RECEIVED

Nov 22 2022

S.C. SUPREME COURT

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

---

Appeal from Charleston County
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

---

Circuit Court Case No. 2018-CP-10-01251

---

Appellate Case No. 2019-001413
Unpublished Opinion No. 2022-UP-169 (S.C. Ct. App. filed April 6, 2022)

---

Supreme Court Case No. 2022-001286

---

Estate of Richard Ladson, Jr.,
by and through Personal Representative
Richard Miles Ladson, Sr., POA,

Respondent,

v.

THI of South Carolina at Charleston, LLC
d/b/a Riverside Health and Rehab,

Appellant.

---

# RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR WRIT OF CERTIORARI

---

PIERCE | SLOAN, LLC
Carl E. Pierce, II (SC Bar No. 7946)
Benjamin C. Smoot, II (SC Bar No. 101372)
Carl E. Pierce, III (S.C. Bar No. 104229)
P.O. Box 22437
Charleston, South Carolina 29413
Phone: (843)722-7733; Fax: (843)722-7732

***Attorneys for Respondent Richard Ladson, Jr., by and through Richard Miles Ladson, Sr., POA***

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

STATE CASES

## CERTIFICATION OF COUNSEL

By and through its undersigned counsel, pursuant to Rule 242(d)(1), SCACR, Attorneys for Respondent Richard Ladson, Jr., by and through Richard Miles Ladson, Sr., POA, certifies that the Court of Appeals filed its opinion in this matter on April 6, 2022 (the "Subject Opinion"); that the Facility[1] petitioned the Court of Appeals for rehearing[2]; and that the Court of Appeals denied the Facility's petition for rehearing by order filed August 18, 2022.

---

[1] The "Facility" is Defendant-Appellant, THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab. It is a nursing facility in Charleston County.

[2] Because the Subject Opinion was filed April 6, 2022, the original deadline to petition for rehearing was April 21, 2022, pursuant to Rule 221(a), SCACR (providing, "Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion . . . ."); see also Rule 262(a), SCACR (regarding computation of time). By order filed April 22, 2022, in response to the Facility's motion of April 21, 2022, the Court of Appeals extended the deadline until May 6, 2022. By order filed May 17, 2022, in response to the Facility's motion of May 5, 2022, the Court of Appeals extended the deadline until Monday, May 23, 2022, on which date the Facility served and filed its petition for rehearing.

## QUESTION PRESENTED

I. DID THE COURT OF APPEALS PROPERLY AFFIRM THE CIRCUIT COURT'S DECISION TO DENY THE FACILITY'S MOTION TO COMPEL ARBITRATION OF PLAINTIFF'S[3] CLAIM UNDER SOUTH CAROLINA LAW?

## STATEMENT OF THE CASE

Plaintiff commenced this action in the Charleston County Court of Common Pleas on March 8, 2018, asserting a claim against the Facility for its negligence/gross negligence in the care/treatment of Mr. Ladson. (R. pp. 3-12). The Facility Answered Plaintiff's complaint on June 22, 2018. (R. pp. 13-20).

On August 21, 2018, the Facility moved to compel arbitration, based on an Arbitration Agreement that Julia Wright had signed when Mr. Ladson was admitted to the Facility.[4] The parties submitted their respective briefs for[5] and against[6] the motion, and following a hearing on November 27, 2018,[7] the circuit court, the Honorable Jennifer B. McCoy presiding, denied the Facility's motion to compel arbitration by order filed February 6, 2019. (R. p. 1). On February 8, 2019, the Facility timely moved the circuit court to alter, amend, and/or reconsider its decision. (R. pp. 94-96). The court denied that motion by order filed July 26, 2019. (R. p. 2).

By notice served August 20, 2019, this appeal timely followed. (R. pp. 97-98). In due course, it was fully briefed and made ready for decision by the Court of Appeals.

---

3 "Plaintiff" is Plaintiff-Respondent, Richard Ladson, Jr., by and through Richard Miles Ladson, Sr., POA.

4 (R. pp. 36-38)

5 (R. pp. 39-77)

6 (R. pp. 78-93)

7 (R. pp. 21-35)

As explained in its principal appellate brief, the Facility failed to meet its burden to show a valid arbitration contract, and the circuit court properly denied the Facility's motion to compel arbitration of Plaintiff's claim consistent with South Carolina law. (Br. of Respondent).

