the woman and a representative of the skilled nursing facility at the same time. This Court considered the agreements as merged and held that the plaintiff was estopped from refusing to comply with the arbitration agreement where, like here, the resident received “direct benefits from the Admission Agreement in the form of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein.” *Id.*, pg. 10 (footnote omitted).

Similarly, Ms. Seabrook embraced all aspects of the Admission Agreement with the Facility. It would be manifestly inequitable to permit a party to claim the other is liable in tort based upon a contractual relationship, while at the same time allowing that party to avoid the arbitration provisions of the contract upon which the party bases its claims, when such claims are in the scope of the arbitration provisions. In other words, Plaintiff cannot “have it both ways” by

³ See also *THI of S.C. at Columbia, LLC v. Wiggins*, C/A No. 3:11-888-CMC, 2011 WL 4089435, at *6 (D.S.C. Sept.13, 2011) (“Hall's care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate.”); accord *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. 7:13-CV-2929-BHH, 2014 WL 6863550, at *4 (D.S.C. Oct. 31, 2014), *report and recommendation adopted*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. Mar. 19, 2015).

relying upon certain terms of the Admission Agreement when it works to her advantage and repudiating the Arbitration Agreement when it works to her disadvantage.

As described, the Plaintiff's allegations fall within the scope of the Arbitration Agreement. In accordance with the foregoing law, Plaintiff cannot assert claims against the Facility based upon certain terms of the Admission Agreement while repudiating the Arbitration Agreement and should be prevented from doing so pursuant to the doctrine of equitable estoppel. Pursuant to numerous orders of this Court and many other courts on essentially identical facts and concerning identical arbitration agreements, where a non-signatory receives the benefits of the contract, which Ms. Seabrook certainly did here, she must be prevented from refusing to comply with the Arbitration Agreement merely because she did not sign it.

iii. Coleman, Thompson, and Hodge are Distinguishable

To the extent Plaintiff argues the Admission Agreement and Arbitration Agreement are not merged pursuant to *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 350, 755 S.E.2d 450, 452 (2014), and *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 769 (Ct. App. 2016), such reliance is misplaced.

First, unlike *Hodge*, *Coleman* and *Thompson*, the resident in this instance — Ms. Seabrook — was admitted to the facility by an agent under a healthcare power of attorney. The Adult Healthcare Consent Act is not the statutory mechanism under which Ms. Tisdale admitted her aunt to the Facility. Second, these cases are distinguishable as it relates to the issue of “separateness” and the doctrine of merger, as described further below.

In *Coleman*, Ann Coleman signed a number of documents, including arbitration agreements, when admitting her sister to a health care facility. 407 S.C. at 350, 755 S.E.2d at

452. Coleman brought suit after her sister's death, and the facility sought to compel arbitration. In determining that the arbitration and admission agreements in the case had not merged, the Supreme Court found, "On its face, this clause recognizes the 'separatedness' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts. Moreover, the [arbitration agreement] could be disclaimed within thirty days of signing while the admission agreement could not, evidencing an intention that each contract remain separate." *Id.* at 452. "By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply." *Id.*

Similarly, in *Hodge*, the admission agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law. 422 S.C. 544, 813 S.E.2d at 302. Furthermore, like in *Coleman*, the arbitration agreement in *Hodge* recognized a separateness, as it referenced the two documents separately, stating "[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement." *Id.* Finally, the arbitration agreement in *Hodge* stated it could be revoked within thirty days, whereas the admission agreement contained no such indication. *Id.* In *Thompson*, the arbitration agreement also contained a disclaimer provision but the admission agreement did not.

Unlike the arbitration agreements in *Coleman*, *Thompson*, and *Hodge*, the Arbitration Agreement in this case does not state that it can be revoked after it has been signed. Furthermore, it does not state that arbitration is a precondition to admission to the Facility.

Instead, in the present case, the agreements "were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction" and, therefore, the documents merged. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts*, *supra*, 268 S.C.

at 88, 232 S.E.2d at 24).⁴ Specifically, the Admission and Arbitration Agreements were signed by Ms. Tisdale, on her aunt's behalf, and the Facility on June 25, 2019. The documents were signed by the exact same people: Ms. Tisdale as representative for her aunt and by the Admissions Director for the Facility. The documents were signed for the same purpose and transaction of establishing Ms. Seabrook's residency at the skilled nursing facility.

While the Admission Agreement in this case does contain an "Entire Agreement" clause, unlike the admission agreements in the other cases, the provision in this case does not separately reference the Arbitration Agreement (in fact, it doesn't refer to it at all). Moreover, the Arbitration Agreement at issue contains no disclaimer provision, unlike *Coleman, Thompson*, and *Hodge*. Also, absent here is the type of discrepancy the *Hodge* Court pointed out as to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* Admission Agreement p. 10 ("This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located.") *with* Arbitration Agreement (providing that, "because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Act;" but also providing that arbitration shall be "as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules"))).

Further still, it must be remembered that the merger question examines whether, "where instruments are executed at the same time, by the same parties, for the same purpose, and in the

⁴ To be clear, even though the *Coleman* Court found evidence of an intent contrary to merger on the particular facts before it, it nonetheless recognized as *correct* the general proposition of law on which the *Coleman* Appellants' based their merger argument, i.e., the *Coleman* Court expressly observed that the admission agreements and arbitration agreements before it (which, in this respect, are no different than the instant agreements—though that is not the case in regard to the material facts bearing on the question of merger), "the documents were [indeed] executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

course of the same transaction,”⁵ as indeed the admission and arbitration agreements were here, there is evidence to upset the *default presumption* that the contracting parties intended the instruments to be construed together as effectively one contract. As a practical matter, if this presumption is to mean anything, upsetting it must require actual evidence of sufficient probity that, notwithstanding the concurrence of all the circumstances that must come together for the presumption of merger to even arise in the first place — i.e., same time, parties, purpose, and transaction — a reasonable, non-speculative inference can be drawn that the parties’ possessed a contrary intention. Such superficial things as the fact that the admission arbitration agreements have their own titles, are separately paginated, and/or are separately signed cannot suffice to show evidence of intent contrary to merger. To reference such things is really to do no more than to state that the admission agreement and arbitration agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. The very nature of merger is to *merge* separate documents.

As noted above, the Arbitration Agreement was not a precondition to admission. However, this provision does not mean that the two instruments worked independently once the arbitration agreement came into existence (i.e., once it was in fact entered into). While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true; the Admission Agreement is indeed necessary to the Arbitration Agreement. In other

⁵ *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

words, yes, the Admission Agreement *could* have stood on its own, without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with; *but that is not what happened*. The Arbitration Agreement was in fact executed, of course, and it was executed under circumstances giving rise to a presumption of merger — again, same time, parties, purpose, and transaction. Unlike the Admission Agreement, however, which is capable of making sense either standing alone or, alternatively, together with the Arbitration Agreement, the Arbitration Agreement only makes sense together with the Admission Agreement, which is the Arbitration Agreement’s sole reason for being.

It matters not whether the Arbitration Agreement was a condition of admission, only that it was in fact agreed to in conjunction with admission; and, here, there can be no question that the Arbitration Agreement — once agreed upon — was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument, governing various interrelated aspects of Ms. Seabrook’s relationship with the Facility. Indeed, this conclusion finds direct support in the Admission Agreement’s “Entire Agreement” provision, which states, “[t]he undersigned further acknowledges that he/she has received and read the Admission Handbook and other Admissions materials and understand that these documents are made a part of this Agreement by reference herein.” (Ex. 2, p. 12 (emphasis added)). Had the Arbitration Agreement not been executed, it would not constitute admissions material, but, of course, it was executed, and it does constitute admissions material; most respectfully, to conclude otherwise simply does not make sense.

Respectfully, the material facts of *Coleman*, *Thompson*, and *Hodge* are different from the material facts of the instant case, and those other cases do not control the outcome here. Under the particular facts of this case, an intent contrary to merger cannot reasonably be found.

D. Should the Court decide to Deny this Defendant's Motion, the Parties Should be Permitted to Conduct Additional Discovery.

If the Court is not inclined to grant the instant motion on the grounds contained in this memorandum or asserted at the hearing, this Defendant requests that the parties be permitted to conduct additional discovery on the issues raised herein or at the hearing, and in particular, the nature of Plaintiff's agency relationship with Ms. Seabrook and the circumstances surrounding the admissions process.

In a case involving similar issues, the Honorable Perry Gravely allowed the parties to conduct additional discovery on the issue of a mother's authority to execute an Arbitration Agreement on her son's behalf in connection with his admission to a skilled nursing facility. See *James Boyd v. THI of South Carolina, LLC d/b/a at Magnolia Place-Greenville, et. Al*, 2018-CP-23-01934 (S.C. Com. Pls. July 9, 2018)(attached hereto as **Exhibit 11**). Critical to the court's decision in that case was whether the son's conduct and admissions director's understanding of that conduct created apparent agency so as to bind the son to an arbitration agreement. The court permitted the parties to take the depositions of the mother, the son, the admissions coordinator for the skilled nursing facility, and the case manager for the hospital the son was transferred from. After considering the testimony of those individuals, the court found there was evidence to support a finding of apparent agency. The case at the bar involves Ms. Tisdale's authority to execute the Arbitration Agreement and the circumstances surrounding its execution. As in *Boyd*, if the Court determines the record is insufficient to properly rule on the issues before it, additional discovery should be permitted as necessary.

Likewise, the Honorable Alison Lee allowed the parties to conduct additional discovery on a wife's authority to execute an arbitration agreement on behalf of her husband. See *Priscilla Brown, as Personal Representative of the Estate of James Brown v. THI of South Carolina at*

Columbia at Magnolia Manor d/b/a Midlands Health and Rehabilitation Center, 2017-CP-40-00516 (S.C. Com. Pls. Nov. 7, 2019) (attached hereto as **Exhibit 12**). The case at the bar involves Ms. Tisdale's authority to execute the Arbitration Agreement and the circumstances surrounding its execution. As in *Boyd and Brown*, if the Court determines the record is insufficient to properly rule on the issues before it, additional discovery should be permitted as necessary.

Most respectfully, if the Court should make such a determination, it is only fair to allow the Defendant to engage in some appropriately limited discovery to attempt to protect its arbitration rights. It must be remembered that the Defendant moved to compel arbitration under a facially valid arbitration agreement. The Defendant firmly believes Ms. Tisdale had the authority to execute the Arbitration Agreement on behalf of her aunt. Nevertheless, neither Plaintiff, nor Ms. Seabrook (or anyone else authorized to act on Ms. Seabrook's behalf) ever questioned Ms. Tisdale's authority to enter into the Arbitration Agreement until now. Defendants had no reason to conduct discovery until this dispute arose, and even then, they still maintain their primary position that the Arbitration Agreement was enforceable based on the record as is. If further development of the record is needed on any point material to arbitrability, the Court should expressly allow Defendants to protect their legitimate interests through discovery into the relevant subject matter without exposing themselves to a claim of waiver by Plaintiff, i.e., without having to expose themselves to a potential Catch-22 where they could be said to have waived their arbitration rights simply by endeavoring to prove them.

CONCLUSION

For the reasons set forth herein, this Defendant respectfully requests that this Court enter an Order either dismissing or staying the pending action and compelling arbitration.

