THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2018-CP-42-04405

Court of Appeals Case No. 2019-001731
Opinion No. 5963 (S.C. Ct. App. filed January 25, 2023)

Supreme Court Case No. 2023-000777

The Estate of Mary Solesbee, by her personal representative, Connie Bayne, Respondent,

v.

Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman; Inpatient Consultants of North Carolina, P.C.; and Angela Brown, ACNP, Defendants,

Of which Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman are the Petitioners.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

By and through their undersigned counsel, pursuant to Rule 242(d)(1), SCACR, the Facility[1] and the Other Appellants[2] certify that the Court of Appeals filed its opinion in this matter on January 25, 2023 (the "Subject Opinion"), affirming the circuit court's denial of the Facility's motion to compel Plaintiff's[3] claims against it to arbitration (the "Motion to Compel Arbitration") and the Other Appellants' corresponding motions to stay this litigation against them pending the outcome of the Motion to Compel Arbitration and any resulting arbitration proceedings (the "Motions to Stay"); that Petitioners timely petitioned the Court of Appeals for rehearing; and that the Court of Appeals denied Petitioners' petition for rehearing by order filed April 14, 2023.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in affirming the circuit court's denial of the Motion to Compel Arbitration and, in turn, the Motions to Stay?

A. Did the Court of Appeals err in its analysis of the Facility's merger argument?

1. Should the Court of Appeals have found that the circuit court erred in not finding the Arbitration Agreement merged with the Admission Agreement?

2. Did the Court of Appeals err in likening this case to *Coleman* and *Hodge*?

(a) Did the Court of Appeals err in finding against the Facility on merger on the basis that "the Admission Agreement provides it

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[1] The "Facility" refers to Defendant/Petitioner THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman. It is a skilled nursing facility in Spartanburg County.

[2] The "Other Appellants" refers, collectively, to Defendants/Petitioners Fundamental Clinical and Operational Services, LLC, and Fundamental Administrative Services, LLC. Collectively, the Facility and the Other Appellants are referred to as "Petitioners."

[3] "Plaintiff" is Plaintiff/Respondent, Connie Bayne, as personal representative of the estate of her late mother, Mary Solesbee ("Ms. Solesbee").

is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law"?

(b) Did the Court of Appeals err in finding against the Facility on merger on the basis that "[t]he Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement 'shall survive any termination or breach of this Agreement or the Admission Agreement'"?

(c) Did the Court of Appeals err in finding against the Facility on merger on the basis that "[t]he Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, 'Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility'"?

(d) Did the Court of Appeals err in finding against the Facility on merger on the basis that "the Admission Agreement and Arbitration Agreement were separately paginated and had their own signature pages"?

(e) Did the Court of Appeals err in finding against the Facility on merger on the basis that Arbitration Agreement was voluntary?

B. Did the Court of Appeals err in not reaching the Facility's equitable estoppel argument?

C. Provided the Court of Appeals erred in not reaching the Facility's equitable estoppel argument (as the Facility contends it did), should the Court of Appeals have found that the circuit court erred in not finding Plaintiff equitably estopped to deny the enforceability of the Arbitration Agreement?

D. Did the Court of Appeals err in not reaching the Facility's argument that the Arbitration Agreement applies with equal force to the wrongful death claim?

E. Provided the Court of Appeals erred in not reaching the Facility's argument that the Arbitration Agreement applies with equal force to the wrongful death claim (as the Facility contends it did), should the Court of Appeals have found that the circuit court erred in finding that the Arbitration Agreement is not enforceable as to the wrongful death claim?

II. Did the Court of Appeals err in affirming the circuit court's denial of the Motions to Stay?[4]

STATEMENT OF THE CASE

With the help of her son, Allen Dover ("Mr. Dover"), Ms. Solesbee, was admitted to the Facility on June 27, 2016. (R. p. 104, pp. 138–39 ¶¶ 1–3 & 5, pp. 165–176.) In conjunction with Ms. Solesbee's admission, Mr. Dover signed an Admission Agreement and an Arbitration Agreement on her behalf. (R. p. 104, pp. 165–176.)[5] Ms. Solesbee remained a resident of the Facility until July 14, 2016, when she was transported to the hospital, where she passed away on August 1, 2016. (R. p. 33 ¶ 9.)

Alleging negligence in Ms. Solesbee's care/treatment at the Facility, Plaintiff filed this wrongful death and survival action in the Spartanburg County Court of Common Pleas on December 27, 2018. (R. pp. 10–29.)

