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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2018-CP-42-03447
Appellate Case No. 2020-001107

Estate of Barbara Owens,
by and through her Personal Representative, Mary Jane McCraw,
Individually and on behalf of Statutory Beneficiaries,

Respondent,

v.

Fundamental Clinical and Operational Services, LLC;
Fundamental Administrative Services, LLC;
THI of South Carolina, LLC;
THI of South Carolina at Spartanburg, LLC
d/b/a Magnolia Manor-Spartanburg,

Appellants.

APPELLANTS' PETITION FOR REHEARING

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By and through their undersigned counsel, pursuant to Rule 221(a), SCACR, the Facility[1] and the Other Defendants[2] (collectively, "Appellants"), hereby petition this Honorable Court for rehearing of this matter, which it decided via Unpublished Opinion No. 2023-UP-272 (S.C. Ct. App. filed July 19, 2023) (the "Subject Opinion," a copy of which, with page numbers added for ease of reference, is attached hereto as **Exhibit A**), affirming the circuit court's denial of the Facility's motion to compel Plaintiff's[3] claims against it to arbitration and, in turn, its denial of the Other Defendants' corresponding motions to stay this lawsuit pending the outcome of the Facility's motion to compel arbitration and any resulting arbitration between Plaintiff and the Facility and dismissing Appellants' appeal of the Subject Confidentiality Order. As particularly stated and explained below, Appellants most respectfully contend that the Court misapprehended or overlooked a number of material points.

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

[2] The "Other Defendants" refers to Defendants/Appellants Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina, LLC, collectively.

[3] "Plaintiff" refers to Plaintiff/Respondent, Estate of Barbara Owens ("Ms. Owens"), by and through her Personal Representative, Mary Jane McCraw ("Ms. McCraw"), Individually and on behalf of Statutory Beneficiaries.

BACKGROUND

With the help of her daughter Ms. McCraw, Ms. Owens was admitted to the Facility on July 23, 2015. (*See* R. pp. 331–32, 357–68.) In conjunction with Ms. Owens's admission to the Facility, Ms. McCraw signed an Admission Agreement[4] and an Arbitration Agreement[5] on Ms. Owens's behalf. By her signature on the Arbitration Agreement, Ms. McCraw expressly "represent[ed] that . . . she ha[d] the

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[4] (R. pp. 357–68.)

[5] (R. p. 280.) Without question, the Arbitration Agreement is covered by the Federal Arbitration Act, 9 U.S.C. §§ 1–16 (the "FAA"). The Arbitration Agreement expressly states that the FAA applies (R. p. 280), and this must be enforced like any other contract term. *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 196, 844 S.E.2d 66, 70 (Ct. App. 2020) ("We first consider whether the FAA applies. We hold it does, for two reasons. First, the [subject contract] provides the parties 'specifically agree that this transaction involves interstate commerce.' We must enforce this agreement like any other contract term.") (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001) (finding the FAA applied because the parties had agreed that the subject contract involved interstate commerce)). Moreover, and in any event, the FAA applies "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363; *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress's power under the Commerce Clause); *id.* at 273–77 (1995) (explaining that unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce). And our Supreme Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

authority to sign on [Ms. Owens's] behalf so as to bind [Ms. Owens] as well as [herself]." (R. p. 280.)

Plaintiff commenced this wrongful death and survival action on October 4, 2018, in the Court of Common Pleas, Spartanburg County. (*See* R. pp. 44–108.) Plaintiff's claims are premised on alleged deficiencies in the care Ms. Owens received during her residency at the Facility, which, according to Plaintiff, caused her decline and eventual death. (*See* R. pp. 46–108.) While acknowledging that the Other Defendants (whom Plaintiff refers to as "Corporate Defendants") did not provide any direct care or services to Ms. Owens, Plaintiff alleges their control over the Facility directly affected the quality of Ms. Owens's care. (*See* R. pp. 46–108; *see also* R. pp. 31, 299.) Appellants deny Plaintiff's allegations on all fronts.

