

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

Appeal from Calhoun County
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No. 2019-CP-09-00220
Appellate Case No. 2021-000700

Jeffery White,
individually and as Personal Representative
of the Estate of Lizzie White,

Respondent,

v.

St. Matthews Healthcare, LLC,
d/b/a Calhoun Convalescent Center,

Appellant.

RECORD ON APPEAL

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SC Court of Appeals

INDEX

Orders

Order Granting Defendant’s Motion to Compel Arbitration and Motion to Stay, filed November 24, 2020	1
Order Granting Plaintiff’s Motion to Reconsider, filed March 31, 2021	16
Order Denying Defendant’s Motion to Alter, Amend, and/or Reconsider Order Granting Plaintiff’s Motion to Reconsider, filed June 2, 2021	24

Pleadings

Summons and Complaint, filed December 16, 2019	27
<u>Exhibit 1B</u> : Affidavit of Norman Khoury, M.D., F.A.C.S	46
Answer, filed January 27, 2020	57

Transcripts

Motion Hearing held August 12, 2020	71
Motion Hearing held February 10, 2021	98

Other Material

Motion to Compel Arbitration, filed June 17, 2020	115
<u>Exhibit A</u> : Arbitration Agreement	118
<u>Exhibit B</u> : SC Health Care Power of Attorney	119
Memo in Opposition to Motion to Compel Arbitration, filed August 10, 2020	124
Memo in Support of Motion to Compel Arbitration, filed August 11, 2020	140

<u>Exhibit 1:</u>	SC Health Care Power of Attorney	(see 119)
<u>Exhibit 2:</u>	Admission Agreement	167
<u>Exhibit 3:</u>	Arbitration Agreement.....	(see 118)
<u>Exhibit 4:</u>	SC Community Long Term Care Consent Form.....	179
<u>Exhibit 6:</u>	Physician Certification Regarding Ability to Consent	181
<u>Exhibit 12:</u>	Email's Between Counsel.....	182
	Plaintiff's Motion for Reconsideration, filed December 3, 2020.....	185
	Defendant's Response in Opposition to Plaintiff's Motion for Reconsideration, filed February 9, 2021	195
	Defendant's Motion to Alter, Amend, and/or Reconsider Order Granting Plaintiff's Motion to Reconsider, filed April 12, 2021	197
	Plaintiff's Memo in Opposition to Defendant's Motion to Reconsider, filed May 3, 2021.....	214
	Notice of Appeal and Proof of Service (omitting attached appealed orders, which are already separately designated for inclusion above), served/filed July 1, 2021	221
	Certificate of Counsel	228

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CALHOUN	)	FIRST JUDICIAL CIRCUIT
	)	
JEFFERY WHITE, INDIVIDUALLY	)	CASE NO. 2019-CP-09-00220
AND AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF LIZZIE WHITE ,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	ORDER GRANTING DEFENDANT'S
	)	MOTION TO COMPEL ARBITRATION
ST. MATTHEWS HEALTHCARE, LLC	)	AND MOTION TO STAY
D/B/A CALHOUN CONVALESCENT	)	
CENTER ,	)	
	)	
DEFENDANTS.	)	
	)	

This matter is before the Court on Defendant St. Matthews Healthcare, LLC d/b/a Calhoun Convalescent Center's Motion to Compel Arbitration and Stay the state court proceedings pending arbitration. For the reasons set forth below, Defendant's motion is GRANTED.

RELEVANT BACKGROUND

Plaintiff's mother, Ms. Lizzie White, was admitted to Calhoun Convalescent Center (the "Facility") for long-term care and rehabilitation on June 1, 2017. On June 3, 2017, an admission agreement (the "Admission Agreement") and an arbitration agreement (the "Arbitration Agreement") were entered into by the Facility and Ms. White. Ms. White's daughter, Darlene Nunnally, executed both the Admission Agreement and the Arbitration Agreement on behalf of her mother. Ms. Nunnally presented a power of attorney (the "Power of Attorney") to one or more representatives at the Facility at the time of entering into the Admissions Agreement, the Arbitration Agreement and various other consents and agreements. The Power of Attorney was executed Ms.

White and Ms. Nunnally on April 29, 2017, more than a month before Ms. White's residency began at the Facility.

The Power of Attorney is identical to the statutory form of health care power of attorney set forth S.C. Code Ann. §62-5-504. As such, the Power of Attorney granted Ms. Nunnally broad powers related to health care matters for her mother, including making choices for Ms. White based upon what Ms. Nunnally believed to be in her best interest, taking any other action necessary to assure the implementation of decisions concerning Ms. White's health care, to pursue any legal action in Ms. White's name and to force compliance by others with Ms. Nunnally's wishes for her mother.

Upon admission, Ms. Nunnally explicitly represented that she was authorized to admit Ms. White to the Facility and execute necessary documents on her behalf, including the Arbitration Agreement. First, she presented the Power of Attorney to the Facility in support of her ability to enter these various agreements.¹ Second, the very first provision of the Admission Agreement states that all information provided to the Facility is truthful and correct, including Ms. Nunnally's authority to bind her mother, Ms. White, to certain agreements. Ms. Nunnally signed the Admission Agreement on behalf of Ms. White as her "Representative," as defined therein.

The Arbitration Agreement at issue defines Calhoun Convalescent Center as the "Facility," Lizzie White as the "Resident," and Darlene Nunnally as the "Representative." Ms. Nunnally signed the Arbitration Agreement as Ms. White's "Representative." The relevant provisions of the Arbitration Agreement state the following:

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal

¹ Defendant was in possession of Ms. White's Power of Attorney and represents that it was found in Ms. White's file at the Facility.

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 Arbitration Agreement further provides:

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

Regarding Ms. Nunnally's authority to sign on behalf of her mother, 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.** (emphasis added).

The Arbitration Agreement was executed by Ms. Nunnally as "Representative" of Ms. White, and Deanna Watkins, the Admissions Director for the Facility, signed on behalf of Calhoun Convalescent Center.

Plaintiff has conceded that Ms. Nunnally had valid and effective authority to admit Ms. White to the Facility – under either the Power of Attorney or the South Carolina Adult Healthcare Consent Act. For the reasons explained more fully herein, this Court finds that Ms. Nunnally had the actual authority to bind her mother to the Arbitration Agreement in this case. Further, because the acts complained of by Plaintiff fall within the scope of the Arbitration Agreement, this Court finds that these proceedings are stayed and this matter is compelled to arbitration. Finally, and in the alternative, because the Arbitration Agreement and the Admission Agreement have merged in this case, Plaintiff is estopped from denying the parties' mutual right to arbitration.

APPLICABLE LAW

As a general matter, there is a strong presumption in favor of the validity of arbitration agreements because of strong policy considerations favoring arbitration. O'Neil v. Hilton Head Hosp., 115 F.3d 272, 273 (4th Cir. 1997). Indeed, both federal and state policy favors 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.”). “The federal policy favoring arbitration, as expressed in the [Federal Arbitration Act], is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements.” Zabinski v. Bright Acres, 346 S.C. 580, 590, 553 S.E.2d 110 (S. Ct. 2001). Further, arbitration agreements are presumed valid, and “[t]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.” Green Tree Fin. Corp.- Ala. v. Randolph, 531 U.S. 79, 91 (2000).

Further, the Arbitration Agreement in this case, by its terms and by law, is governed by the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16. Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) (holding that skilled nursing facility admission agreements and residencies implicate interstate commerce, and thus are governed by the FAA). 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 (FAA) 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. In this case, the Court finds that such a binding and enforceable written agreement to arbitrate disputes exists and Plaintiff's claims should compelled to arbitration.

DISCUSSION

A. Agent had Actual Authority pursuant to South Carolina Health Care Power of Attorney to Enter into the Arbitration Agreement

The Court finds that the Power of Attorney gave Ms. Nunnally actual authority to bind Ms. White to the Arbitration Agreement. “A health care power of attorney is a durable power of attorney” and, as such, is governed by Article 5, Part 5 of the South Carolina Probate Code. See S.C. Code §62-5-502(a). Section 62-5-503 of the South Carolina Probate Code sets forth executory requirements for a durable health care power of attorney, such as the Power of Attorney at issue

here, to be valid. S.C. Code §62-5-503(a)(1) requires that all health care powers of attorney must be in substantially the same form and prescribes a form in §62-5-504. Here, the Power of Attorney at issue is identical to the statutory form of the South Carolina Health Care Power of Attorney found at S.C. Code §62-5-504. The Power of Attorney was also signed by the principal, Ms. White, and two witnesses, as required by S.C. Code §62-5-503(a)(2)-(3). Therefore, this Court finds that the Power of Attorney meets South Carolina's statutory requirements for a valid durable health care power of attorney.

A durable health care power of attorney becomes effective upon a determination of mental incompetency in accordance with S.C. Code §62-5-502(d). Here, Ms. White's mental incompetency was certified by a physician in accordance with the statutory requirements of Section 62-5-502(d). This certification is consistent with the medical records and discharge diagnosis from Regional Medical Center. Accordingly, this Court finds that the Power of Attorney held by Ms. Nunnally became effective upon the physician's certification as to Ms. White's mental incompetency on June 3, 2017.

The Power of Attorney executed by Ms. White April 27, 2017 granted Ms. Nunnally broad powers to act on her behalf upon her mental incompetence. Ms. White stated in Paragraph 4 of the Power of Attorney:

I grant to my agent full authority to make decisions for me regarding my health care. . . **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 limitations I may state below.

Accordingly, **unless specifically limited by the provisions specified below**, my agent is authorized as follows:

...

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 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.

(emphasis added).

By its express terms, among other powers, the Power of Attorney authorized Ms. Nunnally to: (1) make decisions that she believed to be in her mother's best interests; (2) admit Ms. White to a skilled nursing facility; and (3) to take any actions necessary to assure implementation of Ms. White's health care decisions, including but not limited to (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. Nunnally. These broad powers are not limited in any way elsewhere within the Power of Attorney. Further, this Court finds that these broad powers, individually and when construed together, clearly granted Ms. Nunnally authority to do all things to assure implementation of Ms. White's health care decisions, including selecting the forum in which any legal action regarding Ms. White'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).

In Arredondo, the South Carolina Court of Appeals recently held that the statutory form of the South Carolina Health Care Power of Attorney – which is the same form as 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 Nursing Ctrs. Ltd. P'ship v. Clark 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). This Court concurs with this reasoning and its application to this matter.

In the case at bar, Ms. White and Ms. Nunnally entered into *the exact same statutory Health Care Power of Attorney form* which is set out in S.C. Code Ann § 62-5-504. Like the Power of Attorney in Arredondo, the Power of Attorney in this case authorized Ms. Nunnally to pursue legal action, to settle any legal action and to grant any waiver required by health care providers such as the Facility. This authority certainly includes the agent's power to pursue alternative dispute resolution to legal claims.

This Court finds that that Ms. Nunnally had actual authority to enter into the Arbitration Agreement on Ms. White's behalf, and that the acts complained of by Plaintiff fall within the scope

of the Arbitration Agreement. On those grounds, this Court grants Defendant's motion to compel arbitration.

B. Equitable Estoppel based on Merged Admission Agreement and Arbitration Agreement

As additional grounds to compel arbitration, having established that this Court finds that Ms. Nunnally possessed actual authority to admit Ms. White to the Facility², it follows that she also had the authority to enter into the Admission Agreement on behalf of Ms. White. The Court finds that the Admission Agreement and Arbitration Agreement should be construed together, and Plaintiff is estopped from accepting the benefits of Ms. White's admission yet denying the arbitration obligations as agreed to by Ms. White's authorized agent. Therefore, Plaintiff is required to arbitrate her claims against the Facility.

The Arbitration Agreement and Admission Agreement were executed by Ms. Nunnally on behalf of her and Plaintiff's mother, Ms. White. 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).

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

² Plaintiff agrees that Ms. Nunnally possessed actual authority under either the Power of Attorney or the South Carolina Adult Healthcare Consent Act to admit Ms. White to the Facility.

executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the instruments are generally considered and construed 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).

This Court has analyzed facts almost identical to the case at bar and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. McCutcheon v. THI of S.C. at Charleston, LLC, No. 2:11-CV-02861, 2011WL6318575. 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).

Accordingly, this Court finds that both Ms. White, by and through the acts of her representative agent and daughter, Ms. Nunnally, and the Facility contemplated that the terms of the agreement to admit Ms. White were contained in the Admission Agreement and Arbitration Agreement. Ms. Nunnally executed the Arbitration Agreement and the Admission Agreement at the same time – on June 3, 2017; the Arbitration Agreement and the Admission Agreement both

covered the same subject matter and transaction - Ms. White's residency at the Facility and receipt of residential and skilled nursing services; the Arbitration Agreement and Admission Agreement were executed by the same parties; the Arbitration Agreement specifically makes citation to and incorporates the Admission Agreement; and thus this Court finds that the Arbitration Agreement and Admission Agreement are part and parcel of the same agreement between the parties. Therefore, this Court finds that, pursuant to well-established case law in South Carolina, the Arbitration Agreement and Admission Agreement in this case should be construed together.

Having determined that the Admission Agreement and Arbitration Agreement merge and should be construed together, this Court further finds that Plaintiff is therefore equitably estopped from accepting the benefits of the Admission Agreement while repudiating the Arbitration 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, the Court finds that this principle of equitable estoppel 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

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,

Plaintiff, as Ms. White's son and first alternate attorney-agent under the Power of Attorney, embraced all aspects of the Admission Agreement with the Facility. Plaintiff does not dispute the validity of the Admission Agreement or his mother's admission to the Facility. He never removed Ms. White from the Facility and, by all accounts, approved of presence at the Facility/did not seek her discharge. Therefore, 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 relying upon certain terms of the Admission Agreement when it works to his advantage and repudiating the Arbitration Agreement when it works to his disadvantage.⁴

As previously explained, this Court finds that Plaintiff's allegations fall within the scope of the Arbitration Agreement. In accordance with the foregoing law, Plaintiff cannot assert claims against this Defendant based upon certain terms of the 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 numerous other courts on essentially identical facts and concerning identical arbitration agreement, where a non-signatory receives the benefits of the contract, which Plaintiff certainly did here, this Court finds that Plaintiff is prevented from refusing to comply with the Arbitration Agreement merely because he did not sign it.

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).

⁴ In so holding, the Court notes that the cases of Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 350, 755 S.E.2d 450, 452 (2014), Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 769 (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) are factually distinguishable from the case before the Court.

CONCLUSION

For the reasons set forth herein, this Court finds that the Power of Attorney gave Ms. Nunnally actual authority to bind Ms. White to the Arbitration Agreement in this case and the acts complained of by Plaintiff fall within the scope of the Arbitration Agreement. Therefore, the parties are compelled to arbitration pursuant to the terms of the valid and binding Arbitration Agreement.

Further, on separate and independent grounds, the Arbitration Agreement and Admission Agreement have merged and must be construed together in this case. Accordingly, Plaintiff is hereby estopped from accepting the benefits of the admission agreement but denying the parties' mutual right to arbitration.

Based on the foregoing, Defendant St. Matthews Healthcare, LLC d/b/a Calhoun Convalescent Center's Motion to Compel Arbitration is **GRANTED** and this action is **STAYED** pending arbitration.

IT IS SO ORDERED.

The Honorable Maite Murphy

St. George, South Carolina

Dated: _____



Calhoun Common Pleas

Case Caption: Jeffery White VS St. Matthews Healthcare, Llc

Case Number: 2019CP0900220

Type: Order/Other

So Ordered

s/ Maite Murphy 2166

Electronically signed on 2020-11-23 10:45:49 page 15 of 15

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
COUNTY OF CALHOUN	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	Civil Action No.: 2019-CP-09-00220
Jeffery White, individually and as	)	
Personal Representative of the Estate of	)	
Lizzie White,	)	
	)	
Plaintiff,	)	ORDER GRANTING
	)	PLAINTIFF'S MOTION TO
	)	RECONSIDER
v.	)	
	)	
St. Matthews Healthcare, LLC, d/b/a	)	
Calhoun Convalescent Center,	)	
	)	
Defendant.	)	
	)	

This matter comes before the Court on Plaintiff Jeffrey White's ("Plaintiff") motion to reconsider the order compelling arbitration of this case, which was entered on November 24, 2020. For the reasons set forth herein, this Court hereby grants Plaintiff's motion to reconsider and reverses the prior order compelling arbitration.

BACKGROUND

This case arises out of the death of Lizzie White, which occurred on March 3, 2018. Prior to her death, Ms. White was a resident and patient of Defendant Calhoun Convalescent Center ("Defendant") from June of 2017 until her emergency discharge to Regional Medical Center on January 29, 2018. According to the operative complaint, at the time of her discharge from Defendant's facility, she was suffering from a dinner-plate size, infected sacral pressure ulcer. (See *Jeffrey White v. Calhoun Convalescent Center*, C/A No. 2019-CP-09-00220 Complaint at ¶¶ 36, 39 (filed Dec. 16, 2019)). She had no skin ulcerations, lacerations, or other integumentary issues at the time of her admission to Defendant's facility in June of 2017. (*Id.* at ¶¶ 34-37).

At issue before this court are three documents: Defendant's facility admission agreement, and arbitration agreement, and a healthcare power of attorney ("HCPOA") signed by decedent

Lizzie White in April of 2017. During arguments on Defendant's motion to compel arbitration, Defendant conceded that the facility admission agreement in this case was a condition precedent to admission, whereas the arbitration agreement was not. Defendant nevertheless argued that a merger existed between the two documents. Neither document was signed by Ms. White, nor by her son, Jeffrey White, the personal representative of her estate and the Plaintiff in this case. Instead, the facility admission agreement and arbitration agreement were signed by Ms. White's daughter, Darlene Nunnelly.

The third document, the HCPOA, was executed several months prior to Ms. White's admission to Defendant's facility. This document, which designated Darlene Nunnelly as Ms. White's healthcare agent, allowed the authorized representative limited authority to make healthcare decisions on behalf of Ms. White. The HCPOA was not, however, a durable power of attorney and did not confer broad or general rights upon Ms. White's representative.

Defendant's motion to compel arbitration came before this Court on August 22, 2020. On November 24, 2020, this Court issued its order granting Defendant's motion. Plaintiff timely moved, filed, and served his motion to reconsider the order compelling arbitration. Now, following a February 10, 2021 hearing on Plaintiff's motion, and the Court's review of the parties' memoranda both in the underlying motion to compel arbitration and Plaintiff's motion for reconsideration, as well as the record in this case, the Court hereby grants Plaintiff's motion to reconsider, and reverses its earlier order compelling arbitration.

ANALYSIS

I. THE HEALTHCARE POWER OF ATTORNEY EXECUTED BY DARLENE NUNNELLY ON BEHALF OF LIZZIE WHITE DID NOT CONFER THE POWERS OF A GENERAL AGENT

In April of 2017, and prior to her admission to Defendant's facility, Lizzie White executed the HCPOA in this case, which conferred upon Ms. White's authorized representative only the authority to make healthcare decisions in the event of Ms. White's incompetence.

"The existence of an agency relationship is...determined by the relation, the situation, the conduct, and the declarations of the party sought to be charged as principal." *Langdale v. Carpets*, 395 S.C. 194, 201, 717 S.E.2d 80, 83 (Ct.App. 2011). Where an agency relationship exists, the principal will only be bound by the acts of his agent acting within the agent's scope. *Bankers Trust of South Carolina v. Bruce*, 283 S.C. 408, 323 S.E.2d 523 (Ct.App. 1984). See *Moore v. Pilot Life Insurance Company*, 205 S.C. 474, 32 S.E.2d 757, 762 (1945) (the principal is bound only by those acts within the agent's actual or apparent authority). South Carolina courts have found that a healthcare power of attorney authorizes an agent to make only those decisions related to the principal's healthcare, and have further found that a healthcare power of attorney does not confer broader authority allowing the agent to enter into legal obligations to waive other rights. *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 567, 813 S.E.2d 292, 304 (Ct.App. 2018) (citing approvingly the decision of the Court of Appeals of Maryland in *Dickerson v. Longoria*¹, 414 Md. 419, 444, 995 A.2d 721, 736 (Md. 2010) ("Quite obviously, the decision to

¹ In *Dickerson*, the Maryland Court of Appeals noted:

Although we have never addressed this issue, other courts have drawn a distinction between a health care decision and a decision to sign an arbitration agreement, even where the arbitration agreement is related to a health care decision. In several cases involving health care facilities, the intermediate appellate courts in Colorado, Florida, Georgia, and Texas have concluded that the authority to make health care decisions on another's behalf does not constitute authority to sign an arbitration agreement on that person's behalf.

Id. 995 A.2d at 739 (citing *Lujan v. Life Care Ctrs. of Am.*, 222 P.3d 970, 973-76) (Colo.Ct.App. 2009)).

sign an arbitration agreement is not, in and of itself, a health care decision’’)). See *Thompson v. Pruitt Corporation*, 416 S.C. 43, 784 S.E.2d 679, 686 (Ct.App. 2016) (“[T]he authority conveyed by a principal to an agent to handle finances or make health care decision does not encompass executing an agreement to resolve legal claims by arbitration’’); see also *Arredondo v. SNH SE Ashley River, LLC*, Appellate Case No. 2019-001767, Opinion No. 28011, 2021 WL 908508 (Mar. 10, 2021) (finding a healthcare power of attorney did not confer the agent with requisite authority to sign an arbitration agreement that was not a condition precedent to facility care)).

As the South Carolina Supreme Court has recognized, a distinct difference exists between legal decisions, such as the decision to waive the right to a jury trial, and health care decisions, such as entrance into a skilled nursing facility. The HCPOA in this case does not evidence that Ms. White intended her healthcare agent to obtain general powers over her affairs. Instead, the HCPOA allows the healthcare agent to make health care decisions only. Beyond the plain language of the HCPOA, there is no evidence in this case to indicate Ms. White granted a broader scope of authority to her healthcare agent. In addition, there is no evidence to suggest that the HCPOA sprung into a durable power of attorney that would have conferred broader authority. Accordingly, this Court finds that the HCPOA provided the healthcare agent only the limited authority to make healthcare decisions on behalf of Ms. White, which did not include the authority to enter into legal obligations such as waiver of a jury trial.

II. THE ARBITRATION AGREEMENT AND FACILITY ADMISSIONS AGREEMENT IN THIS CASE ARE SEPARATE DOCUMENTS, AND THERE IS NO EVIDENCE OF MERGER BETWEEN THESE DOCUMENTS

In support of its motion to compel arbitration, Defendant argued that a merger existed between the facility admissions agreement in this case, which was a prerequisite to Ms. White’s admission to Defendant’s facility, and the arbitration agreement, which was not mandatory for

admission. A review of the record, however, as well as the four corners of the documents themselves, demonstrates that the documents were separate and distinct instruments, which did not merge.

In *Coleman v. Mariner*, 407 S.C. 346, 755 S.E.2d 450 (2014), the South Carolina Supreme Court found that a facility admissions agreement and arbitration agreement did not merge, and therefore the plaintiff could not be equitably estopped from filing suit against the facility in circuit court. *Id.*, 407 S.C. at 355, 755 S.C. at 455. The Court noted the general rule that, in the absence of anything to the contrary, documents executed at the same time, by the same parties, for the same transaction and purpose will ordinarily be construed as one. *Id.* The Court recognized, however, that certain factors support the separateness of documents, even to the extent the instruments were signed at roughly the same time. *Id.*

Of particular importance to the Supreme Court in *Coleman* was a clause in the admissions agreement, the “Entire Agreement” clause, which the Court found on its face recognized the “separateness” of the admissions agreement and arbitration agreement. *Id.*, 407 S.C. at 355-56, 755 S.E.2d at 455. Since *Coleman*, South Carolina courts have enunciated other factors that weigh against merger. For example, in *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct.App. 2016) the Court of Appeals, considering an argument by the defendant nursing facility that an admissions agreement and arbitration agreement had merged, found that the documents referred to one another separately, and otherwise indicated the intention of the parties for the instruments to remain separate. *Id.*, 416 S.C. at 53, 784 S.E.2d at 684-85. Since *Thompson*, courts have considered a number of factors in assessing the doctrine of merger in the context of arbitration agreements and agreements related to facility admissions, including whether the documents contain separate page numbers, exclusivity clauses, jurisdictional distinctions, etc. *See Hodge*, 422

S.C. at 561, 813 S.E.2d at 301 (finding no merger existed between two instruments governed by different laws, recognizing the distinctness of each instrument, and where one instrument was a condition precedent to admission whereas the other was not).

Here, this Court finds that the plain language of the facility admissions agreement and the arbitration agreement indicates that the agreements were to be construed independent of one another. The instruments are separately paginated, the facility admissions agreement contains an Entire Agreement clause, and the arbitration agreement was not a condition precedent to entry into Defendant's facility, whereas the facility admission agreement was a prerequisite to admission. This Court therefore finds no merger occurred between these two distinct instruments.

III. THE RECORD IN THIS CASE DOES NOT SUPPORT A FINDING OF EQUITABLE ESOPTEL AGAINST MS. WHITE OR HER PERSONAL REPRESENTATIVE

"Equitable estoppel is, ultimately, a theory designed to prevent injustice, and should be used sparingly." *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177 (citing *Hirsh v. Amper Fin. Servs., LLC*, 215 N.J. 174, 71 A.3d 849, 852 (2013) (noting equitable estoppel "is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration"). "In the arbitration context, the doctrine [of direct benefits estoppel] recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has *consistently maintained that other provisions of the same contract should be enforced to benefit him.*" *Wilson*, 426 S.C. at 340, 827 S.E.2d at 175 (quoting *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)) (emphasis in original).

In general, the party asserting equitable estoppel must demonstrate 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) that the party against whom estoppel is sought had actual knowledge of the facts. *Strickland v. Strickland*, 375 S.C. 76, 650 S.E.2d 465 (2007). The party asserting estoppel must also demonstrate that they (1) lacked knowledge and the means of knowledge of the truth of the facts in question; (2) relied on the conduct of the party estopped; and (3) made a prejudicial change of position in reliance on the conduct of the party estopped. *Id.*, 376 S.C. at 84, 650 S.E.2d at 470.

In this case, Jeffrey White, as the personal representative of his mother's estate, was not a signatory to the arbitration agreement Defendant has sought to enforce. While this does not end the inquiry, Defendant has also failed to establish any of the necessary elements in support of equitable estoppel. Defendant has provided no information about Mr. White's conduct in the context of his mother's admission to the Defendant's facility, and therefore has failed to demonstrate how Plaintiff's action asserting his mother's legal rights is somehow contrary to equity. This Court therefore finds that Defendant has not met its burden of demonstrating that equitable estoppel should apply to Mr. White, and thus the doctrine is inapplicable in this case.

CONCLUSION

As set forth herein, this Court now finds that the HCPOA in this case did not confer general powers of attorney on the decedent's designated representative, but authorized the representative to make only those decisions related to healthcare, which exclude decisions to enter into additional legal obligations. In addition, no merger occurred between the facility admission agreement in this case and the separate arbitration agreement. Finally, there is no evidence in the record to demonstrate that Plaintiff's claims are contrary to equity, or otherwise precluded by equitable estoppel. As such, this Court grants Plaintiff's motion to reconsider and reverses its prior order compelling arbitration of this matter.



Calhoun Common Pleas

Case Caption: Jeffery White VS St. Matthews Healthcare, Llc

Case Number: 2019CP0900220

Type: Order/Other

So Ordered

s/ Maite Murphy 2166

Electronically signed on 2021-03-31 10:13:13 page 8 of 8

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP0900220

Jeffery White
PLAINTIFF(S)

St. Matthews Healthcare, Llc
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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ 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:

Pursuant to the previous Order of the Court and Rule 59, SCRPC, the Court has fully considered all arguments and issues, and respectfully denies the Defendant's Motion to Reconsider the Order Granting Plaintiff's Motion to Reconsider.

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 06/02/2021 .

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.



Calhoun Common Pleas

Case Caption: Jeffery White VS St. Matthews Healthcare, Llc

Case Number: 2019CP0900220

Type: Order/Electronic Form 4

So Ordered

s/ Maite Murphy 2166

Electronically signed on 2021-06-02 13:06:15 page 3 of 3

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)
Jeffery White, individually and as)
Personal Representative of the Estate of)
Lizzie White,)
Plaintiff,)
v.)
St. Matthews Healthcare, LLC, d/b/a)
Calhoun Convalescent Center,)
Defendant.)
_____)

COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Civil Action No.: 2019-CP-

**SUMMONS
(JURY TRIAL DEMANDED)**

TO: THE ABOVE-NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED and required to Answer the Complaint in the above-captioned matter, a copy of which is served upon you, and to serve a copy of your Answer upon undersigned counsel for the Plaintiff at the STROM LAW FIRM, LLC, at 2110 N. Beltline Boulevard, Columbia, South Carolina 29204, within thirty (30) days of service, exclusive of the date of service. If you fail to respond to this Complaint within the time prescribed above, judgment by default will be rendered against you for the relief demanded in the complaint.

This 16th day of December, 2019.