Based on the Arbitration Agreement that Mr. Dover signed for Ms. Solesbee, the Facility

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[4] Out of an abundance of caution, this question is separately stated; however, due to the relationship between the Motion to Compel Arbitration and the Motions to Stay, it is not necessary to argue the question separately, because, as explained below, such argument is subsumed in Argument I.

[5] Without question, the Federal Arbitration Act, 9 U.S.C. §§ 1–16 (the "FAA"), applies to the Arbitration Agreement. For one reason, the Arbitration Agreement expressly states that the FAA applies (R. p. 104), 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). 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 v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001); *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); *id.* at 273–77 (1995) (explaining that unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce). And this 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).

filed the Motion to Compel Arbitration on February 22, 2019. (R. pp. 101–04.)[6] The Other Appellants filed the Motions to Stay on August 9, 2019. (R. pp. 105–08.)

Following a hearing on August 16, 2019,[7] the circuit court, the Honorable Grace Gilchrist Knie presiding, denied the Motion to Compel Arbitration, and effectively the Motions to Stay, by order filed September 11, 2019. (*See* R. pp. 1–9.)

This appeal timely followed by notice served and filed October 11, 2019,[8] and in due course, it was briefed and made ready for decision.

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. Solesbee had received direct benefits under the Admission Agreement merged therewith and, in turn, erred in denying the Motions to Stay. (*See* Br. of Appellants; *see also* Reply Br. of Appellants.)

The appeal was submitted for decision in the Court of Appeals on October 3, 2022, without oral argument, and it was decided on January 25, 2023, via the Subject Opinion, which affirmed the circuit court. In particular, the Court of Appeals likened this case to *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), and found that the circuit court had correctly determined there was no merger of the Admission Agreement and the

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[6] There is no dispute here about whether Plaintiff's claims against the Facility are within the scope of the Arbitration Agreement. Without question, they are embraced by its plain and clear language (R. p. 104), 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.").

[7] (R. pp. 62–100.)

Arbitration Agreement and, in turn, had properly rejected the Facility's equitable estoppel argument and properly denied the Motions to Stay, which were rendered moot by the circuit court's (proper, according to the Court of Appeals) denial of the Motion to Compel Arbitration.

As certified above, the Court of Appeals denied Petitioners' timely petition for rehearing on April 14, 2023.

This petition for a writ of certiorari timely 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 circuit 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 circuit 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

I. The Court of Appeals erred in affirming the circuit court's denial of the Motion to Compel Arbitration and, in turn, the Motions to Stay.

The relationship between the Motion to Compel Arbitration and the Motions to Stay is such that, insofar as the circuit court was concerned, the denial of the former mooted the latter.

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[8] (R. pp. 177–180.)

The fates of these motions are similarly intertwined on appeal: If the Motion to Compel Arbitration was properly denied, so too were the Motions to Stay, but if the Motion to Compel Arbitration should have been granted—and, respectfully, it should have—so too should have the Motions to Stay. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, *upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.") (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties."); *see also Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) ("The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement."). Accordingly, to show error in the denial of the Motion to Compel Arbitration (and in the affirmance thereof) is also to show error in the denial of the Motions to Stay (and in the affirmance thereof).

A. Like the circuit court before it, the Court of Appeals erred in its analysis of the Facility's merger argument.

1. The Court of Appeals 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 this 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.
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> 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.
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> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> Here, the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. *Unless there is a contrary intention, appellants are correct that there was a merger.*

407 S.C. at 354–55, 755 S.E.2d at 455 (emphasis added).

Here, the Court of Appeals, 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 *Hodge* and, for that matter, *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016).[9]

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,'"[10] as indeed the Admission Agreement and the Arbitration Agreement were here,[11] 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.

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

[10] *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).

[11] To be clear, *Coleman* unequivocally answers the question of whether the instant Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly 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,*

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

As further specified below, the Court of Appeals erred in likening this case to *Coleman* and *Hodge*. Unlike the arbitration agreements at issue in *Coleman* and *Hodge*, and, for that matter, *Thompson*, all of which provided 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. 104.)

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. 176.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[12]), 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. 176.) Without

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and in the course of the same transaction." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

[12] 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

question, the Arbitration Agreement is among these other Admissions materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) ("The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's *admission documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted); *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. Solesbee 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 Mr. Dover on Ms. Solesbee'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

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agreement and, thus, "recognize[d] the '*separatedness*' of the [arbitration agreement] and the

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. 104 (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. Solesbee'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. 165–176 (setting forth the terms of Ms. Solesbee's admission) *with* p. 104 (providing for arbitration of disputes arising out of Ms. Solesbee'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. 174 (providing "This Agreement will be governed by and construed in accordance with applicable Federal regulations

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admission agreement, not a merger of the two contracts.") (emphasis added).

and those laws of the State in which Facility is located.") *with* p. 104 (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.