Based on the Arbitration Agreement Ms. McCraw signed for Ms. Owens, the Facility moved to compel Plaintiff's claims to arbitration (the "Motion to Compel Arbitration"). (R. pp. 277–79, 333–56.)[6] The Other Defendants moved to stay the

[6] Without question, Plaintiff's claims against the Facility are within the scope of the Arbitration Agreement. (*See* R. p. 280 ("[A]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 [Ms. Owens's] stay at Facility, or to the provisions of care or services to [Ms. Owens], including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively 'Disputes'), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration . . . .").) This plain language clearly embraces the subject matter of Plaintiff's claims against the Facility, but even if there

lawsuit pending the outcome of the Motion to Compel Arbitration and any resulting arbitration between Plaintiff and the Facility (collectively, the "Motions to Stay"). (R. pp. 281–86, 369–83.)

The circuit court heard Appellants' respective motions on July 25, 2019,[7] the Honorable J. Mark Hayes, II, presiding. The court denied the Motion to Compel Arbitration by formal order filed October 25, 2019. (R. pp. 4–17.)[8] Pursuant to Rule 59(e), on November 4, 2019, Appellants timely moved the court to alter, amend, and/or reconsider its decision. (R. pp. 384–95.) The court heard Appellants' Rule 59(e) motion on January 6, 2020,[9] and, by formal order filed July 13, 2020,[10] denied it in all but two (modest) particulars. (R. pp. 29–43.)[11]

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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).

[7] (R. pp. 169–211.)

[8] By Form 4 order filed August 23, 2019, the court had stated its decision to deny the Motion to Compel Arbitration and directed Plaintiff's counsel to submit a proposed formal order to that effect. (R. pp. 1–3.)

[9] (R. pp. 212–73.)

[10] By Form 4 order filed June 25, 2020, the court had stated its decision to deny Appellants' Rule 59(e) motion (in all but the two particulars explained in footnote 11, *infra*) and directed Plaintiff's counsel to submit a proposed formal order to that effect. (R. pp. 18–20.)

[11] In its prior order, filed October 25, 2019, the court had mistakenly referred to "Hunt Valley Holdings, LLC, formerly known as Fundamental Long Term Care Holdings" ("HVH") as a named defendant and had not expressly addressed the Motions to Stay. (*See* R. pp. 18–20.) The court granted Appellants' Rule 59(e) motion only insofar as it (1) removed and vacated the reference to HVH in its prior order and (2) confirmed that, in consequence of its denial of the Motion to Compel Arbitration, the Motions to Stay were denied as moot. (R. pp. 29–30.)

Also on July 13, 2020, on Plaintiff's motion,[12] and over Appellants' objections,[13] the circuit court entered Plaintiff's proposed confidentiality order (the "Subject Confidentiality Order"). (R. pp. 21–28.) Among Appellants' objections to the Subject Confidentiality Order (all of which are addressed bellow) the strongest by far is that it does not restrict the use of their confidential documents to *this* lawsuit, but instead, in terms collectively referred to herein as the "Sharing Provision," not only allows Plaintiff's counsel to keep their confidential documents but also to share them with "other attorneys involved in similar litigation against the same parties so long as the receiving attorney first signs an acknowledgement of agreement to be bound by this Order." (R. p. 23; *see also* R. pp. 26–27.)

To be clear, assuming, *arguendo*, it was appropriate under the circumstances for the circuit court to enter a confidentiality order when it did—given that, as evidenced by this appeal, the question of whether Plaintiff's claims against the Facility should proceed in circuit court or in arbitration (and, in turn, the question raised by the Motions to Stay) was yet to be answered with finality at the time the Subject Confidentiality Order was entered—Appellants had no objection to the entry of a reasonable confidentiality order. (*See, e.g.,* R. p. 430.) Indeed, Appellants submitted a proposed confidentiality order modeled on the standard federal

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[12] (R. pp. 287–88.)

[13] (*See* R. pp. 208:17–210:3, 262:5–271:1, 406, 428–59.)

confidentiality order (the “Standard Federal Order”),[14] the terms of which the circuit court itself had previously indicated to be in accord with the confidentiality orders it was accustomed to entering. (R. pp. 268:1–270:5.) Nor did Appellants seek to prevent Plaintiff from making full and fair use of their confidential documents in *this* case. (R. p. 465 n.1.)