STROM LAW FIRM, LLC

s/ Jessica L. Fickling
Jessica L. Fickling (S.C. Bar No. 100161)
2110 N. Beltline Boulevard
Columbia, SC 29204
TEL: (803) 252-4800
FAC: (803) 252-4801
jfickling@stromlaw.com

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
COUNTY OF CALHOUN	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	Civil Action No.: 2019-CP-
Jeffery White, individually and as	)	
Personal Representative of the Estate of	)	
Lizzie White,	)	
	)	
Plaintiff,	)	
	)	
v.	)	COMPLAINT
	)	(JURY TRIAL DEMANDED)
St. Matthews Healthcare, LLC, d/b/a	)	
Calhoun Convalescent Center,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff, Jeffery White, individually and as the personal representative of the Estate of Lizzie White, brings this action and alleges as follows:

NATURE OF THE CASE

1. This is an action for damages sustained as a result of the negligent, negligent per se, grossly negligent, reckless, willful and wanton conduct of Defendant Saint Matthews Healthcare d/b/a Calhoun Convalescent Center (“Defendant CCC”), which, at all times relevant to this Complaint was responsible for providing reasonable care to decedent Lizzie White while she was a resident and patient (“resident-patient”) of Defendant CCC.

2. As set forth more fully below and herein, Plaintiff seeks monetary damages against Defendant on behalf of the Estate of Lizzie White, due to Defendant’s conduct, including but not limited to Defendant’s failure to abide by applicable state and federal standards, regulations, laws and standards of care regarding skin integrity, care plans, medical documentation, incident reporting, and a resident’s general rights to integrity and dignity in the provision of care, all of which directly and proximately caused Lizzie White to develop an unstageable pressure ulcer, and subsequent sepsis, ultimately resulting in her death.

PARTIES

3. Plaintiff Jeffery White is the duly appointed personal representative of the Estate of Lizzie White, and Lizzie White's biological son. Plaintiff was appointed the personal representative of Lizzie White's estate by order of the Orangeburg County probate court, dated April 24, 2018 in estate number 2018-ES-38-00221.

4. At all times relevant to this Complaint, decedent Lizzie White, ("Plaintiff," "decedent Lizzie White," "Ms. White"), was 84 years old, and a resident of Defendant CCC, whose premises are located at 600 Dantzler Street, St. Matthews, SC 29135.

5. Upon information and belief, at all times relevant to this Complaint, Defendant CCC has been a for-profit long term and skilled nursing facility licensed and operating subject to South Carolina law, and had a responsibility pursuant to its licensure, and general duties of care, to provide reasonable and appropriate care to residents of its facility in accordance with statutes, regulations, standards of care, and its own policies and procedures.

JURISIDCTION & VENUE

6. Upon information and belief, at all times relevant to this Complaint Defendant CCC was responsible for the ownership, operation, management, and decision-making of a long-term skilled nursing facility organized, existing, and licensed pursuant to South Carolina law, whose principle place of business is 601 Dantzler Street, St. Matthews, South Carolina. As a licensed long-term care facility, Defendants are responsible for the provision of required healthcare services for Defendants' residents, as set forth under applicable state and federal statutes, and regulations, and standards, policies and procedures.

7. Upon information and belief, at all times relevant to this Complaint, Defendant held itself out as capable of providing services for the long-term care acuity level, in compliance with applicable state and federal laws and regulations, standards, policies and procedures, and did accept long-term care patients, including decedent Lizzie White, in exchange for payment of good and valuable consideration.

8. At all times relevant to this Complaint, beginning on or around June 1, 2017 until her discharge to Regional Medical Center on January 29, 2018, decedent Lizzie White was a resident of Defendant CCC, and paid good and valuable consideration for residency and medical services.

9. As a resident of Defendant CCC, at all times relevant to this Complaint, decedent Lizzie White was in the exclusive control of Defendant CCC, and its employees, officers, and management, including its facility administrator and medical director, and was reliant upon Defendant CCC for the provision of required care.

10. At all times relevant to this Complaint, Defendant owned, operated, managed, and controlled each and every aspect of care provided by Defendant CCC, including but not limited to staffing, training, supervision, quality assurance, compliance, budgeting, reporting, and undertaking complaint investigations all subject to and governed by state and federal statutes, regulations, standards, policies and procedures. This control was rendered according to legal obligations and applicable standards of care.

11. According to the level of control exercised by Defendant over the daily operations, management and resident care at Defendant CCC, upon information and belief the actions and inactions leading the death of Lizzie White were known, authorized, condoned and effectuated by the named Defendant.

12. Upon information and belief, at all times relevant to this Complaint, Defendant CCC employed physicians, nurses, CNAs, interns, staff and other healthcare and non-healthcare professionals who operated with apparent authority on behalf of Defendant CCC.

13. Upon information and belief, at all times relevant to this Complaint, Defendant CCC individually and through its collective staff members, including its administrator and medical director, had knowledge of each and every resident-patient admitted to Defendant CCC, and had corresponding knowledge of the individual care plans, assessments and medical needs of each resident-patient, as required by state and federal statutes, regulations, and standards of care.

14. At all times relevant to this Complaint, Defendant CCC was licensed pursuant to South Carolina law, and was required to abide by applicable statutes and regulations, including but not limited to South Carolina Code of Regulations § 61-17, standards for licensing nursing homes, South Carolina Code Ann. § 43-35-5, *et seq.*, the Omnibus Adult Protection Act, and South Carolina Code Ann. § 44-81-10, *et seq.*, the Bill of Rights for Residents for Long-Term Care Facilities.

15. At all times relevant to this Complaint, Defendant CCC intended to and did effectuate care of decedent Lizzie White at its skilled nursing facility located at 600 Dantzler Street, in St. Matthews, South Carolina.

16. Upon information and belief, at all times relevant to this Complaint, the employees, staff, agents, contracted entities, volunteers, and other support of the Defendant CCC were acting within the course and scope of their employment and/or their apparent agency.

17. The negligent, grossly-negligent, negligent per se, reckless, willful and wanton acts, omissions, and liabilities of Defendant CCC included agents, contractors, principals, employees, servants, and/or volunteers, both directly and vicariously, pursuant to principles of

respondeat superior, non-delegable duties, corporate liability, apparent authority, agency, and ostensible agency.

18. The acts and omissions set forth more fully in this Complaint all occurred upon premises at Defendant CCC, in Calhoun County, South Carolina.

19. This case was previously filed as a Notice of Intent Action, bearing civil action number 2019NI0900001, with the required expert affidavit and responses to discovery, pursuant to S.C. Code Ann. § 15-79-125.

20. Jurisdiction and venue are therefore proper before this Court.

JOINT & SEVERAL LIABILITY

21. Defendant CCC and its various corporate entities and forms, either operating as St. Matthews Healthcare, or as Calhoun Convalescent Center, are jointly and severally liable for all damages set forth in this Complaint as a result of the singular or conjunctive conduct of Defendants, all of which directly and proximately caused monetary and physical harm to decedent Lizzie White, and which ultimately led to her death.

FACTUAL BACKGROUND

22. Plaintiff reiterates and reaffirms the preceding paragraphs as though set forth verbatim herein.

23. At all times relevant to this Complaint, Defendant CCC has been a long-term skilled nursing facility offering rehabilitative and acute care services in a skilled nursing environment. www.calhounconvalescentcenter.com, last visited December 16, 2019.

24. According to its own marketing and admissions materials, “CCC provides personalized skilled nursing services designed to consider and address the needs of every patient.” www.calhounconvalescentcenter.com, last visited December 16, 2019.

25. In addition, and according to Defendant CCC's own marketing and admissions materials, the services provided by Defendant CCC include 24-hour nursing, advanced modality wound care treatment, and comprehensive wound care. www.calhounconvalescentcenter.com, last visited December 16, 2019.

26. As a long-term care facility offering skilled nursing in South Carolina, Defendant, at all times relevant to this Complaint, was required to abide by applicable statutes, regulations, and standards of care.

27. For example, as a licensed long-term care facility, Defendant CCC was required to have and maintain, and ensure compliance with written policies and procedures governing resident rights, nursing services, physician services, and specialized needs of residents. Specifically, these written policies must address the way in which a facility will prevent formation of pressure-related wounds.

28. In addition, as a licensed long-term care facility, Defendant CCC was required to ensure adequate orientation and continuous training of its nursing, medical, and non-healthcare staff. All staff members were required to be educated in prevention of pressure-related wounds.

29. As a licensed long-term care facility, Defendant CCC was also required at all times relevant to this Complaint, to have a medical director, licensed as a physician whose responsibility would include implementing the policies and procedures pertaining to patient care and treatment and the coordination of medical care at the facility.

30. As a licensed long-term care facility, Defendant CCC was required to have a facility administrator responsible for overseeing the daily operations and management of the facility including ensuring that the needs of all residents were met, the facility was adequately

staffed and appropriately trained, and the facility was adhering to appropriate standards of quality assurance, incident reporting and investigations.

31. In addition to the responsibilities set forth above, as a licensed long-term care facility, Defendant CCC was required to protect its residents' rights pursuant to the Omnibus Adult Protection Act, enacted to protect vulnerable adults¹, and the Bill of Rights Residents of long-term care facilities.

32. Skin integrity is of paramount importance in a long-term care facility where residents may have limited mobility or compromised immunity. Accordingly, long-term care facilities, like Defendant CCC must use an interdisciplinary approach to decrease the risk of pressure-related wounds, and must ensure that a patient's medical record is accurate, and that the patient's individual care plan is updated appropriately.

33. Moreover, in the event a patient's condition changes or a patient sustains significant injury, a long-term care facility, such as Defendant CCC has a responsibility to appropriately notify the family, report to the proper authorities, and ensure the patient receives care consistent with his or her acuity level.

34. Decedent Lizzie White was admitted as a resident to Defendant CCC on June 1, 2017. At the time of her admission, Ms. White's skin near her sacrum was intact and had no redness or rashes.

¹ Pursuant to S.C. Code Ann. § 43-35-10(11), a "Vulnerable adult" is defined as "a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction. A resident of a facility is a vulnerable adult."

35. According to her admitting records, Defendant CCC considered Ms. White to be at moderate risk for developing pressure injuries, and, as such included several pressure wound related prevention interventions in her initial plan of care including repositioning Ms. White every two (2) hours.

36. However, notwithstanding Defendants' knowledge of Ms. White's moderate risk for developing pressure wounds, and pressure related injuries, by January, 2018, Lizzie White had developed an unstageable pressure ulcer above her sacrum that measured roughly 7 cm x 6 cm.

37. As a result of Lizzie White's severe pressure injury, which formed during her time as a resident of Defendant CCC, Ms. White was transferred to Regional Medical Center for emergency care on January 29, 2018.

38. Once admitted to Regional Medical Center, Ms. White underwent surgical debridement of her wound on February 1, 2018. However, by the time of Ms. White's debridement, her condition had deteriorated to the point where recovery appeared unlikely, due to the size of the wound, and Ms. White's compromised immune system.

39. On or around February 16, 2018, Ms. White was transferred to hospice care. Thereafter, on March 6, 2018, Ms. White died. Her official cause of death was sepsis.

40. Ms. White's medical records from Defendant CCC do not indicate any adherence to the pressure injury prevention protocol, nor do Ms. White's records indicate efforts taken by Defendant CCC's various healthcare professionals, including Defendant CCC's Medical Director Franklin Coulter, M.D., or its facility administrator Melissa Kizer to prevent, mitigate, or stop Ms. White's sacral pressure wound from becoming more severe.

41. Rather, upon information and belief, Defendant failed to provide sufficient healthcare professionals for Ms. White's specialized care needs, and, despite Defendant's obligations to implement sufficient policies and procedures and quality assurance mechanisms to provide safe and effective care, Ms. White was allowed to develop an unstageable pressure wound ultimately leading to her death.

42. Upon information and belief, Defendant failed to abide by applicable statutes, regulations and standards in caring for Lizzie White.

43. Upon information and belief, Defendants failed to abide by applicable policies and procedures in caring for Lizzie White.

44. Upon information and belief, Defendant's failures to adhere to the appropriate standards of care, in violation of applicable statutes, regulations, and standards, directly and proximately resulted in the death of Lizzie White.

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

45. Plaintiff repeats and reaffirms the preceding paragraphs as though repeated verbatim herein.

46. Defendant is the provider of skilled nursing and acute care, and, as such, must provide care that is reasonable and in accord with applicable regulations, statutes, standards, codes, policies and procedures.

47. By accepting decedent Lizzie White as a resident-patient at Defendant's long-term skilled nursing facility, Defendant expressly undertook to provide care to Ms. White in accordance with the governing laws, and standards of care.

48. With regard to decedent Lizzie White, Defendant deviated from the acceptable standards of care in one or more of the following particulars:

- a. Failing to have policies or procedures in place to prevent pressure sores and pressure-related sores;
- b. In the event such policies existed, failing to implement these policies or ensure compliance with these policies;
- c. In failing to provide safe and efficient care as required by regulation, law, and standards of care;
- d. In allowing a resident to develop an unstageable pressure ulcer covered in necrotic tissue;
- e. In failing to provide appropriate access to care for skin integrity and hygiene;
- f. In failing to properly document Lizzie White's medical condition, directly contravening the applicable standard of care;
- g. In failing to have adequate and competent staff to prevent and care for injuries sustained by Lizzie White;
- h. In failing to properly monitor and supervise staff to ensure Lizzie White was receiving appropriate care;
- i. In failing to adhere to Lizzie White's initial care plan, which required a pressure ulcer prevention protocol;
- j. In failing to properly implement plans of care or modified plans of care consistent with Lizzie White's clinical condition;
- k. In failing to properly notify the resident and/or family regarding significant changes to Lizzie White's clinical condition;

- l. In failing to discharge Lizzie White at a point in time when her acuity level and medical needs had surpassed Defendant's ability to provide care;
- m. In violating statutes and regulations requiring Lizzie White to receive care sufficient to maintain her dignity and quality of life;
- n. In failing to properly document Ms. White's medical records;
- o. In failing to report Ms. White's injuries;
- p. In failing to have sufficient policies or procedures in place regarding quality of care, access to care, and maintenance of a patient's health status, and prevention from clinical deterioration of a patient's condition;
- q. In the event such policies or procedures did exist, in failing to implement those policies and procedures;
- r. In failing to properly report, and investigate instances of possible neglect resulting in the death of a resident;
- s. Such other particulars as may be revealed during discovery or a trial of this matter.

49. As a direct and proximate result of Defendants' negligent, grossly negligent, negligent per se, reckless, willful and wanton conduct, set forth more fully above, decedent Lizzie White suffered grievous bodily injury, and experienced significant pain and suffering, and mental anguish, including fear for her life. Ultimately, Ms. White died as a result of those injuries.

50. Defendants' conduct, as set forth more fully above, constitutes the complete absence of care.

51. Plaintiff is therefore entitled to judgment against Defendants and for such actual, consequential, punitive, and equitable damages as this court deems proper.

FOR A SECOND CAUSE OF ACTION
(Negligence Per Se)

52. Plaintiff repeats and reaffirms the preceding paragraphs as though repeated verbatim herein.

53. At all times relevant to this Complaint, Defendants have been entities and/or individuals duly licensed, pursuant to the laws of South Carolina, and were further required to abide by the statutes, regulations, codes, and ordinances governing long-term care.

54. These regulations, statutes, codes, and ordinances, including but not limited to S.C. Code of Regs. Ann. § 61-17, S.C. Code Ann. § 43-35-5, *et seq.*, and S.C. Code Ann. § 49-81-10, form the minimally acceptable standards for the provision of long-term skilled nursing in South Carolina.

55. At all times relevant to this Complaint, Defendant had a responsibility to adhere to and provide care consistent with the aforementioned standards to each and every resident of Defendant's facility including decedent Lizzie White.

56. Defendant failed to adhere to these standards in one or more of the following particulars:

- a. Failing to implement policies to assure residents do not develop pressure related wounds;
- b. Failing to ensure the medical director implemented policies and procedures for the adequate care of patients;
- c. Failing to ensure sufficient staffing both qualitatively and quantitatively;
- d. Failing to ensure staff were appropriately trained;

- e. Failing to ensure adequate medical documentation;
- f. Failing to ensure resident rights to dignity and adequate care;
- g. Failing to appropriately document incidents and changes to condition;
- h. Failing to appropriately report incidents and changes to condition to medical staff, the authorities and family members of the affected resident;
- i. Failing to provide a minimally adequate care plan;
- j. Failing to implement the initial plan of care;
- k. Allowing a resident to sustain unstageable pressure related wounds and failing to prevent, or mitigate the continued deterioration of the patient's condition;
- l. Failing to ensure the facility administrator implemented policies and procedures for the adequate care of patients;
- m. Failing to ensure the facility medical director adequately provided care and monitoring to ensure compliance with patient plans of care;
- n. Such other particulars as may be revealed during the discovery or a trial of this matter.

57. The statutes, regulations, and standards to which Defendant was required to adhere were specifically enacted to protect vulnerable adults, including decedent Lizzie White.

58. In general, the violation of a statute expressly intended to protect certain people establishes the negligence per se of the offender.

59. Defendant's conduct in violating statutes, regulations, codes, and ordinances enacted for the protection of vulnerable adults including decedent Lizzie White constitutes negligence per se.

60. In addition, Defendant's violations of statutes, regulations, codes, and ordinances constitute recklessness.

61. As a direct and proximate result of Defendant's negligence per se, set forth more fully above, decedent Lizzie White suffered grievous bodily injury, and experienced significant pain and suffering, and mental anguish, including fear for her life, and ultimately died as a result of those injuries.

62. Plaintiff is therefore entitled to judgment against Defendants and for such actual, consequential, punitive, and equitable damages as this court deems proper.

FOR A THIRD CAUSE OF ACTION
(Vicarious Liability)

63. Plaintiff repeats and reaffirms the preceding paragraphs as though repeated verbatim herein.

64. Decedent Lizzie White, as a patient-resident of Defendant CCC, experienced harm from the negligent, grossly negligent, reckless, and negligent per se acts of the employees, agents, and assigns of Defendant CCC, including the acts or omissions of Defendant CCC's administrator and medical director.

65. The wrongful conduct of Defendant CCC's employees, agents, and assigns were related to duties to be performed upon Defendant CCC's premises and in the course of scope of employment with Defendant CCC.

66. The negligence, neglect, and/or failure to adequately provide care to decedent Lizzie White by the employees, agents, and assigns of Defendant CCC occurred during a time and at a place created and facilitated by employment with Defendant CCC.

67. The negligence, neglect, and/or failure to adequately provide care to decedent Lizzie White, by facility staff, including the facility administrator and medical director, is a well-known, foreseeable hazard and risk for operators of skilled nursing facilities in South Carolina.

68. As a direct and proximate result of the negligent, grossly negligent, negligent per se, reckless, willful and wanton acts of Defendant CCC's employees, agents, and assigns, for whom Defendant CCC is vicariously liable, Lizzie White sustained serious and excruciating injuries, suffered needlessly both physically and mentally, and ultimately died from her injuries.

69. Plaintiff is therefore entitled to judgment against Defendants and for such actual, consequential, punitive, and equitable damages as this court deems proper.

FOR A FOURTH CAUSE OF ACTION
(Corporate Negligence)

70. Plaintiff repeats and reaffirms the preceding paragraphs as though repeated verbatim herein.

71. Defendant CCC owns and operates a long-term skilled nursing facility entrusted with the care of vulnerable adults, as defined by South Carolina law, and had a duty to manage and operate Defendant CCC in a manner that ensured the maximum safety, dignity, and quality of life for its resident-patients against injuries and mistreatment, all in accord with state and federal law, regulations, standards, and policies and procedures.

72. Defendant CC had a duty to provide competent care to its resident-patients, including care related to skin integrity and hygiene.

73. Specifically, Defendant CCC had a duty to provide adequate care to its resident-patients, which included but was not limited to:

- a. A duty to establish and enforce policies and procedures, in compliance with applicable law, and standards, to ensure staff were trained to recognize,

prevent, and mitigate the risks associated with skin breakdown, and skin integrity of resident-patients;

b. A duty to establish and enforce policies and procedures regarding prevention, maintenance, and treatment of skin integrity and/or skin breakdown;

c. A duty to ensure adequate qualitative and quantitative staffing, so as to maximize resident-patient quality of life, and decrease the risk of resident-patient harm;

d. A duty to hire, retain, supervise, and adequately train employees, including administrators and medical directors, in a manner to ensure quality of life for resident-patients, and that resident-patients would be free of skin breakdowns, and related medical issues;

e. A duty to ensure that patient care was provided pursuant to a plan of care;

f. A duty to ensure regular and appropriate updates to resident-patient plans of care consistent with the actual clinical condition;

g. A duty to provide care to timely and safely address new medical conditions of resident-patients;

h. A duty to report incidents;

i. Such other duties as may be revealed during discovery or trial of this matter.

74. Defendant CCC was negligent, grossly negligent, negligent per se, reckless, willful and wanton in operating CCC, and, as a result, decedent Lizzie White suffered needlessly both physically and mentally, and ultimately died from the injuries she sustained as a patient of Defendant CCC.

75. Defendant CCC's negligent control and participation in the daily operations, planning, decision making, and quality improvement of Defendant CCC was done to maximize revenue at the expense of providing adequate care to patient-residents, and ensuring patient-resident safety.

76. Plaintiff is therefore entitled to judgment against Defendants and for such actual, consequential, punitive, and equitable damages as this court deems proper.

FOR A FIFTH CAUSE OF ACTION
(Wrongful Death Pursuant to S.C. Code Ann. § 15-51-10)

77. Plaintiff repeats and reaffirms the preceding paragraphs as though repeated verbatim herein.

78. Plaintiff brings this action for the wrongful death of decedent Lizzie White, who died on March 6, 2018, pursuant to S.C. Code Ann. § 15-51-10, *et seq.* on behalf of the statutory heirs of Lizzie White.

79. The death of Lizzie White was caused as a direct and proximate result of Defendant's negligent, grossly negligent, negligent per se, reckless, willful and wanton conduct, described more fully above.

80. As a direct and proximate result of Defendant's conduct, the beneficiaries of the estate of Lizzie White have been damaged, and suffered loss of Ms. White's services, support, income, society, companionship, love, and/or affection for the remainder of their lives.

81. Plaintiff is therefore entitled to a judgment against Defendant, and for actual, consequential, and punitive damages in an amount to be determined by a jury in accordance with the law and evidence in this case.

WHEREFORE, Plaintiff, individually, and in his fiduciary capacity as the personal representative of the estate of Lizzie White, prays for judgment against the Defendant, for actual,

consequential and punitive damages, for costs associated with this action, and for such other relief in law or equity as this court deems just and proper.

This 16th day of December, 2019.

STROM LAW FIRM, LLC

s/ Jessica L. Fickling

Jessica L. Fickling (S.C. Bar No. 100161)

2110 N. Beltline Boulevard

Columbia, SC 29204

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EXHIBIT B

AFFIDAVIT OF
NORMAN KHOURY, M.D.,
F.A.C.S.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CALHOUN	)	FOR THE 1 ST JUDICIAL CIRCUIT
	)	C/A No.
_____ Individually and as Personal	)	
Representative for the Estate of Lizzie	)	
White,	)	
	)	
v.	)	AFFIDAVIT OF
	)	NORMAN KHOURY, M.D., F.A.C.S.
	)	
Calhoun Convalescent Center, and John	)	
Doe, Medical Director, Jane/John Doe	)	
Director of Nursing, and Jane Doe, RN,	)	
_____	)	

Affiant, Norman P. Khoury, M.D., F.A.C.S., being of sound mind and body and over the age of eighteen (18), having the requisite training, knowledge and experience to provide the opinions enunciated more fully below, hereby avers as follows:

1. CLINICAL BACKGROUND: I, Norman P. Khoury, M.D., F.A.C.S., am a board certified general surgeon licensed in the state of South Carolina since 1975. I attended the Medical University of South Carolina ("MUSC"), graduating in 1976, and thereafter went on to complete my internship and residency at MUSC in 1977 and 1981, respectively. I have over 38 years of experience in general surgery, and am currently a member of East Cooper Surgical Associates, LLC, and have active privileges with East Cooper Medical Center and Roper St. Francis Medical Hospital. I have never been subject to discipline by any licensing board or entity.

In providing the opinions herein, I rely upon my clinical knowledge and experience as a general surgeon treating decubitus ulcers and other diseases, disorders, and injuries to the integumentary system, along with my more than 15 years of combined experience as Medical Director of wound care at Mount Pleasant Hospital and in the comprehensive wound care center in Mt. Pleasant, and my knowledge of the literature regarding the pertinent standards.

2. FAMILIARITY WITH TREATMENT SETTING: As a direct result of my education, training, knowledge, and clinical experience, including acting as a Medical Director for a comprehensive wound care center, and in my capacity as a board certified general surgeon, I am knowledgeable about the standards of care related to prevention, maintenance, and wound care in skilled nursing facilities and in a clinical setting, including standards attributable to medical directors, physicians, nurses, nurse technicians, certified nursing assistants, and management. I am further knowledgeable about standards, generally accepted practices and procedures, and prevailing opinions regarding care in place at the time decedent Lizzie White was a resident of the Calhoun Convalescent Center.

To a reasonable degree of medical certainty, based upon my knowledge, training, and experience it is my professional opinion the care provided to Lizzie White by the clinical and nursing staff at Calhoun Convalescent Center fell below the applicable standards of care for residents of long-term care facilities.

3. RECORDS RELIED UPON: In forming my conclusions, I reviewed the following records for Ms. White:

- a. 1/29/18-2/16/18 Admission to Regional Medical Center due to renal failure and pressure ulcers;
- b. 2/16/18-3/16/18 Transfer to Hospice Care;
- c. Death certificate;
- d. 5/24/2017 – 1/28/18 Calhoun Convalescent Center Patient Chart:
 - i. Nursing progress notes;
 - ii. Progress records;
 - iii. Medical Care progress notes;

- iv. Discharge documentation;
- v. Assessment forms;
- vi. Assessment & treatment;
- vii. Preventative skin care;
- viii. History and physical;
- ix. Consultation and progress notes;

e. Photographs represented as the sacral decubitus ulcer of Lizzie White as of February 5, 2018.

f. I expressly reserve the right to supplement this opinion in light of additional medical information and/or records.

4. **BASIS FOR OPINION:** I have the expertise to evaluate the records used to form the basis for my opinion, set forth in paragraph 3 above, and further, these records are of the type typically relied upon in the ordinary course of expert review in the long term residential care settings. I have specifically reviewed these records to determine whether, to a reasonable degree of medical certainty, the applicable standard of care was violated in the provision of care to Lizzie White, including preventative, maintenance, and restorative skin care, in accord with applicable governing standards of care.

5. **ADDITIONAL OPINIONS:** As a licensed physician, I am also qualified to provide an opinion concerning those aspects of the science and practice of medicine that form the general and common clinical knowledge on the part of licensed physicians: i.e. those aspects of the science and practice of medicine which are part of general and common clinical knowledge on the part of the usual and customary curricula of all accredited schools, which all graduates of accredited schools are capable of providing.

6. STANDARDS FOR QUALITY CARE IN LONG TERM CARE FACILITIES:

a. Every long term care facility in South Carolina must abide by certain standards in providing patient care. In particular, a skilled nursing facility must ensure the protection of resident rights, including the resident's rights to dignified care, participation in care planning, and access to competent care by qualified health care professionals.

b. A facility must conduct an initial assessment and periodic assessments thereafter regarding a resident's functional capacity. These assessments must, at the very least, include admitting orders, and must contain a comprehensive assessment of the resident's needs including the resident's physical functioning and structural problems, continence, disease diagnoses, and skin condition. This physical assessment must be periodically updated, at least once every 12 months and after major changes in the patient's physical condition. A primary purpose for these periodic assessments is to ensure a facility understands the current condition of its residents, and any significant changes in condition resulting in additional care considerations, or care at a different acuity level.

c. In addition to admission and periodic assessments, a facility must create and enforce basic and comprehensive care plans for each resident designed to, at a minimum, include the healthcare information necessary for the safe and competent care of the resident. Again, a primary purpose for these care plans is to ensure a facility is adequately providing the requisite level of care indicated for a patient's clinical condition.

d. As required by state and federal law, a facility must ensure the quality of a resident's care remains consistent with the resident's needs, and that the resident does not

experience significant diminutions in her ability to engage in activities of daily living, such as hygiene, mobility, and toileting. In particular, an inability to perform basic hygiene and toileting functions can increase a patient's vulnerability and likelihood to form pressure ulcers and other avoidable skin conditions.

e. As part of the basic level of care required for residents, a facility must ensure that a patient is provided competent care with regard to skin integrity.

f. Specifically as it relates to skin integrity, a facility must ensure that residents receive care consistent with professional standards of practice, to prevent pressure ulcers and to avoid developing pressure ulcers. In the event a resident has pressure ulcers, the facility must ensure the resident receives necessary treatment and services, consistent with professional standards of practice, to heal the ulcers, ensure the ulcers remain free of infection, and to prevent additional ulcers from forming.

g. In addition, facilities must provide sufficient care to promote healthy footcare, to maintain mobility if possible, to provide adequate care for patients suffering from incontinence, such that a patient does not develop a UTI, or other avoidable infection.

h. Facility's must ensure access to adequate physician and nursing care, and must ensure sufficient training and quality assurance for the facility, consistent with the standard of care and the facility's obligation to its residents. In meeting this obligation, a facility should develop comprehensive policies and procedures related to skin care, and each aspect of mandatory care.

i. In particular, and as indicated by the applicable standards, skin integrity and the risk of skin breakdown is a known and prevalent risk for residents of skilled

nursing facilities. Pressure ulcers are painful, and significantly reduce or compromise a patient's quality of life, and ability to function, and can lead to significant and lethal infections.

j. Accordingly, as part of the routine standard of care, a skilled nursing facility must create and enforce adequate policies and procedures for the prevention and treatment of pressure ulcers, including assessing patient risk for pressure ulcers upon admission, and continuously monitoring patients to prevent pressure ulcer, and to treat ulcers that have formed.

k. Failure to adequately create and/or enforce policies and procedures related to skin integrity constitutes a gross deviation from the standard of care.