Alternatively, and if the Court is not inclined to grant the instant motion on any of the grounds asserted above or at the hearing, this Defendant requests that the parties be permitted to conduct additional discovery. Defendant also requests permission to be heard after such discovery is conducted and requests that it be permitted to submit supplemental memorandum along with any additional evidence procured.

CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Matthew O. Riddle

Gaillard T. Dotterer, III

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mriddle@ycrlaw.com, gdotterer@ycrlaw.com

Attorneys for the Defendant Palmetto Lake City

Operating, LLC d/b/a Lake City-Scranton Healthcare
Center

Charleston, South Carolina

Dated: February 5, 2021

From: LC PRIMARY CARE

18433743624

03/22/2018 13:33

#618 P.020/118

South Carolina Advance Health Care Directive

On this date of November 2, 2017, I, Earlene Seabrook, being at least 18 years of age, and a resident of and domiciled in the State of South Carolina at the following address:
REDACTED RE REDACTED REDACTED REDACT

do hereby sign, execute, and adopt the following as my Advance Health Care Directive. I direct any and all persons or entities involved with my health care in any manner that these decisions are my wishes and were adopted without duress or force and of my own free will.

I have placed my initials next to the sections of this Directive that I have adopted:

- ☒ [ES] Living Will (Declaration of Desire for a Natural Death)
- ☒ [ES] Selection of Health Care Agent (Health Care Power of Attorney)
- ☐ [] Designation of Primary Physician
- ☐ [] Organ Donation

Living Will (Declaration of Desire for a Natural Death)

I willfully and voluntarily make known my desire that no life-sustaining procedures be used to prolong my dying if my condition is terminal or if I am in a state of permanent unconsciousness, and I declare:

If at any time I have a condition certified to be a terminal condition by two (2) physicians who have personally examined me, one (1) of whom is my attending physician, and the physicians have determined that my death could occur within a reasonably short period of time without the use of life-sustaining procedures or if the physicians certify that I am in a state of permanent unconsciousness and where the application of life-sustaining procedures would serve only to prolong the dying process, I direct that the procedures be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure necessary to provide me with comfort care.

INSTRUCTIONS CONCERNING ARTIFICIAL NUTRITION AND HYDRATION: If my condition is terminal and could result in death within a reasonably short time:

(Initial one of the following statements)

- ☒ [ES] I direct that nutrition and hydration BE provided through any medically-indicated means, including medically- or surgically-implanted tubes.
- ☒ [ES] I direct that nutrition and hydration NOT be provided through any medically-indicated means, including medically- or surgically-implanted tubes.

If I am in a persistent vegetative state or other condition of permanent unconsciousness:

(Initial one of the following statements)

- ☐ [] I direct that nutrition and hydration BE provided through any medically-indicated means, including medically- or surgically-implanted tubes.
- ☐ [] I direct that nutrition and hydration NOT be provided through any medically-indicated means, including medically- or surgically-implanted tubes.

In the absence of my ability to give directions regarding the use of life-sustaining procedures, it is my intention that this Declaration be honored by my family and physicians and any health facility in which I may be a patient as the final expression of my legal right to refuse medical or surgical treatment, and I accept the consequences from the refusal. I am aware that this Declaration authorizes a physician to withhold or withdraw life-sustaining procedures. I am emotionally and mentally competent to make this Declaration.

APPOINTMENT OF AN AGENT FOR REVOCATION: You may give another person authority to revoke this declaration on your behalf. If you wish to do so, please enter that person's name in the space below (optional):

Name of Agent with Power to Revoke _____
Address _____

REVOCATION PROCEDURES: This declaration may be revoked by any one (1) of the following methods. However, a revocation is not effective until it is communicated to the attending physician:

- (1) by being defaced, torn, obliterated, or otherwise destroyed, in expression of your intent to revoke, by you or by some person in your presence and by your direction. Revocation by destruction of one or more of multiple original declarations revokes all of the original declarations,
- (2) by a written revocation signed and dated by you expressing your intent to revoke,
- (3) by your oral expression of your intent to revoke the declaration. An oral revocation communicated to the attending physician by a person other than you is effective only if:
 - (a) the person was present when the oral revocation was made;
 - (b) the revocation was communicated to the physician within a reasonable time; OR
 - (c) your physical or mental condition makes it impossible for the physician to confirm through subsequent conversation with you that the revocation has occurred. To be effective as a revocation, the oral expression clearly must indicate your desire that the declaration not be given effect or that life-sustaining procedures be administered.
- (4) if you, in the space above, have authorized an agent to revoke the declaration, then the agent may revoke orally or by a written, signed, and dated instrument. An agent may revoke only if you are incompetent to do so. An agent may revoke the declaration permanently or temporarily,
- (5) by your executing another declaration at a later time.

Selection of Health Care Agent (Health Care Power of Attorney)

Information about this document: This is an important legal document. Before signing this document, you should know these important facts:

1. This document gives the person you name as your agent the power to make health care decisions for you if you cannot make the decision for yourself. This power includes the power to make decisions about life-sustaining treatment. Unless you state other-

wise, your agent will have the same authority to make decisions about your health care as you would have.

2. This power is subject to any limitations or statements of your desires that you include in this document. You may state in this document any treatment you do not desire or treatment you want to be sure you receive. Your agent will be obligated to follow your instructions when making decisions on your behalf. You may attach additional pages if you need more space to complete the statement.

3. After you have signed this document, you have the right to make health care decisions for yourself if you are mentally competent to do so. After you have signed this document, no treatment may be given to you or stopped over your objection if you are mentally competent to make that decision.

4. You have the right to revoke this document, and terminate your agent's authority, by informing either your agent or your health care provider orally or in writing.

5. If there is anything in this document that you do not understand, you should ask a social worker, lawyer, or other person to explain it to you.

6. This power of attorney will not be valid unless two persons sign as witnesses. Each of these persons must either witness your signing of the power of attorney or witness your acknowledgment that the signature on the power of attorney is yours.

The following persons may not act as witnesses: A. Your spouse, your children, grandchildren, and other lineal descendants; your parents, grandparents, and other lineal ancestors; your siblings and their lineal descendants; or a spouse of any of these persons. B. A person who is directly financially responsible for your medical care. C. A person who is named in your will, or, if you have no will, who would inherit your property by intestate succession. D. A beneficiary of a life insurance policy on your life. E. The persons named in the health care power of attorney as your agent or successor agent. F. Your physician or an employee of your physician. G. Any person who would have a claim against any portion of your estate (persons to whom you owe money). If you are a patient in a health facility, no more than one witness may be an employee of that facility.

7. Your agent must be a person who is 18 years old or older and of sound mind. It may not be your doctor or any other health care provider that is now providing you with treatment; or an employee of your doctor or provider; or a spouse of the doctor, provider, or employee; unless the person is a relative of yours.

8. You should inform the person that you want him or her to be your health care agent. You should discuss this document with your agent and your physician and give each a signed copy. If you are in a health care facility or a nursing care facility, a copy of this document should be included in your medical record.

DESIGNATION OF HEALTH CARE AGENT (South Carolina Statutory Form): I hereby appoint:

~~Mary Nixon-Tisale~~
REDACTED (Name)
REDACTED (Address)

Telephone: home **REDACTED** work: **REDACTED** mobile: **REDACTED**
as my agent to make health care decisions for me as authorized in this document.

SUCCESSOR AGENT: If an agent named by me dies, becomes legally disabled, resigns, refuses to act, becomes unavailable, or if an agent who is my spouse is divorced or separated from me, I name the following as successor to my agent:

~~Claudia Brown-Singleton~~
REDACTED (Name)
REDACTED (Address)

Telephone: home **REDACTED** work: **REDACTED** mobile: **REDACTED**

UNAVAILABILITY OF AGENT(S): If at any relevant time the agent or successor agents named here are unable or unwilling to make decisions concerning my health care, and those decisions are to be made by a guardian, by the Probate Court, or by a surrogate pursuant to the Adult Health Care Consent Act, it is my intention that the guardian, Probate Court, or surrogate make those decisions in accordance with my directions as stated in this document.

EFFECTIVE DATE AND DURABILITY: By this document I intend to create a durable power of attorney effective upon, and only during, any period of mental incompetence, except as provided in Paragraph 3 below.

HIPAA AUTHORIZATION: When considering or making health care decisions for me, all individually identifiable health information and medical records shall be released without restriction to my health care agent(s) and/or my alternate health care agent(s) named above including, but not limited to, (i) diagnostic, treatment, other health care, and related insurance and financial records and information associated with any past, present, or future physical or mental health condition including, but not limited to, diagnosis or treatment of HIV/AIDS, sexually transmitted disease(s), mental illness, and/or drug or alcohol abuse and (ii) any written opinion relating to my health that such health care agent(s) and/or alternate health care agent(s) may have requested. Without limiting the generality of the foregoing, this release authority applies to all health information and medical records governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 USC 1320d and 45 CFR 160-164; is effective whether or not I am mentally competent; has no expiration date; and shall terminate only in the event that I revoke the authority in writing and deliver it to my health care provider.

AGENT'S POWERS: I grant to my agent full authority to make decisions for me regarding my health care. In exercising this authority, my agent shall follow my desires as stated in this document or otherwise expressed by me or known to my agent. In making any decision, my agent shall attempt to discuss the proposed decision with me to determine my desires if I am able to communicate in any way. If my agent cannot determine the choice I would want made, then my agent shall make a choice for me based upon what my agent believes to be in my best interests. My agent's authority to interpret my desires is intended to be as broad as possible, except for any restrictions or limitations I may state below.

Accordingly, unless specifically limited by the provisions specified below, my agent is authorized as follows: A. To consent, refuse, or withdraw consent to any and all types of medical care, treatment, surgical procedures, diagnostic procedures, medication, and the use of mechanical or other procedures that affect any bodily function, including, but not limited to, artificial respiration, nutritional support and hydration, and cardiopulmonary resuscitation. B. To authorize, or refuse to authorize, any medication or procedure intended to relieve pain, even though such use may lead to physical damage, addiction, or hasten the moment of, but not intentionally cause, my death. C. To authorize my admission to or discharge, even against medical advice, from any hospital, nursing care facility, or similar facility or service. D. To take any other action necessary to making, documenting, and assuring implementation of decisions concerning my health care, including, but not limited to, granting any waiver or release from liability required by any hospital, physician, nursing care provider, or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my agent, or to seek actual or punitive damages for the failure to comply. E. The powers granted above do not include the following powers or are subject to the following rules or limitations:

ORGAN DONATION: (Initial one only) My agent [] may OR [65] may not consent to the donation of all or any of my tissue or organs for purposes of transplantation, consistent with my wishes as known to my agent and/or as stated in this document.

EFFECT ON DECLARATION OF A DESIRE FOR A NATURAL DEATH (LIVING WILL): I understand that if I have a valid Declaration of a Desire for a Natural Death, the instructions contained in the Declaration will be given effect in any situation to which they are applicable. My agent will have authority to make decisions concerning my health care only in situations to which the Declaration does not apply.

