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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2019-CP-40-02295
Appellate Case No. 2020-000501

Vermell Daniels,
as Personal Representative of the Estate of Annie Porter,

Respondent,

v.

THI of South Carolina at Columbia, LLC,
d/b/a Midlands Health & Rehabilitation Center,

Appellant.

APPELLANT'S PETITION FOR REHEARING

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NOW COMES the Facility,[1] by and through its undersigned counsel, pursuant to Rule 221(a), SCACR, and hereby timely petitions this Honorable Court for rehearing of this matter, which it decided via Unpublished Opinion No. 2022-UP-313 (S.C. Ct. App. filed July 27, 2022) (the "Subject Opinion"), affirming the circuit court's denial of the Facility's motion to compel Plaintiff's[2] claims to arbitration.[3] As particularly stated and explained below (in the Argument section of this petition), the Facility most respectfully contends that the Court misapprehended or overlooked a number of material points.

BACKGROUND

With the help of Ms. Daniels, Ms. Porter was admitted as a resident of the Facility on December 22, 2017. (R. pp. 92, 115, 126.) Ms. Daniels handled the

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[1] The "Facility" refers to Defendant/Appellant, THI of South Carolina at Columbia, LLC, d/b/a Midlands Health & Rehabilitation Center. It is a skilled nursing facility in Richland County. (R. p. 21 ¶¶ 2, 4; pp. 42–43 ¶ 3; p. 43 ¶ 6.)

[2] "Plaintiff" refers to Plaintiff/Respondent, Vermell Daniels ("Ms. Daniels") as the personal representative of the estate of her late mother, Annie Porter ("Ms. Porter"). (R. p. 133 ¶ 3.)

[3] Rule 221(a) provides that "[p]etitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion . . . ." The original deadline for the Facility to petition for rehearing was thus the 15th day after Wednesday, July 27, 2022, which was Thursday, August 11, 2022. *See* Rule 263(a), SCACR (regarding computation of time). By motion served and filed August 11, 2022, the Facility timely requested a 15-day extension of the deadline to Friday, August 26, 2022.

paperwork in conjunction with Ms. Porter's admission and, in so doing, signed an Admission Agreement[4] and an Arbitration Agreement[5] on Ms. Porter's behalf.

Ms. Porter passed away on March 28, 2018,[6] and Plaintiff commenced this wrongful death and survival action in the Richland County Court of Common Pleas on April 25, 2019, alleging that Ms. Porter developed pressure sores because of deficient care/treatment she received at the Facility, which in turn resulted in her decline and eventual death. (R. pp. 20–37, 127.)

On June 5, 2019, the Facility moved to compel Plaintiff's claims to arbitration, based on the Arbitration Agreement Ms. Daniels signed for Ms. Porter. (R. pp. 90–92.)[7] [8] Following a hearing on August 26, 2019,[9] the circuit court, the Honorable L.

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[4] (R. pp. 115–26.)

[5] (R. p. 92.)

[6] (R. p. 127.)

[7] Subject to and without waiving its arbitration rights, the Facility timely answered Plaintiff's complaint, too. (R. pp. 42–52.)

[8] Without question, Plaintiff's claims against the Facility are within the scope of the Arbitration Agreement. (R. p. 92 ("[I]n 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. Porter's] stay at [the] Facility, or to the provisions of care or services to [Ms. Porter] . . . and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration . . . .").) But even if there were "any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration . . . ." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) ("[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.").

[9] (R. pp. 53–73.)

Casey Manning presiding, denied the motion by order filed November 6, 2019. (R. pp. 1–6.) On November 18, 2019, the Facility timely moved the circuit court to alter, amend, and/or reconsider its decision, pursuant to Rule 59(e), SCRCP. (R. pp. 135–42.) Following a hearing on February 13, 2020,[10] the circuit court denied the motion by order filed February 24, 2020. (R. pp. 7–19.)

This appeal timely followed by notice served and filed March 16, 2020,[11] and in due course, it was briefed and made ready for decision.