7. CLINICAL BACKGROUND OF LIZZIE WHITE:

a. According to her chart, Lizzie White was 85 years old at the time of her admission to Calhoun Convalescent Center.

b. Upon admission, Ms. White's chart reflects she was incontinent of both the bowel and bladder, requiring anywhere from 75% to 100% assist. Due to mobility issues, it was felt Ms. White would benefit from placement in a long-term care facility, from an at-home setting where Ms. White received daily care from her seven (7) children.

c. Upon assessment, Ms. White's Brayden Skin Assessment Survey revealed a risk of developing skin problems of 16/23. This finding indicates a high risk of developing significant problems, including skin breakdown, requiring appropriate preventative measures. Other than a 1 cm. healing right heel wound, no additional wounds or areas of skin breakdown were noted on Ms. White's initial assessment or other skin assessments during her first days and weeks status post admission.

d. From June 7, 2017 through December 9, 2017, Ms. White's chart contains multiple assessments noting her skin was intact. For example:

i. August 16, 2017 Skin Assessment notes "no skin breakdown"

ii. August 24, 2017 Skin Assessment notes "no issues or concerns"

e. On December 2, 2017, Ms. White's chart first reflects issues dealing with skin breakdown. Pursuant to the chart, "Tegaderm was applied to a left buttock blister."

f. On December 9, 2017, a 1 cm round, open blister, dry with no drainage was noted on Ms. White' left inner thigh.

g. During this same timeframe, review of the records associated with treatment provided to Ms. White does not indicate aggressive preventative measures being taken to prevent fskin breakdown of the sacral area. Such preventative measures were clearly indicated given her admitting condition and diagnoses, and inability to adequately reposition herself due to issues with mobility.

h. On January 6, 2018, a 2 cm blister was noted at the center of a 7.0 x 3.0 cm pink open area with some active bleeding. There are no clinical notes indicating preventative measures undertaken prior to this entry in Ms. White's chart.

i. In response to the January 6, 2018 note regarding the 2 cm blister, and expanding open area, Ms. White's attending physician ordered Amoxicillin. There are no other indications of aggressive rehabilitative or restorative efforts to heal the wound, or prevent its spread, nor are there any other physician notes related to treatment for this wound.

j. On January 15, 2018, a 7.5 cm x 5.2 cm Stage II sacral ulcer was noted in Ms. White's chart. Once again, the chart contains no indication of preventative or

restorative measures undertaken by the facility to heal the wound, or to prevent its spread, nor is there any indication in the record that the attending physician was notified of the growing ulcer.

k. On January 23, 2018, an unstageable sacral ulcer was noted in Ms. White's chart. The chart reflects significant necrotic tissue and slough, and indicates a Foley catheter was placed and an air flow mattress was put on her bed. Until this point, there are no indications in the chart as to how this growing sacral decubitus ulcer was addressed by the clinical staff at Calhoun Convalescent Center, other than the order for antibiotics. Instead, there is a lack of evidence in the medical record that any care was provided to prevent skin breakdown, or to address the breakdown once it began.

l. On January 29, 2018, Ms. White was admitted to Regional Medical Center with a large, unstageable sacral ulcer. In addition, Ms. White was exhibiting clinical signs of sepsis. Upon admission to Regional, she was evaluated, and treated appropriately, ultimately undergoing an extensive wound debridement on February 1, 2018. Of note, the medical records indicate that, following debridement, the wound would extent to the bone, and that the operation was unlikely to resolve Ms. White's clinical condition, which, at the time of the operation, was, in my opinion, irreversible.

m. Following debridement, the wound measured 15x11x6 cms.

n. Although the family initially elected aggressive measures including a feeding tube. Following debridement, however, the family decided to withdraw aggressive care, and, instead, Ms. White was placed on hospice on February 16, 2018. She passed away on March 6, 2018.

8. VIOLATIONS OF THE STANDARD OF CARE:

a. It is my opinion to a reasonable degree of medical certainty that Calhoun Convalescent Center and its clinical, nursing, and caregiving staff failed to provide Ms. White with the standard of care owed to similarly situated residents of skilled nursing facilities. In particular, it is my opinion that the failure of Calhoun Convalescent Center to appropriately and adequately monitor Ms. White's integumentary system, to document the formation of significant pressure ulcers, and remedial measures, or to provide care upon notice of a skin breakdown, and the failure to render effective and appropriate assistance with mobility all resulted in Ms. White developing an unstageable sacral decubitus ulcer, which caused Ms. White to develop sepsis, and die.

b. The signs and symptoms of a pressure injury became obvious in early December, 2017, but were either not recognized or ignored, and no immediate intervention was provided until Ms. White's admission to Regional Medical Center on January 29, 2018.

c. In my opinion, had appropriate preventative measures and assistance been undertaken at the earliest notice of a pressure wound, the formation of an unstageable pressure ulcer was unlikely to occur.

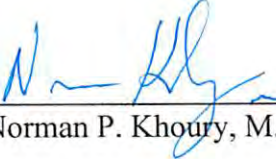
d. It is my opinion to an overwhelming degree of medical certainty that this ulceration was foreseeable given the patient's admitting diagnoses and co-morbidities, as well as her initial Brayden Skin Assessment, and that formation of this ulcer was the direct result of the failure of Calhoun Convalescent Center to enforce policies and procedures related to skin care.

e. My opinions are based upon my training, my 38 plus years of surgical experience and practice, and my experience diagnosing, and treating similar wounds

during my private practice, and while working in a comprehensive wound care center in Mount Pleasant, South Carolina.

SUPPLEMENTAL OPINION: This document does not necessarily address all violations of the standard of care identified in this case. I specifically reserve the right to add, amend, subtract or clarify this report as new evidence develops throughout discovery in this matter.

FURTHER AFFIANT SAYETH NAUGHT


Norman P. Khoury, M.D., F.A.C.S.

Sworn this 23rd day of April, 2019


Notary Public South Carolina
My Commission Expires: June 12, 2025

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CALHOUN	)	FIRST JUDICIAL CIRCUIT
	)	
JEFFERY WHITE, INDIVIDUALLY	)	CASE NO. 2019-CP-09-00220
AND AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF LIZZIE WHITE,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	DEFENDANT ST. MATTHEWS
	)	HEALTHCARE, LLC D/B/A CALHOUN
	)	CONVALESCENT CENTER'S ANSWER
ST. MATTHEWS HEALTHCARE, LLC	)	TO PLAINTIFF'S COMPLAINT
D/B/A CALHOUN CONVALESCENT	)	
CENTER,	)	
	)	
DEFENDANTS.	)	
	)	

TO: JESSICA L. FICKLING, ESQ., ATTORNEY FOR THE PLAINTIFF:

The Defendant, St. Matthews Healthcare, LLC d/b/a Calhoun Convalescent Center (the "Defendant"), by and through its undersigned counsel and subject to and without waiving any right to compel this matter to arbitration and without waiving its rights to have any and all claims dismissed and any defenses available, hereby responds to the allegations set forth in Plaintiff's Complaint as follows:

1. Any and all allegations set forth in Plaintiff's Complaint which are not specifically admitted, qualified, or otherwise explained or denied, are hereby expressly denied and strict proof is demanded thereof.

2. Responding to the allegations set forth in Paragraph 1 of Plaintiff's Complaint, the Defendant admits only that it was subject to the governing standard of care with respect to the care it provided to Lizzie White ("Ms. White") while she was a resident of Calhoun Convalescent Center ("the Facility"). The Defendant affirmatively asserts that the care it provided to Ms. White

met the governing standard of care at all times. The Defendant denies all allegations intended to assert liability or damages against the Defendant and all other remaining allegations set forth in Paragraph 1 and demands strict proof thereof.

3. The Defendant denies the allegations set forth in Paragraph 2 of Plaintiff's Complaint and demands strict proof thereof.

4. The Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 3 of Plaintiff's Complaint and, therefore, denies the same and demands strict proof thereof.

5. Responding to the allegations set forth in Paragraph 4 of Plaintiff's Complaint, the Defendant admits that Ms. White was a resident of the Facility, which is located at 600 Dantzler Street, St Matthews, SC 29135. The Defendant craves reference to her medical records and skilled nursing chart to confirm the dates of her residency and her age during that time. Any and all allegations inconsistent with those records or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof.

6. Responding to the allegations set forth in Paragraph 5 of Plaintiff's Complaint, the Defendant admits only that it is (and was during Ms. White's residency) a skilled nursing facility licensed by South Carolina as the sole licensee and operator of the Facility and, as such, it is subject to certain applicable statutes and regulations. However, the Defendant denies the scope of statutes and regulations alleged in Paragraph 5 to apply to the Facility. The Defendant affirmatively asserts that statutes and regulations applicable to the Facility do not establish any standard of care. The Defendant further asserts that the care it provided to Ms. White met the governing standard of care at all times. Any and all allegations inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof.

7. Responding to the allegations set forth in Paragraph 6 of Plaintiff's Complaint, the Defendant admits that it is the sole licensee of the Facility which is licensed by the state of South Carolina. The Defendant further admits that it is the operator and manager of the skilled nursing facility at issue, which is located at 600 Dantzler Street, St. Matthews, South Carolina, and, as the licensed operator of the Facility, it is subject to certain applicable statutes and regulations. The Defendant affirmatively asserts that such statutes and regulations do not establish any standard of care. The Defendant further asserts that the care and treatment provided to Ms. White met the governing standard of care at all times. Any and all allegations inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof.

8. Responding to the allegations set forth in Paragraph 7 of Plaintiff's Complaint, the Defendant admits only that Ms. White was a resident of the Facility, and that Ms. White paid a fee to stay at the Facility, pursuant to a contract agreed to by both parties. The Defendant denies the remaining allegations set forth in Paragraph 7 of Plaintiff's Complaint as written. The Defendant admits that, as the licensed operator of the Facility, it is subject to certain applicable statutes and regulations. The Defendant affirmatively asserts that such statutes and regulations do not establish any standard of care. The Defendant further asserts that the care it provided to Ms. White met the governing standard of care at all times. Any and all allegations inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof.

9. Responding to the allegations set forth in Paragraph 8 of Plaintiff's Complaint, the Defendant admits that Ms. White paid a fee to stay at the Facility, pursuant to a contract agreed to by both parties. Further responding, the Defendant admits that Ms. White was a resident of the

Facility but craves reference to her medical records and skilled nursing chart to confirm the dates of her residency. Any and all allegations inconsistent with those records or intended to allege liability or damages against the Defendant are denied and strict proof thereof is demanded.

10. The Defendant denies the allegations set forth in Paragraph 9 of Plaintiff's Complaint.

11. Responding to the allegations set forth in Paragraph 10 of Plaintiff's Complaint, the Defendant admits only that it operated and managed the Facility and that it provided certain care to its residents. Any and all allegations inconsistent with this response or intended to assert liability or damages against the Defendant are denied and strict proof thereof is demanded. To the extent any allegations set forth in Paragraph 10 call for legal conclusions, no response is required.

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

13. Responding to the allegations set forth in Paragraph 12 of Plaintiff's Complaint, the Defendant admits that it employs a team of healthcare and non-healthcare professionals. The Defendant affirmatively asserts that its staff met the governing standard of care in its care and treatment of Ms. White at all times. The remaining allegations set forth in Paragraph 12 of Plaintiff's Complaint call for legal conclusions and therefore no response is required.

14. The allegations set forth in Paragraph 13 of Plaintiff's Complaint call for legal conclusions and therefore no response is required. To the extent a response is required or to the extent the allegations in Paragraph 13 are intended to allege liability or damages against the Defendant, all such allegations are denied and strict proof is demanded thereof.

15. Responding to the allegations set forth in Paragraph 14 of Plaintiff's Complaint, the Defendant admits that it is the sole licensee of the skilled nursing facility at issue and is licensed

in South Carolina. The Defendant denies the remaining allegations set forth in Paragraph 14 of Plaintiff's Complaint as written. Subject to and without waiving the foregoing, the Defendant admits that, as the licensed operator of the Facility, it is subject to certain applicable statutes and regulations but denies the scope of statutes and regulations set forth in Paragraph 14. The Defendant affirmatively asserts that the statutes and regulations applicable to it do not establish the standard of care. The Defendant further asserts that the care it provided to Ms. White met the governing standard of care at all times. Any and all allegations inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof thereof is demanded.

16. Responding to the allegations set forth in Paragraph 15 of Plaintiff's Complaint, the Defendant craves reference to Ms. White's medical records and skilled nursing chart for their contents. Any and all allegations inconsistent with such medical and skilled nursing records or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof.

17. The allegations set forth in Paragraph 16 of Plaintiff's Complaint call for legal conclusions and, therefore, no response is required. To the extent these allegations are intended to allege liability or damages against the Defendant, all such allegations are denied.

18. The Defendant denies the allegations set forth in Paragraph 17 of Plaintiff's Complaint and demands strict proof thereof.

19. The Defendant denies the allegations set forth in Paragraph 18 of Plaintiff's Complaint and demands strict proof thereof.

20. Responding to the allegations set forth in Paragraph 19 of Plaintiff's Complaint, the Defendant states only that the Plaintiff filed a Notice of Intent with an attached photocopied

affidavit of Norman Khoury, MD and initial discovery responses. The Defendant denies any and all allegations contained in the NOI and affidavit and demands strict proof thereof. To the extent these allegations call for legal conclusions, no response is required.

21. The allegations set forth in Paragraph 20 of Plaintiff's Complaint call for legal conclusions and, therefore, no response is required. To the extent a response is required, they are denied and strict proof is demanded thereof.

22. The Defendant denies the allegations set forth in Paragraph 21 of Plaintiff's Complaint and demands strict proof thereof.

23. Responding to the allegations set forth in Paragraph 22 of Plaintiff's Complaint, the Defendant restates its answers to the Paragraphs above as if set forth herein verbatim.

24. Responding to the allegations set forth in Paragraphs 23, 24, and 25 of Plaintiff's Complaint, the Defendant craves reference to the website Plaintiff referenced for its contents as of the applicable time period of Ms. White's residency. Any and all allegations inconsistent with the foregoing or intended to allege liability or damages against the Defendant are denied and strict proof thereof is demanded.

25. Responding to the allegations set forth in Paragraph 26 of Plaintiff's Complaint, the Defendant admits that as the licensed operator of the skilled nursing facility at issue, it is subject to certain applicable statutes and regulations. The Defendant affirmatively asserts that such statutes and regulations do not establish the standard of care. The Defendant further asserts that the care it provided to Ms. White met the governing standard of care at all times. Any and all allegations inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof.

26. The allegations set forth in Paragraphs 27, 28, 29, 30, 31, 32, and 33 of Plaintiff's Complaint call for legal conclusions and, therefore, no response is required. To the extent a response is required, the Defendant admits only that as the licensed operator of the Facility it is subject to certain applicable statutes and regulations, but denies the nature and scope of statutes, regulations and requirements alleged in Paragraphs 27, 28, 29, 30, 31, 32 and 33 of Plaintiff's Complaint. Responding further, the Defendant denies any and all allegations in these Paragraphs intended to allege liability or damages against the Defendant and all remaining allegations in these Paragraphs for which a response is required and demands strict proof thereof.

27. Responding to the allegations set forth in Paragraphs 34, 35, 36, 37, 38 and 39 of Plaintiff's Complaint, the Defendant craves reference to Ms. White's medical records and skilled nursing chart for their contents. Any and all allegations inconsistent with such medical and skilled nursing records or intended to allege liability or damages against the Defendant are denied and strict proof thereof is demanded.

28. The Defendant denies the allegations set forth in Paragraphs 40, 41, 42, 43, and 44 of Plaintiff's Complaint and demands strict proof thereof.

29. Responding to the allegations set forth in Paragraph 45 of Plaintiff's Complaint, the Defendant restates its answers to the Paragraphs above as if set forth herein verbatim.

30. Responding to the allegations set forth in Paragraph 46 of Plaintiff's Complaint, the Defendant admits that as the licensed operator of the skilled nursing facility at issue, it is subject to certain applicable statutes and regulations. The Defendant affirmatively asserts that such statutes and regulations do not establish the standard of care. The Defendant further asserts that the care it provided to Ms. White met the governing standard of care at all times. Any and all allegations

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

31. The allegations set forth in Paragraph 47 of Plaintiff's Complaint call for legal conclusions and, therefore, no response is required. To the extent a response is required or the allegations in Paragraph 47 are intended to allege liability or damages against the Defendant, such allegations are denied and strict proof thereof is demanded.

32. The Defendant denies the allegations set forth in Paragraphs 48, 49, 50, and 51, including all subparts, of Plaintiff's Complaint and demands strict proof thereof.

33. Responding to the allegations set forth in Paragraph 52 of Plaintiff's Complaint, the Defendant restates its answers to the Paragraphs above as if set forth herein verbatim.

34. Responding to the allegations set forth in Paragraphs 53, 54, and 55 of Plaintiff's Complaint, the Defendant admits that as the licensed operator of the skilled nursing facility at issue, it is subject to certain applicable statutes and regulations but denies the scope of the statutes and regulations cited in Paragraph 54. The Defendant affirmatively asserts that the statutes and regulations applicable to it do not establish the standard of care. The Defendant further asserts that the care it provided to Ms. White met the governing standard of care at all times. Any and all allegations inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof thereof is demanded.

35. The Defendant denies the allegations set forth in Paragraph 56, including all subparts, of Plaintiff's Complaint and demands strict proof thereof.

36. The allegations set forth in Paragraphs 57 and 58 of Plaintiff's Complaint call for legal conclusions and, therefore, no response is required.

37. The Defendant denies the allegations set forth in Paragraphs 59, 60, 61 and 62 of Plaintiff's Complaint and demands strict proof thereof.

38. Responding to the allegations set forth in Paragraph 63 of Plaintiff's Complaint, the Defendant restates its answers to the Paragraphs above as if set forth herein verbatim.

39. The Defendant denies the allegations set forth in Paragraphs 64 of Plaintiff's Complaint and demands strict proof thereof.

40. To the extent the allegations set forth in Paragraph 65 of Plaintiff's Complaint call for legal conclusions, no response is required. Subject to the foregoing, the Defendant denies all allegations set forth in Paragraph 65 intended to assert liability or damages against the Defendant and all remaining allegations and demands strict proof thereof.

41. The Defendant denies the allegations set forth in Paragraphs 66, 67, 68, and 69 of Plaintiff's Complaint and demands strict proof thereof.

42. Responding to the allegations set forth in Paragraph 70 of Plaintiff's Complaint, the Defendant restates its answers to the Paragraphs above as if set forth herein verbatim.

43. Responding to the allegations set forth in Paragraph 71, 72, 73, including all subparts thereof, of Plaintiff's Complaint, the Defendant admits that as the licensed operator of the skilled nursing facility at issue, it is subject to certain applicable statutes and regulations but denies the scope and nature of the statutes, regulations, duties and requirements alleged in Paragraphs 71, 72 and 73, including all subparts thereof. The Defendant affirmatively asserts that the statutes and regulations applicable to it do not establish the standard of care. The Defendant further asserts that the care it provided to Ms. White met the governing standard of care at all times. Any and all allegations inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof thereof is demanded.

44. The Defendant denies the allegations set forth in Paragraphs 74, 75, and 76 of Plaintiff's Complaint and demands strict proof thereof.

45. Responding to the allegations set forth in Paragraph 77 of Plaintiff's Complaint, the Defendant restates its answers to the Paragraphs above as if set forth herein verbatim.

46. The Defendant is without sufficient knowledge or information to respond to the allegations set forth in Paragraph 78 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

47. The Defendant denies the allegations set forth in Paragraphs 79, 80, and 81 of Plaintiff's Complaint and demands strict proof thereof.

48. The Defendant denies the allegations set forth in Plaintiff's prayer for relief and judgment.

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

49. Pursuant to § 4 of the Federal Arbitration Act, this action must be stayed until the validity of the arbitration agreement entered into by the Plaintiff's decedent and the Facility is determined by this Court. The Defendant hereby provides notice that a Motion to Compel Arbitration and associated Motion to Dismiss or Stay is forthcoming.

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

50. Plaintiff's claim for punitive damages and an award of punitive damages would violate those clauses of the Constitution of the United States and of South Carolina related to

privileges and immunities, due process and equal protection, and the Defendant would further assert the protections, defenses, and statutory rights set forth in S.C. Code Ann. § 15-32-510, *et seq.*

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

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

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

52. Plaintiff failed to properly serve process on the Defendant and therefore the claims should be dismissed pursuant to South Carolina Rules of Civil Procedure 12(b)(5).

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

53. Plaintiff's right to a recovery in this 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**

54. The Defendant affirmatively asserts 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 S.C. Code

Ann. §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**

55. The Defendant affirmatively asserts the defense of intervening and superseding negligence of third parties not a party to this action.

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

56. The Defendant asserts that some, or all, of the standards, regulations, and statutes alleged by the Plaintiff do not create any standard of care applicable to Plaintiff's claims or private right of action in this matter.

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

57. The Defendant asserts that some of the injuries or damages sustained by the Plaintiff or Plaintiff's decedent, if any, were due to, caused and occasioned by a natural disease process over which the Defendant had no control and, as such, the Defendant pleads such a natural disease process as a complete or partial bar to this action.

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

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

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

59. The Defendant hereby raises the doctrine of election of remedies as a defense to Plaintiff's claims.

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

60. Plaintiff, as personal representative, lacks standing to bring some or all of the claims and allegations asserted against the Defendant pursuant to S.C. Code Ann. § 15-5-90 and/or § 15-51-20 & 40.

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

61. To the extent the 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, the 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**

62. The care and treatment provided to Plaintiff's decedent provided by the Defendant met the governing standard of care at all times.

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

63. The Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and thus reserves the right to amend its Answer to assert any such defenses. Furthermore, the Defendant hereby incorporates all defenses asserted by any co-defendants in this matter, if any, to the extent they are applicable.

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

64. The Defendant asserts that no act, omission, representation or fault, if any, of the Defendant was the cause in fact or legal cause of Plaintiff's damages, if any.

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

YOUNG CLEMENT RIVERS, LLP

By: /s/D. Jay Davis, Jr.
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*Attorneys for the Defendant St. Matthews
Healthcare, LLC d/b/a Calhoun Convalescent Center*

Charleston, South Carolina
Dated: January 27, 2020

STATE OF SOUTH CAROLINA)

) IN THE COURT OF

COUNTY OF CALHOUN) COMMON PLEAS

JEFFREY WHITE,)

Plaintiff,)

Vs) CASE NO 2019-CP-38-00220

ST. MATTHEWS HEALTH CARE,)

LLC,)

Defendants)

AUGUST 12, 2020

(VIRTUAL WEBEX)

HONORABLE MAITE MURPHY, JUDGE

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

BY: RUSSEL G. HINES, ESQUIRE

Attorney for the Plaintiff

BY: JESSICA L. FICKLING, ESQUIRE

Attorney for the Defendant

KATHERINE A. SPIRES

REGISTERED PROFESSIONAL REPORTER

1 THE CLERK: Case number 2019-CP-09-00220, Jeffrey
2 White verses St. Matthews Health Care, LLC.

3 THE COURT: All right. So we have Ms. Fickling here
4 and, Mr. Hines, were you able to --

5 MR. HINES: I hope so. Your Honor, can you hear me?

6 THE COURT: I can.

7 MR. HINES: Thank goodness. My blood pressure can
8 drop a little bit now, I guess.

9 THE COURT: The whole sideshow that you had like
10 everyone working on your computer which is nice.

11 MR. HINES: I'm sure it was quite a sight to see us
12 scrambling around trying to find the dude to hit the
13 right button. But thank you very much. And thank you,
14 Jessica, too, for bearing with us.

15 THE COURT: And so, Mr. -- are you here on behalf of
16 the other attorneys or -- Mr. Hines?

17 MR. HINES: That's right. I'm here for the
18 Defendants. For Jay Davis and the other lawyers who are
19 of record here. I'm arguing the motion in their stead.
20 Well, the motion I think title of it includes the word
21 "to dismiss." But, Your Honor, it's a Motion to Compel
22 arbitration is really the bottom line is what we're
23 asking for.

24 THE COURT: All right. So I will be happy to hear
25 from you.

1 MR. HINES: Thank you, Your Honor. Again, for the
2 Defendants St. Matthews Health Care LLC, PBA Calhoun
3 Convalescent Center, I'll just refer to the Calhoun
4 Convalescent Center that is the facility and that's what
5 it is. It's a skilled nursing facility.

6 This case is a case about alleged nursing home
7 malpractice. It's a wrongful death suit and the
8 decedent, her name is Lizzy White. Ms. White. She was
9 admitted to the facility back in June of 2017. At the
10 time that she was admitted, one of her children, her
11 daughter, Darlene Nunnally, signed admission agreements
12 and also an arbitration agreement.

13 Ms. Nunnally had been named in a health care power
14 of attorney that was executed in April. So this is a
15 little over a month before her admission to the
16 facility. It was late April when the health care power
17 of attorney was executed naming Ms. Nunnally as the
18 agent for Ms. White.

19 And these documents, Your Honor, we did file -- and
20 briefly as a housekeeping matter, a memo in support of
21 our motion. I trust that's a part of Your Honor's
22 record. And, of course, we rely on that. But I also
23 wanted to note that Exhibit One to that document -- to
24 that memo is the copy of power of attorney. Exhibit Two
25 is the admission agreement. And Exhibit Three is the

1 arbitration agreement. There are some other exhibits as
2 well, but those are the three that I think I will
3 primarily be discussing.

4 But the bottom line is, is that Ms. Nunnally as the
5 dually appointed agent under this health care power of
6 attorney for her mother, Ms. White, signed at the time
7 of admission to the facility in arbitration. And we're
8 moving to compel arbitration under that agreement on the
9 basis that the allegations of this complaint are
10 completely within the scope of the coverage of the
11 arbitration agreement. And the arbitration agreement
12 was dually signed with authority by Ms. Nunnally as her
13 mother's agent under health care power of attorney.

14 Now, we have -- this is the -- this power of
15 attorney follows the South Carolina statutory health
16 care power of attorney form. And that is in the statute
17 at 62-5-504. And the reason I say that to say that
18 consistent with that form, in fact, exactly in line with
19 that form, it creates what's called a springing power of
20 attorney. I guess that's kind of a colloquial term for
21 it.

22 Because under other types of powers of attorney,
23 durable powers, the agent's authority under the power
24 would exist from the moment of execution. But under a
25 springing power like this, the authority doesn't begin

1 until the principals becomes incapacitated. And so
2 there becomes an issue in a -- under this scenario as to
3 when the person or if the person is incapacitated.

4 We've provided as Exhibit Six to our memo, the
5 certification -- physician certification indicating that
6 she was indeed incapacitated as of June 3, 2017, which
7 is the date of both the admission agreement and the
8 arbitration agreement. There is a question tentatively
9 I cannot answer for you today. But I think it is a
10 discrepancy that is not material. Which is she was
11 actually admitted to the facility, Ms. White, on June
12 1st. Both the admission agreement and the arbitration
13 agreement, however, were not signed by Ms. Nunnally
14 until June 3rd. And that is evident on the signature
15 page for both of those documents which are again,
16 Exhibits One -- excuse me, Exhibits Two and Three
17 respectively to our memo. So they were signed at the
18 same time even though it does appear they were two days
19 after she was technically admitted to the facility.

20 In any event, our position is that we do have the
21 Exhibit Six, the physician certification indicating that
22 she was incompetent and that is incompetent to handle
23 her affairs in terms of, again, not a physical
24 disability, we're talking about a disability that would
25 affect her capacity. And she was, I think, Your Honor,

1 84 years old at the time of her admission to the
2 facility. I would note she has a document history of
3 dementia and that's actually reflected in some of the --
4 or at least one in particular of the exhibits that the
5 Plaintiff filed in opposition. In Exhibit Two is where
6 that's noted.

7 And so there's evidence that suggests or the
8 evidence to the effect that her capacity was -- that she
9 was not -- did not have competency to handle her affairs
10 and, therefore, the springing power had sprung as of
11 June 3, 2017.

12 The next step in the analysis, Your Honor, and
13 again, just to briefly recap. We have clearly the
14 execution of the power. The power that is granted in
15 that springs into effect upon incapacity of the
16 principal, Ms. White. Then the question becomes and I
17 think this is probably the main battleground for today's
18 motion, but, again, I'll let opposing counsel -- I don't
19 want to speak obviously for opposing counsel, but the
20 question is the scope.

21 The scope of whether or not this document which is a
22 health care power of attorney it is so broad as to allow
23 the -- the agents to impact legal rights such as --
24 well, principally, the right to a jury trial. Which is
25 obviously what is being -- which is what is being waived

1 through the arbitration process. Or it's technically, I
2 guess, I wouldn't say it's not exactly a waiver of a
3 right to a jury trial. Because, for instance, that
4 would say the same thing about agreeing to have the case
5 tried nonjury. But it's its own thing, but it includes
6 obviously the taking the dispute resolution into the
7 oral arbitration and away from the judicial process.