The case was submitted without oral argument during the March 2022 term and decided April 6, 2022, via the Subject Opinion, which affirmed the circuit court's denial of the Facility's motion to compel arbitration. 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 compel arbitration. On appeal, [the Facility] argues the circuit court erred in denying its motion because the merger of the at-issue arbitration agreement (Arbitration Agreement) with the admission agreement (Admission Agreement) equitably estopped [Mr. Ladson's] estate from denying the validity of the arbitration agreement. We affirm. The circuit court did not err in denying [the Facility's] motion to 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))), petition for cert. filed (S.C. Apr. 23, 2021); 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 by their own terms, language in the admission agreement that "recognize[d] the 'separatedness' of the two documents [, i.e. the arbitration agreement and the admission agreement]" and 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 fact

> "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. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling 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").
>
> **AFFIRMED.**

As explained above, the Court of Appeals denied the Facility's petition for rehearing on August 18, 2022. This return to Appellant's petition for writ of certiorari follows.

## STATEMENT OF THE FACTS

On September 20, 2010, Julia Wright ("Ms. Wright"), Respondent's sister, accompanied Respondent to Appellant's Facility to admit Respondent for rehabilitation care. (R. pp. 59-77). At the time of his admission, all parties agree Mr. Ladson suffered from dementia. Id.

In conjunction with Mr. Ladson's admission to Facility, Ms. Wright signed a number of documents, including an Admission Agreement[8] and an Arbitration Agreement. (R. p. 71)[9] The Admission Agreement was a twelve-page document, and the Arbitration Agreement was a separate one-page document. The Admission Agreement governed the type of care Mr. Ladson would receive from Appellant and Mr. Ladson's financial obligation to pay for those services.

---

[8] (R. pp. 59-70). Plaintiff does not challenge the validity of the Admission Agreement.

[9] Both the Admission Agreement and the Arbitration Agreement were countersigned by a Leslie Solomon, the Facility's Director of Admissions. (R. pp. 59-71).

On the Admission Agreement's final page, labeled as "Page 12 of 12," there was an "Entire Agreement" provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Mr. Ladson's admission to Appellant's Facility. Ms. Wright signed the Admission Agreement on the "Signature of Representative" line. Appellant did not ask Ms. Wright for proof of authority to act on Mr. Ladson's behalf, and Mr. Ladson never gave Ms. Wright power-of-attorney to complete these documents.

On the same day, Ms. Wright signed a document called an Arbitration Agreement. This document was not part of the 12 pages comprising the Admission Agreement but was its own separate document with its own signature blocks. The Arbitration Agreement provides for alternative dispute resolution for any claim a party may bring against another arising out of Mr. Ladson's admission in Appellant's Facility. Ms. Wright signed the Arbitration Agreement on the line labeled "Resident/Representative Signature."

Thereafter, while under Appellant's care, Mr. Ladson developed multiple preventable pressure ulcers due to Appellant's failure to properly treat him, and Mr. Ladson was unable to heal said pressure ulcers for the same reasons. Mr. Ladson's pressure ulcers worsened, became infected and then septic. (R. pp. 3-12). Mr. Ladson's condition grew increasingly severe over the following months until no other medical alternative existed other than an above the knee amputation of his right leg at Roper Hospital on October 13, 2016.

As a result, Respondent filed negligence claims alleging Respondent's injuries were caused by Appellant's improper nursing home care. After a period of discovery, Appellant moved to dismiss the Complaint and compel arbitration. The Circuit Court denied the motion and concluded the Act did not apply to the Arbitration Agreement, a contract unrelated to nursing home care or payment for nursing home services. The Circuit Court found no agency relationship existed between Mr. Ladson and Ms. Wright and Mr. Ladson was not a third-party beneficiary

because there was no valid underlying contract. Finally, the Circuit Court held that Appellant failed to meet its burden to establish all equitable estoppel elements. The Circuit Court denied Appellant's Motion to Reconsider on the same grounds. The Court of Appeals affirmed the Circuit Court's decision stating, "The circuit court did not err in denying [the Facility's] motion to compel arbitration because the admission agreement and the arbitration agreement did not merge."