This appeal—from the circuit court’s denial of the Motion to Compel Arbitration and the Motions to Stay and the entry of the Subject Confidentiality Order—timely followed by notice served and filed August 12, 2020,[15] and in due course, it was briefed and made ready for decision.

The case was submitted for decision during the June 2023 term without oral argument and decided on July 19, 2023, via the Subject Opinion, which affirmed the circuit court’s denial of the Motion to Compel Arbitration and, in turn, its denial of the Motions to Stay and dismissed Appellants’ appeal of the Subject Confidentiality Order on the basis that it is a discovery order and, therefore, not immediately appealable.

This petition for rehearing timely follows.

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[14] (R. pp. 421–29.)
[15] (R. pp. 496–98.)

STANDARD OF REVIEW

Re: The Motion to Compel Arbitration and, in turn, the Motions to Stay

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.*

Re: The Subject Confidentiality Order

Under Rule 26(c), SCRCP, the circuit court may make orders regulating discovery, including confidentiality orders. A circuit court's rulings on discovery matters will not be disturbed on appeal absent a clear abuse of discretion. *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734 (1989). The burden is upon the party appealing the order to demonstrate the court abused its discretion. *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). An abuse of discretion occurs when the circuit court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000); *see also Kershaw County Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d

369, 372 (1990) ("An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law.").[16]

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[16] The above being said, while the Subject Confidentiality Order is perhaps technically a "discovery" order, the "Sharing Provision" has literally nothing to do with the discovery needs of *this* case. Although embedded within a motion made in this case in Plaintiff's name, as a practical matter, the request for the "Sharing Provision" was the separate and independent request of a non-party, Plaintiff's counsel, made for their own sake, as well as on behalf of other vaguely identified non-parties (generic litigants from parts unknown who may at some point meet Plaintiff's counsel's definition of "similarly positioned"), for relief that (a) is not aimed at protecting Plaintiff's confidential information but rather disclosing Appellants' and (b) is wholly disconnected from any actual need in *this* case, the grant of which affects Appellants' substantial rights. The nature and effect of the relief granted via the "Sharing Provision" is such that it is or is akin to a judgment on the merits of an action or quasi-action/cause of action/claim unto itself in the nature of a request for a declaratory judgment or special remedy. *See Blakely & Copeland v. Frazier*, 11 S.C. 122, 134 (1878) ("The term 'merits' is not very clearly defined. *It certainly embraces more than the questions of law and fact, constituting the cause of action or defen[s]e*.") (emphasis added); Rule 2, SCRCP, Official Note ("This Rule . . . abolishes the mostly cosmetic differences between 'actions' and 'special proceedings'. A special proceeding is really only a civil action in which some special remedy is sought; i.e., writ of mandamus, writ of habeas corpus, etc."). And Appellants' opposition thereto amounts to a countervailing request for a form of injunctive relief to protect them from the prospect of irreparable harm, if not permanently, at least on such a temporary basis as may be necessary to ensure that Appellants are afforded a meaningful opportunity to pursue any/all available legal avenues (to include, without limitation, any/all rights to appeal) to try to protect their property, rights, and/or interests. *Cf. Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001) (the sole purpose of a temporary injunction is to preserve the status quo to avoid potential irreparable injury to the aggrieved party pending litigation.); Jean Hoefer Toal et al., Appellate Practice in South Carolina 154 (3d ed. 2016) ("If an order requires a party to turn over documents that the party feels are privileged or contain proprietary or confidential matters, and the party does

Re: All Issues of Law

Issues of law, however, are reviewed without any particular deference to the lower court. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016). Even where a ruling is on a matter within trial court's discretion, if the ruling is based on a misunderstanding of the law, rather than upon 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).

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not have a right to an immediate appeal, compliance renders the protections afforded by the privilege or confidentiality a nullity.").

ARGUMENT

I. Misapprehending or overlooking the following material points, the Court erroneously affirmed the circuit court's denial of the Motion to Compel Arbitration and, in turn, the Motions to Stay.