8 So in that regard, I have a couple -- first, I guess
9 I'll start with the plain language of the power. And
10 the power gets into the agent's powers on the bottom
11 right corner. It's page 4 of 7. Again, this is Exhibit
12 One to our memo. The agent has for one I would note,
13 broad powers in regard to my -- if you would indulge me.
14 My agent's authority to interpret my desires is intended
15 to be as broad as possible except for any limitations I
16 may state below.

17 Then it goes on and talks about the ability to
18 refuse consents, withdraw consent to different types of
19 medical care and treatment. Authorize medical
20 procedures, authorize admission or discharge to
21 facilities. And it continues on to say, to take any
22 other action necessary to making documenting ensuring
23 implementation decisions concerning my health care
24 including, but not limited to continuing on pursuing any
25 legal action in my name.

1 And, Your Honor, the key thing there and I get the
2 point that some of these cases and I don't know the
3 cases in South Carolina, but the idea would be, all
4 right, it's a difference between having the ability to
5 make health care decisions and the ability to make
6 decisions about waiver or legal rights.

7 However, that can't be -- that distinction or
8 difference cannot be evaluated in the abstract. They
9 have to look at the actual language of the power. And
10 the language of the power here goes beyond -- and it
11 didn't have to include, this is 4(d), for instance. It
12 didn't have to make any reference to legal rights
13 especially pursuing any legal action in my name.

14 Because once you pursue a legal action, you give
15 someone the right to pursue a legal action, Your Honor.
16 That necessarily includes the right to waive legal
17 rights including the right to a jury trial and here's
18 why. If you give me like to pursue a legal action, have
19 you not given me the right to settle that legal action?
20 Because unless you have, then you're saying I have to
21 take it all the way to a jury trial or else I have
22 overstepped my bounds by settling it and, therefore, by
23 waiving a jury's resolution of the issue.

24 So, Your Honor, that point there I think is -- well,
25 it's a stubborn one for the opponent of arbitration to

1 try to get around it. Because once you give me the
2 right, again, to pursue legal action, you give me the
3 right to discontinue legal action and to discontinue
4 legal action so as to, again, to even a beautiful
5 settlement. Even the kind of settlement that anybody
6 would think is a fantastic bit of advocacy is obviously
7 include the waiver of the right to a jury trial. Which
8 is what obviously is the main complaint -- I guess is
9 sort of the complaint as I understand it when
10 arbitration motions are opposed is to try to view this
11 bundle of rights as being completely distinct from the
12 bundle that's affected by the health care power.

13 But I think in sum on that point, the Court should
14 bear in mind that the words "health care" can -- well,
15 they do not necessarily and, in fact, in this case, they
16 do not limit so narrowly as opponents to arbitration
17 would say. I mean, well, is it about a procedure?
18 Certainly that's health care. And I can understand the
19 desire in terms of just sort of the idea that health
20 care is one thing and legal rights are another, but here
21 they address both is my point. And they address both in
22 a document that clearly indicates that this should be
23 interpreted as broadly as possible. There's nothing
24 about the language in this document suggest anything
25 otherwise.

1 And I would also make this point. I mean, we've
2 said this in our memo. There was a case out of Kentucky
3 that went to the US Supreme Court, it's called Kendrick
4 Nursing Center. And what's important about that and
5 this is a contract where arbitration is being discovered
6 by the Federal Arbitration Act. And the main point
7 about that is the Federal Arbitration Act requires
8 states and this is to overcome a traditional reluctance
9 to enforce arbitration agreements. And this goes back
10 many, many, many years, the arbitration act. Because
11 the reason I note that bit of history is because over
12 the years since we have decisions in South Carolina that
13 reflect not only a federal policy that favors
14 arbitration, but the state policy too. So it's not that
15 arbitration is not only not disfavored, it's
16 affirmatively favored.

17 And I know, of course, that doesn't mean that it's
18 not to deny that arbitration is certainly a matter of
19 contract unless there's a contract arbitration won't be
20 enforced except for an equitable ground and I will
21 mention that in a moment.

22 Here the main point is there is a contract that was
23 dually executed by an agent with express authority to do
24 so by virtue of this health care power of attorney. And
25 in answering that question, the court because of the

1 FAA, the FAA and to overcome reluctance of state boards
2 traditional reluctance to enforce arbitration agreements
3 requires that state courts place arbitration agreements
4 on equal footing with any other kind of contract.
5 Meaning that a court can refuse to enforce a contract,
6 an arbitration agreement, but it can't do so for a
7 reason that applies only to arbitration agreements. So
8 it can't apply undue scrutiny that disfavors arbitration
9 agreements.

10 In that Kendrick Nursing Home case which came out of
11 Kentucky that dealt with a law in Kentucky that required
12 health care power -- or required powers of attorney, if
13 they were going to include the right to waive
14 arbitration, they had to expressly say so in the power.
15 Couldn't just be by virtue of these broad powers and
16 means of interpretation as I suggested to you that there
17 is. And the Supreme Court said you can't do that.
18 Because that is a rule that -- and it didn't actually
19 say, or what I should say, this is the only way that you
20 have to expressly say waive the right the ability to
21 agree to arbitration.

22 It was phrased in terms of fundamental rights.
23 You're going to waive fundamental rights. And the court
24 said well, that's a -- well, it thinly veiled effort on
25 the state level to say fundamental rights, jury trial

1 rights, and to prevent arbitration. The bottom line is,
2 the Supreme Court struck it down as an undue and
3 disproved disfavored treatment of arbitration agreements
4 that violates the FAA and, therefore, isn't enforceable.

5 Very quickly, Your Honor, and thank you for your
6 indulgence thus far. This is one whole ground that
7 we're arguing. There is another basis to enforce this
8 and I'll briefly hit it. And this is not to take
9 anything away from the first or and this one, you know,
10 I'd argue is just as persuasive as the first. But if
11 you were to agree on the power of attorney argument then
12 this wouldn't be necessary. However, this is additional
13 basis would be through the process of merger and
14 equitable estoppel. And merger has to do with the
15 merging of two different instruments. In this case
16 we're talking about the admission agreement and the
17 arbitration agreement.

18 The fight here is over whether or not the
19 arbitration agreement is enforceable, not the admission
20 agreement. There's a case called *Coleman verses Mariner*
21 *Health Care*. In *Coleman verses Mariner Health Care*, the
22 Supreme Court analyzed whether or not under the Adult
23 Health Care Consent Act, a surrogate who did have the
24 power to act as a surrogate under that statute had the
25 power to do -- to actually enter an arbitration

1 agreement as opposed to just admitting somebody to a
2 nursing facility.

3 The court said, no. And, of course, it's important
4 to keep in mind, the court's interpretation of that was
5 based upon the interpretation of the Adult Health Care
6 Consent Act. It wasn't based upon the interpretation of
7 language of the power that we have here which again
8 expressly includes the ability to take legal action.

9 But the main point of Coleman that I'm trying to get
10 at is that there was an additional argument based upon
11 merger and estoppel loss rates. And although it didn't
12 prevail in that case, the Coleman decision allowed for
13 that argument to actually have a solid legal foundation
14 to be raised in and when -- to prevail in an
15 appropriateness. And the reason is, the Coleman court
16 recognized the doctrine of merger which predates that
17 case. But the idea is that when two different
18 instruments are signed at the same time, by the same
19 parties, for the same purpose, and, of course, the same
20 transaction, those documents as instruments are presumed
21 to merge into one and to be treated as one.

22 And the reason that's important, Your Honor, is
23 because we take the position that the arbitration
24 agreement merges with the admission agreement. And as a
25 result of that, Ms. White is not able to receive the

1 benefits that she received under the admission agreement
2 while denying the enforceability of the arbitration
3 agreement which is in that same merged agreement.

4 Meaning you can't -- you know, you got to take the --
5 you can't have your cake and eat it too. You can't pick
6 and choose which parts is a binding contract on. And
7 that's sort of the one/two punch of that.

8 And I know that the Plaintiff would say perhaps
9 there's some benefit that she got from the admission
10 agreement. Of course, the Plaintiff would also argue
11 they don't merge and that's a different point.

12 But the reason they do merge again, Your Honor, same
13 time, same transaction, same person, same purpose, and
14 same -- all the different same's. And we -- this is all
15 in our -- I know it's a lot of information I'm flooding
16 you with, Your Honor, and this is all in our briefing.
17 But the -- it's important to note that the Coleman court
18 specifically said not only does that principle apply, it
19 is actually applicable here in the case that we're
20 deciding. It said, unless there is evidence of a
21 contrary intent meaning the merger basically operates as
22 a presumption. When all those factors come together,
23 all the different same's, same transaction, purpose,
24 time, when they all combine, it gives rise to a
25 presumption. That's what the parties intended is the

1 merger. It can upset by evidence of the contrary
2 intention. In Coleman that's what the court found.
3 There was evidence of the contrary intention.

4 My argument here is that there is no such evidence
5 in this case. This case is different from Coleman. But
6 the reason I agree with Coleman and in line with
7 Coleman, to the point that Coleman didn't just leave
8 open -- it did not leave open the question as to whether
9 or not admission agreements and arbitration agreements
10 when signed under these circumstances are presumed to
11 merge. It said they do. It just found there was a
12 contrary intention.

13 There is no contrary intention here because there
14 are some material distinctions between the two
15 documents. For instance, in the Coleman case, there was
16 evidence within -- there was an entire agreement clause
17 in the admission agreement that -- that the court looked
18 -- used to say -- indicated evidence of separatedness, I
19 think.

20 Here we have an entire agreement clause. But it
21 doesn't actually indicate evidence of separatedness
22 between the admission agreement and the arbitration
23 agreement. In fact, it references other admissions
24 materials as being part and partial of the whole
25 agreement. And this arbitration agreement which was not

1 per se a requirement for admission, it was an optional
2 document it could be entered into.

3 There's a difference between saying it was not a
4 condition of admission verses, of course, it not being
5 in conjunction with it which it certainly was in
6 conjunction with admission. There would be no other
7 reason for it to be -- to even exist, but for the
8 admission to the facility. Because what the document
9 does is it provides for a method of dispute resolution
10 for disputes that may arise out of the admission.

11 THE COURT: Mr. Hines, I'm going to interrupt you
12 just for one second. We've got quite a few other
13 matters scheduled, you're kind of going beyond your time
14 limit. If you put all this in your brief, I will
15 certainly take a look at it unless there's something
16 else that you'd like to add that may not have been
17 contained in your brief that you would like to add on
18 the record, I will be happy to hear that.

19 MR. HINES: Your Honor, thank you. If I could just
20 listen to what opposing counsel says and just have maybe
21 30 seconds to make a point or to in response to that,
22 that would be great. But I'll hush for now.

23 THE COURT: Ms. Fickling?

24 MS. FICKLING: Yes, Your Honor. I'll try to be
25 brief. This is Jessica Fickling for the Plaintiff, the

1 estate of Lizzy White.

2 Your Honor, I'd like to start by and I know Your
3 Honor is familiar with these types of disputes where
4 there is an arbitration agreement and a facility may be
5 attempting to enforce that agreement. I don't think
6 that either of the parties disagrees here. Nothing was
7 signed by Ms. White. So the decedent in this case is
8 not the person who actually signed any of the agreements
9 that we're discussing today.

10 Rather what we have is an arbitration agreement that
11 was signed by one of Ms. White's children, her daughter.
12 And as counsel mentioned, there is in this case a health
13 care power of attorney that was executed several months
14 before her admission to the facility.

15 Now, Your Honor, we filed our brief in advance of
16 the Defendants and so, again, just briefly, I'm going to
17 focus on some language that Defense counsel did not
18 reference. The health care power of attorney
19 specifically says it creates an agent to make health
20 care decisions. And as Your Honor is familiar, what our
21 courts have determined is that health care decisions and
22 the decision to waive the right to a jury trial are not
23 coextensive. They're not the same thing.

24 With respect to the paragraph that Defense counsel
25 pointed you to in the health care power of attorney

1 which talks about legal action. It expressly authorizes
2 legal action to force compliance with my wishes as
3 determined by my agent or to seek actual or punitive
4 damages for the failure to comply. Thereafter, the
5 health care power of attorney enunciates certain wishes
6 that Ms. White had when she executed the document
7 including the right to withhold care, the right to
8 determine end of life situation.

9 The document itself also indicates on the face of it
10 that it did not turn into a durable power of attorney
11 until a finding of mental incompetence. And that's very
12 important here. Because Defense is essentially saying,
13 please, read this more expansively than it is. This is
14 a health care power of attorney that provides the
15 ability to make health care decisions which expressly on
16 its face states the document does not become durable
17 until a determination of mental incompetence.

18 This is not one of the instances where I believe,
19 and I could be mistaken, but I don't think the Defendant
20 is arguing that there's any sort of apparent agency
21 here. What they're saying is that the health care power
22 of attorney which vests agency and certain individuals
23 sprung into a durable power of attorney and so actual
24 agency allowed for Ms. Nunnally to sign the arbitration
25 agreement and admission agreement.

1 And, Your Honor, respectfully, I disagree with that.
2 They pointed you in their Exhibit Six to a certification
3 signed by physicians purportedly at the time of her
4 admission. And they have said this is sufficient under
5 the law to be a deeming of mental incompetence. But,
6 Your Honor, the word "incompetent" is not referenced
7 anywhere in the physician certification. What this is,
8 is a certification under the Adult Health Care Consent
9 Act which provide that Ms. White is unable to consent to
10 health care decisions. And then it specifically defines
11 health care.

12 And, again, nowhere in the documentation does it
13 indicate that a health care decision is consistent with
14 the right to waive a jury trial. So the physician
15 certification is not supportive of Defendant's argument.

16 The other thing, Your Honor, and I point this out
17 only because I think I have to for the record. The
18 physician certification includes two physician
19 signatures. The second of which I cannot legibly read
20 the date. So to the extent the argument is the
21 physician certification was signed at the same time as
22 the arbitration agreement was signed is the same time
23 that all the other documents were signed. I do think
24 that that's not something we can actually verify from
25 the face of the document itself. And, again, that's

1 contained at Exhibit Six.

2 So, Your Honor, I believe that in this case where we
3 have Ms. White granting authority to agents to make
4 health care decisions, it was very clear what her
5 intention was. And there's no intention for those
6 agents to have any authority beyond that scope. Which
7 means, while there was authority to admit her to the
8 facility there was not authority to sign this separate
9 arbitration agreement.

10 And in counsel's second point which was about the
11 idea of merger. And he's correct that Coleman did
12 discuss the concept of merger. What I think is not
13 clear was that in Coleman which is 407 S.C. 346, the
14 court quoting to the Klutts case at 268 S.C. 80, stated,
15 "The general rule is that in the absence of anything
16 indicating a contrary intention are instruments are
17 executed at the same time by the same parties for the
18 same purpose and in the course of the same transaction,
19 the courts will consider and construe the documents
20 together."

21 It is an indication on the face of the documents.
22 It's not necessarily evidence. And I think that that's
23 an important distinction. But, again, this is one of
24 those cases where we can look at the documents in the
25 record and we can see a clear intention that the

1 arbitration agreement and the facility agreement were
2 two separate things.

3 And, yes, I'm going to point to things like the
4 titles. They're titled separately. Arbitration
5 agreement, admission agreement. They have separate
6 dates associated or page numbers associated with them.
7 There is an entire agreement provision in the facility
8 admission agreement. And it does reference admission
9 materials, but it doesn't specifically list admission
10 materials.

11 And so the case law that we have in South Carolina
12 indicates, and this is in our brief, where it's not --
13 where it's capable of multiple interpretations. If
14 there's any ambiguity that would be construed against
15 the drafter. If the facility had wanted to specifically
16 identify the admissions materials it certainly could
17 have done so, but it didn't. And so that is construed
18 against the facility. And I believe that that's
19 supported in the *Thompson verses Pruitt* court case at
20 416 S.C. 43.

21 So the admissions agreement or the arbitration
22 agreement rather also contains a final statement. In
23 its last paragraph it says, "This agreement shall remain
24 in effect for all care rendered at facility and shall
25 survive any termination or breach of this agreement or

1 the admission agreement."

2 In our case is including the Coleman case supported
3 determination that the face of the documents themselves
4 can evidence separateness. And here the use of the word
5 "or," again, we're taking this in light of the fact that
6 the facility had the ability to draft it, they're two
7 separate agreements. So there isn't any merger.

8 And the reason that that's important is because if
9 there's no merger then we're not trying to obtain the
10 benefit of one agreement to the exclusion of the other.
11 The arbitration agreement doesn't stand on its own.

12 I think, Your Honor, it's also important to note all
13 of the discussion that we've had today is about Darlene
14 Nunnally who is one of Ms. White's seven children. And
15 all of her children love her and I want to make sure
16 that that's very clear for the record. But the personal
17 representative in this case is Jeffrey White. And what
18 we haven't heard is any information about Mr. White or
19 about conduct with Ms. White at the time that she was
20 admitted to the facility that might have facilitated
21 some kind of representation to the facility about agents
22 the outside of the scope of the plain language of the
23 document.

24 This is not an unsophisticated facility unfamiliar
25 with the laws and how these documents operate. They

1 drafted them. They know what they mean. And the
2 facility was aware that a health care power of attorney
3 is not a durable power of attorney. That they're
4 separate.

5 So, Your Honor, I believe that the plain language of
6 the documents is going to control here that Ms. White
7 did not vest authority in anyone else to make decisions
8 about waiving fundamental rights and that there is no
9 merger so there can be no estoppel with respect to this
10 action.

11 And, Your Honor, we would ask that this case proceed
12 forward in circuit court.

13 THE COURT: Thank you, Ms. Fickling. Brief
14 response, Mr. Hines?

15 MR. HINES: Very briefly, Your Honor. On the point
16 that the health care power of attorney and some
17 confusion about whether it was durable. If -- Your
18 Honor, it is. This statutory section 62-5-500, at
19 definition 4, "Health care power of attorney and some
20 quotes means a durable power of attorney executing
21 importance with this part."

22 And the thing about that is and the reason I got in
23 the idea that the springing nature of it, it actually is
24 -- it could only have any affect if it's a durable power
25 of attorney meaning that it survives her incompetency

1 because that's when it becomes effective. I mean, you
2 know, and again, the document itself also says this.

3 I point to paragraph 2 or section 2, "Effective Date
4 And Durability. By this document I intend to create a
5 durable power of attorney effective upon, and only
6 during, any period of mental incompetence."

7 And again, as far as whether an issue of her
8 incompetence and I think counsel mentioned that the
9 document in the record would attest to her incompetence
10 references the Adult Health Care Consent Act which is
11 true. The -- it's exactly what the health care power of
12 attorney statute says you should do, 62-5-502(c), "To
13 the extent not inconsistent with this part, the
14 provisions of the Adult Health Care Consent Act apply to
15 the making of decisions by a health care agent and the
16 implementation of those decisions." So that's exactly
17 in line with it.

18 And, again, Your Honor, we're not talking about what
19 is health care in the colloquial sense. You know, today
20 this is health care and it doesn't have anything to do
21 with legal rights. And I can understand that. But it's
22 -- the legal analysis is respectfully, Your Honor, is
23 deeper and it actually looks to the language of the
24 document.

25 And two final points, Your Honor. There is a case

1 we cite, I think it's Exhibit Seven. It's definitely
2 one of our exhibits, it's called Arredondo, Court of
3 Appeals case from last year. It's an unpublished
4 decision, so we're not citing it as precedent per se,
5 but we do think it certainly can be instructive to the
6 court just like an amateur article, for instance, could
7 be. It flat out says that the statutory health care
8 power of attorney is not limited to health care
9 decisions.

10 It also authorizes in this case the person's name
11 was Arredondo to pursue legal action and grant a waiver
12 required thusly hold the powers of attorney authorized
13 to waive a jury trial right and execute any agreements
14 like this one. It's on point, but it's unpublished.

15 And so, again, while I would not cite that to you as
16 precedent, I think the analysis is fair game and the
17 analysis comes out exactly the way we have argued this.

18 And on the point about the illegible signature. The
19 health care power of attorney statute also indicates
20 that the agent can also attest to the -- to attest to
21 the incapacity which in this case Ms. Nunnally has done
22 by signing indicating that she was -- she had the power
23 under a power of attorney to do that.

24 Also, if there is some point that would be cleared
25 up by discovery on that narrow point, we'd argue that

1 that's the hang up with the decision and we respectfully
2 would ask that we be able to get to the bottom of that
3 if that's a material point. I don't think that it is
4 respectfully.

5 But, Your Honor, thank you very much for bearing
6 with me both as to you getting started and then also on
7 the length of the argument. I very much appreciate it
8 and I will stand down.

9 MS. FICKLING: And, Your Honor, I'm so sorry. I
10 know we're way out of time, but just briefly. As to the
11 Arredondo case, which I know they're not citing for
12 precedent, it did involve two separate powers of
13 attorney, a general and a health care. And that's the
14 last thing I'll say.

15 THE COURT: All right. Thank you, Counsel. I'll
16 take a look at your memorandum along with the pleadings
17 and I'll notify you of an opinion. Y'all have a good
18 day.

19 MS. FICKLING: Thank you, Your Honor.

20 MR. HINES: You too, Your Honor. Thank you.

21 - - -END OF REQUESTED TRANSCRIPT OF RECORD- - -
22
23
24
25

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)

COUNTY OF CALHOUN)

I, KATHERINE A. SPIRES, Registered Professional Reporter for the First Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Calhoun County, South Carolina, on the 12th of August, 2020.

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

July 12, 2021

Katherine A. Spires

Katherine A. Spires

Registered Professional Reporter

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CALHOUN	)	
	)	
JEFFREY WHITE, INDIVIDUALLY	)	
and as PERSONAL REPRESENTATIVE)	)	
of the ESTATE of LIZZIE WHITE)	)	
PLAINTIFF ,)	)	
vs.	)	TRANSCRIPT OF RECORD
	)	2019-CP-09-0220
ST. MATTHEWS HEALTHCARE, LLC,	)	
d/b/a CALHOUN CONVALESCENT	)	
CENTER	)	
DEFENDANT .)	)	

FEBRUARY 10, 2021
HEARD VIRTUALLY
FROM CALHOUN COUNTY

B E F O R E:

THE HONORABLE MAITE MURPHY, JUDGE

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

JESSICA L. FICKLING, ESQUIRE
ATTORNEY FOR THE PLAINTIFF

KATE METTLER, ESQUIRE
ATTORNEY FOR THE DEFENDANT

SANYA L. KAISER
COURT REPORTER

I N D E X O F W I T N E S S E S

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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STATEMENTS MADE,
 BY MS. FICKLING 3, 14
 BY MS. METTLER 10, 15

ORDER OF THE COURT 16

CERTIFICATE OF REPORTER 17

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
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(THERE WERE NO EXHIBITS TENDERED.)

1 THE COURT: This morning we have the motion to
2 reconsider from Ms. Fickling.

3 Are you ready to proceed, ma'am?

4 MS. FICKLING: Good morning, Your Honor and may
5 it please the Court. My name is Jessica Fickling
6 and as you indicated, this is my motion to
7 reconsider the order of the court compelling
8 arbitration in this matter. And I'll try to be
9 brief here because obviously the parties have argued
10 this extensively before Your Honor and I know that
11 you have got a wealth of information from both sides
12 about this case to the extent we have it.

13 Our argument today essentially boils down to
14 the fact that there was not sufficient information
15 in the record here in order to establish that a
16 contract for arbitration existed, an enforceable
17 contract for arbitration. Obviously, there is a
18 body of case law in South Carolina that prefers
19 arbitration where an enforceable agreement is found
20 to exist. But that fundamental first step is on the
21 defendants to demonstrate where they are asking to
22 compel arbitration.

23 In this case we have an arbitration provision
24 that was not signed by the resident, but instead by
25 a family member of the resident. And so the

1 defendants are reliant upon an argument of agency in
2 order to confer that authority to enter into the
3 agreement. And our argument, Your Honor, is simply
4 that there is no information here from which the
5 court can make that agency determination.

6 And specifically the defendants point to two
7 different things. First, they point to a health
8 care power of attorney. But as our courts in South
9 Carolina have determined, a health care power of
10 attorney is not the equivalent of a durable power of
11 attorney. They are two different things and they
12 confer different types of agency, one of which is to
13 make health care decisions. But the right to enter
14 into contracts and the right to waive fundamental
15 rights frankly has never been found to be
16 encompassed within that health care power of
17 attorney.

18 The second argument that the defendants have
19 made is related to a physician certification. And
20 this to us, Your Honor, is one of the biggest issues
21 presented in this case is the finding that a
22 physician certification that a person is unable to
23 make a health care decision where health care is
24 expressly defined, might in some way be an
25 equivalent for a competency determination that would

1 be done judicially. And that has a major
2 implication for the person against whom it is made.

3 Obviously, in this case Lizzie White has passed
4 but in the event that she had not passed, a
5 competency determination by a court would have
6 divested her of the ability to make financial
7 decisions, would have divested her of substantial
8 independence and that's never what this physician
9 certification was intended to do. Rather, it was
10 intended for the facility purposes to say that the
11 facility doctors could make decisions for Mrs. White
12 related to her health care.

13 There were also some issues that we brought up
14 during the initial hearing factually about the
15 signing of that physician certification. Those
16 factual issues have not been evaluated because we
17 don't have a record in this case. That happens a
18 lot with arbitration. And through no fault of the
19 parties here, we don't have the discovery available.

20 But the physician certification itself is not
21 an equivalency for a competency determination. And
22 to the extent that the defendants here are saying it
23 is, it can serve to spring a durable power of
24 attorney. We don't think that there is any
25 precedent to establish that and it is concerning

1 that that would strip a person of very essential
2 rights without the full benefit of a competency
3 hearing that you would ordinarily see.

4 So, Your Honor, in our viewpoint there is just
5 no evidence here that the defendants have presented.
6 And again, they are the party hoping to enforce this
7 contract and thus, they have to demonstrate an
8 enforceable contract exists. We don't have a
9 signature from the resident and the signature from
10 the party we do have doesn't have, in our view,
11 adequate support behind it to determine or to make
12 the representation of agency that the defendants
13 would like this court to make.

14 Our second argument, Your Honor, with respect
15 to the order that was entered has to do with merger.
16 And so the order indicates that there was a merger
17 between the facility admission agreement and the
18 arbitration agreement. They are two separate
19 agreements. The defendants did acknowledge that the
20 facility admission agreement or that the arbitration
21 agreement rather was not a caveat or a condition of
22 entering into the facility.

23 There are separate pagination on the facility
24 admission agreement. There is a clause in the
25 facility admission agreement essentially saying here

1 is the sum total of what the parties understand. So
2 they are two separate agreements and our case law
3 seems to support that when you have got these
4 factors, which we have got in this case, those
5 agreements don't merge. We don't have, again, any
6 factual record of intention of the parties that they
7 should merge.

8 There are some findings of fact in the order
9 but there has been no record established in this
10 case, which is another one of the things that we
11 have brought up in our motion for reconsideration
12 and that relates first to equitable estoppel.
13 Equitable estoppel is a fact-intensive inquiry. It
14 requires there to be information about the
15 communications and representations between the
16 parties. And in this case again, we don't have any
17 of those things.

18 Through no fault of the parties there's not
19 been discovery in this case. And without discovery,
20 without the ability to understand the intentions of
21 the individuals involved, you know, for example,
22 Your Honor, we don't even know who was fully present
23 at the admission. We don't know about the admission
24 process. We don't know about the physician
25 certifications. We don't have affidavits. We

1 haven't had the ability to talk to those doctors.

2 So for a fact-intensive inquiry like equitable
3 estoppel to have been resolved at this point without
4 a factual record in support of it, that's why we
5 think that the court should reconsider its order
6 related to the equitable estoppel portion.

7 Finally, Your Honor, and again, I promise I'm
8 almost done. I don't want to take up too much of
9 your time. But there are some determinations about
10 the conduct of the parties in the record. And we
11 simply don't have the information to make those
12 factual evaluations. Jeffrey White is the proposed
13 personal representative here or the personal
14 representative here.

15 He was not the person who signed the
16 arbitration agreement and we don't have any
17 information about his conduct in relation to this
18 case. So to the extent that there are conclusions
19 that Mr. White took advantage of the admission
20 agreement or that he in some way was -- that his
21 intentions can be determined at this point, simply
22 isn't supported in the record.

23 Lastly, Your Honor, the order itself cites
24 heavily to a number of circuit court memorandum
25 opinions and to some unpublished opinions. And our

1 South Carolina precedent seems to indicate that
2 that's not necessarily a proper thing for an order
3 to rely upon. That rather, the order should rely
4 upon published opinions and precedent. And the
5 order in this case disposes of those precedential
6 opinions in a footnote without making a distinction
7 or without providing a framework for which we can
8 understand the distinction between our case and
9 those precedential opinions.

10 And we think that that's problematic for a
11 couple of different reasons. But as an example,
12 when it comes to memorandum opinions issued by
13 circuit courts, a lot of times there are things that
14 happen after the opinions themselves are issued.
15 With respect to this case, after the order was
16 issued I filed for motion for reconsideration but
17 this order has already been cited in another case in
18 support of an arbitration agreement. And we just
19 don't know the conclusion which is, I think, one of
20 the issues that we have when it comes to certain
21 memorandum opinions being cited is that there can be
22 a lot of things that occur after an order is entered
23 all the way up to the Supreme Court that may change
24 the outcome of that order.