STATEMENT OF DESIRES CONCERNING LIFE-SUSTAINING TREATMENT: With respect to any Life-Sustaining Treatment, I direct the following:
(Initial only one of the following 3 paragraphs)

- [] GRANT OF DISCRETION TO AGENT. I do not want my life to be prolonged nor do I want life-sustaining treatment to be provided or continued if my agent believes the burdens of the treatment outweigh the expected benefits. I want my agent to consider the relief of suffering, my personal beliefs, the expense involved and the quality as well as the possible extension of my life in making decisions concerning life-sustaining treatment. OR
- [] DIRECTIVE TO WITHHOLD OR WITHDRAW TREATMENT. I do not want my life to be prolonged and I do not want life-sustaining treatment: (a). If I have a condition that is incurable or irreversible and, without the administration of life-sustaining procedures, expected to result in death within a relatively short period of time; or (b). If I am in a state of permanent unconsciousness. OR
- VS [] DIRECTIVE FOR MAXIMUM TREATMENT. I want my life to be prolonged to the greatest extent possible, within the standards of accepted medical practice, without regard to my condition, the chances I have for recovery, or the cost of the procedures.

STATEMENT OF DESIRES REGARDING TUBE FEEDING: With respect to Nutrition and Hydration provided by means of a nasogastric tube or tube into the stomach, intestines, or veins, I wish to make clear that in situations where life-sustaining treatment is being withheld or withdrawn pursuant to my desires stated above. (Initial only one of the following 3 paragraphs)

[ES] GRANT OF DISCRETION TO AGENT. I do not want my life to be prolonged by tube feeding if my agent believes the burdens of tube feeding outweigh the expected benefits. I want my agent to consider the relief of suffering, my personal beliefs, the expense involved, and the quality as well as the possible extension of my life in making this decision. OR

[] DIRECTIVE TO WITHHOLD OR WITHDRAW TUBE FEEDING. I do not want my life prolonged by tube feeding. OR

[] DIRECTIVE FOR PROVISION OF TUBE FEEDING. I want tube feeding to be provided within the standards of accepted medical practice, without regard to my condition, the chances I have for recovery, or the cost of the procedure, and without regard to whether other forms of life-sustaining treatment are being withheld or withdrawn.

IF YOU DO NOT INITIAL ANY OF THE ABOVE 3 STATEMENTS, YOUR AGENT WILL NOT HAVE AUTHORITY TO DIRECT THAT NUTRITION AND HYDRATION NECESSARY FOR COMFORT CARE OR ALLEVIATION OF PAIN BE WITHDRAWN.

STATEMENT OF ANY RESTRICTIONS OR LIMITATIONS: (Optional. Use additional pages if necessary-However, any additional pages must be signed and dated).

ADMINISTRATIVE PROVISIONS: I revoke any prior Health Care Power of Attorney and any provisions relating to health care of any other prior power of attorney. This power of attorney is intended to be valid in any jurisdiction in which it is presented.

Designation of Primary Physician

I designate the following physician as my primary physician: _____

(name)
(address)
(phone).

OPTIONAL- DESIGNATION OF ALTERNATE PRIMARY PHYSICIAN: If the physician I have designated above is not willing, able, or reasonably available to act as my primary physician, I designate the following physician as my primary physician:

(name)
(address)
(phone).

Organ Donation

In the event of my death, I have placed my initials next to the following part(s) of my body that I wish donated for the purposes that I have initiated below:

☐ any organs or parts OR
☐ eyes ☐ bone and connective tissue ☐ skin
☐ heart ☐ kidney(s) ☐ liver
☐ lung(s) ☐ pancreas ☐ other _____
for the purposes of:
☐ any purpose authorized by law OR
☐ transplantation ☐ research ☐ therapy
☐ medical education ☐ other limitations _____

Signature

I sign this Advance Health Care Directive, consisting of the following sections, which I have initialed below and have elected to adopt:

☒ Living Will (Declaration of Desire for a Natural Death)
☒ Selection of Health Care Agent (Health Care Power of Attorney)
☐ Designation of Primary Physician
☐ Organ Donation

BY SIGNING HERE I INDICATE THAT I UNDERSTAND THE PURPOSE AND EFFECT OF THIS DOCUMENT.

Signature: Earlene Seabrook Date: 4/2/17

City, County, and State of Residence: Kingstree, Williamsburg and South Carolina

Notary Acknowledgment

State of South Carolina

County of Williamsburg

On November 2, 2017 _____ came before me personally and, under oath, subscribed to, acknowledged, and stated that he or she is the person described in the above document and he or she signed the above document in my presence. I declare under penalty of perjury that the person whose name is subscribed to this instrument appears to be of sound mind and under no duress, fraud, or undue influence.

Additionally subscribed and sworn to before me by Mary N. Fendall
and Maria B. Fendall, the witnesses on the same date noted above.

Mary N. Fendall
Notary Public
My commission expires April 18, 2024



From: LC PRIMARY CARE

18433743624

03/22/2018 13:38

#618 P.027/118

ELECTRONICALLY FILED - 2021 Feb 05 5:37 PM - FLORENCE - COMMON PLEAS - CASE#2020CP2102290

Witness Acknowledgment and Affidavit

State of South Carolina Affidavit

County of Georgetown

We, Mary N. Tisdale and _____
the undersigned witnesses to the foregoing Advance Health Care Directive, consisting of a Decla-
ration of a Desire for a Natural Death, an Designation of Health Care Power of Attorney, a Designa-
tion of Primary Physician, and an Organ Donation, dated the 11 day of 2, 2017,
at least one of us being first duly sworn, declare to the undersigned authority, on the basis of our
best information and belief, that the Advance Health Care Directive was on that date signed by the
declarant/principal as and for his Advance Health Care Directive, consisting of a Declaration of a
Desire for a Natural Death, an Designation of Health Care Power of Attorney, a Designation of Pri-
mary Physician, and an Organ Donation, in our presence and we, at his request and in his presence,
and in the presence of each other, subscribe our names as witnesses on that date. The declarant/
principal is personally known to us, and we believe him to be of sound mind and under no duress,
fraud, or undue influence. Each of us affirms that he is qualified as a witness to this Advance Health
Care Directive under the provisions of the South Carolina Death With Dignity Act and any other
relevant provision of South Carolina law, that he or she is not related to the declarant/principal by
blood, marriage, or adoption, either as a spouse, lineal ancestor, descendant of the parents of the
declarant/principal, or spouse of any of them; nor directly financially responsible for the declarant/
principal's medical care; nor entitled to any portion of the declarant/principal's estate upon his
decease, whether under any will or as an heir by intestate succession; nor the beneficiary of a life
insurance policy of the declarant/principal; nor the declarant/principal's attending physician; nor an
employee of the attending physician; nor a person who has a claim against the declarant/principal's
decedent's estate as of this time. Neither of us has been appointed as Health Care Agent or Succes-
sor Health Care Agent by this document. No more than one of us is an employee of a health facility
in which the declarant/principal is a patient. If the declarant/principal is a resident in a hospital or
nursing care facility at the date of execution of this Advance Health Care Directive, at least one of
us is an ombudsman designated by the State Ombudsman, Office of the Governor.

Witness Signature Mary N. Tisdale Date 11-2-2017

Printed Name and Address of Witness Mary N. Tisdale REDACTED

Second Witness Signature _____ Date 11-2-2017

Printed Name and Address of Second Witness _____ REDACTED

REDACTED

Acceptance of Health Care Agent and Attorney-in-Fact for Health Care
I accept my appointment as Health Care Agent and Attorney-in-Fact for Health Care:

Signature _____ Date _____

Signature of Successor _____ Date _____

ADMISSION AGREEMENT – SOUTH CAROLINA

RESIDENT NAME:

Earlene Seabrook

RESIDENT NUMBER:

207268

DATE OF ADMISSION:

6-25-19

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among LCSHC ("Facility"), Earlene Seabrook ("Resident") and/or Mary T. Seabrook ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative").

WHEREAS, the parties wish to admit Resident to Facility and hereto agree as follows:

I. GENERAL CONDITIONS

1. **Inducement:** Resident and/or Representative verifies that all information submitted to Facility, including without limitation, financial information, medical history and medical diagnosis, is true and correct and acknowledges that providing false information constitutes a breach of this Agreement.

2. **Personal Property:** It is understood that Facility is not responsible for either damage to or theft/loss of Resident's valuables, monies or clothing unless the item(s) are held in trust by Facility and the damage, theft, loss was caused by the negligent or willful conduct of Facility personnel. Personal property will not be considered to be held in trust unless the policies and procedures outlined in the *Admission Handbook*, which is made a part of this Agreement by reference herein, and any future amendments thereto, have been followed. Facility reserves the right to prohibit certain personal effects, funds or other property in accordance with state and federal law. Facility is not liable for either damages to or theft/loss of any personal belongings or personal care items, such as dentures, hearing aides and eyeglasses, except with respect to damage, theft or loss caused by the negligent or willful conduct of Facility personnel.

3. **Emergency Care:** In case of an emergency and Resident's personal physician is not available, Resident and/or Representative allows Facility to retain a physician on Resident's behalf. The physician will bill Resident directly and Facility will not be responsible for payment of the bill for such service.

4. **Representative:** When Resident has a Representative, Representative will act on Resident's behalf for all purposes permitted under applicable law. Representative will pay all fees and charges incurred hereunder by or on behalf of Resident using proceeds from Resident's assets or estate. Representative may act in more than one capacity and will be bound by the applicable terms and conditions of this Agreement. Except when Representative has access to Resident's assets, or as otherwise expressly provided to the contrary herein, or as permitted by state or federal law, Representative will not become personally liable for the payment of Resident's fees and charges by signing this Agreement. To the extent possible, Resident acknowledges and consents to the execution of this Agreement by Representative.

5. **Terms and Conditions:** By signing this Agreement, Resident and/or Representative agree(s) to comply with all terms and conditions set forth in this Agreement and Facility's policies, as same apply and as may change from time to time.

Original: Business File • Photocopy: Resident/Representative

FFSC001 South Carolina Admission Agreement (Rev. 6/2009)

DEFENDANT'S
EXHIBIT

2

II. AGREEMENT FOR CARE

A. FACILITY AGREES TO:

1. Admit Resident upon receipt of a physician's order; assist in obtaining physician services if a personal physician becomes unavailable; obtain emergency physician services when required. *Resident is not deemed admitted until such time as all agreements required by law and Facility have been appropriately executed.* This provision may be waived in writing by Facility, at its sole discretion.
2. Maintain written records of financial transactions with Resident and/or Representative responsible for payment. Resident has the right to have personal funds held in trust in accordance with applicable state and federal law, as may be amended from time-to-time.
3. Furnish room, routine meals, nursing care, personal care, or custodial care to Resident in accordance with applicable State and Federal law. This provision expressly excludes extraordinary services, including but not limited to, physician care, private duty nursing, private sitters, specialty foods and therapies not required by law. Resident will be placed in a semi-private room, absent medical need for a private room as determined by Facility staff. Residents residing in private rooms will be billed accordingly.
4. Assist in applying for private insurance benefits, but not to accept assignment thereof unless otherwise noted as an exception herein.
5. Assist Resident and/or Representative in applying for Medicare or Medicaid benefits where applicable.
6. Provide assistance in daily living and restorative nursing care in accordance with Resident's care plan, where appropriate. Resident and/or Representative reserves the right to refuse said treatment. If said treatment is refused, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
7. Arrange for transfer of Resident to a hospital upon physician's order or in an emergency situation. Expenses of transfer and care of Resident at the hospital are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment of those services.
8. Obtain and administer medication as prescribed. Expenses for the cost of obtaining the medications are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment for the medications. Resident and/or Representative has the right to refuse medication. If Resident refuses medication, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
9. Provide an activities program for Resident, components of which will be at the discretion of Facility.
10. Furnish Resident bed linens and hospital gowns. All personal clothing will be supplied by Resident or Representative and will be properly labeled as outlined in the *Admission Handbook* for identification purposes.