As explained in its principal appellate brief, and further supported in its reply brief, the Facility argued that the circuit court erred in failing to find that the Arbitration Agreement merged with the Admission Agreement and that Plaintiff was equitably estopped to deny the enforceability of the Arbitration Agreement because Ms. Porter had received direct benefits under the Admission Agreement merged therewith. (Br. of Appellant pp. 4–17; *see also* Reply Br. of Appellant.)[12] The Facility also argued that the circuit court erred in denying its alternative request for limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability based on agency or related concepts. (*See* Br. of Appellant pp. 19–22.)

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[10] (R. pp. 74–89.)

[11] (R. pp. 148–52.)

[12] This argument included the Facility's challenge to the circuit court's finding that the Arbitration Agreement is not enforceable because of a supposed lack of consideration and mutuality. (Br. of Appellant pp. 17–19.)

The case was submitted for decision during the June 2022 term without oral argument and decided on July 27, 2022, via the Subject Opinion, which affirmed the circuit court. The body of the Subject Opinion is brief enough to reproduce here in full:

> **PER CURIAM:** [The Facility] appeals the circuit court's order denying its motion to dismiss and compel arbitration. On appeal, [the Facility] argues the circuit court erred (1) because the merger of the at-issue arbitration agreement with the admission agreement equitably estopped [Ms.] Daniels, as the personal representative of the estate of her mother, [Ms.] Porter, from denying the validity of the arbitration agreement and (2) in denying its alternative request to allow limited discovery. We affirm.
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> 1. We hold the circuit court did not err in denying [the Facility's] motion to dismiss and compel arbitration because the admission agreement and the arbitration agreement did not merge. *See Berry v. Spang*, 433 S.C. 1, 9, 855 S.E.2d 309, 314 (Ct. App. 2021) ("Appeal from the denial of a motion to compel arbitration is subject to de novo review." (quoting *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008))); *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019) ("Whether an arbitration agreement may be enforced against a nonsignatory to the agreement is a matter subject to de novo review by an appellate court."); *Berry*, 433 S.C. at 9, 855 S.E.2d at 314 ("[A] circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." (quoting *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009))); *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (concluding that language in the admission agreement that "recognize[d] the 'separatedness' of the [arbitration agreement] and the

admission agreement" plus a clause allowing the arbitration agreement to "be disclaimed within thirty days of signing while the admission agreement could not" indicated the parties' intention "that the common law doctrine of merger not apply"); *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 562–63, 813 S.E.2d 292, 302 (Ct. App. 2018) (determining an admission agreement and arbitration agreement did not merge because the facts "the Admissions Agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law," "each document was separately paginated and had its own signature page," and "the Arbitration Agreement stated signing it was not a precondition to admission" evidenced the parties' intention the documents be construed as separate instruments). Because the documents did not merge, we need not address [the Facility's] equitable estoppel argument or its argument related to consideration and mutuality. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when its resolution of a prior issue is dispositive); *Coleman*, 407 S.C. at 356, 755 S.E.2d at 455 ("Since there was no merger here, appellants' equitable estoppel argument was properly denied by the circuit court."); *Hodge*, 422 S.C. at 563, 813 S.E.2d at 302 (concluding "equitable estoppel would only apply if documents were merged").

2. We hold the circuit court did not abuse its discretion in denying [the Facility's] alternative request for limited discovery. [The Facility] failed to present an argument to the circuit court or on appeal as to why discovery was likely to uncover relevant evidence supporting its position regarding authority and agency. *See Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016) ("A trial court's rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion."); *id.* ("An abuse of discretion occurs when the trial court's order is

> controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions."); *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991) (discussing, in the context of summary judgment, the necessity that the party requesting discovery "demonstrate[] a likelihood that further discovery will uncover additional evidence relevant to the issue").
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> **AFFIRMED.**

This petition for rehearing follows.