25 And so, Your Honor, in sum, from our

1 perspective there is no information to establish
2 agency here. There is no merger between these
3 documents. There is not a factual record to support
4 equitable estoppel and there is not a factual record
5 to support conclusions of fact related to the
6 intentions of the parties. And there was some
7 reliance on unpublished or memorandum opinions that
8 we think is probably not proper.

9 And so respectfully, Your Honor, we would ask
10 for the court to look at those issues, to modify the
11 order and to reconsider the ultimate conclusion
12 compelling arbitration in this case.

13 THE COURT: Thank you, ma'am.

14 Response?

15 MS. METTLER: Yes, Your Honor. This is Kate
16 Mettler on behalf of the defendant. I will keep it
17 brief. It is a little difficult to split up the
18 various arguments that Ms. Fickling has made as new
19 arguments or old arguments but I would submit to the
20 court there are a number of issues she's raised that
21 are untimely in their issues.

22 As to her first point in terms of the validity
23 of the authority of Darlene Nunley, Mrs. White's
24 daughter, there is a valid health care power of
25 attorney which comports with the prescribed form in

1 the statute at South Carolina code section 62-5-504.
2 We refer again as we have previously to section
3 62-5-502 and specifically subsections a, c and d,
4 which expressly provide that physician
5 certifications that are made under the Adult Health
6 Care Consent Act pursuant to section 44-66-20,
7 subsection 8, that that is a valid determination of
8 incapacity.

9 That section also expressly states that health
10 care powers of attorney which substantially comport
11 with the statutorily prescribed form that those are
12 durable powers of attorney. It says it right in the
13 statute and that this is the mode for determining
14 when that durability springs into action.

15 So the arguments in Ms. Fickling's or
16 plaintiff's motion to reconsider about the scope of
17 the physician certification defines what it was
18 intended to do, the statute determines the mode for
19 determination of incapacity and what we are relying
20 upon is permitted under the statute. So we feel
21 like we have a completely valid determination of
22 incapacity which triggered Ms. Nunley's authority
23 under the power of attorney.

24 Second of all, the health care power of
25 attorney, the powers that are provided in the health

1 care power of attorney are what govern. The
2 statute, I think, plaintiff has conflated that
3 health care decisions only are committed under a
4 health care power of attorney. That's not what the
5 statute provides. It is not what existing case law
6 provides. And on the terms and the face of the
7 contract the power of attorney that's not what it
8 provides.

9 Second, on the issue of merger, we have already
10 gone through this. I think Your Honor has obviously
11 considered things carefully. We refer to our
12 initial briefing but I would also submit that the
13 whole concept of merger is that there's two distinct
14 provisions. Otherwise, they wouldn't require
15 merging. So while there are factors which are
16 considered prior to the application of the document
17 merger, it presupposes two distinct provisions by
18 its nature.

19 The case law that plaintiff relies upon and
20 relied upon really initially in the case of Coleman,
21 that deals in the spirit of the Adult Health Care
22 Consent Act. That is not the issue that we have
23 here. We have express authority under the health
24 care power of attorney. It is a completely distinct
25 source of authority from the Adult Health Care

1 Consent Act.

2 Finally, in terms of plaintiff's contentions,
3 actually two other things, two arguments. But the
4 third would be plaintiff's contention that there are
5 findings of fact. Again, I think that's a
6 conflation of by legal operation when a valid
7 contract is found contracts express a party's
8 intention.

9 So any statements that what plaintiff intended
10 or plaintiff's power of attorney intended, that can
11 be presumed once a valid contract is found. It is
12 by operation of legal principle and not a real
13 finding of fact. So I think that that's an
14 overstatement there. And I think that the court's
15 findings in the order are appropriate based on
16 operations of contract principles and what contracts
17 stand for.

18 Finally, in terms of the citations to the
19 orders, we're only as good as the information we
20 currently have, whether that's what we submit to the
21 court or what's then relied upon, what the court
22 relies upon in its findings. Certainly plaintiff
23 cannot be contending that we only rely upon orders
24 that have gone up to the Supreme Court or whatnot.
25 So I submitted an order to the court based on my

1 briefing which was consistent with the court's
2 request and I think all the cited orders of which
3 there are a lot in support of this arbitration
4 agreement being a valid, validly covering the types
5 of disputes that we have here and that's what it is
6 cited for as well as authority, that those are
7 perfectly permissible.

8 Other than that, I just refer to our prior
9 briefing and I don't think that any of the new
10 issues Ms. Fickling has raised are appropriate for
11 the court's consideration and all issues are
12 addressed by this oral argument and that briefing.
13 Thank you.

14 THE COURT: Thank you, counsel.

15 Any response, Ms. Fickling?

16 MS. FICKLING: Briefly, Your Honor. Again, I
17 go back to the fact that with respect to the
18 physician certification, the certification itself
19 cites exclusively to the Adult Health Care Consent
20 Act. It does not cite to the probate code as
21 counsel for defendant has referenced today. Those
22 are different statutory provisions.

23 But furthermore, and as we brought up in oral
24 argument initially, there are factual disputes as to
25 the signatures associated with that physician

1 certification. And those factual disputes, we
2 think, preclude it from rendering a decision. We
3 also think that that document has an intention
4 expressed in it about what decisions it encompasses
5 and it does not encompass decisions related to
6 waiving fundamental rights.

7 Finally, Your Honor, there are some
8 inconsistencies in a conclusion that and I hear what
9 counsel for defendant is saying with respect to when
10 a valid contract is found intention can be presumed.
11 But in this case, we are presuming that the contract
12 is valid because Mrs. White was incapacitated. And
13 again, that would require a finding of incapacity
14 that isn't supported by the record.

15 So I won't belabor the point, Your Honor, but
16 if you have any questions, I'll be happy to answer
17 those. And we also refer back to our initial
18 briefing. We think that the issues raised today
19 were all either raised in the briefing or raised in
20 our argument the first time.

21 Thank you, Your Honor.

22 MS. METTLER: Your Honor, may I reply briefly?

23 THE COURT: Sure.

24 MS. METTLER: Just in terms of the factual
25 information that Ms. Fickling contends is not known,

1 I would with reference to South Carolina's Notice of
2 Intent statute and the supreme powers and the
3 discovery powers that were vested in plaintiff at
4 that point in time. They certainly could have
5 discovered or sought to find other information about
6 this physician certification. There is nothing on
7 the face which should undermine the credibility of
8 the physicians. The plaintiff did not conduct that
9 discovery as permitted under the NOI statute. They
10 should be, you know, unfortunately that's an
11 untimely contention.

12 In addition, I refer back to 62-5-502 where
13 physician certifications exactly like this are
14 permitted for determination of incapacity. Thank
15 you.

16 THE COURT: Thank you, ladies. I'll take the
17 matter under advisement and notify you of an
18 opinion.

19 MS. FICKLING: Thank you, Your Honor.

20 THE COURT: Have a good day.

21 MS. FICKLING: You too.
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24
25

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF CALHOUN)

I, Sanya L. Kaiser, Official Court Reporter for the 11th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, Court of Common Pleas for Calhoun County, South Carolina, on the 10th day of February, 2021.

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

October 14, 2021



Sanya L. Kaiser, Court Reporter

My Commission Expires: 9-5-2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CALHOUN	)	FIRST JUDICIAL CIRCUIT
	)	
JEFFERY WHITE, INDIVIDUALLY	)	CASE NO. 2019-CP-09-00220
AND AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF LIZZIE WHITE,	)	
	)	
PLAINTIFF,	)	DEFENDANT ST. MATTHEWS
	)	HEALTHCARE, LLC D/B/A CALHOUN
vs.	)	CONVALESCENT CENTER'S MOTION
	)	TO DISMISS PLAINTIFF'S COMPLAINT,
ST. MATTHEWS HEALTHCARE, LLC	)	COMPEL ARBITRATION AND STAY
D/B/A CALHOUN CONVALESCENT	)	STATE COURT PROCEEDINGS
CENTER,	)	
	)	
DEFENDANTS.	)	
	)	

TO: JESSICA L. FICKLING, ESQ., ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that Defendant St. Matthews Healthcare, LLC d/b/a Calhoun Convalescent Center (hereinafter referred to as "Defendant" or the "Facility"), by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure and compelling this matter to arbitration, or, alternatively, staying the action pending arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.

Plaintiff has sued Defendant for negligence and/or gross negligence, negligence per se, vicarious liability, corporate negligence, and wrongful death related to his mother's residency at the Facility. However, prior to being admitted to the Facility, Plaintiff's mother, Lizzie White, entered into an arbitration agreement with the Facility. (See **Exhibit A** - Arbitration Agreement). The Arbitration Agreement was signed on behalf of Lizzie White by her daughter, Darlene

Nunnally. *See* Ex. A. Darlene Nunnally identified herself as Lizzie White’s “Durable Power of Attorney for Health Care/Legal Guardian/Responsible Party” in the Arbitration Agreement. *Id.* Additionally, prior to the Arbitration Agreement being signed, Lizzie White designated Darlene Nunnally as her power of attorney, and Darlene Nunnally had full authority to enter into the binding Arbitration Agreement on behalf of Lizzie White. (See **Exhibit B** - Power of Attorney).

The parties to the Arbitration Agreement agreed that the South Carolina Uniform Arbitration Act would not apply; rather, arbitration would be governed by the Federal Arbitration Act (“FAA”), because the services and reimbursement thereof to be provided to the Plaintiff upon his admission to the facility involved interstate commerce. *See* 9 U.S.C. §§1 et seq. In accordance with the terms of the parties’ agreement, the Defendant respectfully requests that this matter be compelled to arbitration.

Alternatively, this Defendant requests that these proceedings be stayed pending the outcome of arbitration pursuant to Section 3 of the FAA. Defendant respectfully requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any other motions or discovery filed or served by Plaintiff while the current motion is pending.

This Motion and Petition are supported by the attached Arbitration Agreement, the attached Power of Attorney, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Kate C. Mettler

T. Ashton Phillips, III

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Attorneys for the Defendant St. Matthews

Healthcare, LLC d/b/a Calhoun Convalescent Center

Charleston, South Carolina

Dated: June 17, 2020

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

This Agreement is made between CALHOUN CONVALESCENT CTR. ("Facility"), its agents, employees and servants, and Lizzie White ("Resident") or Darlene Nunnally ("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.

Darlene Nunnally 6/3/17
Resident/Representative Signature Date
Deana Watkins 6/3/17
Authorized Agent of Facility Date

Darlene Nunnally
Printed Name of Resident/Representative
DEANA WATKINS - ADMISSIONS DIRECTOR
Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

SOUTH CAROLINA HEALTH CARE POWER OF ATTORNEY

1. DESIGNATION OF HEALTH CARE AGENT

I, Lizzie White, hereby appoint:
(Principal)

(Agent's Name) Darlene Nunnally

(Agent's Address) REDACTED

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 successors to my agent, each to act alone and successively, in the order named:

a. First Alternate Agent: Jeffery A. White
REDACTED

Address: REDACTED

Telephone: home: REDACTED work: REDACTED mobile: REDACTED

b. Second Alternate Agent: Evelyn White Turner
REDACTED

Address: REDACTED

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.

2. 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.

3. 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 Information 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.

4. 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 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:

5. ORGAN DONATION (INITIAL ONLY ONE)

My agent may ____; may not X consent to the donation of all or any of my tissue or organs for purposes of transplantation.

6. 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.

7. 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)

(1) ☒ 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

(2) ☐ 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

(3) ☐ 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.

8. 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 Item 7, (INITIAL ONLY ONE OF THE FOLLOWING THREE PARAGRAPHS):

(a) ☒ 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

(b) ☐ DIRECTIVE TO WITHHOLD OR WITHDRAW TUBE FEEDING. I do not want my life prolonged by tube feeding.

OR

(c) ☐ 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 STATEMENTS IN ITEM 8, YOUR AGENT WILL NOT

HAVE AUTHORITY TO DIRECT THAT NUTRITION AND HYDRATION NECESSARY FOR COMFORT CARE OR ALLEVIATION OF PAIN BE WITHDRAWN.

9. ADMINISTRATIVE PROVISIONS

A. I revoke any prior Health Care Power of Attorney and any provisions relating to health care of any other prior power of attorney.

B. This power of attorney is intended to be valid in any jurisdiction in which it is presented.

BY SIGNING HERE I INDICATE THAT I UNDERSTAND THE CONTENTS OF THIS DOCUMENT AND THE EFFECT OF THIS GRANT OF POWERS TO MY AGENT.

I sign my name to this Health Care Power of Attorney on

this 29th day of April, 20 17. My current home address is:
REDACTED

Principal's Signature: [Signature]

Print Name of Principal: Lizzie Lee White

I declare, on the basis of information and belief, that the person who signed or acknowledged this document (the principal) is personally known to me, that he/she signed or acknowledged this Health Care Power of Attorney in my presence, and that he/she appears to be of sound mind and under no duress, fraud, or undue influence. I am not related to the principal by blood, marriage, or adoption, either as a spouse, a lineal ancestor, descendant of the parents of the principal, or spouse of any of them. I am not directly financially responsible for the principal's medical care. I am not entitled to any portion of the principal's estate upon his decease, whether under any will or as an heir by intestate succession, nor am I the beneficiary of an insurance policy on the principal's life, nor do I have a claim against the principal's estate as of this time. I am not the principal's attending physician, nor an employee of the attending physician. No more than one witness is an employee of a health facility in which the principal is a patient. I am not appointed as Health Care Agent or Successor Health Care Agent by this document.

Witness No. 1

Signature: [Signature]

Date: 4/29/17

Print Name: Rebecca Davis

Telephone: REDACTED

Address: REDACTED

Witness No. 2

Signature: [Signature]

Date: 04/29/17

Print Name: Incentlee B. Lemon

Telephone: REDACTED

Address: REDACTED

(This portion of the document is optional and is not required to create a valid health care power of attorney.)

STATE OF SOUTH CAROLINA

COUNTY OF Berkeley

The foregoing instrument was acknowledged before me by Principal on April 29,
20 17.

Notary Public for South Carolina Evelyn B. Pringle

My Commission Expires: _____

EVELYN B. PRINGLE
Notary Public, State of South Carolina
My Commission Expires 1/20/2026

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
COUNTY OF CALHOUN	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	Civil Action No.: 2019-CP-09-00220
Jeffery White, individually and as	)	
Personal Representative of the Estate of	)	
Lizzie White,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
St. Matthews Healthcare, LLC, d/b/a	)	
Calhoun Convalescent Center,	)	
	)	
Defendant.	)	
	)	

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANT’S MOTION TO
DISMISS AND/OR TO STAY AND COMPEL ARBITRATION**

Plaintiff, Jeffery White, individually and as the Personal Representative of the Estate of Lizzie White, files this Memorandum in Opposition to the Motion to Dismiss and/or Compel Arbitration filed by Defendant St. Matthews Healthcare d/b/a Calhoun Convalescent Center (“Defendant,” “Defendant CCC”), and would demonstrate that because Defendant has failed to provide evidence of an enforceable arbitration agreement, Defendant’s Motion must be denied. As Defendant has filed nothing at this time in support of its Motion, Plaintiff expressly reserves the right to supplement and/or modify this memorandum.

BACKGROUND

This matter arises out of the death of Ms. Lizzie White on March 6, 2018. (*See Exhibit 1*, Filed Complaint, C/A No. 2019-CP-09-00220, Dec. 16, 2019, ¶ 39). On her death certificate, Ms. White’s primary cause of death was sepsis. (*Id.*) At the time of her death, she was also suffering from an unstageable sacral pressure ulcer. (*Id.* at ¶ 36). Ms. White was admitted to Defendant’s

facility on June 1, 2017¹ and remained there until her discharge on 29, 2018. (*Id.* at ¶¶ 34-37). Ms. White's daughter, Mildred Scott, initially consented to Ms. White's admission to Defendant's facility. (See **Exhibit 2**, at PLTMEMO_000004).

As set forth in the Complaint, at the time she entered Defendant's facility in June of 2017, Ms. White's sacral skin was intact. (*Id.* at ¶ 34). However, at the time of her discharge from Defendant's facility in January of 2018, Ms. White had developed a sacral pressure injury the size of a small dinner, which required surgical debridement. (*Id.* at ¶¶ 36-39). Ms. White ultimately died due to complications from her wounds. (*Id.*).

Plaintiff served initial discovery in this case on February 19, 2020. On February 20, 2020, Defendant filed a Motion to Compel Arbitration, which Defendant later withdrew by consent of the parties, and without prejudice to Defendant. After Plaintiff inquired as to Defendant's outstanding discovery responses, Defendant renewed its Motion. (See Defendant's Motion to Compel Arbitration, C/A. No. 2019-CP-09-00220, filed Jun. 17, 2020).

In its Motion, Defendant argues that an agreement signed by Ms. White's daughter, Darlene Nunnely,² should preclude a jury from deciding Ms. White's case. (*Id.* at p. 2-3). Defendant attached two (2) documents to its Motion. First, Defendant Attached an Arbitration Agreement executed by Ms. Nunnely, on June 3, 2017, two (2) days after Ms. White's admission. The third paragraph of the agreement expressly references the "Facility's Admission Agreement," which is a separate document from the Arbitration Agreement. The Defendant did not provide a

¹ See **Exhibit 2**, Excerpt of Patient Chart, PLTMEMO_000002 (filed under seal).

² Ms. White was the mother of seven children, and lived with a number of her children periodically in the years leading up to her admission to Defendant's facility. While her children have been highly involved in their mother's care, none have ever had a durable power-of-attorney, and at no point has any probate court or other court of competent jurisdiction found Ms. White mentally incapacitated.

copy of the Facility Admission Agreement to this Court, nor has the Defendant ever provided a copy of this Agreement to Plaintiff despite Plaintiff's pre-suit request for Ms. White's entire chart. Regardless, the right corner of the Arbitration Agreement is numbered "Page 1 of 1", and nothing in the Agreement indicates its completion is a pre-requisite for the provision of healthcare. The Agreement purports to bind "the Resident as well as the Representative," but does not seek to expand the scope of its reach to heirs, successors, assigns or the Estate.

In addition to the Arbitration Agreement, Defendant attached a copy of a Health Care Power of Attorney executed by Ms. White on April 29, 2017, which granted, in succession, Darlene Nunnally, Jeffery White, and Evelyn White Turner, the ability to make health care decisions on Ms. White's behalf. (*See Id.* at Exhibit B). Contrary to Defendant's statement in its motion that, by this document, "Lizzie White designated [her daughter] as her power of attorney and [her daughter] had full authority to enter into the binding arbitration agreement," the Health Care Power of Attorney was not a Durable Power of Attorney. Rather, the document is labeled "South Carolina Health Care Power of Attorney." This document granted the health care agent only the authority "to make decisions for me regarding my health care." (*Id.* at Exhibit B, ¶ 4). The document expressly provides that a durable power of attorney is created "upon, and only during, any period of mental incompetence, except as provided in Paragraph 3 below³." (*See Id.* at Exhibit B, ¶ 2). Defendant has provided no further evidence that Ms. White was officially deemed incapacitated prior to execution of the Arbitration Agreement.

³ Paragraph 3 of the Health Care Power of Attorney merely authorized disclosure of health care related documents to the signor's "health care agent(s)." (*See Motion to Compel Arbitration, Exhibit B, ¶ 3*).

Ms. Nunnelly was not designated as the personal representative of Ms. White's estate, and did not initiate this case. Though this case has been pending since December of 2019, Defendant has failed to provide any substantive information surrounding the circumstances of Ms. White's admission on June 1, 2017, or Ms. Nunnelly's execution of the arbitration agreement two (2) days later. Accordingly, the only evidence Defendant has provided of Ms. Nunnelly's authority indicates limited authority to make health care decisions.

Now, based upon Defendant's failure to provide any evidence that Ms. White intended to waive her right to a jury trial, Defendant's Motion to Compel Arbitration must be denied.

STANDARD OF REVIEW

Whether a non-signatory may be bound by an arbitration agreement is a question of law reviewed by the appellate courts *de novo*. *Weaver v. Brookdale Senior Living, Inc.*, Appellate Case No. 2017-002241, 2020 WL 4342679 (Ct.App. July 29, 2020) (unreported opinion) (attached as **Exhibit 3**); *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019). The trial court's well-founded factual findings will not be disturbed, however, where reasonably supported by the record. *Weaver*, 2020 WL 4342679 at *1 (citing *Wilson, supra*).

ANALYSIS

I. There is no Presumption in Favor of Arbitration in the Absence of an Enforceable Arbitration Agreement

The question of arbitrability of a claim is usually an issue for judicial determination, unless the parties submit otherwise. *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 553 S.E.2d 110 (2001); *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 649, 106 S.Ct. 1415, 1419 89 L.E.2d 648 (1986); *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422

S.C. 544, 554, 813 S.E.2d 292, 297 (Ct.App. 2018)⁴. “Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.” *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

A party moving to compel arbitration must demonstrate first that a valid arbitration agreement exists. *Weaver*, 2020 WL 4342679 at *1; *Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 644 S.E.2d 705 (2007); *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (Ct.App. 2008). While there is a presumption in favor of arbitration, “it does not apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement.” *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173; *EEOC v. Waffle House*, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.E.2d 755 (2014); *see Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.E.2d 488 (1989) (“[W]e have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so”).

Whether a valid contract binding on a non-signatory exists is decided under principles of South Carolina law. *Wilson*, 426 S.C. at 338, 827 S.E.2d at 174. “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.” *Id.*, 426 S.C. at 338-39, 827 S.E.2d at 174 (citing *Malloy v. Thompson*, 409 S.C. 557, 561-62, 762 S.E.2d 690, 692 (2014)). As set forth below, none of the theories recognized as binding nonsignatories applies in this case.

II. Defendant has Failed to Demonstrate Decedent’s Daughter was Authorized to waive Decedent’s Right to a Jury Trial

⁴ Included as **Exhibit 4**.

Defendant alleges that the Health Care Power of Attorney executed by Lizzie White should satisfy this Court that Lizzie White intended to waive her right to a jury trial. Not only have Courts in South Carolina held health care powers of attorney are limited to health care decisions, the record in this case is silent as to any other authority Ms. White vested in her children.

a. Defendant has Failed to Introduce any Evidence of Apparent Authority

“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.” *Hodge*, 422 S.C. at 564, 813 S.E.2d at 303 (quoting *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct.App. 2013)); *see also 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) (“Agency is a fiduciary relationship which results from the manifestation of consent by one person to another to be subject to the control of the other and to act on his behalf”). The party asserting agency must prove “the existence of the agency, and the agency must be clearly established by the facts.” *Hodge, supra. McCall v. Finley*, 294 S.C. 1, 6, 362 S.E.2d 26, 29 (Ct.App. 1987); *see also Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct.App. 2005) (“The test to determine agency is whether or not the purported principal has the *right to control* the conduct of the alleged agent”).

In addition, “[t]he existence of an agency relationship is...determined by the relation, the situation, the conduct, and the declarations of the party sought to be charged as principal.” *Langdale v. Carpets*, 395 S.C. 194, 201, 717 S.E.2d 80, 83 (Ct.App. 2011). Thus, a principal will only be bound by the acts of his agent acting within the agent’s scope. *Bankers Trust of South Carolina v. Bruce*, 283 S.C. 408, 323 S.E.2d 523 (Ct.App. 1984). *See Moore v. Pilot Life Insurance Company*, 205 S.C. 474, 32 S.E.2d 757, 762 (1945) (the principal is bound only by those acts

within the agent's actual or apparent authority). "Agency may not be established solely by the declarations and conduct of the alleged agent." *Estate of Barbara Owens v. THI of South Carolina, et al*, C/A No. 2018-CP-42-03477, Order Denying Motion to Compel Arbitration (attached as **Exhibit 5**) (citing *Cowburn*, 366 S.C. at 39, 619 S.E.2d at 448 (Ct.App. 2005)). Moreover, "[a] party dealing with an agent has a duty to use due care to ascertain the scope of the agent's authority to act." *Estate of Owens*, at p. 5 of 13 (citing *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct.App. 1996)).

Here, the only evidence Defendant provided was a Health Care Power of Attorney signed by Ms. White in April of 2017, which authorized "health care decisions." The document expressly sets forth the powers of the Agent(s), and further decrees that the document is not intended to be durable unless Ms. White is deemed mentally incapacitated.⁵ The four corners of the Health Care Power of Attorney do not grant the Health Care Agent the right to waive a jury trial.

Defendant has not suggested Ms. White was unable to understand or appreciate the Arbitration Agreement in this case. In fact, Defendant has provided no evidence to this Court indicating Ms. White intended to expand the powers listed in the Health Care Power of Attorney, or that any court of competent jurisdiction deemed Ms. White incompetent. Defendant has further failed to produce any information about the facts and circumstances of Ms. White's admission on June 1, 2017, or the subsequent execution of the Arbitration Agreement on June 3, 2017 – by two separate people, neither of whom initiated this action. The record is therefore silent on the scope

⁵ S.C. Code Ann. § 62-5-101, *et seq.*, governs the protection of persons under disability, and provides the procedure for a finding of incapacity and appointment of a guardian or conservator. Defendant has provided no information of a probate court deeming Ms. White incapacitated as would trigger the durable power of attorney, and, to the best of Plaintiff's knowledge, none exists. Accordingly, there is no finding of incapacity for Ms. White that would allow her designated health care agents to make any decisions beyond the clearly identified scope set forth in the Health Care Power of Attorney.

of additional authority Ms. White vested in her children, beyond the four-corners of the health-care power of attorney.

b. A Health-Care Power of Attorney is Insufficient to Waive the Right to a Jury Trial

In *Hodge v. UniHealth Post-Acute Care*, the South Carolina Court of Appeals affirmed the circuit court's denial of the defendant's motion to compel arbitration, concluding the defendant failed to demonstrate the purported agent was authorized to waive the decedent's right to a jury trial. *Hodge*, 422 S.C. at 566, 813 S.E.2d at 304. In *Hodge*, the estate of the decedent alleged she passed away as a direct and proximate result of care (or lack thereof) she received from the defendant's skilled nursing facility. *Id.*, 422 S.C. at 553, 813 S.E.2d at 297. According to the record, upon entry into the defendant's facility, the decedent's husband executed two (2) documents: a facility admission agreement, and an arbitration agreement. *Id.* Following the decedent's death, the facility sought to enforce the arbitration agreement. *Id.*

Relying upon *Dickerson v. Longoria*, 414 Md. 419, 995 A.2d 721 (2010), the circuit court in *Hodge* denied the defendant facility's Motion to Compel Arbitration. *Id.* The court determined the facility failed to demonstrate the husband had authority to enter into an arbitration agreement waiving his wife's right to a jury trial. *Id.*, 422 S.C. at 566, 813 S.E.2d at 304.

In *Dickerson*, the Maryland Court of Appeals declined to enforce an arbitration agreement signed by the decedent's health care power of attorney. *Id.*, 995 A.2d at 456. In an issue of first impression, the Court of Appeals noted:

Although we have never addressed this issue, other courts have drawn a distinction between a health care decision and a decision to sign an arbitration agreement, even where the arbitration agreement is related to a health care decision. In several cases involving health care facilities, the intermediate appellate courts in Colorado, Florida, Georgia, and Texas have concluded that the authority to make health care decisions on another's behalf does not constitute authority to sign an arbitration agreement on that person's behalf.

Id. 995 A.2d at 739 (citing *Lujan v. Life Care Ctrs. of Am.*, 222 P.3d 970, 973-76) (Colo.Ct.App. 2009)). *See also Life Care Cntrs. of Am. v. Smith*, 298 Ga.App. 739, 681 S.E.2d 182, 185 (Ga. Ct.App. 2009) (finding that a “health care power of attorney did not give [a daughter] the power to sign away her mother’s or her mother’s legal representative’s right to a trial by jury…”).

The *Dickerson* court concluded that the limited range of authority granted through the health care power of attorney did not include a decision to waive a trial by jury. *Id.*, 995 A.2d at 456. The *Dickerson* court joined a number of other jurisdictions who concluded that the decision to sign an arbitration agreement was distinct from a health care decision, particularly where separate agreements governed entrance into a facility and the arbitration of disputes. *See Koricic v. Beverly Enterprises-Nebraska, Inc.*, 278 Neb. 713, 720, N.W.2d 145, 149-52 (2009) (declining to enforce an arbitration agreement where the principal did not know that her purported agent would be asked to sign the agreement, and where no evidence existed to suggest the principal later authorized or acknowledge the existence of the agreement); *see also Miss. Care Ctr. Of Greenville, LLC v. Hinyub*, 975 So.2d 211, 218 (Miss. 2008) (“[T]his Court [has] found that execution of the arbitration provision as part of the admissions agreement was part of the ‘health care decision,’ the arbitration provision was an essential part of the consideration for the receipt of ‘health care’ in those instances. On the other hand, in today’s case, Hinyub was not required to sign the arbitration provision to admit Don Wyse to the Mississippi Care Center of Greenville”).

In *Thompson v. Pruitt Corp., Inc.*, 416 S.C. 43, 784 S.E.2d 679 (Ct.App. 2016), the South Carolina Court of Appeals found the authority conveyed by a principal to an agent to handle finances or make health care decisions did not include executing an agreement to resolve claims by arbitration, and a waiver of the principal’s right of access to the courts. *Id.*, 416 S.C. at 55, 784 S.E.2d at 686 (citing *Dickerson*, 414 A.2d at 736-739). Similarly, in *Hodge*, the circuit court

determined Mr. Hodge lacked apparent or actual authority to sign an arbitration agreement on behalf of his wife. *Hodge*, 422 S.C. at 573, 813 S.E.2d at 308.