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

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

> Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] under the [Adult Health Care Consent] Act, she is nevertheless equitably estopped to deny the [arbitration agreement's] enforceability. The circuit court held there was no estoppel here, and we agree.
>
> Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. In South Carolina,
>
>> The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

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

407 S.C. 346, 354–55, 755 S.E.2d 450, 455 (2014) (emphasis added).

Most respectfully, the Court, like the circuit court before it, erroneously concluded that the Admission Agreement and the Arbitration Agreement did not merge, its analysis (recited below) 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 v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018):

> Here, as in *Coleman*, the plain language of the arbitration agreement and the admission agreement indicated the two agreements were to be considered separate from one another. Here, as in *Hodge*, (1) the two agreements were governed by different bodies of laws because the admission agreement was governed by state law and the arbitration agreement was governed by federal law; (2) each document was separately labeled, numbered, and contained its own signature page; and (3) both parties agreed that signing the arbitration agreement was not a prerequisite to admission. Thus, we affirm the circuit court's denial of the motion to compel arbitration.

(Subject Opinion p. 3.)[17]

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[17] Immediately prior to setting forth this analysis, the Court cited *Coleman* and *Hodge* and follows:

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,'"[18] as indeed the Admission Agreement and the Arbitration Agreement were here,[19] there is evidence to overcome the *presumption in favor of*

> *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 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 admissions agreement and arbitration agreement did not merge because the fact "the [a]dmission [a]greement indicated it was governed by South Carolina law, whereas the [a]rbitration [a]greement stated it was governed by federal law[,]" "each document was separately paginated and had its own signature page[,]" and "the [a]rbitration [a]greement stated signing it was not a precondition to admission" evidenced the parties' intention that the documents be construed as separate instruments).

(Subject Opinion pp. 2–3.)

[18] *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).

[19] 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

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

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

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respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), "the documents were [indeed] executed at *the same time, by the same parties, for the same purposes, and in the course of the same transaction*." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

The Court erroneously likened the instant case to *Coleman*. The plain language of the instant Arbitration Agreement and Admission Agreement does not indicate that the two instruments were to be considered separate from one another. First off, unlike the arbitration agreement at issue in *Coleman*, which provided that it could be disclaimed or revoked within 30 days of signing (while the corresponding admission agreement did not), *the instant Arbitration Agreement has <u>no</u> disclaimer/revocation provision*. (R. p. 280.) This is a material distinction between this case and *Coleman* that the Subject Opinion simply does not recognize.[20] Moreover, 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. 368.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[21]),

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[20] Indeed, the Court did so even while expressly recognizing as material to the *Coleman* decision the fact that there was "a clause allowing the arbitration agreement to 'be disclaimed within thirty days of signing while the admission agreement could not.'" (Subject Opinion p. 2 (citing *Coleman* as "concluding that by their own terms, language in the admission agreement that "recognize[d] the 'separatedness' of [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") (emphasis added).)

[21] 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike the instant case—the "Entire Agreement" clause expressly referred to a separate arbitration agreement and, thus, "recognize[d] the '*separatedness*' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.") (emphasis added).

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. 368.) Without question, the Arbitration Agreement is among these other Admissions materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) ("The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's *admission documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted); *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)).

The Court also erred in likening this case to *Hodge*. As an initial matter, the Court noted only *some* of the factors that the *Hodge* Court relied on in finding against merger, namely, (1) that "the two agreements were governed by different bodies of laws because the admission agreement was governed by state law and the arbitration agreement was governed by federal law;" (2) that "each document was separately labeled, numbered, and contained its own signature page;'" and (3) that "both parties agreed that signing the arbitration agreement was not a prerequisite to admission." (Subject Opinion p. 3.) Here again, the Court failed to recognize that in *Hodge*, too, as in *Coleman* (as explained above)—but, again, *not* in the instant case—the

arbitration agreement contained a disclaimer/revocation provision, the existence of which was a material to the *Hodge* Court's finding against merger. 422 S.C. at 562, 813 S.E.2d at 302 ("Also, the Arbitration Agreement stated it could be revoked within thirty days, whereas the Admission Agreement contained no such indication . . . ."); *id.* at 563, 813 S.E.2d at 302 ("Based on all of this, we find the Admissions Agreement and Arbitration Agreement did not merge.").