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B. RESIDENT AND/OR REPRESENTATIVE AGREE(S) TO:

1. Provide complete and accurate information regarding Resident to Facility as requested. This information must be updated on a regular basis and when any substantial change occurs.

2. Provide Facility, prior to or at the time of admission, orders from Resident's attending physician for the immediate care of Resident, medical history, physical examination, current physician's orders and physician's statement that Resident is free from communicable disease at the time of Resident's admission or within the required time limitation. If Resident is suffering from communicable disease, Resident and/or Representative will provide a physician's certificate that the disease is not in a transferable stage, or that adequate or appropriate isolation measures are being carried out to control transmission of the disease. Facility retains the right to refuse admission to any Resident suffering from a communicable disease, whether that disease is in a transferable stage or not, so long as said refusal is in compliance with state and federal law. Resident's attending physician will provide, at Resident's expense, a physical examination performed either within five (5) days prior to admission or within forty-eight (48) hours following admission.

3. Allow Facility staff to perform such functions as may be necessary to maintain Resident's well-being, including but not limited to, assistance with bathing and hygiene, dressing, toileting, daily activities, performance of restorative nursing care as appropriate (including bowel and bladder training), and the performance of therapies determined necessary by a physician, but limited to those therapies for which Resident has funding. Resident and/or Representative has the right to refuse medication and treatment as prescribed by Resident's physician. In accordance with the policies of Facility, in the event that Resident and/or Representative refuses to abide by the physician's orders, Facility retains the right to discharge Resident from Facility if, in the judgment of appropriate Facility staff, it is determined that discharge or transfer is appropriate under applicable federal and state law. In addition, if Resident and/or Representative refuses to abide by the physician's order, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.

4. Pay all fees and charges described in this Agreement upon the terms agreed to herein.

5. Adhere to Facility's *Bed Reservation Policy* as outlined in the *Admission Handbook* and the *Facility's Policy and State Requirements for a Temporary Leave Bed-Hold*.

6. Provide and be responsible for personal items of clothing and property.

7. (a) Vacate/remove Resident from Facility within thirty (30) days, upon receipt of a Notice of Discharge and Transfer for any of the reasons required or allowable under state or federal law; (b) cooperate with Facility's efforts to locate alternative placement; (c) Vacate/remove Resident from Facility in less than thirty (30) days if the situation warrants immediate removal. All transfers and discharges will be carried out in accordance with state and federal law.

8. In the event Resident no longer requires Medicare or Medicaid services, Resident and/or Representative agree that Resident will be relocated to a bed certified for the appropriate level of care needed. Please note, room-to-room changes within the same certified unit of Facility are not considered a transfer for purposes of this section.

9. Notify Facility at least three (3) days in advance of Resident's voluntary discharge from Facility, excepting discharge as the result of an emergency. If advance notice is not provided, Resident and/or Representative will be liable for payment of three (3) days.

Original: Business File • Photocopy: Resident/Representative

10. Accept full responsibility for, absolve and release Facility, its agents, Medical Director and/or attending physicians from any liability for any event, including but not limited to, injury, illness, accident, or deterioration of medical condition suffered by Resident when Resident is not on Facility premises and is not under the care, custody and/or supervision of Facility and its staff.

11. Abide by Facility's policies and procedures as amended from time to time and outlined in the *Admission Handbook* and other Admissions materials, which are made a part of this Agreement by reference herein, as well as the Resident Rights under applicable state law and any future amendments. Facility's rules, regulations, policies and procedures shall not be construed as imposing contractual obligations on Facility and are subject to change.

12. Cooperate with Facility in securing third-party payments, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments.

13. In the event Resident is transferred or discharged, Resident and/or Representative will be responsible for collecting and moving Resident's personal property within forty-eight (48) hours of the transfer/discharge. If the property is not moved, Facility will remove all property from the Resident's room and store same at Resident's and/or Representative's cost and risk. Facility is not responsible for any damage, theft or loss to Resident's property during this period of time. Unclaimed property will be disposed of in accordance with applicable state law.

14. Resident and/or Representative will be responsible for any damage caused to Facility property by Resident or his/her guests beyond normal wear and tear and will pay for such damage, based on the actual charge to Facility for repair or replacement.

15. Resident and/or Representative will be responsible for obtaining adequate information from Resident's attending physician before any extraordinary treatment. Absent knowledge that the consent was not informed, Facility staff may rely upon the physician's written order as evidence that the physician secured informed consent.

16. Resident and/or Representative will be responsible for any damages or injuries caused by Resident to other persons, and will indemnify and hold Facility harmless from any claims, actions or proceedings against Facility resulting from Resident's actions or omissions.

17. In the event of Resident's death, Representative agrees to authorize Facility to notify the person(s) designated by Resident and/or Representative. Additionally, Facility is authorized to transfer Resident's body to the designated funeral home. If Resident has not designated a funeral home, Resident's family will be consulted and Resident's body will be transferred in accordance with their wishes. All costs associated with the transfer and funeral expenses will be the responsibility of Resident's estate.

18. In the event Resident becomes incapable of making medical decisions and no guardian, proxy, surrogate or agent under a valid durable power of attorney for health care or no person qualified under the South Carolina Adult Health Code Consent Act is available, Facility is authorized to seek court appointment of a legal guardian. All associated costs and attorneys' fees will be borne by Resident or Resident's estate.

19. Resident and/or Representative agree that they will present grievances in an orderly manner. Information on Facility's Grievance Procedure can be found in the *Admission Handbook* and the *Resident Rights* under applicable state law. Nothing herein will preclude Resident or any other party from filing a complaint with any governmental agency, but will be ancillary thereto. Facility will review and investigate all complaints in a timely manner.

Original: Business File • Photocopy: Resident/Representative

20. Resident and/or Representative will be responsible for paying all costs, expenses and reasonable attorneys' fees, whether or not suit is brought, in the event costs, expenses, and/or attorneys' fees are incurred by Facility in the collection of sums due from and owed by Resident or any other party on Resident's behalf to Facility.

III. FINANCIAL AGREEMENT

Resident and/or Representative will be responsible for immediate payment of all charges incurred as follows:

1. Room and board, including meals, laundering of linens and bedding, nursing care, personal care or custodial care for the health, grooming and well-being of Resident in (☐-private) (☐-semi-private) accommodations, for a basic fee of \$_____ per day, payable one month in advance. In the event Resident is unable or unwilling to receive any of the services included in the room and board charge, such as meals, laundry, etc., no adjustment will be made to the daily rate. Payment for all invoices is due upon receipt. In the event public aid funds are denied for services for which coverage has been expected, Resident and/or Representative will be responsible for payment and will pay such charges upon receipt of invoice. Resident and/or Representative agree(s) to pay any rate change charged to Resident so long as each party to this Agreement is given at least thirty (30) days written notice of the new rate, including any increases or adjustments in Resident's liability by any financial third party or regulatory agency. Additional notice may be provided under applicable state regulations.

- a. Additional services and items may be provided at a separate charge. The current rates charged for additional services and items are set out in Exhibit B. These charges may change from time to time. Resident and/or Representative agree(s) to pay the charges in effect at the time that the service is performed or the item supplied. Facility agrees to give thirty (30) days advance notice to Resident and/or Representative of any price changes.
- b. Services or items not provided by Facility may be supplied by third-party vendors. Facility will assist Resident and/or Representative in securing such items or services, but will assume no liability for providing the services and makes no representations or warranties regarding the quality of such items or services. Facility assumes no liability for payment of any services provided by third-party vendors.
- c. The daily rate will be charged for the day of admission. Private pay residents will not be charged the daily charge for the day of discharge if discharge occurs before 12:00 p.m., unless the discharge is for emergency medical treatment. Medicare and Medicaid Residents will not be charged a daily charge for the day of discharge. The daily rate will be charged, if applicable, on the day of death.

2. Facility may charge a private pay resident a late payment fee of interest at a rate equal to the lesser of (a) eighteen percent (18%) per annum or, if lesser, the highest percentage allowed by law, on all charges (exclusive of interest) for which resident is liable that are outstanding for more than thirty (30) days from the date on which the resident was billed for said charges or (b) the amount set forth in any Agreement Addendum.

3. Refunds will be made for any prepaid room and board services for which payment has been received. The refund of the unused portion of prepaid fees and charges will be made within thirty (30) days following Resident's discharge. In the event of Resident's death, refunds will be made in accordance with

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state and federal law. Any personal property belonging to Resident in Facility at the time of Resident's discharge or death will be released in accordance Section II-B-13 herein.

4. In the event Resident leaves Facility and has personal funds on account, Facility may deduct any outstanding monies due to Facility from said personal funds. The remainder will be distributed in accordance with applicable state and federal law.

5. If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative shall pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

IV. TERMINATION

1. Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.

2. Except as otherwise provided herein, Facility may terminate this Agreement by providing at least fifteen (15) days advance notice to Resident and/or his/her legal representative.

3. This Agreement may be terminate immediately upon the occurrence of any of the following:

- a. Resident's condition has improved sufficiently so that he/she no longer requires the services provided by Facility.
- b. Resident's physical or mental condition changes and he/she requires a higher level of care which cannot be provided by Facility.
- c. Resident's death
- d. The safety or health of individuals in the Facility is endangered.
- e. Resident and/or his/her legal representative has failed to pay for his/her stay.
- f. Facility ceases to operate or is no longer able to provide services to Resident.
- g. Sanctions or remedies imposed by the Department.

4. In the event Facility terminates this Agreement through an involuntary transfer or Discharge, Facility shall provide appropriate notice and discharge planning as required by State and Federal law.

V. MEDICAID BENEFICIARIES

1. **Eligibility.** Eligibility for Medicaid-sponsored long-term care services is based on income and medical necessity. To qualify for assistance through the Medicaid program, a nursing home patient must need intermediate or skilled nursing care as determined through an assessment conducted by Medicaid program staff. The fact that a patient has already been admitted to a nursing home is not considered in this determination. It is possible that a patient could exhaust all other means of paying for nursing home care and meet Medicaid income criteria but still be denied assistance due to the lack of medical necessity.

It is recommended that all persons seeking admission to a nursing home be assessed by the Medicaid program prior to admission. This assessment will provide information about the level of care needed and the viability of community services as an alternative to admission. The Department may charge a fee, not to exceed the cost of the assessment, to persons not eligible for Medicaid-sponsored long-term care services.

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2. **Covered Services.** If Resident is a Medicaid recipient, the Medicaid Program will reimburse Facility for certain skilled services ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to: hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream, toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, and basic personal laundry.