In *Hodge*, the circuit court made the following findings: the facility knew the decedent was competent when she entered the facility, no health care power of attorney existed, and no indications existed in the record that Ms. Hodge vested her husband with the authority to enter into such agreements. *Id.* The circuit court further found:

[E]ven if Husband had authority to handle finances or make health care decisions, as [the facility-defendants] contend is evidenced by Husband signing past healthcare documents, this court has held “the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal’s right of access to the courts and to a jury trial.”

Id., 422 S.C. at 574, 813 S.E.2d at 308, quoting *Thompson*, 416 S.C. at 55, 784 S.E.2d at 686. The Court of Appeals affirmed the circuit court’s denial of the defendant’s motion to compel arbitration.

This case is analogous to *Hodge*. Defendant does not contend Ms. White agreed to arbitration. Rather, Defendant has moved to compel arbitration pursuant to an Agreement signed by Ms. White’s daughter. Defendant has provided no information on which this Court might conclude Ms. White’s daughter had apparent authority to waive Ms. White’s right to a jury trial. Accordingly, Defendant relies exclusively on the Health Care Power of Attorney to establish actual agency. Yet, the Health Care Power of Attorney, executed before two witnesses who attested to Ms. White’s competence, provides only a limited scope of authority – to make health care decisions. (See Motion to Compel, Exhibit B, ¶ 2).

Defendant has provided no testimony or affidavit(s)⁶ regarding Ms. White's admission to Defendant's facility, or the circumstances under which the Arbitration Agreement was executed. There is no information suggesting Ms. White had been declared legally incompetent at the time the Arbitration Agreement was signed. South Carolina Courts have joined a number of other jurisdictions in finding the authority to make health care or financial decisions is not commensurate with the authority to waive the right to a jury trial. *Thompson*, 416 S.C. at 55, 784 S.E.2d at 686; *see Hodge*, 422 S.C. at 572, 813 S.E.2d at 307. Accordingly, Ms. White's estate should not be compelled to arbitration.

III. Equitable Estoppel does not Apply to Prevent the Decedent and her Estate from Maintaining this Action in Circuit Court

As indicated at the outset of this memorandum, Defendant has not yet filed a brief in support of its motion. To the extent, however, that Defendant raises equitable estoppel to argue the Arbitration Agreement must be enforced, Defendant has failed to demonstrate (1) merger between the Facility Admission Agreement and the Arbitration Agreement; and (2) the requisite elements of equitable estoppel.

a. The Facility Admission Agreement and Arbitration Agreement are Separate Documents

In general, "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." *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014) (quoting *Klutts Resort Realty*,

⁶ Rule 6(d), SCRCP provides that "...when a motion is supported by affidavit, the affidavit shall be filed with the motion; and except as otherwise provided in Rule 59(c), additional or opposing affidavits may be served not later than two days before the hearing[.]" This motion was not filed with any supporting affidavits. Defendant is therefore precluded from supplementing its motion with affidavits at this time.

Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). Since the South Carolina Supreme Court's decision in *Klutts*, however, many decisions have opined on factors indicating the separateness of agreements. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455; *see Hodge v. Uni-Health*, 422 S.C. 544, 532, 813 S.E.2d 292, 302 (Ct.App. 2018) (noting two separate agreements, distinctly paginated, governed by separate law, and referring to the documents separately sufficed to evidence the two documents should not be merged); *Thompson v. Pruitt Corp.*, 407 S.C. 43, 52, 784 S.E.2d 679, 684-85 (Ct.App. 2016). Even where an ambiguity exists as to merger, "the law is clear that any ambiguity in such clause is construed against the drafter..." *Thompson, supra* (quoting *Coleman*, 407 S.C. 346, 355-56, 755 S.E.2d 450, 455).

The circumstances of this case confirm no merger exists between the Facility Admission Agreement and the Arbitration Agreement. While Plaintiff has never been provided with a copy of the Facility Admission Agreement, a number of documents in Plaintiff's possession indicate Ms. White was admitted to Defendant's facility on June 1, 2017. The Arbitration Agreement was not executed until June 3, 2017. Accordingly, not only were the documents not contemporaneously executed, but it is clear that signing the Arbitration Agreement was not a condition of providing healthcare services to Ms. White. In addition, documentation from June 1, 2017 was signed by a distinct individual from the daughter who executed the Arbitration Agreement, and neither person subsequently became the personal representative of Ms. White's estate. The Arbitration Agreement is numbered as "Page 1 of 1." In addition, the Arbitration Agreement provides as follows: "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*" (emphasis added). By its plain language, and on its face, the Arbitration Agreement is therefore a separate document from the Facility Admission Agreement and cannot be merged.

b. Defendant's Cannot Enforce the Arbitration Agreement under a Theory of Equitable Estoppel

“Equitable estoppel is, ultimately, a theory designed to prevent injustice, and should be used sparingly.” *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177 (citing *Hirsh v. Amper Fin. Servs., LLC*, 215 N.J. 174, 71 A.3d 849, 852 (2013) (noting equitable estoppel “is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration”). South Carolina courts have enforced arbitration agreements when a moving party demonstrates direct benefits conferred on the non-signatory. *See Pearson v. Hilton Head Hospital*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (“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”) (internal citations omitted). “In the arbitration context, the doctrine [of direct benefits estoppel] recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has *consistently maintained that other provisions of the same contract should be enforced to benefit him.*” *Wilson*, 426 S.C. at 340, 827 S.E.2d at 175 (quoting *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)) (emphasis in original).

As set forth above, the Arbitration Agreement and Facility Admission Agreement are separate documents. To the extent Defendant argues that Plaintiff should be estopped from avoiding arbitration based upon benefits derived from the Facility Admission Agreement, the argument has no merit. Even if this Court were to find the documents merged, however, it cannot be said that Ms. White derived benefits from the facility admission agreement where, within roughly six months of her admission she was discharged with an infected hole above her coccyx the size of a dinner plate.

In addition to its failure to demonstrate merger, Defendant has also failed to meet its burden of demonstrating the elements of equitable estoppel. In general, the party asserting equitable estoppel must demonstrate 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) that the party against whom estoppel is sought had actual knowledge of the facts. *Strickland v. Strickland*, 375 S.C. 76, 650 S.E.2d 465 (2007). The party asserting estoppel must also demonstrate that they (1) lacked knowledge and the means of knowledge of the truth of the facts in question; (2) relied on the conduct of the party estopped; and (3) made a prejudicial change of position in reliance on the conduct of the party estopped. *Id.*, 376 S.C. at 84, 650 S.E.2d at 470.

In this case, Defendant has failed to establish any of the requisite elements of equitable estoppel. Defendant is a sophisticated entity with deep familiarity of instruments like the Health Care Power of Attorney signed by Ms. White, and further understood that such an instrument failed to convey the necessary authority to execute an Arbitration Agreement. In addition, even if the Arbitration Agreement were somehow enforceable, it is Ms. White's son, Jeffrey White who initiated this Complaint. The Arbitration Agreement therefore can have no preclusive effect on this case. Because Defendant has failed to demonstrate merger, and has further failed to satisfy the elements of equitable estoppel, Defendant's Motion to Compel Arbitration must be denied.

IV. Defendant has Waived any Argument not Raised by its Motion

Defendant's Motion raises a single ground – that the Arbitration Agreement executed by Ms. White's daughter should be enforced against Ms. White. Rule 7(b)(1), SCRCF provides that:

An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

South Carolina courts have interpreted the particularity requirement with flexibility. *Lucey v. Meyer*, 401 S.C. 122, 736 S.E.2d 274 (Ct.App. 2012). However, “[b]y requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly.” *Lucey*, 401 S.C. at 131-32, 736 S.E.2d at 279, quoting *Calderon v. Kansas Dept. of Soc. & Rehab Servs.*, 181 F.3d 1180, 1186 (10th Cir. 1999).

Plaintiff files this memorandum in opposition without the benefit of ever receiving a supporting brief or any additional information about the basis for Defendant’s motion. Defendant should be precluded from setting forth new grounds in a subsequent supporting memorandum that have not previously been raised. Should Defendant raise additional grounds for the first time at argument or in a memorandum filed by Defendant contemporaneous with Plaintiff’s motion, Plaintiff would respectfully request time to respond prior to the Court’s decision.

CONCLUSION

Defendant has failed to demonstrate that Lizzie White’s daughter was authorized to execute an arbitration agreement on behalf of her mother, has failed to demonstrate merger, and cannot meet the requisite elements of equitable estoppel. Defendant therefore cannot demonstrate that the Arbitration Agreement in this case is enforceable. Accordingly, Defendant’s Motion to Compel Arbitration must be denied, and the case should move forward in the Circuit Court.

This 10th, day of August, 2020.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CALHOUN	)	FIRST JUDICIAL CIRCUIT
	)	
JEFFERY WHITE, INDIVIDUALLY	)	CASE NO. 2019-CP-09-00220
AND AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF LIZZIE WHITE ,	)	
	)	
PLAINTIFF,	)	DEFENDANT ST. MATTHEWS
	)	HEALTHCARE, LLC'S D/B/A CALHOUN
	)	CONVALESCENT CENTER'S
vs.	)	MEMORANDUM IN SUPPORT OF ITS
	)	MOTION TO COMPEL ARBITRATION
	)	AND STAY STATE COURT
ST. MATTHEWS HEALTHCARE, LLC	)	PROCEEDINGS AND REPLY TO
D/B/A CALHOUN CONVALESCENT	)	PLAINTIFF'S MEMORANDUM IN
CENTER ,	)	OPPOSITION
	)	
DEFENDANTS.	)	
	)	

COMES NOW the Defendant, St. Matthews Healthcare, LLC d/b/a Calhoun Convalescent Center (hereinafter referred to as “Defendant” or the “Facility”), by and through its undersigned counsel, and submits the following Memorandum in Support of its Motion to Dismiss Plaintiff’s Complaint, Compel Arbitration, and stay state court proceedings, pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16. Defendant also submits this Memorandum in Reply to Plaintiff’s response brief.

INTRODUCTION

Plaintiff has sued the Facility in tort based upon allegations which arise solely out of and concern the residency of Plaintiff’s decedent, Ms. Lizzie White, at Defendant’s skilled nursing facility. However, Darlene Nunnally, Ms. White’s daughter, acting pursuant to a valid South Carolina Health Care Power of Attorney (“Power of Attorney”), executed and entered into a valid, binding Admissions Agreement and Facility-Resident/Representative Arbitration Agreement (“Arbitration Agreement”) with the Facility in connection with Ms. White’s residency there. See

Exhibit 1 – White Power of Attorney; **See Exhibit 2** – Admission Agreement; **See Exhibit 3** – Arbitration Agreement. The Arbitration Agreement covers all allegations raised in the Complaint and, according to its express terms, requires that the Plaintiff and the Facility submit this matter to arbitration. **See Ex. 3.** Further, the Arbitration Agreement explicitly binds not only the parties to the agreement, but “also their successors, assigns, heirs, **personal representatives**, guardians or any persons deriving their claims through or on behalf of Resident.” **See Id.** (emphasis added).

When the Admission Agreement and the Arbitration Agreement were signed by Darlene Nunnally on June 3, 2017, Ms. Nunnally was acting as Lizzie White’s power of attorney and possessed express authority to enter into the Admission Agreement and the Arbitration Agreement pursuant to the terms of the Power of Attorney, as discussed further below. Ms. Nunnally presented the Power of Attorney to the Facility¹, and the Facility relied upon such presentation and the terms of thereof. There is absolutely no evidence that the Arbitration Agreement was entered into under duress. Further, the Arbitration Agreement is not substantively or procedurally unconscionable by its terms. Therefore, as discussed further herein, Defendant respectfully requests that that the Court compel arbitration of Plaintiff’s claims pursuant to the valid and binding contract between the Parties and, accordingly, dismiss or stay Plaintiff’s Complaint.

FACTUAL BACKGROUND

Plaintiff’s mother, Ms. Lizzie White, was admitted to the Facility for long-term care and rehabilitation on June 1, 2017, following a hospitalization at Regional Medical Center. Earlier in 2017, on April 29, 2017, Lizzie White executed a durable power of attorney in favor of her daughter, Darlene Nunnally, to be “effective upon, and only during, any period of mental incompetence” of Ms. White. **See Ex. 1 - White Power of Attorney, ¶2.** The Power of Attorney granted Ms. Nunnally *broad* powers related to health care matters for her mother, including

¹ Defendant notes that Ms. White’s Power of Attorney was found in her file at the Facility.

making choices for Ms. White based upon what Ms. Nunnally believed to be in her best interest, taking any other action necessary to assure the implementation of decisions concerning Ms. White's health care, to pursue any legal action in Ms. White's name and to force compliance by others with Ms. Nunnally's wishes for her mother. **See Ex. 1, ¶4.**

Approximately one (1) month following Ms. White's execution of the Power of Attorney, on May 24, 2017, Ms. White experienced an acute change in mental status and was admitted to the Regional Medical Center for evaluation and treatment. **See Exhibit 5 - RMC Medical Records.** Ms. White was discharged from the hospital on June 1, 2017 to Defendant's skilled nursing facility, with a discharge diagnosis of **acute encephalopathy.**² **See Id.** Her primary care physician, Dr. Franklin Coulter, MD, completed a Physician Certification Regarding Ability to Consent on June 3, 2017 and determined that Ms. White suffered from a probable **permanent inability to consent to health care decisions.** **See Exhibit 6 – Physician Certification.**³

Accordingly, Ms. Nunnally's powers under the Power of Attorney became effective as a result of Ms. White's status, and Ms. Nunnally entered into a number of contracts and consents with the Facility on behalf of Ms. White (as well as herself individually) pursuant thereto – namely, the Admission Agreement, the Arbitration Agreement and the various consents related to her residency at the Facility. These contracts were for the mutual benefit of both Ms. White and the Facility and their respective representatives and agents. **See Exhibit 2 – Admission Agreement; Exhibit 3 – Arbitration Agreement; Exhibit 4 - Other Written Consents.**

² Ms. White also appears to have suffered from dementia. However, her family sought care for Ms. White at Regional Medical Center on May 24, 2017 due to a change in her baseline and markedly increased confusion.

³ A health care power of attorney is a durable power of attorney. See S.C. Code §62-5-502(a). For purposes of determining when the effectiveness of a health care power of attorney, the certification of mental incompetence may be made by a physician. See S.C. Code §62-5-502(d).

Based on the Admission Agreement and pursuant to the agreements set forth therein, Ms. White was admitted to the Facility and accepted the benefits of the contracts entered into on her behalf by Ms. Nunnally. Such benefits included, but are not limited to, Ms. White's receipt of the skilled nursing care, other health care and residential services at the Facility. Plaintiff and his family, including Darlene Nunnally, have never challenged the validity of any of these agreements and consents until now. Notably, Plaintiff does not assert that the Admission Agreement is invalid or that Ms. Nunnally lacked authority to enter into that contract. Indeed, Plaintiff acknowledges in his Memorandum in Opposition that Ms. Nunnally had valid and effective authority under the Power of Attorney to admit Ms. White to the Facility. **See Plf. Memorandum in Opposition, p. 7, FN 5.**

Upon admission, Ms. Nunnally explicitly represented that she was authorized to admit Ms. White to the Facility and execute necessary documents on her behalf, including the Arbitration Agreement. First, she presented the Power of Attorney to the Facility in support of her ability to enter these various agreements.⁴ Second, the very first provision of the Admission Agreement states that *all information provided to the Facility* is truthful and correct, including Ms. Nunnally's authority to bind her mother, Ms. White, to certain agreements. **See Ex. 2.** Ms. Nunnally signed the Admission Agreement on behalf of Ms. White as her "Representative," as defined therein.

The Arbitration Agreement at issue defines Calhoun Convalescent Center as the "Facility," Lizzie White as the "Resident," and Darlene Nunnally as the "Representative." Further, Ms. Nunnally signed the Arbitration Agreement as Ms. White's "Representative." The relevant provisions of the Arbitration Agreement state the following:

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of

⁴ See *supra* FN 1.

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.**

The Arbitration Agreement further provides:

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law. **See Ex. 3.**

Regarding Ms. Nunnally's authority to sign on behalf of her mother, 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.** (emphasis added) **See Ex. 3.**

The Arbitration Agreement was executed by Ms. Nunnally as "Representative" of Ms. White, and Deanna Watkins, the Admissions Director for the Facility, signed on behalf of Calhoun Convalescent Center. Indeed, Ms. Nunnally was her mother's legal representative pursuant to the Power of Attorney and her apparent agent through presentation of the Power of Attorney to the Facility. Because the acts complained of by Plaintiff fall within the scope of the Arbitration Agreement, the Court should stay these proceedings, and compel this matter to arbitration. 9 U.S.C. § 3.

ARGUMENT AND CITATION TO AUTHORITY

I. POLICY IN FAVOR OF ARBITRATION

As a general matter, there is a strong presumption in favor of the validity of arbitration agreements because of strong policy considerations favoring arbitration. O’Neil v. Hilton Head Hosp., 115 F.3d 272, 273 (4th Cir. 1997). Indeed, both federal and state policy favors 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.”). “The federal policy favoring arbitration, as expressed in the [Federal Arbitration Act], is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements.” Zabinski v. Bright Acres, 346 S.C. 580, 590, 553 S.E.2d 110 (S. Ct. 2001). Further, arbitration agreements are presumed valid, and “[t]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.” Green Tree Fin. Corp.- Ala. v. Randolph, 531 U.S. 79, 91 (2000).

II. THE FEDERAL ARBITRATION ACT GOVERNS THE ARBITRATION AGREEMENT AND MANDATES THAT THE CLAIMS ASSERTED BY THE PLAINTIFF IN THE COMPLAINT BE COMPELLED TO ARBITRATION

As an initial matter, the Arbitration Agreement, by its terms and by law, is governed by the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16. Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) (holding that skilled nursing facility admission agreements and residencies implicate interstate commerce, and thus are governed by the FAA). 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 (FAA) 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 compelled to arbitration.

III. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE

A. Ms. Nunnally Possessed Actual Authority to Bind Ms. White to the Arbitration Agreement.

1. The Power of Attorney was valid and effective at the time the Arbitration Agreement was entered into.

(a) The executory requirements of S.C. Code § 62-5-503 were satisfied

“A health care power of attorney is a durable power of attorney” and, as such, is governed by Article 5, Part 5 of the South Carolina Probate Code. See S.C. Code §62-5-502(a). Section 62-5-503 of the South Carolina Probate Code sets forth executory requirements for a durable health care power of attorney, such as the Power of Attorney at issue here, to be valid. S.C. Code §62-5-503(a)(1) requires that all health care powers of attorney must be in substantially the same form and prescribes a form in §62-5-504. Here, the Power of Attorney at issue here is identical to the statutory form of the South Carolina Health Care Power of Attorney found at S.C. Code §62-5-504.⁵ The Power of Attorney was also signed by the principal, Ms. White, and two witnesses, as required by S.C. Code §62-5-503(a)(2)-(3). Therefore, Power of Attorney meets South Carolina’s statutory requirements for a valid durable health care power of attorney.

(b) The Power of Attorney became effective on June 3, 2017 upon certification of Ms. White’s mental incompetency by her physician in accordance with S.C. Code §62-5-502

A durable health care power of attorney becomes effective upon a determination of mental incompetency in accordance with S.C. Code §62-5-502(d). Here, Ms. White’s mental incompetency was certified by a physician – Dr. Franklin Coulter – in accordance with the

⁵ The Power of Attorney is also the same statutory form at issue in Arredondo v. SNH SE Ashley River Tenant, LLC, 2019 WL 3814725 (Ct. App. August 14, 2019), which is discussed further in Section II.B below.

statutory requirements of Section 62-5-502(d). **See Ex. 6 – Physician’s Certification.** This certification is consistent with the medical records and discharge diagnosis from Regional Medical Center. **See Ex. 5 – Regional Medical Center Records.** Accordingly, the Power of Attorney held by Ms. Nunnally became effective upon the physician’s certification as to Ms. White’s mental incompetency on June 3, 2017.

2. The Power of Attorney granted Ms. Nunnally broad powers, including entering into the Arbitration Agreement.

The Power of Attorney executed by Ms. White April 27, 2017 granted Ms. Nunnally broad powers to act on her behalf upon her mental incompetence. **See Ex. 1, ¶4.** Ms. White states in Paragraph 4 of the Power of Attorney:

I grant to my agent full authority to make decisions for me regarding my health care. . . **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 limitations I may state below.

Accordingly, **unless specifically limited by the provisions specified below**, my agent is authorized as follows:

...

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 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.

See Id. at ¶4 (emphasis added).

By its express terms, among other powers, the Power of Attorney expressly authorized Ms. Nunnally to: (1) make decisions that she believed to be in her mother’s best interests; (2) admit

Ms. White to a skilled nursing facility; and (3) to take any actions necessary to assure implementation of Ms. White's health care decisions, including but not limited to (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. Nunnally. **See Ex. 1, ¶4.** These broad powers are not limited in any way elsewhere within the Power of Attorney. Further, these broad powers, individually and when construed together, clearly granted Ms. Nunnally to do all things to assure implementation of Ms. White's health care decisions, including selecting the forum in which any legal action regarding Ms. White'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 7.**

In Arredondo, the South Carolina Court of Appeals recently held that the statutory form of the South Carolina Health Care Power of Attorney – which is the same form as 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 Nursing Ctrs. Ltd. P'ship v. Clark 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 the case at bar, Ms. White and Ms. Nunnally entered into *the exact same statutory Health Care Power of Attorney form* which is set out in S.C. Code Ann § 62-5-504. **See Exhibit 1** – White Power of Attorney; **see also** S.C. Code Ann. § 62-5-504. Like the Power of Attorney in Arredondo⁶, the Power of Attorney in this case authorized Ms. Nunnally to pursue legal action and to grant any waiver required by health care providers such as the Facility. Based on the express scope of the Power of Attorney and the foregoing authority, Ms. Nunnally had actual authority to enter into the Arbitration Agreement on Ms. White's behalf, and this Court should grant Defendant's motion to compel arbitration.⁷

⁶ Defendant further points to the case Stott v. White Oak Manor Inc. in support of its position that courts of South Carolina recognize that Health Care Power of Attorneys authorize the agent to bind the mentally incompetent principal to Arbitration Agreements in situations like the one at bar. Stott v. White Oak Manor, Inc., 426 S.C. 568, 578, 828 S.E.2d 82, 87 (Ct. App. 2019), reh'g denied (June 6, 2019), cert. denied (Sept. 25, 2019) (holding “**Because we find Decedent was mentally competent to sign the Arbitration Agreement**, we affirm the circuit court's decision that Stott did not have authority under her durable health care power of attorney to sign the Arbitration Agreement”) (emphasis added). Thus, the negative inference of the Court's decision in White Oak is that had the Decedent been adjudged to be mentally incompetent, then the agent would have had authority under her Health Care Power of Attorney to sign the arbitration agreement.

⁷ Plaintiff cites to Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544 (Ct. App. 2018) as quoting a Maryland case, Dickerson v. Longoria, 995 A.2d 721 (Md. 2010), in support of the proposition that health care powers of attorney do not confer authority to sign an arbitration agreement related to the provision of health care when they are not a pre-requisite to admission. Hodge itself does

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

In the alternative, and as additional grounds to compel arbitration, Plaintiff agrees that Ms. Nunnally possessed actual authority under the Power of Attorney to admit Ms. White to the Facility and, it follows, to enter into the Admission Agreement. **See Plf. Memorandum in Opposition, p. 7, FN 5.** Therefore, 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. Nunnally on behalf of her and Plaintiff's mother, Ms. White. 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 – Arbitration Agreement (emphasis added).** As previously described, the Arbitration Agreement and the Admissions Agreement were both signed by Ms. White on behalf of her mother on the same day, at the same time, and in connection with the same subject matter and transaction - Ms. White's residency at Calhoun Convalescent Center and receipt of skilled nursing care there.

not stand for this principle and is distinguishable from the case at bar because Hodge did not have a health care power of attorney at issue and the resident was not mentally incompetent. Moreover, Dickerson is a Maryland case and was expressly rejected by the Arredondo court in their August 2019 decision. See Arredondo, 2019 WL 3814725, *2 (unpublished opinion).

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* analyzed facts almost identical to the case at bar and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. McCutcheon v. THI of S.C. at Charleston, LLC, No. 2:11-CV-02861, 2011WL6318575 (See **Exhibit 8**). 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 and Campsen attached hereto as **Exhibits 9 and 10, respectively**.

Accordingly, Ms. White, by and through the acts of her representative and daughter, Ms. Nunnally, and the Facility, both contemplated that the terms of the agreement to admit Ms. White were contained in the Admissions Agreement and Arbitration Agreement. Ms. Nunnally executed the Arbitration Agreement and the Admissions Agreement at the same time – on June 3, 2017; the Arbitration Agreement and the Admissions Agreement both covered the same subject matter and transaction - Ms. White’s residency at the Facility and 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)).⁸

Plaintiff, as Ms. White's son and first alternate attorney-agent under the Power of Attorney, embraced all aspects of the Admission Agreement with the Facility. Plaintiff does not dispute the validity of the Admission Agreement or his mother's admission to the Facility. He never removed Ms. White from the Facility and, by all accounts, approved of presence at the Facility/did not seek her discharge. Therefore, 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 relying upon certain terms of the Admission Agreement when it works to his 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 this Defendant 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

⁸ 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).

equitable estoppel. Pursuant to numerous orders of this Court and numerous other courts on essentially identical facts and concerning identical arbitration agreement, where a non-signatory receives the benefits of the contract, which Plaintiff certainly did here, Plaintiff must be prevented from refusing to comply with the Arbitration Agreement merely because he 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. White – was rendered mentally incompetent and there is a “springing” durable health care power of attorney – the Power of Attorney discussed above. **See Ex. 1.** Plaintiff agrees that Ms. Nunnally admitted their mother to the Facility pursuant to her powers under the Power of Attorney. **See Plf. Memorandum in Opposition, p. 7, FN 5.** The Adult Healthcare Consent Act is not the statutory mechanism under which Ms. Nunnally admitted her mother to the Facility. She admitted Ms. White to the Facility pursuant to the terms of a durable health power of attorney as prescribed by the South Carolina Probate Code (S.C. Code §62-5-504), the existence of which would be rendered unnecessary and superfluous if it were treated as equivalent to the authority conferred under the Adult Healthcare Consent Act. Therefore, Hodge, Coleman and Thompson should not be followed as it relates to the doctrine of merger.

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 and Admission Agreement in the case at bar should not be considered “separate” for

purposes of denying merger. Unlike 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).⁹ Specifically, the Admission and Arbitration Agreements were signed by the Ms. Nunnally as health care power of attorney, on Plaintiff’s mother’s behalf, and the Facility on June 3, 2017. The documents were signed by the exact same people: Ms. Nunnally as representative for her mother and by the Admissions Coordinator for the Facility. The documents were signed for the same purpose and transaction of establishing Ms. White’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 those 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 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

⁹ 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).

(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”).)

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 course of the same transaction,”¹⁰ 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 point to such things is really to do no more than to point out 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

¹⁰ Coleman, 407 S.C. at 355, 755 S.E.2d at 455.

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.

Even though, as noted above, the Arbitration Agreement was not a precondition to admission, this does not mean that the two instruments did not work hand-in-hand 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 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 its (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. White's relationship with Defendant. 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 they do not control the outcome here. Under the particular facts of this case, an intent contrary to merger cannot reasonably be found.

D. The Arbitration Agreement is Not Unconscionable

“In analyzing claims of unconscionability of arbitration agreements, . . . [courts should] focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.” One Belle Hall Prop. Owners Ass’n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 60, 791 S.E.2d 291 (Ct. App. 2016)(internal quotations omitted).

Should Plaintiff contend in any supplemental briefing that this Arbitration Agreement is unenforceable because it is unconscionable, the law and facts surrounding Ms. Nunnally entering into this Arbitration Agreement and the clear language of the Agreement demonstrates this is clearly not the case. As an initial matter, both state and federal courts in South Carolina have consistently ruled that arbitration agreements identical to the one *sub judice* are not unconscionable. See McCutcheon v. THI of S.C. at Charleston, LLC, *supra*, at 6* - *8; Benson v. THI of S.C. at Charleston, LLC, No. C.A. No. 7:11-CV-2613-HMH (D.S.C. Nov. 30, 2011)(attached hereto as **Exhibit 11**); 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).

Further, the court in Arredondo found that an arbitration agreement separate from the admission agreement “. . . is conducive to greater freedom of choice for the consumer. It also better protects the nursing home from a contention that the arbitration contract is unconscionable.” 2019 WL 3814725, *2 (S.C. Ct. App. August 14, 2019)(quoting J. Toal dissent in Coleman, 407 S.C. 346, 357).

Anyone who enters into a written contract has a duty to read the contract which she or he signs. Maw v. McAlister, 252 S.C. 280, 284-285, 166 S.E.2d 203, 204 (1969). Anyone who is capable of reading and understanding, but fails to read a contract before signing, is bound by the terms thereof. Sims v. Tyler, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Furthermore, arbitration clauses are not unconscionable and will be enforced if a person who can read fails to read the contract, regardless of whether he was advised of the arbitration terms by the contracting party. Munoz v. Green Tree Financial Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding the plaintiff’s failure to read an arbitration provision did not render it unconscionable even though the plaintiffs claimed they were not advised of those terms). Additionally, “inequality of bargaining power alone will not invalidate an arbitration agreement.” *Id.*

The Arbitration Agreement clearly articulates that the resident entering into the Agreement is fully aware of his or her healthcare options and other potential providers of nursing home facilities. The Agreement states:

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

Furthermore, on that same signature page, the Arbitration Agreement states clearly in bold

lettering in a separate heading: “**I understand and agree that I am giving up and waiving my right to a jury trial.**” See **Ex. 3** (emphasis in original).