The Court of Appeals 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. Solesbee'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.

2. To be clear, the Court of Appeals erred in likening this case to *Coleman* and *Hodge*.[13]

(a) The Court of Appeals erred in finding against the Facility on merger on the basis that "the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law."[14]

It is simply not true that "the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law." What the Admission Agreement actually provides regarding governing law is this: "This Agreement will

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[13] (Subject Opinion pp. 7–8 ("Here, [1] the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law. [2] The Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement 'shall survive any termination or breach of this Agreement or the Admission Agreement.' [3] The Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, 'Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.' [4] The Admission Agreement and Arbitration Agreement were separately paginated and had their own signature pages. [5] [Petitioners'] attorney admitted at the hearing that '[i]t's perfectly true that [Dover] did not have to sign the arbitration agreement to move forward with [Solesbee] being admitted. It was voluntary . . . .' Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and [the Facility's] equitable estoppel argument was properly denied.").)

[14] (Subject Opinion p. 7.)

be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which the Facility is located." (R. p. 174.) And the Arbitration Agreement states as follows:

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

(R. p. 104.)

Again, the FAA applies whenever an arbitration agreement involves interstate commerce—and this is so even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law. *See Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (The FAA "create[d] a body of federal substantive law," which is "applicable in state and federal courts."); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) ("[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."); *see also Allied-Bruce*, 513 U.S. at 273–77. Moreover, even under the FAA, the general state law of contracts continues to apply. *Allied-Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause upon such grounds as exist at law or in equity for the revocation of any contract.") (internal quotation marks and citation omitted). Further still, the Arbitration Agreement expressly calls for the arbitration proceedings to be conducted pursuant to the South Carolina ADR Rules. (R. p. 104.)

Again, essentially, the provisions of the Admission Agreement and the Arbitration Agreement regarding governing law are to the effect that South Carolina law applies except

where displaced by federal law, and they do not support any reasonable inference of any intent contrary to merger.

(b) The Court of Appeals erred in finding against the Facility on merger on the basis that "[t]he Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement 'shall survive any termination or breach of this Agreement or the Admission Agreement.'"[15]

This, too, provides no reasonable inference of an intent contrary to merger here. Unlike in *Coleman* and *Hodge*, the supposed textual recognition of the Admission Agreement being separate from the Arbitration Agreement is *not* included in any "Entire Agreement" provision. Rather, the "Entire Agreement" provision of the Admission Agreement here expressly states, "other Admissions materials . . . are made a part of this Agreement by reference." (R. p. 176.) And as already explained, the Arbitration Agreement that Mr. Dover signed in conjunction with Ms. Solesbee's admission is clearly among these "other Admissions materials." Moreover, that the Arbitration Agreement "shall survive any termination or breach of this Agreement or the Admission Agreement" just means that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

[15] (Subject Opinion p. 7.)

(c) The Court of Appeals erred in finding against the Facility on merger on the basis that "[t]he Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, 'Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.'"[16]

This, too, provides no reasonable inference of an intent contrary to merger here. The absence of a "revocation" provision is one way in which the Arbitration Agreement here is materially *different* from those at issue in *Coleman* and *Hodge*, and, for that matter, *Thompson*. Moreover, the Court of Appeals drew a false equivalency between the concept of "revocation" and that of "termination." A "revocation" is an annulment (i.e., making something a nullity),[17] whereas "termination" is putting or bringing something that properly exists to an end—which is materially different from making something a nullity, i.e., void and never having properly existed in the first place. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. at 612–13.

(d) The Court of Appeals erred in finding against the Facility on merger on the basis that "the Admission Agreement and Arbitration Agreement were separately paginated and had their own signature pages."[18]

As already fully explained above (*see* discussion of separate pagination/signature pages, *supra*), this, too, provides no reasonable inference of an intent contrary to merger here.

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[16] (Subject Opinion pp. 7–8.)

[17] *Black's Law Dictionary* p. 1321 revocation (7th ed. 1999); *id.* at 89 annulment ("The act of nullifying or making void.").

[18] (Subject Opinion p. 8.)

(e) The Court of Appeals erred in finding against the Facility on merger on the basis that Arbitration Agreement was voluntary.[19]

As already fully explained above (*see* discussion of the optional nature of the Arbitration Agreement, *supra*), this, too, provides no reasonable inference of an intent contrary to merger here.