STANDARD OF REVIEW

A circuit court's determination of whether a claim is subject to arbitration is reviewed de novo on appeal. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). This includes de novo review of the determination of whether an arbitration agreement is enforceable against a nonsignatory. *Wilson v. Willis*, 426 S.C. 326, 334, 827 S.E.2d 167, 172 (2019). "Under de novo review, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Id.* Issues of law, however, are reviewed without any particular deference to the lower court. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016). Even where a ruling is on a matter within trial court's discretion, if the ruling is based on a misunderstanding of the law, rather than on the exercise of discretion, the question presented on appeal is one of law. *See Bain v. Self Mem'l Hosp.*, 281 S.C. 138, 152, 314 S.E.2d 603, 611 (Ct. App. 1984).

ARGUMENT

1. Misapprehending or overlooking the following material points, the Court erroneously affirmed the circuit court's denial of the Facility's motion to compel arbitration.

(a) Like the circuit court before it, the Court erred in its analysis of the Facility's merger argument. The Court should have found that the circuit court erred in not finding the Arbitration Agreement merged with the Admission Agreement.

In *Coleman v. Mariner Health Care, Inc.*, even though our Supreme Court found against merger on the particular *facts* of the case, 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 [arbitration agreement] under the [Adult Health Care Consent] Act, she is nevertheless equitably estopped to deny the [arbitration agreement'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 [arbitration agreements] 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. 346, 354–55, 755 S.E.2d 450, 455 (2014) (emphasis added).

Here, this Court, like the circuit court before it, 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, conversely, were simply not involved in) *Coleman* and its progeny, *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), and *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016).[13]

The Subject Opinion wrongly concludes that the Admission Agreement and the Arbitration Agreement are separate contracts that do not merge. 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,'"[14] as indeed the Admission Agreement and the Arbitration Agreement were here,[15]

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[13] Of the three cases (*Coleman*, *Hodge*, and *Thompson*), the Court only cited *Coleman* and *Hodge* in the Subject Opinion, but to be clear, *Thompson* does not support the Court's decision either.

[14] *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (quoting *Klutts*, 268 S.C. at 88, 232 S.E.2d at 24).

[15] To be clear, *Coleman* unequivocally answers the question of whether the instant Admission Agreement and Arbitration Agreement were executed at the

there is evidence to overcome the *presumption in favor of merger*, i.e., the presumption that the instruments were intended to be construed together as effectively one contract. This is a question of intention. *Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a contrary *intention* . . .") (emphasis added). And "in attempting to ascertain th[e] [parties'] intention," our courts "endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into." *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

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 even to arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference of an intention 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, under

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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 states regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), "the documents were [indeed] executed at *the same time, by the same parties, for the same purposes, and in the course of the same transaction*." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

the circumstances, the idea that there would have been an intention contrary to merger does not make sense.

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 signing (while the corresponding admission agreements did not), *the instant Arbitration Agreement has no disclaimer/revocation provision*. (R. p. 92.) The Court failed to recognize this material distinction in erroneously likening this case to *Coleman*.[16] The Court also erred in likening this case to *Hodge*. In citing *Hodge*, the Court noted only *some* of the factors that the *Hodge* Court relied on in finding against merger, namely, that "'the Admissions Agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law;'" that "'each document was separately paginated and had its own signature page;'" and that "'the Arbitration Agreement stated signing it was not a precondition to admission' evidenced the parties' intention the documents be

[16] Indeed, the Court has done so even while expressly recognizing as material to the *Coleman* decision the fact that there was "a clause allowing the arbitration agreement to 'be disclaimed within thirty days of signing while the admission agreement could not.'" (Subject Opinion p. 2 ("*Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (concluding that language in the admission agreement that 'recognize[d] the 'separatedness' of the [arbitration agreement] and the admission agreement' plus a clause allowing the arbitration agreement to 'be disclaimed within thirty days of signing while the admission agreement could not' indicated the parties' intention "that the common law doctrine of merger not apply'").)

construed as separate instruments." (Subject Opinion p. 2 (citing *Hodge*, 422 S.C. at 562–63, 813 S.E.2d at 302).) The Court failed to recognize that, as in *Coleman*—but, again, *not* in the instant case—the presence of a disclaimer/revocation provision in the arbitration agreement was a material fact that existed in *Hodge*, too. 422 S.C. at 562, 813 S.E.2d at 302 ("Also, the Arbitration Agreement stated it could be revoked within thirty days, whereas the Admission Agreement contained no such indication . . . ."); *id.* at 563, 813 S.E.2d at 302 ("Based on all of this, we find the Admissions Agreement and Arbitration Agreement did not merge.").