## STANDARD OF REVIEW

A circuit court's order denying arbitration is immediately appealable. Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 121, 747 S.E.2d 461, 464 (2013). 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. While both federal and South Carolina policy favors arbitration of disputes, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Int'l Paper Co. v. Scwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416 (4th Cir. 2000). Ultimately, arbitration "is a matter of consent, not coercion." Volt Information Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

## LEGAL ARGUMENT

The Facility's motion to compel arbitration sought to deny Mr. Ladson the constitutionally guaranteed right to a jury trial based on an invalid arbitration contract. Arbitration may be favored by federal law but only when the parties voluntarily agree to it. Here, the Facility has produced

nothing to show Mr. Ladson's sister, Julia Wright, had the authority to bind her brother to the Arbitration Agreement. South Carolina appellate courts have repeatedly rejected nearly all of the legal and equitable theories the Facility now proposes to create a binding contract where there is not one. In sum, the Facility failed to meet its burden to show a valid arbitration contract, and the circuit court properly denied the Facility's motion to compel arbitration of Plaintiff's claim consistent with South Carolina law.

## I. The Adult Health Care Consent Act does not apply to the Arbitration Agreement.

South Carolina's Adult Health Care Consent Act empowers designated family members of some vulnerable adults to sign a contract admitting the vulnerable adult to a skilled nursing facility and agreeing to pay the fees imposed by that facility for its services. S.C. Code Ann. § 44-66-60(A) (2016); Coleman v. Mariner Health Care. Inc., 407 S.C. 346, 352, 755 S.E.2d 450,453 (2014). But, since the Act is limited to health care decisions, it provides no authority for separate contracts like the Arbitration Agreement. Id. at 354, 755 S.E.2d at 454; Thompson v. Pruitt Corp., 416 S.C. 43, 51, 784 S.E.2d 679, 684 (Ct. App. 2016) (citing Coleman and agreeing an "Arbitration Agreement does not deal with healthcare decisions"). Additionally, a family member signing a nursing home admission contract pursuant to authority derived from the Act does not estop a later argument that the same family member lacked authority to sign a separate arbitration contract. Coleman, 407 S.C. at 354-56, 755 S.E.2d at 455; Thompson, 416 S.C. at 60, 784 S.E.2d at 688. The Act was never meant to affect anything other than "health care" decisions and, as the Facility admitted to the circuit court, signing the Arbitration Agreement was not a health care decision because Mr. Ladson could get all the health care services covered in the Admission Agreement without agreeing to arbitrate. (R. p. 31, lines 19-23).

The Adult Health Care Consent Act ("the Act") does not apply to a free-standing nursing home arbitration contract, and the circuit court properly concluded that Respondent is not bound to the Arbitration Agreement under the Act's provisions. The Act establishes the order of priority for those individuals authorized to make health care decisions. The first level of decision-making priority, pursuant to the Act, is granted to a legally appointed guardian and an attorney-in-fact empowered pursuant to a duly executed durable power of attorney. S.C. Code Ann. § 44-66-30(A) (2016). An incapacitated individual's other adult relative by blood, such as Respondent and Sister, are eighth in priority. Id.

The Act expressly limits the decision-making power of any individual to only "health care" decisions. Id. "Health care" is defined in the Act and the South Carolina Supreme Court recently construed the definition to limit an individual's decision-making authority to: (1) "provision or withholding of medical care including placement in a facility which provides such care;" and (2) "certain financial decisions... to pay for services rendered." Coleman, 407 S.C. at 352, 755 S.E.2d at 453. An individual's power under the Act applies "primarily to traditional health care decisions" and only "secondarily" to financial matters related to those decisions. Id. at 353, 755 S.E.2d at 454.

The Act grants only limited decision-making power related to nursing home admission. An individual authorized by the Act may enter an agreement to admit a resident to nursing home and may enter a contract agreeing to pay for nursing home services. Coleman, 407 S.C. at 353-54, 755 S.E.2d at 454. A potential resident or her family are typically presented with multiple contracts and other documents when the family contemplates admitting their loved one to a nursing home. Coleman demonstrates that the Act does not apply to all documents associated with nursing home admission. Specifically, the Act does not apply if a document "was not required for [the resident's]

admission, contained no provision for medical, nursing, or health care services to be provided for [the resident], and did not require any financial commitment to pay for such services. Id. at 353, 755 S.E.2d at 454.