3. **Non-Covered Services.**

- a. Medicaid is a cost-sharing program. Resident's monthly income must be contributed to the cost of his or her care. Medicaid determines how much of the Resident's monthly income must be paid to the Facility (also called "patient liability"). To the extent permitted by law, Resident's monthly Social Security and pension funds, minus the personal allowance retained by Resident (or other allowance as set by law), will be paid to Facility.
- b. Resident and/or Representative may purchase from Facility certain miscellaneous products and services that are not covered by Medicaid. An itemized list of fees for these additional products and services is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office.

4. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicaid for services rendered by Facility and authorizes Facility to receive payments from Medicaid pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicaid refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative will remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from Medicaid.

5. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

6. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VI. MEDICARE BENEFICIARIES

1. **Covered Services.** If Resident is a Medicare recipient, the Medicare Program will reimburse Facility for certain skilled services such as nursing services and certain therapies ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to, hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream,

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toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, basic personal laundry and medically related social services.

2. **Non-Covered Services.** Resident and/or Representative will be required to pay certain other "Allowable Charges" which include, but are not limited to:

- a. Fees for certain products and services not covered under the Medicare program. Fees for such services will be identical those charged to private pay residents of Facility for the same products and services.
- b. Fees for certain products and services that are more expensive than the products and services covered under the Medicare program (e.g., a private room), as requested by a Resident and/or Representative. Fees charged for the more expensive products and services will be based on the difference between the fees charged to private pay residents of Facility and the customary charge for the same products and services under Medicare. Facility staff will inform Resident and/or Representative requesting additional or more expensive products or services that there will be a specified charge.
- c. Certain deductibles and co-insurance amounts under the Medicare Program.

3. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicare for services rendered by Facility and authorizes Facility to receive direct payments from Medicare pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicare refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative shall remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from Medicare.

4. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

5. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VII. PRIVATE PAY/INSURANCE

1. **Routine Services.** If Resident is paying for his/her stay privately OR if he/she is having his/her stay paid for through a third-party insurance carrier, Resident and/or Representative will reimburse Facility for routine services ("Routine Services") which include: routine nursing services; routine dietary services; routine activities programs; and routine room and bed maintenance services. Beauty shop fees are not included in the daily rate. Resident and/or Representative shall pay a deposit of two months' basic room and board prior to admission. Each subsequent monthly payment is due on or before the 10th day of the month.

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2. **Ancillary Services.** Resident and/or Representative may purchase services and products that are not included in Routine Services from Facility. An itemized list of fees for these additional services and products is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office. Resident and/or Representative shall pay for ancillary services at the end of the month in which such services are rendered.

3. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from any insurance company paying benefits to Resident for services rendered by Facility and authorizes Facility to receive payments from such insurance company pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent such insurance company refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative shall remain liable for payment for these services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from such insurance company.

4. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

5. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VIII. NOTICES

All notices, consents, approvals and the like required to be given hereunder shall be given in writing to Facility to the address below or such other address as Facility may designate:

All notices, consents, approvals and the like required to be given to Resident and/or Representative shall be given in writing to Resident and/or Representative to the address below or at such other address as he/she may designate:

Notice may be given via facsimile, e-mail or U.S. Mail, certified mail return receipt requested.

Original: Business File • Photocopy: Resident/Representative

IX. GOVERNING LAW

This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located. This Agreement will be binding and inure to the benefit of each of the undersigned parties and their respective heirs, personal representatives, successors and assigns.

X. SEVERABILITY

If any provision(s) of this Agreement will be deemed to be illegal or otherwise unenforceable, all other provisions will remain in full force and effect as if the invalid provision had not been part of this Agreement.

XI. CAPTIONS

Captions are for the purpose of reference only and do not govern, limit, modify, enlarge or in any manner affect the scope, meaning and intent of the provisions of this Agreement, nor will such captions be given any legal effect.

XII. MODIFICATIONS

Facility reserves the right to unilaterally modify this Agreement to conform to law and regulations as may be passed from time to time. Reasonable notice, considering all of the circumstances, will be given to Resident and/or Representative when any change is made in accordance with this paragraph. Any other modification, except as otherwise specifically reserved herein, will be made in writing and signed by all relevant parties.

XIII. WAIVER

Facility reserves the right to waive any obligation of Resident under the provisions of this Agreement in its sole and absolute discretion. No term, provision or obligation of this Agreement will be deemed to have been waived by Facility unless in writing, signed by Facility. Any waiver of any provision of this Agreement will not be deemed a waiver of any other term, provision or obligation of this Agreement, and the other obligations of Resident and/or Representative and this Agreement will remain in full force and effect.

XIV. RESIDENT

Use of the term "Resident" herein includes the Resident and any person with legal authority to handle Resident's funds or property and/or make medical decisions depending on the context in which the term is used.

XV. ASSIGNABILITY

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

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XVI. INFORMATION RELEASE/BILLING AUTHORIZATION

1. Resident information included in Facility's records is confidential. Unauthorized persons will not be allowed to review these records without Resident's and/or Representative's consent, except as required or permitted by law. Resident's records are the sole property of Facility, but may be reviewed by authorized person(s) by appointment, in the presence of a Facility representative, as permitted by applicable state or federal law. Authorized persons may request and purchase photocopies of the medical record or any portion thereof with two (2) business days notice, unless a longer time period is permitted under state law. The fees for reproduction will be billed at the current rate permitted by applicable state or federal law.

2. Resident and/or Representative authorize(s) Facility to release all or part of Resident's protected health information ("PHI") as defined by the Health Information Protection and Portability Act of 1996 to any person or entity which has or may have a legal contractual obligation to pay all or a portion of the costs of care provided to Resident, including but not limited to Medicare, Medicaid, hospital or medical service companies, insurance companies, workers' compensation carriers, welfare funds and/or Resident's employer.

3. Resident and/or Representative authorize(s) Facility to release all or any part of Resident's PHI to any medical professional or institution responsible for Resident's medical or nursing care when Resident is receiving treatment, is transferring, or is discharged from Facility.

4. Resident and/or Representative authorize(s) Facility to send and release PHI to Medicare, Medicaid or other third-party payers for the purpose of receiving payment of covered services. Resident and/or Representative further authorize(s) and request(s) that Medicare, Medicaid, their representatives, their intermediaries and other third-party payers send payment for covered services directly to Facility. This authorization does not release Resident and/or Representative from financial responsibility for charges that may be non-covered or denied by Medicare or Medicaid, or other third party payer.

XVII. MISCELLANEOUS

1. In the event Resident is unable to physically sign his/her name, Resident will sign below by making a mark. If this is the manner in which the Agreement is signed, the witness will verify that Resident was aware that he/she was signing an Agreement and that it was his/her intent to sign.

2. In the event Resident has appointed a Representative to control his/her assets and even if such appointment has not been made through a legal document, Representative will be fully bound to the extent of those assets to the terms of this Agreement, to the extent allowed by law in the State where Facility is located.

3. A copy of any court order appointing a guardian for the Resident's person or estate must be supplied to Facility. This court order must appoint the legal guardian to sign contracts on behalf of Resident. The legal guardian will only be given such rights under this Agreement as are set out in that court order. In addition, the legal guardian must file with Facility on an annual basis the same financial documents filed with the court showing the resources available to pay for Resident's care.

4. Representative will supply Facility with a copy of any power of attorney, durable power of attorney, durable power of attorney for health care or other legal documentation permitting him or her to act on Resident's behalf. It is understood that the Representative will pay for the care of Resident in accordance with this Agreement to the extent that he/she has access to Resident's income or resources. Failure to utilize the Resident's income or resources for payment to Facility may subject Representative to legal action. Facility may require an accounting from time to time as to the type of said resources. Failure to supply such an accounting will be a breach of this Agreement.

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5. In the event that an individual voluntarily agrees to become legally responsible for payment for the care and treatment of Resident, said Representative will be fully bound to the terms of this Agreement. Please note, Facility does not require a third-party guarantor.

6. Facility reserves the right to apply its indigent care policy, as appropriate, in its sole discretion.

XVIII. ENTIRE AGREEMENT

I/we hereby acknowledge that I/we have read this page and all preceding pages and acknowledge that this Agreement represents the entire agreement and understanding between the parties and supersedes all previous representations, understandings or agreements, oral or written, between the parties and may not be amended except by written agreement of the parties.

By signing below, I/we further acknowledge that I/we have made the above promises and representations in order to induce Facility to enter into this Agreement. The parties further understand that, by signing this Agreement, Facility is relying upon the truthfulness of the promises and representations I/we have made. The parties further agree that if any term or provision of the Agreement is found by a court or agency of competent jurisdiction to be legally unenforceable, the term and provision will be deemed severed from this Agreement and the remaining terms or provisions will be fully enforceable.

The undersigned further acknowledges that he/she has received and read the *Admission Handbook* and other Admissions materials and understand that these documents are made a part of this Agreement by reference herein.

Signature of Resident

Date

Printed Name of Resident

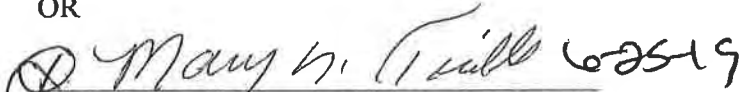
Resident Social Security Number

Witness Signature

Date

Printed Name of Witness

OR

 6-25-19

Signature of Representative, if any

Date

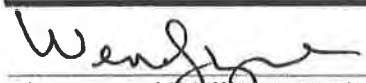
Printed Name of Representative

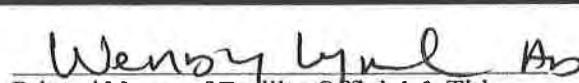
Witness Signature

Date

Printed Name of Witness

Representative Social Security No. (Voluntary Info.)


Signature of Facility Official

 As
Printed Name of Facility Official & Title

Date

Original: Business File • Photocopy: Resident/Representative

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	C/A No. 2020-CP-21-02290
	)	
Mary Tisdale as Personal Representative of the	)	
Estate of Earlene Seabrook,	)	
	)	
	)	PLAINTIFF'S MEMORANDUM IN
Plaintiff,	)	OPPOSITION OF DEFENDANT'S
	)	MOTION TO STAY ACTION AND
Versus	)	COMPEL ARBITRATION
	)	
Palmetto Lake City Operating, LLC d/b/a Lake	)	
City-Scranton Healthcare Center and Jeffrey	)	
Gibbs,	)	
	)	
Defendants.	)	

The Plaintiff, Mary Tisdale as Personal Representative of the Estate of Earlene Seabrook hereby serves her Memorandum in Opposition to Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center and Jeffrey Gibbs ("Defendants") Motion to Stay Action and Compel Arbitration.

FACTS

Earlene Seabrook was admitted to the Defendants' skilled nursing facility on or about June 25, 2019. The Defendants operate a skilled nursing facility, licensed by the South Carolina Department of Health and Environmental Control, subject to R.61-17, *Standards for Licensing Nursing Homes*. While Ms. Seabrook was a resident and under the Defendants' care, she was allowed to develop pressure ulcers which became infected, leading to her decline and eventual death. Ms. Seabrook died on August 31, 2019.