Also unlike the admission agreement at issue in *Coleman*, the "Entire Agreement" clause in the instant Admission Agreement does not reference the Arbitration Agreement as a separate contract. (R. p. 126.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[17]), 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." (R. p. 126.) 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

[17] 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).

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); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 ("Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement*.") (emphasis added)).

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. Porter 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 signed. 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).

To say that the Arbitration Agreement was not required for admission, which it was not, is not to say that it was not intended to be part of the admissions materials in the event it was agreed to, which it was, by Ms. Daniels on Ms. Porter's behalf. While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement *is* necessary to the

Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitrations Agreement's) sole reason for being. (*See* R. p. 92 (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. Porter'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* R. pp. 115–26 (setting forth the terms of Ms. Porter's admission) *with* p. 92 (providing for arbitration of disputes arising out of Ms. Porter's admission).)

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* R. p. 124 (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* p. 92 (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 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. The very nature of *merger* is to *merge* separate documents.

And—besides the fact, explained elsewhere, that there is no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement—to fall back on any 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."

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 finding against merger here relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent. It must be remembered that the presumption of merger arises only where the four elements of time, parties, purpose, and transaction coincide—as the all do here. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. If even one of these is lacking there is no merger. This is why, 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. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). The merger presumption is "earned," so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that

both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

This Court should have found that the circuit court erred in not finding the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the whole of which related to Ms. Porter'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 as to an intention contrary to merger.

(b) The Court erred in not reaching the Facility's equitable estoppel argument.

As explained in the Subject Opinion, the Court did not reach the Facility's equitable estoppel argument because of its finding that the Arbitration Agreement and the Admission Agreement did not merge. (Subject Opinion p. 2 ("Because the documents did not merge, we need not address [the Facility's] equitable estoppel argument . . . .").) Therefore, for the same reasons that the Court erred in affirming the circuit court's finding that these documents did not merge, it likewise erred in not reaching the Facility's equitable estoppel argument.

(c) Had it reached the Facility's equitable estoppel argument, as it should have, the Court should have found that the circuit court erred in not finding Plaintiff equitably estopped to deny the enforceability of the Arbitration Agreement.

In *Wilson v. Willis*, our Supreme Court observed that South Carolina has recognized a number of theories under which a nonsignatory can be bound to an arbitration agreement, including under the theory of estoppel. 426 S.C. at 338, 827 S.E.2d at 174. The *Wilson* Court favorably discussed the framework of the so-called direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court for review 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 that Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Ms. Porter received direct benefits (in the form of her admission to 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, *Wilson* supports the use of the direct benefit test to answer the question of equitable estoppel in a case like this.

The key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability but whether benefits to the nonsignatory are direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 ("Under direct benefits estoppel, [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. In the arbitration context, the doctrine 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. Stated another way, [u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement . . . .") (internal citations and quotation marks omitted); *id.* at 343, 827 S.E.2d at 176 ("It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of

the parties, but does not exploit (and thereby assume) the agreement itself.") (internal citations omitted). Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration clause (which is the case here because the Admission Agreement and the Arbitration Agreement merge) while at the same time denying that the arbitration clause is enforceable.

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Ms. Porter received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment she received therein. To deny her receipt of such benefits is illogical. It would require wholly discounting every single aspect of her residency (every meal, every instance of care/treatment delivered, essentially every moment at the Facility). Not even Plaintiff has alleged this. (R. pp. 21–37.)