B. The Court of Appeals erred in not reaching the Facility's equitable estoppel argument.

As explained in the Subject Opinion, the Court of Appeals 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. 8 ("Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and [the Facility's] equitable estoppel argument was properly denied.").) Therefore, for the same reasons that the Court of Appeals 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 of Appeals 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*, this 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.

[19] (Subject Opinion p. 8.)

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. Solesbee 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. Solesbee 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. 10–61.)

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

D. The Court of Appeals erred in not reaching the Facility's argument that the Arbitration Agreement applies with equal force to the wrongful death claim.

As explained in the Subject Opinion, the Court of Appeals did not reach the Facility's argument that the Arbitration Agreement applies with equal force to the wrongful death claim. (Subject Opinion p. 9 ("[The Facility] further asserts that because [Ms.] Solesbee was bound by

the Arbitration Agreement at the time of her death, her wrongful death beneficiaries are bound by the Arbitration Agreement as well. However, we previously found the Arbitration Agreement is not enforceable against [Ms.] Solesbee because she did not sign it or authorize [Mr.] Dover to sign it for her; thus, [Ms.] Solesbee's cause of action was not barred at the time of her death.").) Therefore, for the same reasons that the Court of Appeals erred in affirming the circuit court's finding that these documents did not merge—and also because, as explained, the Court of Appeals 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 of Appeals likewise erred in not reaching the Facility's argument related to consideration and mutuality.

E. Had it reached the Facility's argument that the Arbitration Agreement applies with equal force to the wrongful death claim, as it should have, the Court of Appeals should have found that the circuit court erred in finding that the Arbitration Agreement is not enforceable as to the wrongful death claim.

The only way it could be true (i.e., legally correct) for the Arbitration Agreement not to apply with equal force to the wrongful death claim is if the claim of wrongful death (i.e., the substantive right of action) belongs to the wrongful death beneficiaries themselves. If this were the case, then general principles of contract law would indeed apply to prevent wrongful death beneficiaries from having to arbitrate "their" claims if they themselves had not agreed to do so. A wrongful death claim, however, does not belong to the wrongful death beneficiaries. It belongs to the decedent's personal representative, and a specific rule prohibiting enforcement of otherwise valid agreements to arbitrate wrongful death claims would violate the FAA's requirement that arbitration agreements be placed on equal footing with other contracts,[20] as

[20] *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

indeed this Court has already recognized in *Dean*, 408 S.C. at 389, 759 S.E. at737 n.3 ("[C]ourts *may not* refuse to compel arbitration simply because a wrongful death claim is involved.") (emphasis added).

"The right of action for wrongful death is purely statutory and did not exist at common law . . . ." *Glenn v. E. I. DuPont Nemours & Co.*, 254 S.C. 128, 133, 174 S.E.2d 155, 157 (1970). A wrongful death claim must be a claim that, had the decedent lived, they could have maintained themselves. S.C. Code Ann. § 15-51-10 ("Whenever the death of a person shall be caused by the wrongful act, neglect or default of another *and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof*, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.") (emphasis added); *see also Maxey v. Sauls*, 242 S.C. 247, 250, 130 S.E.2d 570, 572 (1963) ("[T]he right to maintain the [wrongful death] action is based upon the condition that 'the act, neglect or default' must be 'such as would, if death had not ensued, have entitled the person injured to maintain an action and recover damage in respect thereof.' In other words, '*if the deceased never had a cause of action, none accrues under the wrongful death statute*.'") (discussing prior statutory language that is identical to that in present § 15-51-10) (quoting *Scott v. Greenville Pharmacy*, 212 S.C. 485, 489, 48 S.E. 324, 326 (1948) (emphasis added)). Accordingly, a claim of wrongful death is derivative in nature, in that it derives from (and does not arise without) a cause of action arising in favor of the *decedent*. *See Id.*; *see also* 26 S.C. Jur. Limitation of Actions § 32 ("A wrongful death action is derivative in nature . . . ."); *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 942 (D.S.C. 1988) ("If the decedent never had a cause of action, none accrues under the wrongful death statute. Furthermore, anything that would have

defeated the decedent's recovery had he survived the accident, such as contributory negligence, a valid release, or similar acts on his part, would defeat the right of recovery in behalf of his family in case of his death. It follows logically that the decedent's failure to file a timely claim . . . is an act, or omission, on his part which should defeat the right of recovery of his personal representative.") (internal citations and quotation marks omitted); *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010) ("*Quattlebaum* was correctly decided and adheres to the principle that a decedent's estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived.'").