STANDARD OF REVIEW

A parties' right to a jury trial in South Carolina is governed by state law. Pelfrey v. Bank of Greer, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978). While the Federal Arbitration Act ("FAA") imposes a presumption favoring arbitration, the presumption does not apply to the "identity" of the parties who may be bound to such an agreement. Wilson v. Willis 426 S.C. 326, 335 827 S.E.2d 167, 179 (2019). In fact, there is a presumption against arbitration when enforcement is sought against a non-signatory. Id. The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid

arbitration agreement. Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). It is well established that “where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement to arbitrate exists in the first place...If no agreement is found to exist, the court must deny any application to arbitrate.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) citing S.C. Code Ann. § 15-48-20(a) (2005). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

In determining whether an agreement to arbitrate exists, “the court should apply ‘ordinary state-law principles that govern the formation of contracts.’” Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E. 2d 839, 844 (Ct. App., 1999). Arbitration is available only when the parties involved contractually agree to arbitrate. Id. South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Player v. Chandler, 299 S.C. 101, 105, (1989). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a).

ANALYSIS

I. THERE IS NOT AN ENFORCEABLE ARBITRATION AGREEMENT

a. Earlene Seabrook’s Health Care Power of Attorney Did Not Authorize Mary Tisdale to Execute the Arbitration Agreement.

Of utmost importance in this matter, it is undisputed that Earlene Seabrook never signed the arbitration agreement. Mary Tisdale executed documents on behalf of Earlene Seabrook upon her entry to the Defendants’ facility, including an Arbitration Agreement and Admissions Agreement. It is important to note the distinctions among the two documents. An admissions agreement sets forth the terms of the resident’s admission and scope of healthcare to be provided while at the facility. An arbitration agreement

is a legal document which sets forth the terms of resolving potential disputes.

The mere fact that an arbitration exists does not automatically refer any dispute to arbitration. Like any contract, the agreement must be valid to be enforceable, signed by the parties who had the express and legal authority to do so. Mary Tisdale was not the court appointed legal guardian of Earlene Seabrook, nor did she have a durable power of attorney. The only authority that Ms. Tisdale was given by Ms. Seabrook was a health care power of attorney, which applies only to healthcare decisions.

The HCPOA's language expressly states Ms. Tisdale's limited authority and did not grant her power to sign the Arbitration Agreement on Ms. Seabrook's behalf. Under South Carolina law, an action to interpret a power of attorney is similar to a contract interpretation action. Watson v. Underwood, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014). Accordingly, contract interpretation principles apply to determine the HCPOA's scope. Stott v. White Oak Manor, Inc., 426 S.C. 568, 577, 828 S.E.2d 82, 87 (Ct. App. 2019) (citing In re Thames, 344 S.C. 564, 571, 544 S.E.2d 854, 857 (Ct. App. 2001)). Contracts (and powers of attorney) must be interpreted to carry out their parties' intent as determined primarily by the language they chose in the document itself. A court may not read terms into a contract or power of attorney or infer the parties intended a meaning inconsistent with the language they expressed. Radalytic Labs, Inc. v. Culver, 329 S.C. 380, 383, 495 S.E.2d 782, 784 (1997) (citing Blakeley v. Rabon, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976)).

The Defendant facility is a sophisticated business entity frequently interacting with residents and their families during the nursing home admission process. It should be well aware of the differences between a durable power of attorney, a healthcare power of attorney, and other forms of guardianship. Based on the plain language of the agreements, it is abundantly clear that the Plaintiff cannot be bound to arbitration.

Starting with its title, the HCPOA defines its limited scope. Ms. Seabrook chose to create only a "health care" power of attorney with a specific eye toward her preferences on life-sustaining end of life

medical treatments (“Advance Directive Regarding a Natural Death”). Ms. Tisdale was appointed not as Ms. Seabrook’s general financial or legal representative but only as a “health care agent . . . to make health care decisions.

Defendants’ reliance on HCPOA is also misplaced as that section granted Ms. Tisdale only the authority to take actions “necessary to carry out” her enumerated powers including the power to admit Ms. Seabrook to the Facility. While Ms. Tisdale had limited power to take actions “necessary” to “health care” decisions, the HCPOA “shall not give [Ms. Tisdale] general authority over [Ms. Seabrook’s] property or financial affairs.” Since the Arbitration Agreement is unlinked from admission to the Facility and instead affects the forum, procedures, and potential value for Ms. Seabrook’s personal injury claim, executing the Arbitration Agreement is a “financial” and “property”-related matter rather than a “health care” decision.

b. South Carolina Courts Define “Health Care” to Exclude Execution of an Optional Arbitration Contract.

South Carolina appellate courts have also held that “health care” decisions do not encompass arbitration contracts. In Coleman v. Mariner Health Care, Inc., the South Carolina Supreme Court was tasked with determining whether committing a loved one to arbitration was a “health care” decision. 407 S.C. 346, 755 S.E.2d 450 (2014). Coleman considered this key term as it was defined in South Carolina’s Adult Health Care Consent Act (“the Act”), holding that the statutory definition of “health care” includes medical procedures, nursing care, placement in a nursing home, and agreeing to pay for nursing home services. Id. at 352, 755 S.E.2d at 453. However, a separate arbitration contract—like the Arbitration Agreement Daughter signed—was not a “health care” matter because it was (1) not required for the resident’s admission to the nursing home; (2) contained no provisions for medical or nursing services; and (3) did not require any financial commitment for medical or nursing services. Id. at 353, 755 S.E.2d at 454. Coleman is directly on point here because, while it construed the term “health care” in the context of the Act, the statute governing health care powers of attorney instructs courts to apply the Act’s terms to

documents like the HCPOA. S.C. Code Ann. § 62-5-502(c) (stating that generally the Act's provisions "apply to the making of decisions by a health care agent").

c. Mary Tisdale Lacked Actual or Apparent Authority to Sign the Arbitration Agreement for Earlene Seabrook

The legal consequences of an agent's actions can only be attributed to the principle when the agent as actual or apparent authority. Charleston Registry v. Young Clement, 359 S.C. 635, 598 S.E.2d 717 (Ct. App. 2004). It is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority. Frasier v. Palmetto Homes of Florence, 473 S.E.2d 865 (Ct. App. 1996). South Carolina law requires that to prove apparent authority, the Defendant must show "... (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412, S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists. Id.

Defendants have produced no evidence indicating that Mary Tisdale had authority to enter a contract on Earlene Seabrook's behalf or waive Ms. Seabrook's right to a jury trial. The issue of arbitration agreements in skilled nursing facilities has been addressed at the Court of Appeals and Supreme Court, and the case is very similar to Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292, 304 (Ct. App. 2018); and Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d, 679 (Ct. App. 2016). In all three of these

cases, our Courts have found Arbitration Agreements to be unenforceable where a family member signed an Arbitration Agreement near the time of admission to a skilled nursing facility for the Decedent and did not have any actual authority to do the same. In all three cases, the Courts found that no implied authority nor estoppel applied. Presently, a review of the admissions and arbitration documents by the Defendants would have informed them that Mary Tisdale did not have actual authority by way of a Durable Power of Attorney, nor Court Appointed Guardianship to bind her aunt, nor did she ever indicate that she had any apparent authority to enter contracts on behalf of her aunt.

II. PLAINTIFF IS NOT EQUITABLY ESTOPPED FROM DENYING THE ARBITRATION AGREEMENT.

Defendants also argue that Plaintiff should be equitably estopped from denying enforcement of the Arbitration Agreement. Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements.” Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conduct be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting the estoppel must lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on the conduct of the party to be estopped. Id.

Defendant has not met its burden to establish these elements. There is no evidence Ms. Tisdale acted in a way amounting to a false representation to Defendant regarding Ms. Seabrook’s status or that Ms. Tisdale intended for Defendants to act in reliance on her conduct. Additionally, the evidence shows Defendants cannot meet possibly its burden to show they lacked knowledge or the means of knowledge of the truth of the facts in question. Ms. Seabrook provided a copy of her health care power of attorney to the Defendants at the time of admission. Equitable doctrines such as estoppel favor diligent parties who

actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

In this case, the Defendants had the capacity to determine whether Ms. Tisdale had the authority to sign an arbitration agreement on Ms. Seabrook's behalf. The Defendant is a sophisticated business entity frequently interacting with residents and their families during the nursing home admission process. The Defendants are or should be familiar with the legal concepts of guardianship and powers-of-attorney. Since the Defendant has not cited or provided evidence on all required elements of equitable estoppel, Plaintiff is not equitably estopped from denying the arbitration agreement.

III. THE ADMISSION AGREEMENT AND ARBITRATION AGREEMENT ARE SEPARATE CONTRACTS THAT DO NOT MERGE.

The Admission Agreement and Arbitration Agreement are separate contracts that do not merge. See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert. denied Aug. 21, 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014) (Coleman refused to apply the doctrine of merger because language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 407 S.C. at 355, 755 S.E.2d at 455. Thompson and Hodge applied Coleman and provided further examples of factors demonstrating "separateness and preventing merger. 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.

As discussed above, there were two separate agreements signed separately, and they were not merged. Since there was no merger here, Defendants' equitable estoppel argument must be denied. See Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455 (rejecting estoppel argument by finding no merger). South Carolina courts have three times refused merger arguments for nursing home admission and

arbitration contracts, and Defendants' argument should be rejected as well. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 49-52, 784 S.E.2d at 683-84; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

The Klutts Resort Realty, Inc. v. Down'round Development Corp., 268 S.C. 80, 232 S.E.2d20 (1070) "merger" principle cannot apply unless the writings in question were executed "at the same time, by the same parties, for the same purpose, and in the course of the same transaction." Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts, 268 S.C. at 88, 232 S.E.2d at 24). Even then, merger does not apply if there is "anything indicating a contrary intention." Id. (emphasis added). Thus, multiple executed writings relating to the same general subject matter will not be viewed as a single or merged agreement if either their language or the circumstances even hint that the parties actually intended the writings to be distinct, separate contracts. Three nursing homes have previously attempted but failed to meet these requirements, and South Carolina's appellate courts have never applied merger to nursing home admission and arbitration contracts. See generally Coleman, Thompson, and Hodge.

The terms and context of the admissions agreement and arbitration agreement show the parties intended the two to be separate contracts. Hodge is the key precedent here because it builds on Coleman and Thompson to provide the Court's most recent and complete illustration of the type of contract language or structure showing parties do not intend multiple agreements to be interpreted as one. For example, admission and arbitration contracts cannot merge if they contain inconsistent terms, especially provisions related to how each contract may be terminated or the substantive law governing their interpretation. Hodge, 422 S.C. at 562, 813 S.E.2d at 302; Thompson, 416 S.C. at 53, 784 S.E.2d at 685. Moreover, courts look at the way the contracts are structured, finding it is unlikely parties intended two contracts to be treated as one if they chose separate titles and required separate signatures. Hodge, 422 S.C. at 15 562, 813 S.E.2d at 302; see also Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1. Finally, Hodge held a nursing home cannot argue for merger when it chose to separate arbitration and admission into two

agreements while taking the position that agreeing to the former was not required to obtain the benefits of the latter. 422 S.C. at 562-63, 813 S.E.2d at 302.