This Court should have found that the circuit court erred in not finding Plaintiff equitably estopped to deny the Arbitration Agreement's enforceability, Ms. Porter having effectively embraced and directly benefitted from the Admission Agreement merged therewith.

(d) The Court erred in not reaching the Facility's argument related to consideration and mutuality.

As explained in the Subject Opinion, the Court did not reach the Facility's argument related to consideration and mutuality because of its finding that the

Arbitration Agreement and the Admission Agreement did not merge. (Subject Opinion p. 2 ("Because the documents did not merge, we need not address [the Facility's] . . . argument related to consideration and mutuality.").) Therefore, for the same reasons that the Court erred in affirming the circuit court's finding that these documents did not merge—and also because, as explained, the Court should have reached the Facility's equitable estoppel argument and should have found that the circuit court erred in not finding Plaintiff equitably estopped to deny the enforceability of the Arbitration Agreement—the Court likewise erred in not reaching the Facility's argument related to consideration and mutuality.

(e) Had it reached the Facility's argument related to consideration and mutuality, as it should have, the Court should have found that the circuit court erred in finding that the Arbitration Agreement is not enforceable because of a lack of consideration and mutuality.

Though nowhere actually analyzed in either its order denying the Facility's motion to compel arbitration or its order denying the Facility's Rule 59(e) motion, in the conclusion section of the latter order, the circuit court indicates that its ruling includes a finding that the Arbitration Agreement is unenforceable because "there was a lack of consideration and mutuality under the circumstances." (R. p. 19.) This point would seem immaterial in the context of this appeal, because (1) it improperly views the Arbitration Agreement as separate from (i.e., not merged with the Admission Agreement), as explained above, and (2) it is incongruent with the equitable nature of the Facility's estoppel argument, which, strictly speaking, is not

about the Arbitration Agreement's enforceability but about Plaintiff being estopped to deny its enforceability. To the extent it may be material, however, it is erroneous.

The Arbitration Agreement clearly reflects the parties' mutual and concurrent promises to forfeit their respective rights to a jury trial in favor of arbitration. Without question, this is adequate consideration. *See Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 304, 468 S.E.2d 292, 300 (1996) ("Valuable consideration for a contract may consist of some forbearance given or detriment suffered."); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274–75 (4th Cir. 1997) ("O'Neil first argues the contract to arbitrate was not supported by adequate consideration because the agreement was not binding on the hospital. O'Neil's argument fails because its premise is mistaken. . . . It is true that courts have refused to enforce arbitration agreements where the agreement specifically allows the employer to ignore the results of arbitration. That is not the case here, however. There is no such clause in the arbitration agreement signed by O'Neil, and we decline to read such a clause into the contract. *A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement*.") (citing *Rickborn*, 321 S.C. 291, 468 S.E.2d 292) (internal citation omitted) (emphasis added); *id.* at 275 ("O'Neil's argument is especially misplaced in the circumstances of this case. Not only has the hospital consistently argued that it is bound by the arbitration agreement, it has, by virtue of this suit, shown its commitment to the arbitration process. Indeed, the only party to

this case who has shown a desire to avoid binding arbitration is O'Neil herself.") (applying South Carolina law); *Towles*, 338 S.C. at 40, 524 S.E.2d at 846 n.4 (favorably citing *O'Neil* for the proposition that "a mutual promise to arbitrate constituted sufficient consideration to enforce an arbitration agreement where the employer proffered, and the employee signed, an employee handbook and acknowledgment form over three and one-half years after employment began."). Moreover, to require additional consideration for the Arbitration Agreement beyond the parties' mutual promises to arbitrate (where mutual promises constitute sufficient consideration for other contracts under South Carolina law[18]) violates the FAA's[19] requirement that arbitration agreements be placed on equal footing with all other contracts. *AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333, 339 (2011) ("[C]ourts must place arbitration agreements on equal footing with other contracts . . . ."); *see also Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (While a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not do so based on legal rules that "apply only

[18] *Rickborn*, 321 S.C. at 304, 468 S.E.2d at 300 ("Clearly, there was a meeting of minds, and the exchange of promises qualified as consideration. *Evatt v. Campbell*, 234 S.C. 1, 106 S.E.2d 447 (1959) (mutual promises constitute good consideration).").