The Facility cannot show the Admission Agreement and Arbitration Agreement were executed *for the same purpose*. The Admission Agreement was formed because its "parties wish to admit [Mr. Ladson] to" the Facility (R. p. 59). That purpose is borne out in the Admission Agreement's twelve pages. The Facility agreed to "[furnish room, routine meals, nursing care, personal care, or custodial care" (R. p. 60, § (A)(3)) to Mr. Ladson who, in turn, agreed to "[p]ay all fees and charges" for those skilled nursing services. Id. at 61, § (B)(4). The Admission Agreement's provisions referred to Medicaid eligibility, bed hold policies, late fees for unpaid service charges, etc. The Arbitration Agreement covers a completely different issue. It is solely devoted to directing an alternative dispute resolution method and purporting to eliminate its parties' right to seek relief through the courts. (R. p. 59). These two contracts cannot have the same purpose because, as Appellant's counsel admits, the Arbitration Agreement "was not a precondition for admission [and] not mandatory." (R. p. 31, lines 19-23).

Like the arbitration agreement in Coleman, the Arbitration Agreement offered to Julia Wright by the Facility in the present case was presented to her and not to Mr. Ladson. Furthermore, the terms of Ladson's Admission Agreement signed by Ms. Wright do not reference, incorporate, or merge the Arbitration Agreement into it in any way. There is no requirement in the Admission Agreement that the execution of the Arbitration Agreement was a condition to Ladson's admission to the Facility.

Based on the Coleman standard, the Act does not apply to the Arbitration Agreement, because the Arbitration Agreement does not contain any provision for medical, nursing, or health

care services. The only bolded and underlined language in the Arbitration Agreement indicates that its provisions are intended only for dispute resolution. The Arbitration Agreement does not contain any provisions relating to payment for medical, nursing, or health care services. Only the scope of arbitrable disputes and procedures for an arbitration hearing are included in the Arbitration Agreement. Because Facility can rely on no authority (statutory, legal, or otherwise) binding Mr. Ladson to its Arbitration Agreement, it now asserts under the doctrines of merger and equity Mr. Ladson should be bound to it because it was merged with the Admission Agreement. For the reasons outlined under South Carolina law below, Facility's argument must fail.

## II. The Independently Invalid Arbitration Agreement does not Merge with the Admission Agreement.

The Coleman Court acknowledged South Carolina law indicating that contracts signed at the same time by the same parties and *for the same purpose* will be construed together "in the absence of anything indicating a contrary intention." 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts Resort Realty, Inc. v. Down'round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)) but refused to apply the merger doctrine to a nursing home arbitration agreement because the admission agreement contained language "indicating a contrary intention." The Court found that the language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 407 S.C. at 355, 755 S.E.2d at 455. Like in Coleman, here, the Facility fails to demonstrate how or why the Arbitration Agreement and Admission Agreement were offered *for the same purpose* to permit the two documents to be merged under South Carolina law. This is because the two documents were offered for two completely different purposes- for the provision of health care and for dispute resolution. The Arbitration Agreement was intended to be a separate contract from the Admission Agreement and, just as in Coleman, the merger rule from Klutts is

overcome by the contracts' plain meaning and contrary intent. Klutts Resort Realty, Inc., 268 S.C. at 88, 232 S.E.2d at 24.

Appellant's merger argument suffers from other flaws. Klutts indicates that merger only applies to instruments executed "at the same time, by the same parties, *for the same purpose*, and in the course of the same transaction." Even if Appellant's positions were taken as true and two valid contracts existed, the Agreements would not merge under the Klutts test, because the two Agreements were not executed for the same purpose. The Admission Agreement purports to cover activities incident to nursing home services. In contrast, the Arbitration Agreement's stated purpose is to establish the procedures to submit for resolution by arbitration any disputes that may arise.