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

IV. THE FEDERAL ARBITRATION AGREEMENT ACT DOES NOT MANDATE ENFORCEMENT OF THIS AGREEMENT.

Under the FAA, arbitration is required when there is a valid arbitration agreement and a dispute exists which is within the scope of the agreement. Under the arbitration clause, neither prong is satisfied. As discussed above, there is no valid arbitration agreement because Mary Tisdale did not have the legal authority to execute a valid arbitration agreement. Second, Plaintiff's claims include negligence, negligence per se, fraud and misrepresentation, violations of the South Carolina Unfair Trade Practices Act, wrongful death and survivorship. Nowhere in the Defendants' arbitration agreement are those causes of action listed. Accordingly, the FAA does not apply.

V. THE COURT SHOULD NOT PERMIT LIMITED JURISDICTIONAL DISCOVERY

The Court should deny Defendants' request for limited discovery focusing on the nature of Ms.

Tisdale's agency relationship with Ms. Seabrook. The facts at hand are simple and straightforward. Ms. Seabrook granted Ms. Tisdale authority to make health care related decisions only. Doing so would only continue to contribute to delay and serve no useful purpose.

CONCLUSION

Based on the reasons set forth above, the Plaintiff respectfully requests the Defendant's Motion to Compel Arbitration be denied and any other such relief the Court so sees fit.

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February 8, 2021

Mount Pleasant, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ electronic filing, ☐ mailing, ☒ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 8th day of February, 2021

s/Bradley H. Banyas

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	CASE NO. 2020-CP-21-02290
MARY TISDALE	)	
as Personal Representative	)	
of the Estate of Earlene Seabrook,	)	
	)	
Plaintiff,	)	MOTION TO ALTER, AMEND, AND/OR
	)	RECONSIDER ORDER DENYING
vs.	)	MOTION TO COMPEL ARBITRATION
	)	
PALMETTO LAKE CITY OPERATING, LLC	)	
d/b/a Lake City-Scranton Healthcare Center	)	
and JEFFREY GIBBS,	)	
	)	
Defendants.	)	

TO: THE HONORABLE WILLIAM H. SEALS, JR., Presiding Judge, and D. NATHAN HUGHEY, ESQUIRE, A. STUART HUDSON, ESQUIRE, and BRADLEY H. BANYAS, ESQUIRE, HUGHEY LAW FIRM, Attorneys for Plaintiff

NOW COMES Defendant Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center (the “Facility”), by and through its undersigned counsel, pursuant to Rule 59(e), SCRCF, and, on the grounds set forth below, hereby moves this Honorable Court to alter, amend, and/or reconsider its Order Denying Defendant’s Motion to Stay Action and Compel Arbitration, filed March 1, 2021 (the “Subject Order”).

1. The Motion to Compel Arbitration¹ was *not* made by the Facility and Jeffrey Gibbs, but by *the Facility only*.

The Subject Order refers to “Defendants Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center *and Jeffrey Gibbs* Motion to Dismiss and Compel Arbitration.” (Subject Order p. 1 (emphasis added).) While Mr. Gibbs is named as a defendant in this case, personal jurisdiction has not been obtained over him via service of process and he has not appeared in the action. The Motion to Compel Arbitration was *not* made by the Facility *and Jeffrey Gibbs*, but by *the Facility only*—however, assuming, *arguendo*, personal jurisdiction is obtained over Mr. Gibbs, he is covered by the Arbitration Agreement as an “agent,” “employee,” and/or “servant” of the Facility. (See Arbitration Agreement (“This Agreement is made between [the Facility], its agents, employees, and servants, and”); see also Compl. ¶ 3 (alleging Mr. Gibbs “is the administrator of [the Facility]”).)

2. The Court erred in finding that “the FAA does not apply.”²

Without question, the Arbitration Agreement is governed by the FAA. It expressly states that the FAA applies. (Arbitration Agreement.) Moreover, our Supreme Court has held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

¹ The “Motion to Compel Arbitration” refers to the motion disposed of via the Subject Order, i.e., Defendant Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center’s Motion to Stay Action and Compel Arbitration, filed December 30, 2020.

² (Subject Order p. 11.)

3. **The Court erred in applying or otherwise relying on S.C. Code Ann. § 15-48-10(a) and its requirement that “[n]otice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.”³**

The FAA, not South Carolina’s arbitration act, applies here. There is no such notice requirement under the FAA, and South Carolina’s statutory notice requirement cannot be applied to invalidate an arbitration agreement that is, like the instant Arbitration Agreement, governed by the FAA, because to apply South Carolina’s rule is to violate the FAA’s mandate that arbitration agreements be placed on equal footing with all other contracts under state law. *AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333, 339 (2011). Indeed, by its own terms, the notice requirement in § 15-48-10(a) does not apply to the instant Arbitration Agreement because the instant Arbitration Agreement does not provide for “arbitration pursuant to this chapter,” i.e., pursuant to South Carolina’s arbitration act, but rather for arbitration pursuant to the FAA.

4. **It is error to view Plaintiff’s claims as being outside the scope of the Arbitration Agreement.**

The Subject Order states, “Plaintiff’s claims include negligence, negligence per se, fraud and misrepresentation, violations of the South Carolina Unfair Trade Practices Act, wrongful death and survivorship. Nowhere in the Defendants’ arbitration agreement are those causes of action listed.” (Subject Order p. 11.) To the extent the Court views Plaintiff’s claims as being outside the scope of the Arbitration Agreement, it is error.

Without question, Plaintiff’s claims against the Facility are within the scope of the Arbitration Agreement. Its plain language clearly embraces the subject matter of Plaintiff’s claims. (See Arbitration Agreement (“It is the intention of the parties to this [Arbitration] Agreement to

³ (Subject Order pp. 11–12.)

bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of [Ms. Seabrook].”); *id.* (“It is . . . understood that in the event of any controversy or dispute between the parties arising out of or relating to [the] Facility’s Admission Agreement, or breach thereof, or relating in any way to [Ms. Seabrook’s] stay at [the] Facility, or to the provisions of care or services to [Ms. Seabrook] . . . and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration . . .”).) The Facility is aware of no requirement that an arbitration agreement must specifically state causes of action, and the Subject Order cites none. And even if there were “any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration” *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999).

5. **The Subject Order (A) incorrectly states, “a review of the admissions and arbitration documents by the Defendants would have informed them that Mary Tisdale did not have actual authority by way of a Durable Power of Attorney, nor Court Appointed Guardianship to bind her aunt, nor did she ever indicate that she had any apparent authority to enter contracts on behalf of her aunt,”⁴ and (B) violates the FAA’s mandate that arbitration agreements be placed on equal footing with all other contracts when it charges the Facility with a heightened duty to determine the existence or scope of Ms. Tisdale’s authority to sign the Arbitration Agreement for Ms. Seabrook and/or absolves Ms. Tisdale of the legal consequences of her act of signing the Arbitration Agreement and/or of her reciprocal duty of good faith and fair dealing.**

The Arbitration Agreement itself reflects (by virtue of her signature upon it) Ms. Tisdale’s express representation that she had all due authority to sign it for Ms. Seabrook. There is no question raised here as to Ms. Tisdale’s competency. She is thus “presumed to have read,

⁴ (See Subject Order p. 7; see also *id.* at p. 8 (“In this case, the Defendants had the capacity to determine whether Ms. Tisdale had the authority to sign an arbitration agreement on Ms. Seabrook’s behalf.”).)

understood, and assented to [the] terms” of the Arbitration Agreement,⁵ including, of course, the terms whereby she represented herself to the Facility as having authority to act on Ms. Seabrook’s behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract,⁶ and Ms. Tisdale is no less bound by this covenant than the Facility. To require anything more from the Facility as a contracting party just because the contract in issue is an arbitration agreement would violate the FAA’s requirement that arbitration agreements be placed on equal footing with other contracts. *Concepcion*, 563 U.S. at 339.

6. The Court erred in finding that “the plain reading of the HCPOA is straightforward and limited discovery regarding the facts and circumstances surrounding the signing of the arbitration agreement would serve no useful purpose.”⁷

Most respectfully, the Subject Order does not seem to appreciate that South Carolina law recognizes numerous viable theories under which a nonsignatory can be bound to an arbitration agreement. Regardless of the authority (or lack thereof) granted by the HCPOA, the HCPOA was not the only pertinent area of inquiry. To be clear, South Carolina law recognizes numerous viable theories under which a nonsignatory can be bound to an arbitration agreement. *See Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (“South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel.”); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel). The Court should

⁵ *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) (“[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.”).

⁶ *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995).

⁷ (Subject Order p. 11.)

have granted the Facility's alternative request for limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability.

The Arbitration Agreement is valid on its face, containing Ms. Tisdale's express representation of her authority to bind her Ms. Seabrook. (See Arbitration Agreement.) Indeed, the idea that Ms. Tisdale lacked authority to bind Ms. Seabrook—which, of course, directly contradicts Ms. Tisdale's own prior representation that she had such authority—only came about in the context of Plaintiff's opposition to the Motion to Compel Arbitration.

Assuming, *arguendo*, the Court did not err in denying the Facility's primary request for relief (which was, of course, to compel arbitration), the interests of justice require that it allow the Facility to conduct targeted discovery on the Arbitration Agreement's enforceability based on agency or related concepts. Otherwise, the Facility is left in the impossible Catch-22 of, on the one hand, being vulnerable to Plaintiff's argument that it has not presented sufficient evidence to prove the Arbitration Agreement is enforceable (whether by true agency,⁸ estoppel,⁹ or

⁸ A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). "An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145–46, 425 S.E.2d 764, 773 (Ct. App. 1992). The doctrine of apparent authority provides that a principal may be bound by the acts of its agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

⁹ "When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of

ratification,¹⁰ each a fact-intensive inquiry), while, on the other hand, being vulnerable to Plaintiff's argument that it waived its arbitration rights by making use of the tools of litigation (i.e., discovery) to prove them.

It is manifestly unfair for the Court to rely on Plaintiff's unchecked assertion contradicting Ms. Tisdale's representation in the Arbitration Agreement without allowing the Facility any opportunity to question Ms. Tisdale about it or otherwise follow pertinent evidentiary leads. It cannot be the case that the proponent of arbitration (who, it must be remembered, may well be attempting to vindicate a valid right to arbitrate that the arbitration opponent has wrongfully denied) has the burden to establish that right in a fact-based judicial proceeding in which it is disallowed use of the fact-finding tools (discovery procedures) available in other judicial proceedings. Obviously, if this were an action to determine the validity of a contract other than an arbitration agreement there would be no question about the Facility's ability to conduct discovery relevant to the facts/circumstances bearing on the contract's validity. To force the Facility into a situation where its arbitration rights are at the mercy of an unchecked assertion (again, an assertion directly contradicting Ms. Tisdale's own prior representation), where it cannot otherwise conduct relevant discovery to vindicate those rights without risking waiving them, is not only patently

reasonable prudence dealt with the agent on the faith of such appearances." *R & G Const.*, 343 S.C. at 433, 540 S.E.2d at 118 (Ct. App. 2000).