[19] The "FAA" refers to the Federal Arbitration Act, 9 U.S.C §§ 1–16.

to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.") (citing *Concepcion*, 563 U.S. at 339).[20]

Accordingly, this Court should have found that the circuit court erred in finding that the Arbitration Agreement is not enforceable because of a lack of consideration and mutuality.

[20] Without question, the Arbitration Agreement is governed by the FAA. For one reason, it expressly says so. (R. p. 92 ("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.").) 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 the parties had agreed the subject contract involved interstate commerce)). Moreover, 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).

(f) At a minimum, the Court should have found that the circuit court erred in denying the Facility's alternative request for limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability.

The Arbitration Agreement is valid on its face, containing Ms. Daniels's express representation of her authority to bind her mother, Ms. Porter. (*See* R. p. 92 ("By . . . her signature below, the executing party [(i.e., Ms. Daniels)] represents that . . . she has the authority to sign on [Ms. Porter's] behalf so as to bind [Ms. Porter] as well as [herself].").)[21] The only evidence that Ms. Daniels lacked authority to bind Ms. Porter is her own affidavit (filed just days before the hearing on the Facility's motion to compel arbitration) contradicting her prior representation that she had authority to sign the Arbitration Agreement on her mother's behalf. (R. pp. 133–34.) Without this affidavit, Plaintiff would have no evidence to upset the facial validity of the Arbitration Agreement. In other words, the testimony presented via this affidavit constitutes the only evidentiary basis for the trial court's denial of the Facility's motion to compel arbitration based on agency or related concepts, and the Facility has thus far been forced to take it at face value, without any opportunity to depose the affiant.

[21] Having signed the Arbitration Agreement, Ms. Daniels "is presumed to have, read, understood, and assented to its terms." *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.").

Assuming, *arguendo*, the circuit court did not err in denying the Facility's primary request for relief, the interests of justice required that it allow the Facility to conduct targeted discovery on the Arbitration Agreement's enforceability based on agency or related concepts. Otherwise, the Facility is left in the impossible Catch-22 of, on the one hand, being vulnerable to Plaintiff's argument that it has not presented sufficient evidence to prove the Arbitration Agreement is enforceable (whether by true agency,[22] estoppel,[23] or ratification,[24] each a fact-intensive inquiry),

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

[23] "When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances." *R & G Const.*, 343 S.C. at 433, 540 S.E.2d at 118 (Ct. App. 2000).

[24] Authority can be supplied to an agent retroactively by express or implied ratification. *See Brazell Bros. Contractors v. Hill*, 245 S.C. 69, 74, 138

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

It is manifestly unfair and unjust for the circuit court to rely on Ms. Daniels's unchecked affidavit without allowing the Facility any opportunity to question her about it or otherwise follow pertinent evidentiary leads. The circuit court itself makes much of the validity of a disputed arbitration agreement being a matter for judicial determination and of it being the Facility's burden to establish the validity of the Arbitration Agreement. It cannot be the case that the proponent of arbitration (who, it must be remembered, may well be attempting to vindicate a valid right to arbitrate that the arbitration opponent has wrongfully denied) has the burden to establish that right in a fact-based judicial proceeding in which it is disallowed use of the fact-finding tools (discovery procedures) available in other judicial proceedings. Obviously, if this were an action to determine the validity of a contract

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

other than an arbitration agreement there would be no question about the Facility's ability to conduct discovery relevant to the facts/circumstances bearing on the contract's validity. To force the Facility into a situation where its arbitration rights are at the mercy of an unchecked affidavit (filed by an affiant directly contradicting her own prior representations) and where it cannot otherwise conduct relevant discovery to vindicate those rights without risking waiving them at the same time as it proves them is not only patently unjust but also a violation of the FAA's requirement that arbitration agreements must be placed on equal footing with other contracts. *Concepcion*, 563 U.S. at 339; *see also Kindred Nursing Centers*, 137 S. Ct. at 1423.