Since Ms. White’s representative and agent, Ms. Nunnally, had a duty to read and understand the documents she was signing on her sister’s behalf under proper authority, she also had a duty to communicate those terms to Ms. White as her agent. To the extent she did not, Plaintiff cannot now claim that Ms. White was unaware of the terms of the Arbitration Agreement that Ms. Nunnally voluntarily and with proper authority executed on her mother’s behalf.

IV. PLAINTIFF’S COUNSEL’S SUGGESTION THAT DEFENDANT HAS FAILED TO PROVIDE SUFFICIENT INFORMATION TO PLAINTIFF OR IN SUPPORT OF ITS MOTION IS MISPLACED

Plaintiff’s counsel represents to the Court that Defendant has not provided her with sufficient information to evaluate the Arbitration Agreement or the Power of Attorney or in support of its Motion to Compel Arbitration. See **Plf. Memorandum in Opposition, p. 4 and p. 15**. While Plaintiff’s arguments in this regard do not merit attention substantively, counsel for Defendant cannot let Plaintiff inaccurately represent the timing of and the extent of the exchange of information between the parties.

First, the parties held pre-suit mediation in December 2019, at which time defense counsel notified Plaintiff’s counsel of the Arbitration Agreement. Defense counsel sent Plaintiff’s counsel both the Arbitration Agreement and the Power of Attorney in December 2019 via e-mail (**See Exhibit 12**) and asked if Plaintiff would submit his claims to arbitration. Plaintiff’s counsel never asked for the Admission Agreement, though defense counsel would have been happy to provide the same had she done so. Plaintiff rejected arbitration and proceeded to file suit. Defendant answered Plaintiff’s complaint timely on January 27, 2020 and

shortly thereafter, on February 19, 2020 filed its initial motion to compel arbitration. Further, Defendant objected to Plaintiff's discovery requests with formal responses served on March 24, 2020 in light of its rights to arbitration and objections to the jurisdiction of this Court to adjudicate these claims, so as to preserve and not waive its arbitration rights.

The hearing on this first motion was set before the Court for the first week of April 2020, and before the South Carolina Supreme Court's April 14, 2020 Order regarding the COVID-19 public health pandemic and court operations. Therefore, due to great mutual uncertainty by both counsel for Plaintiff and counsel for Defendant with how hearings would be conducted and with other legitimate COVID-19 concerns during those nascent weeks, the parties ultimately agreed that Defendant would withdraw the motion with leave to refile once there was more certainty regarding COVID-19 generally and court operations in particular. Defendant filed this Motion to Compel Arbitration on June 17, 2020 – when there was more certainty as to the Court hearing motions. Thus, any attempt by Plaintiff's counsel to frame Defendant's approach to this Motion or its objections to discovery as dilatory or somehow disadvantageous to Plaintiff is misplaced.

Plaintiff incorrectly contends that Defendant's Motion offers "a single ground" as the basis for the Motion. Defendant craves reference to its Motion to Compel Arbitration, **attached as Exhibit 13**, which clearly states our position that "Ms. Nunnally had full authority to enter into the binding Arbitration Agreement on behalf of Lizzie White" under the Power of Attorney. Further, Defendant cites to the Federal Arbitration Act as grounds for finding the Arbitration Agreement valid in the face of a valid Power of Attorney. Defendant has satisfied its obligations under Rule 7, SCRPC with respect to its Motion and there certainly has been no prejudice whatsoever to Plaintiff in evaluating the validity of the Power of Attorney, Ms. White's mental incompetency or the Arbitration Agreement simply because Defendant did not brief their entire

position in detail together with their Motion. Moreover, as personal representative of Ms. White's estate, Plaintiff has had the ability to request – and upon information and belief has requested – medical records directly from the Facility outside of the discovery powers of this litigation and from third party medical providers, such as Regional Medical Center and Dr. Franklin Coulter, to evaluate Ms. White's mental incompetency and its relation to the effectiveness and validity of the Power of Attorney.

Plaintiff goes on to contend further that because he filed his Memorandum in Opposition before Defendant filed this Memorandum in Support, that Defendant should be foreclosed from offering argument in support of its Motion. Such a game of “gotcha” would encourage a race to the courthouse to file briefs and is not supported in the absence of a briefing schedule setting Defendant's deadline prior to Plaintiff's deadline for briefing submission, which has not been set in this instance.

CONCLUSION

Defendant submits that Ms. Nunnally had actual authority to enter into the Arbitration Agreement under the terms of the Power of Attorney executed by Ms. White in favor of Ms. Nunnally. This is supported by the recent Court of Appeals decisions in Arredondo and White Oak.

Alternatively, because Plaintiff agrees that Ms. Nunnally had actual authority to enter into the Admission Agreement on behalf of Ms. White under the Power of Attorney, the doctrine of merger as between the Admission Agreement and the Arbitration Agreement should operate to bind Ms. White to the Arbitration Agreement. These documents were executed on the same date, by the same parties and with respect to the same transaction – the provision of nursing and

other health care to Ms. White at the Facility. The Arbitration Agreement, by its terms, is binding the personal representative of Ms. White and, therefore, is binding on Plaintiff. Therefore, Defendant respectfully requests that this Court enter an Order staying the pending action and compelling arbitration.

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Charleston, South Carolina

Dated: August 11, 2020

ADMISSION AGREEMENT – SOUTH CAROLINA

RESIDENT NAME: Lizzie White
RESIDENT NUMBER: REDACTED
DATE OF ADMISSION: 6-1-17

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among CALHOUN CONVALESCENT CENTER ("Facility"), Minnie Wright/Dorcas Nunnally ("Resident") and/or Lizzie White ("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.

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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.

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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.

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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 \$ 185.00 per day, payable one month in advance. In the event Resident is unable or unwilling to receive any of the services included in the room and board charge, such as meals, laundry, etc., no adjustment will be made to the daily rate. Payment for all invoices is due upon receipt. In the event public aid funds are denied for services for which coverage has been expected, Resident and/or Representative will be responsible for payment and will pay such charges upon receipt of invoice. Resident and/or Representative agree(s) to pay any rate change charged to Resident so long as each party to this Agreement is given at least thirty (30) days written notice of the new rate, including any increases or adjustments in Resident's liability by any financial third party or regulatory agency. Additional notice may be provided under applicable state regulations.

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

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

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

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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:

CALHOUN CONVALESCENT CENTER
601 DANTLER STREET
ST. MATTHEW, SC 29135

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:

Debra Annally
REDACTED

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

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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

Daylene Nunnally 6-3-17
Signature of Representative, if any Date

Daylene Nunnally
Printed Name of Representative

Witness Signature

Date

Printed Name of Witness

Representative Social Security No. (Voluntary Info.)

Deana Watkins
Signature of Facility Official

DEANA WATKINS - ADMISSIONS DIRECTOR
Printed Name of Facility Official & Title

6-3-17
Date

Original: Business File • Photocopy: Resident/Representative

SOUTH CAROLINA COMMUNITY LONG TERM CARE
CONSENT FORM

Client Name: Luzie L. White
Social Security Number: REDACTED

I understand as part of my application for long term care services in the community or a Title XIX nursing home, my condition must be evaluated by the South Carolina Community Long Term Care Program.

This evaluation includes information provided by:

- a. my physician and medical records;
- b. professionals and organizations involved with my care; and,
- c. an interview with me and, if necessary, with my family.

I hereby authorize any social service professionals, organizations, doctors, nurses, or other medical personnel and medical facilities involved in my care to release to Community Long Term Care any medical information regarding my diagnoses and recommended treatment.

I hereby authorize Community Long Term Care to release information on my behalf to physicians, hospitals, health and human service organizations, health and human service agencies, family members and/or other persons directly involved with my care.

I understand if my current or future diagnosis includes Alzheimer's Disease, senile dementia or a similar disorder, my records may be reviewed by the statewide Alzheimer's Disease and Related Disorders Registry, and I, or my responsible party, may be contacted for additional information.

Use the space below to indicate the name of any organization, agency or person to whom you do not choose to release information.

This consent shall remain in effect until _____, revoked by me in writing, or until such time as my case is closed by Community Long Term Care.

Date: 7-20-17

Darlene H. Munnally
Signature of Client or Responsible Party

If Signed by Responsible Party, State Relationship and Authority to Sign.

Date: 7-20-17

Cindy Bogard
Signature of Witness

COMMUNITY LONG TERM CARE
CLIENT SERVICE CHOICE

Client Name:

Luzie L. White

CLTC #:

Choice of Location of Services

I choose to have my long term care services provided:

☐ In Community

☒ In Nursing Home

I understand that at some future date I may change my choice for location of care. If this occurs, I will contact my Community Long Term Care worker and sign a new Client Service Choice Form.

Choice of Participation in Community Case Management

☒ I choose to participate in a Medicaid home and community-based waiver program.

☐ I do not choose to participate in a Medicaid home and community-based waiver program.

Comments:

Client/Responsible Party:

Dorlene Munnally

Date:

7-20-17

CLTC Worker:

Date:

PHYSICIAN CERTIFICATION
REGARDING ABILITY TO CONSENT

A resident's inability to consent must be certified by two licensed physicians (Code of Laws of South Carolina, Title 44, Chapter 66 – Adult Health Care Consent Act – §44-66-20). "Unable to consent" means unable to appreciate the nature and implications of the resident's condition and proposed health care, to make a reasoned decision concerning the proposed health care, or to communicate that decision in an unambiguous manner. "Health Care" means a procedure to diagnose or treat a human disease, ailment, defect, abnormality or complaint, whether of physical or mental origin. Health Care also includes the provision of intermediate or skilled nursing care; services for the rehabilitation of injured, disabled or sick persons; and the placement in or removal from a facility that provides these forms of care.

PHYSICIAN STATEMENT

I, Franklin Butler, (attending physician), do hereby certify that Lizze White (Resident) is able / unable to provide consent regarding health care decisions as defined by South Carolina Adult Health Care Consent Act.

My decision is based upon the following cause and nature: *(condition that is responsible for inability to consent & degree of intellectual or related disability; i.e. non-verbal, unable to follow commands)*

I believe the extent of this inability is: *(specific areas where resident cannot make informed decisions.)*

I believe that the probable duration of this inability is:
☒ Permanent ☐ Temporary

This declaration is made following examination of this resident and review of the medical record.

Franklin Butler
Attending Physician

08/17
Date

CONSULTING PHYSICIAN STATEMENT

I, Vernon Beth Shellen (attending physician), do hereby certify that Lizze White (Resident) is able / unable to provide consent regarding health care decisions as defined by South Carolina Adult Health Care Consent Act.

My decision is based upon the following cause and nature: *(condition that is responsible for inability to consent & degree of intellectual or related disability; i.e. non-verbal, unable to follow commands)*

I believe the extent of this inability is: *(specific areas where resident cannot make informed decisions.)*

I believe that the probable duration of this inability is:
☒ Permanent ☐ Temporary

This declaration is made following examination of this resident and review of the medical record.

Vernon Beth Shellen
Consulting Physician

08/17/10
Date

DEFENDANT'S
EXHIBIT

Wakeham, Rebecca (Becky)

From: Mettler, Kate C.
Sent: Thursday, December 12, 2019 3:19 PM
To: Jessica Fickling
Cc: Davis, Jay; Wakeham, Rebecca (Becky)
Subject: RE: Jeffrey White as PR for Estate of Lizzie White v. St. Matthews Healthcare, LLC
Attachments: Lizzie White PoA.pdf

Hi Jessica,

Please see attached.

Kate C. Mettler
Attorney
Direct: (843) 720-5417
Email: kmettler@ycrlaw.com

From: Jessica Fickling <jfickling@stromlaw.com>
Sent: Thursday, December 12, 2019 11:20 AM
To: Mettler, Kate C. <kmettler@ycrlaw.com>
Cc: Davis, Jay <jdavis@ycrlaw.com>; Wakeham, Rebecca (Becky) <bwakeham@ycrlaw.com>
Subject: RE: Jeffrey White as PR for Estate of Lizzie White v. St. Matthews Healthcare, LLC

Dear Kate,

I am following to see whether you have a copy of the executed medical POA you can provide. Thank you, and please do not hesitate to give me a call with any questions.

Sincerely,

Jessica L. Fickling, *Attorney at Law*



Strom Law Firm, L.L.C.
2110 N. Beltline Blvd. Columbia, SC 29204
Tel: (803) 252-4800 :: Fax: (803) 252-4801
jfickling@StromLaw.com :: www.StromLaw.com



The greatest compliment you can give us is the referral of a loved one or friend. Thank you for your trust.

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CIRCULAR 230 DISCLOSURE:

To comply with Treasury Department regulations, we inform you that, unless otherwise expressly indicated, any tax advice contained in this communication (including any attachments or enclosures) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties that may be imposed under the Internal Revenue Code or any other applicable tax law, or (ii) promoting, marketing or recommending to another party any entity, investment, plan, transaction, arrangement, or other tax related matter.

From: Jessica Fickling

Sent: Wednesday, December 4, 2019 9:40 AM

To: Mettler, Kate C. <kmettler@ycrlaw.com>

Cc: Davis, Jay <jdavis@ycrlaw.com>; Wakeham, Rebecca (Becky) <bwakeham@ycrlaw.com>

Subject: RE: Jeffrey White as PR for Estate of Lizzie White v. St. Matthews Healthcare, LLC

Dear Kate,

Please send a copy of the power of attorney at your earliest convenience. Thank you.

Sincerely,

Jessica L. Fickling, *Attorney at Law*



Strom Law Firm, L.L.C.

2110 N. Beltline Blvd. Columbia, SC 29204

Tel: (803) 252-4800 :: Fax: (803) 252-4801

jfickling@StromLaw.com :: www.StromLaw.com



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From: Mettler, Kate C. <kmettler@ycrlaw.com>

Sent: Tuesday, December 3, 2019 9:59 AM

To: Jessica Fickling <jfickling@stromlaw.com>

Cc: Davis, Jay <jdavis@ycrlaw.com>; Wakeham, Rebecca (Becky) <bwakeham@ycrlaw.com>

Subject: Jeffrey White as PR for Estate of Lizzie White v. St. Matthews Healthcare, LLC

Jessica,

The arbitration agreement is attached. Please let us know if your client will agree to arbitration of the claims.

Kate C. Mettler

Attorney

Direct: (843) 720-5417

Email: kmettler@ycrlaw.com



25 Calhoun Street
Suite 400
Charleston, SC 29401
www.ycrlaw.com

Building on a strong foundation.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CALHOUN	)	FIRST JUDICIAL CIRCUIT
	)	
Jeffery White, individually and as	)	CASE NO. 2019-CP-09-00220
Personal Representative of the Estate of	)	
Lizzie White,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	MOTION FOR RECONSIDERATION
	)	
St. Matthews Healthcare, LLC D/B/A	)	
Calhoun Convalescent Center,	)	
	)	
Defendants.	)	

Pursuant to Rules 52 and 59 of the South Carolina Rules of Civil Procedure (SCRCP), Plaintiff respectfully requests that this Court reconsider its decision in the above case granting Defendant's motion to compel arbitration, taking into consideration certain factors the Court may have overlooked or misapprehended. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004) ("[I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court 'alter or amend judgment,' but also as a vehicle to seek 'reconsideration' of issues and arguments.").

PROCEDURAL BACKGROUND

Plaintiff Jeffrey White ("Plaintiff," "Jeffrey White") incorporates by reference Plaintiff's response in opposition to Defendant's motion to compel arbitration (*See* C/A No. 2019-CP-09-00220, *Estate of Lizzie White v. Calhoun Convalescent Center*, Plaintiff's response in opposition to motion to compel arbitration, filed Aug. 10, 2020), and will only briefly review the background and history of this case. This matter arises out of the death of Lizzie White, which occurred on March 6, 2018. Prior to her death, Ms. White was a resident of Defendant's facility, Calhoun Convalescent Center, from June 1, 2017 until her emergency discharge on January 29,

2018. Jeffrey White is one of Ms. White's seven children, and the duly appointed personal representative of her estate. Neither Lizzie White nor Jeffrey White signed either the Facility Admission Agreement or the Arbitration Agreement that are the subject of Defendant's motion to compel arbitration.

Defendant's motion to compel arbitration came before this Court on August 12, 2020. In its motion to compel, filed June 17, 2020, Defendant argued arbitration was proper for the following reasons:

1. The arbitration agreement signed by Ms. White's daughter, Darlene Nunnally, was valid and enforceable pursuant to a Health Care Power of Attorney executed in April of 2017; and
2. The parties' dispute was governed by the Federal Arbitration Act (FAA).

(See C/A No. 2019-CP-09-00220, Defendant's motion to compel arbitration, filed June 17, 2020). In its memorandum in support, Defendant further argued that Plaintiff Jeffrey White should be estopped from bringing his claim in circuit court; that a Health Care Power of Attorney executed in April of 2017 by Ms. White and her daughter somehow sprung into a Durable Power of Attorney; and that the separate Arbitration Agreement and Facility Admission Agreement at issue in this case somehow merged. (See C/A No. 2019-CP-09-00220, Defendant's Memorandum in Support of Motion to Compel Arbitration, filed August 11, 2020).

On November 24, 2020, this Court entered its order compelling arbitration. Plaintiff now respectfully requests that this Court reconsider its order.

ANALYSIS

- I. THE COURT SHOULD RECONSIDER ITS FINDING THAT THE HEALTH CARE POWER OF ATTORNEY IN THIS CASE CONFERRED ACTUAL AGENCY ON A THIRD PARTY TO WAIVE LIZZIE WHITE'S CONSTITUTIONAL RIGHT TO A JURY TRIAL**

In its November 24, 2020 Order, the Court compelled arbitration on the basis that a Health Care Power of Attorney¹ provided actual authority for an agent to execute the Defendant's Arbitration Agreement in this case. In so finding, this Court reasoned that the language of the Health Care Power of Attorney was governed by the South Carolina Probate Code, S.C. Code Ann. § 62-5-502(a), and further relied upon the Court of Appeals' unpublished opinion in *Arredondo v. SNH SE Ashley River Tenant, LLC*, 2019-UP-293, 2019 WL 3814725 (Ct.App. Aug. 14, 2019). The Court's reliance on the probate code, and its heavy reliance on *Arredondo*, are improper, and the Court should reconsider its holding.

Specifically, this Court's conclusion presupposes that the Health Care Power of Attorney in this case was somehow modified into a durable Power of Attorney pursuant to a Physician Certification executed by Defendant's physicians. This Certification, however, did not, nor was it intended to authorize third parties to waive constitutionally guaranteed rights. Specifically, the document, titled Physician Certification Regarding Ability to Consent, provides:

A resident's inability to consent must be certified by two licenses [sic] physicians - Code of Laws of South Carolina, Title 44, Chapter 66 - Adult Health Care Consent Act - § 44-66-20). "Unable to consent" means unable to appreciate the nature and implications of the resident's condition and proposed health care, to make a reasoned decision concerning the proposed health care, or to communicate that decision in an unambiguous manner. "Health care" means a procedure to diagnose or treat a human disease, ailment, defect, abnormality or complaint, whether of physical or mental origin. Health care also includes the provision of intermediate or skilled nursing care; services for the rehabilitation of injured, disabled or sick persons; and the placement in or removal from a facility that provides these forms of care.

¹ The only Power of Attorney executed by Ms. White was a Health Care Power of Attorney containing a durability clause, which became applicable only in the event of Ms. White's incompetence. The crux of Defendant's argument is that a certification performed by in-house physicians at Defendant's facility is a valid substitute for a competency determination. No probate court ever deemed Ms. White incompetent during her lifetime, nor was any hearing ever scheduled related to Ms. White's competence.

(See C/A No. 2019-CP-09-00220, Defendant’s Memorandum in Support of Motion to Compel, Exhibit 6).

The plain language of the Physician Certification limited its scope, and no information exists indicating that the Certification was intended to serve as an alternative to a declaration of incompetence after a hearing.² The Certification provides reference only to the Adult Health Care Consent Act, and specifically defines the terms “unable to consent” and “Health care.” The conclusion Defendant has asked of this Court is for this limited certification to serve as the functional equivalent of an incompetency analysis that would have the impact of stripping individuals of their control over finances, daily decision making, and the right to contract, a scope this Court must decline.

Instead, this Court should construe the Physician Certification in light of the facial limitations within the four corners of the document itself. *See Dickerson v. Longoria*, 995 A.2d 721, 739 (Md. 2010) (“[T]he authority to make health care decisions on another’s behalf does not constitute authority to sign an arbitration agreement on that person’s behalf.”), *cited approvingly in Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 567, 813 S.E.2d 292, 304 (Ct. App. 2018); *Lujan v. Life Care Ctrs. of Am.*, 222 P.3d 970, 978 (Colo. App. 2009) (“[A]lthough a health care proxy can make major life and death decisions, such authority does not necessarily imply the authority to agree to arbitrate.”); *Life Care Ctrs. of Am. v. Smith*, 681 S.E.2d 182, 185 (Ga. Ct. App. 2009) (“[T]he plain language of the health care power of attorney did not give [daughter] the power to sign away her mother’s or her mother’s legal representative’s right to a jury trial. . . . We note that the agreement to arbitrate was optional

² In ruling in favor of arbitration, this Court’s order creates a potential due process violation, stripping Ms. White of certain fundamental rights without a hearing.

and it is not contended in this case that in order for [mother] to be admitted to Life Care, [daughter] was required to sign the agreement to arbitrate.”).

Here, no information exists to support Defendant’s contention that the Physician Certification somehow triggers the durability provision of a Healthcare Power of Attorney. Rather, the Physician Certification may do only that which is contemplated by its plain language – establish whether a patient can or cannot consent to health care decisions in Defendant’s facility. As a result, reliance on this certification is misguided, and this Court should reconsider its finding that the Health Care Power of Attorney in this case vests actual authority to enter into an arbitration agreement on behalf of Lizzie White.

Questions of fact also exist related to execution of the Physician Certification. These issues were addressed at the hearing on Defendant’s motion, where Plaintiff noted that Defendant presented no evidence or testimony from the physicians who signed the Certification related to the facts or circumstances of its execution. At least one of the signatures bears an illegible date, making it impossible to ascertain whether the document was formally executed in advance of the Arbitration Agreement.

Defendant bore the burden of demonstrating an enforceable Arbitration Agreement. *Aiken v. World Finance Corp. of S.C.*, 373 S.C 144, 644 S.E.2d 705 (S.C. 2007); *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). With the minimal information Defendant provided in this case, it is impossible to understand the circumstances of the physician signatures, or whether or to what extent they may be relied upon.

Respectfully, this Court should reconsider its conclusion that the Physician Certification presented by Defendant sufficed to convert a Health Care Power of Attorney into a Durable Power of Attorney, and should further reconsider its conclusion that the Health Care Power of

Attorney gave Lizzie White's agent actual authority to waive her fundamental right to a jury trial. In light of South Carolina precedent indicating a healthcare power of attorney does not confer actual authority on a third party to waive the right to a jury trial, this Court should conclude that no authority existed for an agent to execute the Arbitration Agreement in this case on Lizzie White's behalf.

II. NO MERGER EXISTS BETWEEN THE FACILITY ADMISSION AGREEMENT AND THE ARBITRATION AGREEMENT

Defendant does not contend that the Arbitration Agreement in this case was a pre-requisite for admission to its facility, and, in fact, acknowledges that the Arbitration Agreement and the Facility Admission Agreement are separate documents. In *Hodge v. UniHealth*, the Court of Appeals determined that certain factors tended to support a conclusion of two separate documents, including the separateness of the agreements themselves, independent pagination, governed by separate law, and reference to the completeness of the document. *Id.*, 422 S.C. at 562, 813 S.E.2d at 302; *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) ("On its face, [the "Entirety of the Agreement"] clause recognizes the 'separatedness' of the [Arbitration Agreement] and the admission agreement, not a merger of the two contracts.").

In this case, the Facility Admission Agreement was separate from the Arbitration Agreement, and the Arbitration Agreement was not a condition of admission. The Facility Admission Agreement has its own pagination, and contains an express provision, part XVIII, titled "Entire Agreement," which provides:

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, understanding or agreements, oral or written, between the parties and may not be amended except by written agreement of the parties.

(See Defendant's Memorandum in Support of Motion to Compel, at Exhibit 2).

This clause suffices to demonstrate that the Facility Admission Agreement is separate from the Arbitration Agreement, and no merger between the documents exists. This Court should therefore reconsider its conclusion that the two documents merged.

III. DEFENDANT FAILED TO MEET ITS BURDEN TO DEMONSTRATE EQUITABLE ESTOPPEL AGAINST PLAINTIFF JEFFREY WHITE

In the absence of merger in this case, equitable estoppel cannot preclude Plaintiff from maintaining his claims before the circuit court. Separate from this issue, however, is whether Jeffrey White, as a nonsignatory to the Arbitration Agreement, can be bound by its terms. This Court should reconsider its conclusion that Defendant met its burden related to equitable estoppel.

Specifically, equitable estoppel is a fact intensive inquiry that requires the moving party to demonstrate: 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) that the party against whom estoppel is sought had actual knowledge of the facts. *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The moving party must also demonstrate that they (1) lacked knowledge and the means of knowledge of the truth of the facts in question; (2) relied on the conduct of the party estopped; and (3) made a prejudicial change of position in reliance on the conduct of the party estopped. *Id.* at 84–85, 650 S.E.2d at 470; *see also Pearson v. Hilton Head Hospital*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) (“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.” (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417–18 (4th Cir. 2000))).

In *Pearson*, the Court of Appeals noted that 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’”. 400 S.C. at 290, 733 S.E.2d at 601 (quoting *Int’l Paper Co.*, 206 F.3d at 418). This Court’s order determined that “[Jeffrey White], as Ms. White’s son and first alternate attorney-agent under the Power of Attorney, embraced all aspects of the Admission Agreement of the Facility.” (See C/A No. 2019-CP-09-220, Order Compelling Arbitration at p. 13). Other than Defendant’s conclusory statements, however, Defendant provided no information about what benefit Jeffrey White received from the Facility Admission Agreement or how Mr. White embraced its terms.

At this early stage of the case, the only certainties are that Jeffrey White was not a signatory to any agreement, and that Lizzie White was pulled from Defendant’s facility within six months of her admission suffering from a significant and infected sacral pressure wound. Without more, this information fails to meet the requisite elements of equitable estoppel, and the Court should reconsider its conclusion that Mr. White is equitably estopped from maintaining his case in the circuit court in light of the absence of merger, and the insufficient factual support provided by Defendant.

IV. THE COURT SHOULD OMIT UNSUPPORTED FINDINGS OF FACT AND CORRESPONDING LEGAL CONCLUSIONS FROM ITS ORDER

In its order, this Court adopted Defendant’s recitation of certain facts, including assumptions about the intentions and actions of the parties and witnesses. For example, the Court found that Ms. Lizzie White individually and through her daughter “contemplated that the terms of the agreement to admit Ms. White were contained in the Admission Agreement and the Arbitration Agreement.” (See order compelling arbitration, at page 10) (emphasis added). The

order makes additional findings of fact related to Jeffrey White's conduct and intentions related to the two agreements.

To date, however, Defendant has presented no information or evidence to support these findings. The Court should therefore reconsider its order to the extent it includes unsupported findings of fact, and to the extent its legal conclusions, including as to merger and equitable estoppel, are based on unsubstantiated facts.

V. THE COURT SHOULD RECONSIDER ITS RELIANCE ON UNPUBLISHED AND MEMORANDUM OPINIONS

In the order compelling arbitration, this Court relied heavily upon the Court of Appeals' unpublished opinion in *Arredondo*, *supra*. The *Arredondo* case, however, does not involve the same parties as those in dispute before this Court, was not decided by this Court, nor does it involve the facts in dispute in this case. *See Arredondo*, 2019 WL 3814725 at * 2 (considering an Arbitration Agreement signed by a third party who had both a durable power of attorney and healthcare power of attorney for the resident). In addition to reliance on *Arredondo*, this Court's order also cites and relies heavily upon memorandum opinions of the South Carolina District Court and South Carolina courts of common pleas. (*See* order at p. 10, citing *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-cv-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011); *Abrams v. Fundamental Long-Term Care Holdings, LLC, et al*, Case No. 2011-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)).

This Court's heavy reliance on *Arredondo*, and on a multitude of district and circuit court memorandum opinions, is improper. *Hodge*, 422 S.C. at 555, 813 S.E.2d at 298 ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." (quoting Rule 268(d)(2), SCACR)). This

reliance was also extremely prejudicial to Plaintiff as this Court simultaneously disregarded in a footnote South Carolina precedent related to arbitration provisions without any explanation as to the factual distinctions between those cases and the case before this Court. (*See* Order Compelling Arbitration at p. 13, FN 4). The Court should reconsider its reliance upon unpublished and memorandum opinions, and should further reconsider its legal conclusions arising from these opinions.

CONCLUSION

As set forth herein, Plaintiff respectfully requests that this Court reconsider its holdings related to enforceability of the arbitration provision in this case, including its holdings related to actual authority, merger, and equitable estoppel, its reliance upon opinions that lack precedential value, and its inclusion of factual findings and corresponding legal conclusions that are not supported by the record of this case.