Coleman, Thompson, and Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544 (Ct. App. 2017) are controlling. An arbitration contract does not merge with an admission contract in which a nursing home and its resident chose to insert an "entire agreement" or integration provision (aka "merger clause") limiting its parameters and excluding other writings. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. Coleman held one such provision proved "on its face" that merger does not apply. Id. Also, admission and arbitration contracts cannot merge if they contain inconsistent terms, especially provisions related to how each contract may be terminated. Id.; Thompson, 416 S.C. at 53, 784 S.E.2d at 685. Moreover, courts look at the way the contracts are structured, finding it is unlikely parties intended two contracts to be treated as one if they chose separate titles, required separate signatures, and numbered each contract's pages differently. Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685; Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Finally, Hodge held a nursing home cannot argue for merger when it chose to separate arbitration and admission into two agreements while taking the position that agreeing to the former was not required to obtain the benefits of the latter. 422 S.C. at 562-63, 813 S.E.2d at 302. All four

of these examples apply to the Admission Agreement and Arbitration Agreement used by the Facility in this case.

**i. The Admission Agreement's "Entire Agreement" Provision**

The Admission Agreement concludes with an "Entire Agreement" provision identifying the limited scope of that contract. (R. p. 70, § XVIII). Specifically, this provision states "this Agreement represents the entire understanding between the parties." "Agreement" is capitalized because it is a defined term, which the Admission Agreement's opening line limits to "THIS ADMISSION AGREEMENT." (R. p. 59) (emphasis in original). The Facility argues the Admission Agreement's "Entire Agreement" provision is different than its counterparts in Coleman, Thompson, and Hodge because it does not specifically reference the Arbitration Agreement. However, the Admission Agreement's "Entire Agreement" provision is just as probative against merger as those in earlier cases. It specifically limits the contract's interpretation to the "Agreement" and then defines that term narrowly in a way that does not include the Arbitration Agreement or any other writing. To argue the "Entire Agreement" provision must specifically reference a separate writing to exclude that writing from the common law merger rule is to overlook the fundamental purpose an integration provision serves in a contract. See Palmetto State Sav. Bank of S.C. v. Barr, 293 S.C. 252, 253-54, 359 S.E.2d 531, 532 (Ct. App. 1987) (finding purpose of integration provision is to create "strong implication the whole intentions of the parties has been expressed" in the writing containing the clause); Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984) (citing Armour Fertilizer Works v. Hyman, 120 S.C. 375, 113 S.E.2d 330 (1922) (the terms of a completely integrated contract "cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing")).

Plus, there is contract language here that tracks Coleman and progeny almost word for word. In Coleman, the court focused on the fact that the admission contract's "Entire Agreement" provision referenced "[t]his Agreement... and the Arbitration Agreement." Referencing the two writings distinctly was "the admission agreement's recognition of the arbitration agreement as a separate document." Thompson, 416 S.C. at 52, 784 S.E.2d at 684 (citing Coleman, 407 S.C. at 355, 755 S.E.2d at 455). Hodge applied the same principle using language from an arbitration contract that referenced an admission contract in distinct terms. 422 S.C. at 562, 813 S.E.2d at 302. If an arbitration contract explains its scope extends to disputes arising from "this Agreement or the ... Admission Agreement," then the parties "recognized a separateness" between the two contracts. Id. The Arbitration Agreement in this case does exactly what Coleman, Thompson, and Hodge identify as proof that defeats the Facility's merger argument. In describing its term, the Arbitration Agreement states that its effect will continue even after the termination of "this Agreement or the Admission Agreement." (R. p. 59).

Finally, the Facility hints that the "Entire Agreement" provision supports an Admission Agreement-Arbitration Agreement merger because it incorporates "other Admissions Materials." (R. p. 70, § XVIII). To the extent the Facility implies the Arbitration Agreement was incorporated by reference into the Admission Agreement, the Facility has offered nothing in either contract to support this conclusion. "Admissions Materials" is not a defined term and there is nothing to suggest the Arbitration Agreement was intended to be included within it. Plus, since the Facility admits agreeing to arbitration was not required for admission, it would be counterintuitive to conclude the Arbitration Agreement was an "admissions material." Thompson rejected a similar argument when a nursing home argued its admission contract's "entire agreement" provision incorporated a separate arbitration contract by referring broadly to "exhibits." Since "exhibit" was

undefined and not referenced elsewhere in either contract, the term was ambiguous and was interpreted against the nursing home who drafted it. 416 S.C. at 53-54, 784 S.E.2d at 685 (citing Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455).