Still, this Court affirmed the circuit court in this regard on the basis that "[the Facility] failed to present an argument to the circuit court or on appeal as to why discovery was likely to uncover *relevant* evidence supporting its position regarding authority and agency." (Subject Order p. 3 (emphasis added).) This is not so.

As an initial matter, the Court misapprehends the authority it cites for this proposition, namely, *Baughman v. American Telephone and Telegraph Company*, 306 S.C. 101, 410 S.E.2d 537 (1991).[25] The Subject Opinion cites *Baughman* for the proposition that the Facility had to show "why discovery was likely to uncover

[25] This part of the Subject Opinion also cites *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016), but only for the applicable standard of review. (Subject Opinion p. 3.)

relevant evidence *supporting its position* regarding authority and agency." (Subject Opinion p. 3 (citing *Baughman*, 306 S.C. at 112, 410 S.E.2d at 544) (emphasis added).) But the proposition that *Baughman* actually states is that the proponent of discovery must show "a likelihood that further discovery will uncover additional evidence *relevant to the issue*" at hand. *Baughman*, 306 S.C. at 112, 410 S.E.2d at 544 (emphasis added). And without question, the Facility showed this.

The Facility duly showed (1) that the enforceability of the Arbitration Agreement based on agency or related concepts (whether by true agency, estoppel, or ratification) presents a fact-intensive inquiry; (2) that, as plainly evidenced by the very fact of Plaintiff's submission of Ms. Daniels's affidavit in opposition to the Facility's motion to compel arbitration, Ms. Daniels was a material witness in this regard; and (3) that, instead allowing the Facility to depose Ms. Daniels, the circuit court allowed her affidavit, which directly contradicted the express representation of authority she made to the Facility when she signed the Arbitration Agreement for Ms. Porter, to stand unchecked. "'Relevant evidence' means evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE (emphasis added). Without question, the Facility showed that deposing Ms. Daniels, and following any pertinent evidentiary leads

discovered in the process, was likely to uncover relevant evidence bearing on the question of authority and agency.

Accordingly, at a minimum, this Court should have found that the circuit court erred in denying the Facility's alternative request for limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability.

CONCLUSION

For the foregoing reasons, along with any other or further reason(s) set forth in its appellate briefs already on file, the entirety of which it hereby adopts and incorporates herein by reference and reiterates/reasserts in support hereof, the Facility asks this Honorable Court to grant the instant petition, to rehear this matter, to withdraw the Subject Opinion, and to decide this appeal anew via an opinion that reverses the circuit court and stays this lawsuit in favor of arbitration or, alternatively, remands this case to the circuit court with instructions for it to do so or, alternatively, reverses the circuit court and remands the case to the circuit court for the additional discovery requested by the Facility to be conducted, for additional briefing to be submitted to the circuit court in light thereof, and for the circuit court to decide the Facility's motion to compel arbitration anew with the benefit thereof.

<SIGNED ON THE FOLLOWING PAGE>

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August 23, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2019-CP-40-02295
Appellate Case No. 2020-000501

Vermell Daniels,
as Personal Representative of the Estate of Annie Porter,

Respondent,

v.

THI of South Carolina at Columbia, LLC,
d/b/a Midlands Health & Rehabilitation Center,

Appellant.

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I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellant, hereby certify that **APPELLANT'S PETITION FOR REHEARING** was served on all other parties to this matter on August 23, 2022, by emailing (see attached) a copy of the same to their following counsel of record:

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August 23, 2022

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Subject: Daniels v. THI (2020-000501) - Appellant's Petition for Rehearing
Attachments: Daniels v. THI (2020-000501) -- Appellant's Petition for Rehearing.pdf

Attached regarding the above-referenced matter, please find **Appellant's Petition for Rehearing**.

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