¹⁰ Authority can be supplied to an agent retroactively by express or implied ratification. See *Brazell Bros. Contractors v. Hill*, 245 S. C. 69, 74, 138 S.E.2d 835, 837 (1964) ("Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent."). "Ratification, as it relates to the law of agency, may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into on his behalf by another who at the time assumed to act as his agent." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S. C. 75, 89, 124 S.E.2d 602, 608 (1962). It is not necessary for a principal to be present at the time of the commission of his agent's act in order for him to ratify that act. See *State v. Waldrop*, 73 S. C. 60, 52 S.E. 793, 795 (1905) ("The presiding judge ruled that he could ratify the act of the agent, whether he was present or not, and in this we see no error.").

unjust but also a violation of the FAA's requirement that arbitration agreements must be placed on equal footing with other contracts. *See Concepcion*, 563 U.S. at 339.

7. The merger/equitable estoppel analysis in the Subject Order is erroneous, to include the Subject Order's use of the wrong test for equitable estoppel.

Re: Merger

In *Coleman v. Mariner Health Care, Inc.*, even though our Supreme Court found against merger on the *particular facts* then before it, the Court nonetheless confirmed the validity of the general proposition of *law* on which the *Coleman* appellants based their merger/equitable estoppel argument:

Appellants contend that even if Sister lacked capacity to execute the AA under the Act, she is nevertheless equitably estopped to deny the AA's enforceability. The circuit court held there was no estoppel here, and we agree.

Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the AAs merged. In South Carolina,

The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).

Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.*

407 S.C. at 354–355, 755 S.E.2d at 455 (emphasis added).

Here, the Court has erred in rejecting the Facility’s merger argument, failing to recognize material differences between the facts and arguments involved in the instant case and those that controlled (or were simply not addressed in) *Coleman* and its progeny, *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

The merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”¹¹ as indeed the Admission Agreement and the Arbitration Agreement were here,¹² there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the contracting parties intended the instruments to be construed together as effectively one contract. This is a question of the parties’ intention. *Id.* at 355, 755 S.E.2d at 455 (“in the absence of anything indicating a contrary *intention* . . .”) (emphasis added). “[I]n attempting to ascertain th[e] [parties’] intention,” the Court “endeavor[s] to determine the situation of the parties, as well as their purposes, at the time the contract was entered into.” *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25. The assertion in the Subject Order that “multiple executed writings relating to the same general subject matter will not be viewed as a single or merged agreement if either their language or the circumstances *even hint* that

¹¹ *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

¹² To be clear, *Coleman* unequivocally answers the question of whether the instant Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly observes regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), “the documents were [indeed] executed at *the same time, by the same parties, for the same purposes, and in the course of the same transaction.*” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

the parties actually intended the writings to be distinct, separate contracts”¹³ is an incorrect statement of law.

For the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). No such inference can be drawn here. Indeed, it does not even make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement not to merge

Unlike the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (See Arbitration Agreement.) Moreover, while the instant Admission Agreement does contain an “Entire Agreement” clause, it does not reference the Arbitration Agreement as a separate contract. (Admission Agreement p. 12.) Indeed, directly contradicting the idea of “separatedness” (in the parlance of the *Coleman* Court¹⁴), the “Entire Agreement” clause in the instant Admission Agreement expressly states that “other Admissions materials” are part of the Admission Agreement, thereby expressly contemplating the

¹³ (Subject Order pp. 9–10 (emphasis added).)

¹⁴ 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike the instant case—the “Entire Agreement” clause expressly referred to a separate arbitration agreement and, thus, “recognize[d] the ‘separatedness’ of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.”) (emphasis added).

lack of its own supposed “separatedness.” (Admission Agreement p. 12.) And without question, the Arbitration Agreement is among these other materials.

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. But all this means is that it did not have to be agreed to for Ms. Seabrook to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact agreed to. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

Moreover, while it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement’s) sole reason for being. (See Arbitration Agreement (providing for arbitration of “any controversy or dispute between the parties arising out of or relating to Facility’s Admission Agreement, or breach thereof, or relating in any way to Resident’s

stay at Facility, or to the provisions of care or services to Resident”); *id.* (“This [Arbitration] Agreement shall remain in effect for all care rendered at Facility”).)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Ms. Seabrook’s relationship with the Facility: the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission. (*Compare* Admission Agreement (setting forth the terms of Ms. Seabrook’s admission to the Facility) *with* Arbitration Agreement (providing for arbitration of disputes arising out of Ms. Seabrook’s admission in the Facility).)

Also absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* Admission Agreement p. 10 (providing “This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located.”) *with* Arbitration Agreement (providing that, “because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action;” but also providing that arbitration shall be “as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules”).) Essentially, both instruments provide that South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, the termination provisions provide no evidence of “separatedness.” The only reason for the Arbitration Agreement is the Admission Agreement, i.e., the Arbitration Agreement

covers disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13(D.S.C. 1998) (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

And to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that *merger is the default position*, i.e., it is presumed, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same

purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger presumption to be upset based on evidence that is merely ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention, but at most might (or might not) reflect a contrary intention—is to allow the exception to devour the rule.

Respectfully, the Court’s finding against merger relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties’ intent. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130. It should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Ms. Seabrook’s admission to the Facility and would not have been done at all but for her admission to the Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties’ intent.

Re: Equitable Estoppel

The view of equitable estoppel reflected in the Subject Order misapprehends our Supreme Court’s decision in *Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel). The *Wilson* Court favorably discussed the framework of the so-called direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on

writ of certiorari, which followed the Court of Appeals' earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which the Facility contends Plaintiffs are estopped from refusing to comply with the Arbitration Agreement here, where Ms. Seabrook received direct benefits (in the form of her admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement was merged. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added). In other words, contrary to the Court's analysis in the Subject Order, *Wilson* supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration case like this, not the six-factor test identified in the Subject Order. (See Subject Order pp. 7–8.)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Ms. Seabrook received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment she received therein. Not even Plaintiff herself alleges that every single aspect of the residency (every meal, every instance of care/treatment delivered, essentially every moment at the Facility) was deficient. (See Comp.)

Respectfully, the Court should have found that the Arbitration Agreement merged with the Admission Agreement (the validity of which Plaintiff does not challenge¹⁵) and that Plaintiff is

¹⁵ Although the dispute here is about the Arbitration Agreement, as opposed to the Admission Agreement, to the extent there were any question about the enforceability of the Admission Agreement, the Facility's equitable estoppel argument applies with equal for to the Admission Agreement.

estopped to deny the Arbitration Agreement's enforceability, Ms. Seabrook having effectively embraced the contract with the Facility for the purpose of her admission and receipt of the benefits thereof only to later, via her estate, attempt to repudiate the Arbitration Agreement with which her Admission Agreement merged.

- 8. Most respectfully, the Facility asks the Court to (re)consider and expressly rule on each and every distinct issue/argument raised in support of the Motion to Compel Arbitration, i.e., each and every distinct issue/argument set forth in the Motion to Compel Arbitration, Memo in Support¹⁶, and via oral argument, all of which are hereby incorporated herein by reference.**

See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (“[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.”) (emphasis in original).

WHEREFORE, for the foregoing reasons (and, again, for that matter, for all of the reasons previously advanced to the Court in support of the Motion to Compel Arbitration (both those advanced in writing and those advanced via oral argument), all of which the Facility incorporates by reference herein and asks the Court to (re)consider and expressly rule upon), the Facility asks that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Motion to Compel Arbitration.

¹⁶ The “Memo in Support” refers to Defendant Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center’s Memorandum in Support of Motion to Stay and Compel Arbitration, filed February 5, 2021.

PLEASE NOTE: the Facility reserves all rights to provide further support for this motion via such briefing, argument (to include oral argument), and/or additional submissions as the Court may permit or require.

Respectfully submitted,
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March 11, 2021

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

Appeal from Florence County
Court of Common Pleas

William H. Seals Jr., Circuit Court Judge

Case No. 2020-CP-21-02290

Mary Tisdale
as Personal Representative of the Estate of Earlene Seabrook,

Respondent,

v.

Palmetto Lake City Operating, LLC
d/b/a Lake City-Scranton Healthcare Center
and Jeffrey Gibbs,

Defendants,

Of whom Palmetto Lake City Operating, LLC
d/b/a Lake City-Scranton Healthcare Center is

Appellant.

NOTICE OF APPEAL

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Defendant, Palmetto Lake City Operating, LLC, d/b/a Lake City-Scranton Healthcare Center (“Appellant”), hereby appeals the following orders of the Honorable William H. Seals Jr., Circuit Court Judge:

- **Order Denying Defendant’s Motion to Stay Action and Compel Arbitration**, filed March 1, 2021, and
- **Order Denying Defendant’s Motion to Alter, Amend, and/or Reconsider Arbitration**, filed May 4, 2021.

Copies of the appealed orders are attached hereto and incorporated herein by reference. Appellant received written notice of entry of the most recent order on May 4, 2021.

Respectfully submitted,
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June 2, 2021

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

Appeal from Florence County
Court of Common Pleas

William H. Seals Jr., Circuit Court Judge

Case No. 2020-CP-21-02290

Mary Tisdale
as Personal Representative of the Estate of Earlene Seabrook,

Respondent,

v.

Palmetto Lake City Operating, LLC
d/b/a Lake City-Scranton Healthcare Center
and Jeffrey Gibbs,

Defendants,

Of whom Palmetto Lake City Operating, LLC
d/b/a Lake City-Scranton Healthcare Center is

Appellant.

PROOF OF SERVICE

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Attorneys for Appellant

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellant, hereby certify that Appellant's **NOTICE OF APPEAL** was served on Respondent, Mary Tisdale, as Personal Representative of the Estate of Earlene Seabrook, on June 2, 2021, by emailing (see attached) a copy of the same to Respondent's counsel of record:

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Attorneys for Respondent

I also certify that a copy of this **NOTICE OF APPEAL** is this day, June 2, 2021, being E-Filed with the lower court (which will also, i.e., in addition to service by email, effect service of the notice today on Respondent's above-identified counsel of record via the E-Filing System).

Respectfully submitted,
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June 2, 2021

From: [Hines, Russell](#)
To: nate@hugheyfirm.com; stuart@hugheyfirm.com; [Brad Banyas](#)
Cc: ["Brown, Steve"](#); [Davis, Jay](#); [Riddle, Matthew](#); [Dotterer III, Gaillard T. \(Gilly\)](#); [Justman, Aimee](#); [Bell, Pollyana \(Polly\)](#); [Wakeham, Rebecca \(Becky\)](#); [McNeil, Tasha](#)
Subject: Tisdale v. Palmetto Lake City (Circuit Court Case No. 2020-CP-21-02290) -- Notice of Appeal
Date: Wednesday, June 2, 2021 11:43:59 PM
Attachments: [image001.png](#)
[Tisdale v. Palmetto Lake City -- Notice of Appeal.pdf](#)
[Appealed Order filed 3-1-21.pdf](#)
[Appealed Order filed 5-4-21.pdf](#)

Attached please find Appellant's **Notice of Appeal** in the above-referenced matter, along with copies of the **Appealed Orders** referenced in the notice.

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Mar 09 2022

SC Court of Appeals

Certificate of Counsel

The undersigned counsel for Appellant certifies that, in accordance with Rule 210(c), SCACR, this **Record on Appeal** contains all material proposed to be included by any party that was presented to the lower court and not any other material. The undersigned also certifies that this **Record on Appeal** complies with the Supreme Court of South Carolina's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings issued April 15, 2014.

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March 9, 2022