**ii. Inconsistent Termination Provisions**

Two contracts executed at the same time do not merge if they contain inconsistent terms. The parties likely did not intend for the two be read as one if they chose to, for example, apply different substantive law to the two agreements. Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Coleman, Thompson, and Hodge made special note of inconsistent provisions in admission and arbitration contracts regarding when each contract may be cancelled at the resident's urging. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 551, 813 S.E.2d at 296. In each instance, the arbitration contract allowed the resident to disclaim or revoke its provisions within thirty days, but the admission contract did not include a similar right. Id. Here, the Arbitration Agreement does not have a disclaimer provision, and the Facility positions this fact as its primary argument for distinguishing Coleman, Thompson, and Hodge. Appellant's Brief, Page at 9.

However, the contracts' termination provisions are just as inconsistent here as in those cases. The Arbitration Agreement states that its effect on disputes between the parties would survive even if both the Admission Agreement and Arbitration Agreement are cancelled. (R. p. 59). As structured by the Facility, there does not seem to be any means by which a resident could unilaterally cancel the Arbitration Agreement. The Admission Agreement is very different in that it allows a resident to unilaterally terminate that contract "at any time." (R. p. 64, § IV, ¶ 1). Thus, while the Facility is correct the Arbitration Agreement is technically different than Coleman and progeny because it lacks a disclaimer provision, that distinction makes no difference because the

Arbitration Agreement and Admission Agreement still have inconsistent termination provisions that rebut any argument the parties intended these two separate contracts merge into one.

### iii. Contract Formatting and Structure

Thompson and Hodge prove it is not just specific contract language that shows a nursing home and its resident did not intend for admission and arbitration contracts to merge. Intent can be derived from the way a contract is formatted or structured. Rather than adding an arbitration provision to the admission contract or attaching that language as an exhibit, the nursing home in Thompson chose to place it in an entirely separate document with its own, distinct "Arbitration Agreement" label. 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1. That choice was in itself further proof of "the parties' intent for [the arbitration contract] to stand by itself as an independent contract." Id. The Facility did the same here, and the Arbitration Agreement announces itself as a distinctive contract from its very title. Hodge also noted the importance of formatting choices a nursing home makes when constructing its admission and arbitration contracts. 422 S.C. at 562, 813 S.E.2d at 302. An arbitration contract looks more and more like its own independent document if entering it requires a separate signature than the admission contract and the documents have separate pagination. Id. Here, the Arbitration Agreement required separate signatures. Plus, the Admission Agreement ran from "Page 1 of 12" to "Page 12 of 12," while the Arbitration Agreement was all on its own.

Based on the foregoing, the law of merger as adopted and applied in South Carolina fails to operate to bind Mr. Ladson to the Arbitration Agreement through the Admission Agreement.

## III. Mr. Ladson is not Equitably Estopped from Denying Ms. Wright had Authority to Bind him to Arbitration.

Because the documents did not merge, we need not address the Facility's equitable estoppel argument. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d

591, 598 (1999) (ruling 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").

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

The circuit court correctly found Appellant did not meet their burden to establish these elements. Appellant does not attempt to apply or even cite these elements in their brief. Appellant cannot prove they relied on Mr. Ladson's conduct as affirmation that Ms. Wright had authority to enter the Arbitration Agreement on Mr. Ladson's behalf.

Appellant cannot meet its burden on other elements listed in Strickland. There is no evidence Ms. Wright acted in a way amounting to a false representation to Appellant regarding Mr. Ladson's status or that Ms. Wright intended for Appellant to act in reliance on her conduct. Mr. Ladson's diminished mental capacity from dementia prevented Mr. Ladson from forming the

required intent for Appellant to rely on his conduct. Additionally, the evidence shows Appellant cannot meet its burden to show they lacked knowledge or the means of knowledge of the truth of the facts in question. This element requires Appellant to show they did not know Ms. Wright lacked authority to sign the arbitration agreement on Mr. Ladson's behalf and Appellant lacked the ability to make this determination. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. See Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

In this case, Appellant had the capacity to determine whether Ms. Wright had authority to sign an arbitration agreement on Mr. Ladson's behalf. Appellant is a sophisticated business entity frequently interacting with residents and their families during the nursing home admission process. Appellant is familiar with the legal concepts of guardianship and powers-of-attorney. Appellant had the ability to ask Ms. Wright whether she was Mr. Ladson's guardian or attorney-in-fact and had the ability to request supporting documentation.