Respectfully submitted this 3rd day of December, 2020.

s/ Jessica L. Fickling
Jessica L. Fickling (Bar No. 100161)
STROM LAW FIRM, LLC
6923 N. Trenholm Road, Suite 200
Columbia, SC 29206
TEL: (803) 252-4800
FAC: (803) 252-4801
jfickling@stromlaw.com

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF CALHOUN	)	CASE NO. 2019-CP-09-00220
JEFFERY WHITE,	)	
individually and as personal representative of	)	
the Estate of Lizzie White,	)	
	)	
Plaintiff,	)	
	)	DEFENDANT'S RESPONSE IN
vs.	)	OPPOSITION TO PLAINTIFF'S MOTION
	)	FOR RECONSIDERATION
ST. MATTHEWS HEALTHCARE, LLC	)	
d/b/a Calhoun Convalescent Center,	)	
	)	
Defendant.	)	
	)	

Defendant St. Matthews Healthcare, LLC d/b/a Calhoun Convalescent Center, by and through undersigned counsel, hereby responds in opposition to the motion (the "Instant Motion") of Plaintiff, Jeffery White, individually and as personal representative of the Estate of Lizzie White, filed December 3, 2020, for reconsideration of the Court's Order Granting Defendant's Motion to Compel Arbitration and Motion to Stay (the "Underlying Order"), filed November 24, 2020.

As indeed reflected in the Underlying Order itself, upon due consideration of the parties' respective written submissions and oral arguments, the Court has already addressed all salient points relative to Defendant's motion to compel arbitration and correctly determined to grant the motion. "An issue may not be raised for the first time in a motion to reconsider." Johnson v. Sonoco Products Co., 381 S.C. 172, 177, 672 S.E.2d 567 (2009).¹

¹ Defendant submits to the Court that Plaintiff has raised several new issues in his motion to reconsider that are improperly raised. The new issues raised by Plaintiff for the first time in his motion include, but are not limited to: (a) Plaintiff's challenge to the validity of the physicians' certifications for the determination of Ms. White's incapacity; (b) Plaintiff's assertion that "a declaration of incompetence after a hearing" was required for the requisite determination of the effective date of the power of attorney at issue; and (c) Plaintiff's contention that the doctrine of merger involves findings of fact and, therefore, cannot be relied upon by the Court in determining the enforceability of an arbitration agreement. Pursuant to Sonoco Products Co., none of these issues may be presented to the Court by Plaintiffs pursuant to a Rule 59(e) motion to reconsider because they are untimely. In any event, these issues are without merit according to

Therefore, unless the Court should wish to hear more from the Defendant on this matter, for the reasons it has already advanced (both in writing and via oral argument at the hearing on its motion to compel arbitration, all of which are hereby incorporated herein by reference), Defendant maintains that the Court's holding is well-founded and not undermined by the Instant Motion, which is properly denied.

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/D. Jay Davis, Jr.
D. Jay Davis, Jr.
Russell G. Hines
Kate C. Mettler
25 Calhoun Street, Suite 400
Charleston, SC 29401
P.O. Box 993 (29402)
(843) 720-5406
jdavis@ycrlaw.com
rhines@ycrlaw.com
kmettler@ycrlaw.com
Attorneys for Defendant
St. Matthews Healthcare, LLC
d/b/a Calhoun Convalescent Center

Charleston, South Carolina

Dated: February 9, 2021

South Carolina's Probate Code, §62-5-500 *et seq.* and applicable South Carolina case law concerning the untimely issues raised by Plaintiff.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF CALHOUN	)	CASE NO. 2019-CP-09-00220
JEFFERY WHITE,	)	
individually and as personal representative of	)	
the Estate of Lizzie White,	)	
	)	
Plaintiff,	)	DEFENDANT'S MOTION
	)	TO ALTER, AMEND, AND/OR
vs.	)	RECONSIDER ORDER GRANTING
	)	PLAINTIFF'S MOTION TO RECONSIDER
ST. MATTHEWS HEALTHCARE, LLC	)	
d/b/a Calhoun Convalescent Center,	)	
	)	
Defendant.	)	
	)	

TO: THE HONORABLE MAITE MURPHY, Presiding Judge, and JESSICA L. FICKLING, ESQUIRE, STROM LAW FIRM, LLC, Attorneys for Plaintiff

NOW COMES Defendant, St. Matthews Healthcare, LLC d/b/a Calhoun Convalescent 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 Granting Plaintiff's Motion to Reconsider, filed March 31, 2021 (the "Subject Order").^{1 2}

¹ The Subject Order was preceded by the Court's Order Granting Defendant's Motion to Compel Arbitration and Motion to Stay, filed November 24, 2020 (the "Original Decision").

² The Subject Order was entered on the motion, filed December 3, 2020, of Plaintiff, Jeffery White, individually and as personal representative of the Estate of Lizzie White, for reconsideration of the Original Decision ("Plaintiff's Motion to Reconsider"). In this motion, "Ms. White" refers to the decedent, Lizzie White.

1. **Most respectfully, the Facility asks the Court to (re)consider and expressly rule on each and every distinct issue/argument it raised in support of the Motion to Compel Arbitration³ and in opposition to Plaintiff's Motion to Reconsider, i.e., each and every distinct issue/argument set forth in the Motion to Compel Arbitration, the Memo in Support of Arbitration⁴, the Memo in Opposition to Reconsideration⁵, and via oral argument on both the Motion to Compel Arbitration and Plaintiff's Motion to Reconsider, all of which is/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).

2. **The merger/equitable estoppel analysis in the Subject Order is erroneous, to include specifically, but without limitation, the Subject Order's use of the wrong test for equitable estoppel in this context⁶ and the Court's misplaced focusing of the estoppel analysis on Plaintiff (i.e., Jeffery White) instead of on Ms. White, the actual resident of the Facility and the decedent on whose estate's behalf he is pursuing this action against the Facility as personal representative.⁷ The Court erred in rejecting the Facility's merger/equitable**

³ The “Motion to Compel Arbitration” refers to the motion originally disposed of via the Original Decision and now via the Subject Order, i.e., the Facility's Motion to Dismiss Plaintiff's Complaint, Compel Arbitration and Stay State Court Proceedings, filed June 17, 2020.

⁴ The “Memo in Support of Arbitration” refers to the Facility's memo in support of the Motion to Compel Arbitration, filed August 11, 2020.

⁵ The “Memo in Opposition to Reconsideration” refers to the Facility's response in opposition to the Plaintiff's Motion to Reconsider, filed February 9, 2021.

⁶ (See Subject Order pp. 6–7 (citing the six-factor test for estoppel traditionally applied in *non*-arbitration cases).).

⁷ (See Subject Order p. 7 (“In this case, Jeffrey White, as the personal representative of his mother's estate, was not a signatory to the arbitration agreement Defendant has sought to enforce. While this does not end the inquiry, Defendant has also failed to establish any of the necessary elements in support of equitable estoppel. Defendant has provided no information about Mr. White's conduct in the context of his mother's admission the Defendant's facility, and therefore has failed to demonstrate how Plaintiff's action asserting his mother's legal rights is somehow contrary to equity. This Court therefore finds that Defendant has not met its burden of

estoppel argument, i.e., it erred in failing to find (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Ms. White effectively embraced and directly benefitted from the Admission Agreement, Plaintiff should be estopped to deny the enforceability of the Arbitration Agreement.

To be clear, the Facility's merger/equitable estoppel argument is not an argument for the enforceability of the Arbitration Agreement but rather an argument for Plaintiff—as personal representative of Ms. White's estate—to be estopped to deny the enforceability of the Arbitration Agreement. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and *Ms. White* having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Arbitration Agreement merged therewith. Accordingly, any contention about the Arbitration Agreement's supposed lack of enforceability is beside the point and unavailing to refute the Facility's merger/equitable estoppel argument, which, again, turns not on the question of whether the Facility can show that the Arbitration Agreement is enforceable but whether it can show that Plaintiff should be estopped to deny that the Arbitration Agreement is enforceable—and, most respectfully, the Facility has done so.

Re: Merger

South Carolina law recognizes numerous viable theories under which a nonsignatory can be bound to an arbitration agreement. *See Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (“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.*

demonstrating that equitable estoppel should apply to *Mr. White*, and thus the doctrine is inapplicable in this case.”) (emphasis added).)

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).

In *Coleman*, 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 Subject Order wrongfully concludes that the Admission Agreement and the Arbitration Agreement are separate contracts that do not merge. (*See* Subject Order p. 6 (“Here, this Court finds that the plain language of the facility admissions agreement and the arbitration agreement indicates that the agreements were to be construed independent of one another. The instruments are separately paginated, the facility admissions agreement contains an Entire Agreement clause, and the arbitration agreement was not a condition precedent to entry into Defendant’s facility, whereas the facility admission agreement was a prerequisite to admission. This Court therefore finds no merger occurred between these two distinct instruments.”).)

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,”⁸ as indeed the Admission Agreement and the Arbitration Agreement were here,⁹ 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 must “endeavor to determine the situation of the parties, as well as their purposes, at the time the contract

⁸ *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

⁹ 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).

was entered into.” *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25. The assertion in the Subject Order that, “[t]he [*Coleman*] Court recognized . . . that certain factors support the separateness of documents, even to the extent the instruments were signed at roughly the same time,”¹⁰ is overbroad and incorrect. Neither *Coleman* nor the other case the Court cites in this regard, *Thompson*, sets forth “factors” of general application; rather, those decisions turn on case-specific facts analyzed in case-specific context.

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,

¹⁰ (Subject Order p. 5.)

directly contradicting the idea of “separatedness” (in the parlance of the *Coleman* Court¹¹), 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 lack of its own supposed “separatedness.” (Admission Agreement p. 12.) And without question, the Arbitration Agreement is among these other Admissions materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) (“The same day as Decedent’s admission to White Oak, Stott, acting as Decedent’s authorized representative, signed White Oak’s *admission documentation—including the Arbitration Agreement.*”) (emphasis added) (internal footnote omitted).

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. White 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

¹¹ 407 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).

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. White’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. White’s admission to the Facility) *with* Arbitration Agreement (providing for arbitration of disputes arising out of Ms. White’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. White’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 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 Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Ms. White 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.

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, *Ms. White*¹² received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment she received therein. Not even Plaintiff himself alleges that every single aspect of the residency (every meal, every instance of care/treatment delivered, essentially every moment at the Facility) was deficient.

Respectfully, the Court should have found that the Arbitration Agreement merged with the Admission Agreement (the validity of which Plaintiff does not challenge¹³) and that Plaintiff is estopped to deny the Arbitration Agreement's enforceability, *Ms. White* 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. If anything, this conclusion is all the more compelling given that, as the Court recognized in the Original Decision, *Ms. White's* daughter *Darlene Nunnally* ("*Ms. Nunnally*"), who signed the Admission Agreement and the Arbitration Agreement for *Ms. White*, did so while not only making express representations to the Facility that she had all due authority to sign the documents for her mother but also bolstering these representations by presenting the Facility with a power of attorney. (*See* Original Decision pp. 1–2.)

¹² Again, the Court's analysis of estoppel in terms of Plaintiff (*Mr. White*), the personal representative of *Ms. White's* estate, is simply misplaced.

¹³ 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.

3. **While recognizing that this Court is bound by the Supreme Court’s very recent decision in *Arredondo v. SNH SE Ashley River Tenant, LLC*, Opinion No. 28011 (S.C. Sup. Ct. filed March 10, 2021), the Facility nonetheless wishes to preserve its argument based on actual authority via the power of attorney and, thus, contends that the Court’s analysis in the Subject Order and the Supreme Court’s holding in *Arredondo* is incorrect and violates the FAA**

Without question, the Arbitration Agreement is governed by the FAA. First off, the Arbitration Agreement expressly states that the FAA applies,¹⁴ and this must be enforced like any other contract term. *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 196, 844 S.E.2d 66, 70 (Ct. App. 2020) (“We first consider whether the FAA applies. We hold it does, for two reasons. First, the [subject contract] provides the parties ‘specifically agree that this transaction involves interstate commerce.’ We must enforce this agreement like any other contract term.”) (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001) (finding the FAA applied because parties had agreed contract involved interstate commerce)). Additionally, and in any event, the FAA applies “to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363; *see also Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress’s power under the Commerce Clause). And our Supreme Court has expressly 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).

¹⁴ (Arbitration Agreement (“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 [FAA], notwithstanding any contrary provision of this Agreement or contrary state law.”).)

The FAA requires arbitration agreements to be placed on equal footing with other contracts under state law and prohibits courts from setting aside arbitration agreements based on state-law defenses “that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

Without question, Plaintiff’s claims against the Facility are within the scope of the Arbitration Agreement. The plain language of the Arbitration Agreement clearly embraces the subject matter of Plaintiff’s claims. (*See* Arbitration Agreement (“It is the intention of the parties to this [Arbitration] 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 [Ms. White].”); *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. White’s] stay at [the] Facility, or to the provisions of care or services to [Ms. White] . . . and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration”).) And even were there “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).

In *Kindred Nursing Centers Limited Partnership v. Clark*, the United States Supreme Court rejected Kentucky’s “clear statement rule,” which provided a power of attorney could not entitle a representative to enter into an arbitration agreement without specific language granting that authority. 137 S. Ct. at 1421, 1426–27 (2017). The Court explained, “Because that rule singles out arbitration agreements for disfavored treatment . . . it violates the FAA.” *Id.* at 1425. South Carolina law does not require an act 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. *See First S. Bank v.*

Rosenberg, 418 S.C. 170, 181, 790 S.E.2d 919, 925–26 (Ct. App. 2016) (rejecting appellant’s contention “that an agent cannot sign a guaranty on behalf of his principal pursuant to a power of attorney unless the power of attorney specifically authorized the execution because this assertion is unsupported by South Carolina law”). Accordingly, under the FAA’s “equal footing” rule, a power of attorney does not need to explicitly refer to arbitration in order to grant the agent authority to execute an arbitration agreement as long as the powers granted are broad enough to include such an act. *Concepcion*, 563 U.S. at 339.

The power of attorney at issue here is a South Carolina Statutory Health Care Power of Attorney, *see* S.C. Code Ann. §§ 62-5-500 to -518 (the “Health Care POA Act”). In accordance with the Health Care POA Act, the power of attorney granted Ms. Nunnally broad authority:

To take any other action necessary to making, documenting, and assuring implementation of decisions concerning [Ms. White’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 [Mr. Acevedo’s] name, and at the expense of my estate to force compliance with my wishes as determined by [Mr. Acevedo’s] agent.

See § 62-5-504.

The power of attorney explicitly granted Ms. Nunnally the authority to admit Ms. White to a skilled nursing facility and to take any actions necessary to assure implementation of her health care decisions, including: (i) pursuing legal actions, (ii) settling legal actions, (iii) waiving claims and liability, and (iv) forcing compliance with Ms. White’s wishes.¹⁵ These broad powers,

¹⁵ The matter of the forum for the enforcement of compliance with Ms. White’s health care wishes, and the selection thereof, is directly related to the matter of forcing compliance with Ms. White’s health care wishes.

expressly stated to be *without limitation*, are not limited in any way. Ms. Nunnally was duly empowered under the power of attorney to sign the Arbitration Agreement on White's behalf, and most respectfully, by employing an unduly restrictive reading of the power of attorney in issue, both the Subject

WHEREFORE, for the foregoing reasons, the Facility asks that the Court alter, amend, and/or reconsider the Subject Order in favor of an order in line with the holding of the Original Decision.

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.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,
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Charleston, South Carolina

April 12, 2021

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
COUNTY OF CALHOUN	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	Civil Action No.: 2019-CP-09-00220
Jeffery White, individually and as	)	
Personal Representative of the Estate of	)	
Lizzie White,	)	
	)	
Plaintiff,	)	PLAINTIFF'S MEMORANDUM IN
	)	OPPOSITION TO DEFENDANT'S
	)	MOTION TO RECONSIDER
v.	)	
	)	
St. Matthews Healthcare, LLC, d/b/a	)	
Calhoun Convalescent Center,	)	
	)	
Defendant.	)	

This matter comes before the Court on Defendant's motion to reconsider the Court's Order reversing its decision compelling arbitration. (*See Estate of Lizzie White v. Calhoun Convalescent Center*, C/A No. 2019-CP-09-220, Order Granting Plaintiff's Motion to Reconsider (Mar. 31, 2021)). This is now the third time this Court has been asked to consider whether Plaintiff Jeffrey White must arbitrate claims arising out of the death of his mother Lizzie White, who, prior to her death was a resident of Defendants' facility. Ms. White became a resident in June of 2017, and was discharged under emergency circumstances in January of 2018, with a large and infected sacral pressure injury. Among the allegations, Plaintiff contends Ms. White died as a result of this wound, which was caused by the actions, inactions and/or omissions of Defendants.

For its part, Defendants sought to enforce an arbitration agreement executed by Ms. White's daughter Darlene Nunally. The Court's original Order, issued on November 24, 2020, granted this request. Plaintiff thereafter moved for reconsideration, and, on March 31, 2021, this

Court reversed its decision, finding Ms. White's claims were not subject to arbitration and should proceed to a jury.

Specifically, the March 31, 2021 Order determined that the Healthcare Power of Attorney (HCPOA) executed by Darlene Nunnally, which formed the basis of Defendants' argument in favor of arbitration, did not vest Ms. Nunnally with the requisite authority to sign general legal documents, but, instead, only granted limited authorization to make healthcare decisions. (*See* Order, at p. 2-4). The Court further found that the agreement to arbitrate claims at issue in this case, was not a "healthcare decision," because the agreement to arbitrate was separate from the facility admission agreement signed by Ms. Nunnally admitting Ms. White to Defendant's facility. (*Id.* at p. 4-6). This Court also concluded that no evidence existed to support equitable estoppel against Mr. White in this matter.

This Court's Order granting Plaintiff's motion for reconsideration, reversing the order compelling arbitration, was well reasoned, and supported by facts and information in the record as well as South Carolina precedent. Accordingly, at this time, Defendants' Motion to Reconsider must be denied.

I. THE SOUTH CAROLINA SUPREME COURT'S DECISION IN *ARREDONDO* IS CONTROLLING AND SUPPORTS THIS COURT'S DECISION TO DENY ARBITRATION

In support of arbitration, Defendants cited extensively to the South Carolina Court of Appeals' unpublished opinion in *Arredondo v. SNH SE Ashley River Tenant, LLC*, Appellate Case No. 2017-001298, 2019 WL 3814725 (Aug. 14, 2019) (unpublished) (rev'd) ("*Arredondo I*"). Not only did Defendants include the opinion as an exhibit in support of the original motion to compel arbitration, but, during oral argument, Defendants noted:

There is a case we cite, it's called *Arredondo*, Court of Appeals case from last year. It's an unpublished decision so we're not citing it as precedent per se, but we do think it certainly can be instructive... it flat out says that the statutory

health care power of attorney is not limited to health care decisions. It also authorizes in this case the person's name was Arredondo to pursue legal action and grant a waiver required thusly hold the powers of attorney authorized to waive a jury trial right and execute any agreements like this one. It's on point, but it's unpublished.

(See **Exhibit A**, *Estate of White v. Calhoun Convalescent Center*, C/A 2019-CP-09-220, Transcript of Hearing on Defendant's Motion to Compel Arbitration, p. 24, ll. 24 – p. 25, ll. 1-14).

The Court of Appeals issued its opinion in *Arredondo I* in 2019. Thereafter, in March of 2021, the South Carolina Supreme Court reversed the Court of Appeals' decision. See *Arredondo v. SNH SE Ashley River Tenant, LLC*, Appellate Case No. 2019-001767, 2021 WL 908508 (Mar. 21, 2021) ("*Arredondo II*") (**Exhibit B**). In the Opinion, Justice James, writing for the Court, concluded that neither the general durable power of attorney, which authorized the representative to enter into agreements concerning transfers of property, nor the healthcare power of attorney, which authorized the representative to make healthcare decisions, gave the representative the authority to execute an arbitration clause waiving the decedent's right to a jury trial. *Id.*, 2021 WL 908508 at *5-6.

In *Arredondo II*, the healthcare power of attorney executed by the decedent's representative contained a clause authorizing the representative to take "any other action necessary to making, documenting, and assuring implementation of decisions concerning my healthcare..." *Id.*, 2021 WL 908508 at *5. Analyzing this paragraph, the Court concluded the Arbitration Agreement was not a "necessary" condition of facility admission, and therefore that the healthcare power of attorney did not vest the representative with authority to execute the document. *Id.* (citing favorably to *Dickerson v. Longoria*, 414 Md. 419, 995 A.2d 721 (2010) (finding that an agent designated to make health care decisions did not have authority to execute

a voluntary and free-standing arbitration agreement, which was not essential to the facility's provision of care)).

The Court emphasized that “the characterization of an arbitration agreement as either a mandatory condition to admission or an optional, collateral agreement often determines the authority issue when the agent holds the power of attorney empowering her to make necessary health care decisions.” *Id.* at *6. *See Miss. Care Ctr. Of Greenville, LLC v. Hinyub*, 975 So.2d 211, 218 (Miss. 2018) (health care surrogate did not have authority to execute arbitration agreement that was not required for admission to facility; *Coleman v. United Health Servs. Of Georgia, Inc.*, 344 Ga.App. 682, 812 S.E.2d 24, 26 (2018) (agent not authorized to execute “voluntary” arbitration agreement that was not mandatory for facility admission).

In support of its current motion to reconsider, Defendants encourage this Court to ignore *Arredondo II*, stating that the case was wrongly decided in violation of the Federal Arbitration Act. However, Defendants conceded in their own argument that the arbitration agreement in this case was not a condition precedent to facility admission. (*See Estate of Lizzie White v. Calhoun Convalescent Center*, C/A No. 2019-CP-09-220 Defendant's Motion to Reconsider, p. 7 (“To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitrate was not required to gain admission to the Facility”)). The HCPOA in this case contains a similar clause to the HCPOA in *Arredondo II*, authorizing the representative to make only those decisions “necessary” to healthcare. This Court's Order therefore aligns with *Arredondo II*.

To the extent Defendants suggest interpreting any constraints upon the HCPOA executed by Lizzie White's daughter somehow contravenes the Federal Arbitration Act's mandate to hold arbitration agreements on equal footing with all other contracts, this argument is without merit. South Carolina precedent requires a power of attorney to be interpreted according to the general

rules of contract interpretation. *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 577, 828 S.E.2d 82, 87 (Ct.App. 2019), *cert. pending* (considering contract law when reviewing actions to interpret a power of attorney); *see Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct.App. 2014) (“Where the language of a contract is plain and capable of legal construction, that language alone determines the instruments force and effect”). This analysis would exist irrespective of the type of contract the agent executed on behalf of the principal. Therefore, this Court did not err in considering the scope of authority vested by the power of attorney at issue and the decisions Ms. White’s representative was authorized to make consistent with that scope. The Court’s findings are consistent with South Carolina precedent, and with the Federal Arbitration Act, and Defendants’ motion must be denied.

II. THE COURT CORRECTLY CONCLUDED NO MERGER EXISTS BETWEEN THE ARBITRATION AGREEMENT AND THE FACILITY ADMISSION AGREEMENT IN THIS CASE

Far from relying on a formulaic recitation, in its Order granting reconsideration, this Court considered a number of factors when it concluded no merger existed between the facility admission agreement and the arbitration agreement at issue. (*See Order Granting Reconsideration*, p. 5, citing *Coleman v. Mariner*, 407 S.C. 346, 755 S.E.2d 450 (2014) (holding no merger existed between a facility admissions agreement and an arbitration agreement when the agreements contained an “Entire Agreement” clause recognizing the separateness of the agreements)).

As an initial matter, the Court’s ruling that Ms. White’s representative lacked authority to execute the arbitration agreement in this case is dispositive as to all other issues. To the extent, however, that any issues remain, the Court was within its discretion to consider factors such as separate pagination, headings, terminology, and clauses in the agreements themselves in

concluding that the two documents were separate, and should not be read together. *Coleman*, 47 S.C. at 355, 755 S.E.2d at 450; *see Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct.App. 2016) (finding that a facility admissions agreement and arbitration agreement did not merge when, among other factors, the documents referred separately to each other).

Based upon its consideration of the record, and the plain language of the documents themselves, this Court concluded that no merger occurred between the documents in this case. The Court did not err in so finding. *See Arredondo II*, 2021 WL 908508 at * 2 (the factual findings of the circuit court in a motion to compel arbitration will not be reversed if they are supported by any evidence).

III. THE COURT CORRECTLY CONCLUDED THAT THERE IS NO EVIDENCE IN THIS CASE TO SUPPORT EQUITABLE ESTOPPEL AGAINST JEFFREY WHITE

In its motion to reconsider, Defendants assert that the Court erred in applying an equitable estoppel analysis to Jeffrey White. Contrary to Defendants' argument, however, estoppel is generally viewed as a shield to prevent a party from denying an arbitration provision in a given contract where the party attempts to enforce other provisions. First, this Court has correctly concluded that the facility admissions agreement in this case did not merge with the arbitration agreement. In addition, even if the documents had merged, what benefit, if any, that Mr. White, or his mother, decedent Lizzie White, received pursuant to the facility admissions agreement is tenuous at best where, as here, Ms. White sustained grievous bodily injury while in the care and control of Defendants' facility.

The Court's reasoning and analysis related to equitable estoppel is sound, and not controlled by an error of law, and therefore Defendants' motion for reconsideration must be denied.

CONCLUSION

For the reasons set forth herein, as well as those supported by the record of this case, including multiple hearings, and the supporting and opposing memoranda, which are hereby incorporated by reference, the Court's order granting Plaintiff's motion to reconsider and reversing its order compelling arbitration is supported by the evidence of record, does not constitute an abuse of discretion, and otherwise should not be reversed. Additionally, Defendants should be foreclosed from using this motion to reconsider as a vehicle to make those arguments that should have or could have previously been argued. As such, the Defendants' motion to reconsider should be denied at this time.

Respectfully this 3rd day of May, 2021.

s/ Jessica L. Fickling
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ATTORNEYS FOR PLAINTIFF

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Jul 01 2021

SC Court of Appeals

Appeal from Calhoun County
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No. 2019-CP-09-00220

Jeffery White,
individually and as Personal Representative
of the Estate of Lizzie White,

Respondent,

v.

St. Matthews Healthcare, LLC,
d/b/a Calhoun Convalescent Center,

Appellant.

NOTICE OF APPEAL

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Attorneys for Respondent

Defendant, St. Matthews Healthcare, LLC, d/b/a Calhoun Convalescent Center (“Appellant”), hereby appeals the following orders of the Honorable Maite Murphy, Circuit Court Judge:

- **Order Granting Plaintiff’s Motion to Reconsider**, filed March 31, 2021, and
- **Form 4 Order filed June 2, 2021**, denying Defendant’s motion to reconsider the Order Granting Plaintiff’s Motion to Reconsider.

Copies of the above-referenced appealed orders are attached hereto and incorporated herein by reference. Appellant received written notice of entry of the most recent order on June 2, 2021.

Respectfully submitted,
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July 1, 2021

**THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

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I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellant, hereby certify that Appellant's **NOTICE OF APPEAL** was served on Respondent on July 1, 2021, by emailing (see attached email) a copy of the same to Respondent's counsel of record:

Jessica L. Fickling, Esquire
jfickling@stromlaw.com
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Attorneys for Respondent

I also certify that a copy of this **NOTICE OF APPEAL** was this day, July 1, 2021, E-Filed with the lower court (see attached NEF), thus also, i.e., in addition to service by email, effecting service of the notice today on Respondent's above-identified counsel of record via the E-Filing System.

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Russell G. Hines (SC Bar No. 72100)

Attorneys for Appellant

Charleston, South Carolina

July 1, 2021

From: [Hines, Russell](#)
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Cc: ["MTurnage@stromlaw.com"](#); ["Brown, Steve"](#); [Davis, Jay](#); [Mettler, Kate C.](#); [Phillips, Ashton](#); [McNeil, Tasha](#); [Wakeham, Rebecca \(Becky\)](#); [Justman, Aimee](#); [Bell, Pollyana \(Polly\)](#)
Subject: White v. St. Matthews Healthcare (Circuit Court Case No. 2019-CP-09-00220) -- Notice of Appeal
Date: Thursday, July 1, 2021 11:32:28 PM
Attachments: [image001.png](#)
[White v. St. Matthews Healthcare -- Notice of Appeal.pdf](#)
[Appealed Order filed 3-31-21 \(Order Granting Pl.'s Mot. to Reconsider\).pdf](#)
[Appealed Order filed 6-2-21 \(Order Denying Def.'s Motion to Reconsider\).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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***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2019CP0900220

Official File Stamp: 07-01-2021 11:35:30 PM
Court: CIRCUIT COURT
Common Pleas
Calhoun
Case Caption: Jeffery White VS St. Matthews Healthcare, Llc
Document(s) Submitted: Appeal/Notice of Appeal to Court of Appeals
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
Filed by or on behalf of: Donald Jay Davis, Jr.

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Kate Mettler for St. Matthews Healthcare, Llc
Ted Ashton Phillips, III for St. Matthews Healthcare, Llc
Donald Jay Davis, Jr. for St. Matthews Healthcare, Llc
Jessica Lerer Fickling for Jeffery White

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Mar 14 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.

Respectfully submitted,
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March 14, 2022