"[T]he substantive right to bring . . . a wrongful death action . . . is determined by the Probate Code." *Fisher on behalf of estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 240, 811 S.E.2d 739, 742 (2018); *see also id.* at 242, 811 S.E.2d at 743 ("The Probate Code defines who may act on behalf of the estate of a deceased person. The Probate Code, therefore, is the substantive law by which the identity of the *'real party in interest'* is determined for all civil actions *brought on behalf of the estate of a deceased person*.") (emphasis added). "Under the Probate Code . . . *wrongful death actions must be brought by the personal representative* . . . ." *Id.* (emphasis added); *see also* S.C. Code Ann. § 15-51-20 ("Every [wrongful death] action shall be brought by or in the name of the executor or administrator of [the] person [whose death was wrongfully caused]."); [21] *Glenn*, 254 S.C. at 134, 174 S.E.2d at 158 ("If an action for wrongful

[21] As explained by the *Fisher* Court, "Under the Probate Code . . . the terms 'executor' and 'administrator' do not have separate meaning, but are included within the defined term 'personal representative.'" 422 S.C. at 240, 811 S.E.2d at 742 (citing S.C. Code Ann. § 62-1-201(33) (defining "Personal representative" to "include[] executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.")). "Therefore, wrongful death actions must be

death is instituted by one other than the personal representative of a decedent, duly appointed by the Probate Court, it should be dismissed.").

Even though it is for their "benefit," a wrongful death claim does not belong to the wrongful death beneficiaries themselves. It is a claim that is brought on behalf of the estate of the deceased person. The substantive right to bring the claim belongs to decedent's personal representative, who must bring the claim and is the real party in interest under South Carolina law. And consistent with Judge Anderson's "correct" analysis in *Quattlebaum* (which explains that anything that would have defeated the decedent's recovery had he survived, such as, for instance, a valid release, will apply to the wrongful death claim), it follows logically that a valid arbitration agreement must also apply to the wrongful death claim.

Accordingly, had it reached the Facility's argument that the Arbitration Agreement applies with equal force to the wrongful death claim, as it should have, the Court of Appeals should have found that the circuit court erred in finding that the Arbitration Agreement is not enforceable as to the wrongful death claim.

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brought by the personal representative, despite the language 'shall be brought by . . . the executor or administrator' that still appears in section 15-51-20." *Id.*

CONCLUSION

For the foregoing reasons, Petitioners ask this Honorable Court to grant the instant petition, to reverse the Subject Opinion, and either to directly determine that this lawsuit should be stayed in favor of arbitration between Plaintiff and the Facility (with the lawsuit stayed as to the Other Appellants pending the outcome of such arbitration) or, alternatively, to remand the matter for such further proceedings (consistent with the reversal of the Subject Opinion) as may be needed to effectuate the reversal of the Subject Opinion and the proper determination of the Motion to Compel Arbitration and the Motions to Stay.

Respectfully submitted,
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June 5, 2023

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2018-CP-42-04405

Court of Appeals Case No. 2019-001731
Opinion No. 5963 (S.C. Ct. App. filed January 25, 2023)

Supreme Court Case No. 2023-000777

The Estate of Mary Solesbee, by her personal representative, Connie Bayne, Respondent,

v.

Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman; Inpatient Consultants of North Carolina, P.C.; and Angela Brown, ACNP, Defendants,

Of which Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman are the Petitioners.

PROOF OF SERVICE

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Attorneys for Petitioners

I, Russell G. Hines, of Clement Rivers, LLP, counsel for Petitioners, hereby certify that Petitioners' **PETITION FOR A WRIT OF CERTIORARI** was served on all other parties to this appeal on June 5, 2023, via email (see attached) to their following counsel:

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I also certify that Petitioners' **PETITION FOR A WRIT OF CERTIORARI** and **PROOF OF SERVICE** was filed with the South Carolina Court of Appeals on June 5 2023, via email to ctappfilings@sccourts.org.

Respectfully submitted,

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June 5, 2023

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Subject:	Solesbee v. Fundamental (Sup. Ct. 23-000777 // Ct. App. 19-001731) - CR 180793 - Petition for a Writ of Certiorari
Date:	Monday, June 5, 2023 7:19:00 PM
Attachments:	image002.png Solesbee v. Fundamental (Sup. Ct. Case No. 2023-000777) -- Cert Petition.pdf

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Attached for service in the above-referenced matter please find our **Petition for a Writ of Certiorari**.

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