Another major flaw in Appellant's equitable estoppel argument is that it is premised on Appellant's faulty merger argument. In Coleman, the South Carolina Supreme Court rejected a nursing home's equitable estoppel argument because it was based on the home's faulty assertion that an admission agreement merged with a separate and independent arbitration agreement. 407 S.C. at 354-55, 755 S.E.2d at 455. Appellant makes similar arguments in their brief. Appellant argues Respondent is not free to selectively enforce portions of the Admission Agreement. However, Respondent has not chosen to "enforce" any portion of the Admission Agreement. His Complaint alleges negligence claims premised on common law duties owed by a nursing home to

its resident. For the same reason, Appellant errs when they claim Respondent seeks to "repudiate" any agreement. Respondent's Complaint does not reference and is not based on any contract.

Even if Respondent had based a claim on an alleged breach of the Admission Agreement, such conduct would not equitably estop him from opposing enforcement of the separate and independent Arbitration Agreement. If Respondent had based his claim on an alleged breach of the Admission Agreement, the issue at hand is not whether specific clauses of the Agreement were violated, but rather that common law duties imposed by negligence law were violated. Presumably, Appellant is arguing that the Admission Agreement and Arbitration Agreement merge, and Respondent is bound by the later by seeking to enforce the former. Yet, Respondent does not seek to enforce either agreement, and Appellant cannot meet their burden of proving merger because the agreements indicate that they are not to merge.

The separateness of the two contracts in this case is an important fact further distinguishing the "direct benefit" cases on which Appellant relies. Appellant's Brief at 16. International Paper notes that equitable estoppel can apply to bar refusal of arbitration when the refusing party "receives a direct benefit from a contract containing an arbitration clause." 206 F.3d at 418 (quoting Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999)). Like Weaver v. Brookdale Senior Living, Inc., the Court makes it clear that, particularly in a nursing home case, the only agreement the resident may benefit from is the Admission Agreement. However, if the nursing home later allegedly causes the death of the resident, the Court has determined the resident did not benefit even from being admitted. Weaver v. Brookdale Senior Living, Inc., 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020) (citing Hodge v. UniHealth Post-Acute Care of Bamberg, LLC,442 S.C. 544, 563, 813 S.E.2d 292, 302 (Ct. App. 2018)). The Fourth Circuit opinion does not fully list the equitable estoppel elements for South Carolina law provided

in Strickland. Additionally, International Paper considered a single contract in which a party was suing to enforce some terms while seeking to avoid the same contract's arbitration provision. The same is true for Jackson v. Iris.com., 524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007), which Appellant cites in further support of their estoppel argument. In Jackson, a musician was estopped from refusing a contract's mandatory arbitration provision when he sought to enforce the same contract's liquidated damages provision. Id. at 750-51. That is not the case here. In sum, Appellant's equitable estoppel argument is only potentially viable if this Court finds the Admission Agreement and Arbitration Agreements merge. However, as in Coleman, the evidence shows the contracts are separate, and Appellant cannot meet its burden to prove merger to advance their equitable estoppel argument.

## CONCLUSION

Based on the arguments stated above, Mr. Ladson respectfully requests this Honorable Court to deny the instant petition and affirm the Subject Opinion. The Facility cannot force Mr. Ladson to arbitrate its nursing home negligence claims without showing a valid arbitration contract. The Arbitration Agreement is not valid because Mr. Ladson could not and did not assent to its terms. Ms. Wright possessed no legal authority to do bind him to it. Merger fails to operate to bind him to the Arbitration Agreement under South Carolina law, and therefore Appellant's estoppel argument must necessarily fail.

(*Signature Page Follows*)

Respectfully submitted,

_____

**PIERCE | SLOAN, LLC**
Carl E. Pierce, II (SC Bar No. 7946)
Benjamin C. Smoot, II (SC Bar No. 101372)
Carl E. Pierce, III (S.C. Bar No. 104229)
P.O. Box 22437
Charleston, South Carolina 29413
Phone: (843)722-7733; Fax: (843)722-7732

*Attorneys for Respondent Richard Ladson, Jr., by and through Richard Miles Ladson, Sr., POA*

November 22, 2022
Charleston, South Carolina