As for the three factors from *Hodge* that the Court relied on, they are unavailing. First, it is simply not true that "the two agreements were governed by different bodies of laws because the admission agreement was governed by state law and the arbitration agreement was governed by federal law." (Subject Opinion p. 3.) Regarding governing law, what the Admission Agreement actually states is this: "This Agreement will 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. 366.) And what the Arbitration Agreement actually states is this:

> 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. 280.)

Again, without question, the FAA applies here. And 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. 265, 270–77. 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.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted). Further still, the Arbitration Agreement expressly calls for the arbitration proceedings to be conducted pursuant to the South Carolina ADR Rules. (R. p. 280.)

Essentially, the provisions of the *both* 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, *but even if this were not so*, i.e., even if it were true that the Admission Agreement and the Arbitration Agreement were governed by different bodies of law (with the Admission Agreement being governed by state law and the Arbitration Agreement being governed by federal law), this still could not logically support any reasonable inference of an intent contrary to merger, because the same is true (with federal law applying to the agreement to arbitrate and state law applying to the remainder of the agreement) even where an agreement to arbitrate is included in a single instrument that is otherwise governed by South Carolina law.

Second, the fact that each document was separately labeled, numbered, and contained its own signature page 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.

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

To say that the Arbitration Agreement was not required for admission, which it was not, is not to say that it was not intended to be part of the admissions materials in the event it was agreed to, which it was, by Ms. McCraw on Ms. Owens's behalf. While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not

what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitrations Agreement's) sole reason for being. (*See* R. p. 280 (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. Owens'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. 357–68 (setting forth the terms of Ms. Owens's admission) *with* p. 280 (providing for arbitration of disputes arising out of Ms. Owens's admission).)

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 *Coleman* Court clearly endorsed the rule of law that a presumption of merger arises where, as here, multiple instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction and that upsetting this presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." 407 S.C. at 355, 755 S.E.2d at 455. While it is true that the *Coleman* Court also cited the rule that ambiguity is construed against the drafter,[22] (a) it did so in dicta and (b) it never addressed the logical inconsistency—

[22] *Id.* at 407 S.C. at 355–56, 755 S.E.2d at 455.

which thus remains fair game as an argument in this case[23]—in recognizing a rule of law creating a presumption in favor of merger (i.e., in recognizing the occurrence of a set of circumstances (same time, parties, purpose, and transaction) as sufficiently probative to affirmatively tip the scales in favor of merger) while at the same time allowing that presumption to be completely overturned by evidence that is merely ambiguous, i.e., that does not even go so far as to clearly indicate a contrary intention and, indeed, is actually still susceptible to a reasonable conclusion in favor of merger. *See S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation.").

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

[23] To be clear, none of *Coleman's* progeny has addressed this either.

place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). The merger presumption is "earned," so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

This Court should have found that the circuit court erred in not finding the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the whole of which related to Ms. Owens's admission to the Facility and would not have been done at all but for her admission to the Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn as to an intention contrary to merger.

B. The Court erred in dismissing the Other Defendants' appeal of the circuit court's denial of the Motions to Stay as moot.

As explained in the Subject Opinion, the Court dismissed the Other Defendants' appeal of the circuit court's denial of the Motions to Stay as moot

because of its finding that the Arbitration Agreement and the Admission Agreement did not merge. (Subject Opinion p. 3 ("Because we find the documents did not merge, . . . we . . . dismiss as moot their appeal of the circuit court's denial of the motion to stay").) Therefore, for the same reasons that the Court erred in affirming the circuit court's finding that these documents did not merge, it likewise erred in dismissing the Other Defendants' appeal of the circuit court's denial of the Motions to Stay as moot.

C. Had it reached the Other Defendants' appeal of the circuit court's denial of the Motions to Stay, as it should have, the Court should have found that the circuit court erred in not granting 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. The fates of these motions (or, more precisely, the fates of the appeals taken from the circuit court's rulings thereon) are likewise intertwined in this Court: whether the Motions to Stay are properly viewed as moot depends on whether the Motion to Compel Arbitration was properly denied—which, most respectfully, it was not.

Accordingly, showing (as is done elsewhere herein) that the Court erroneously affirmed the circuit court's denial of the Motion to Compel Arbitration in turn shows that the Court should have found that the circuit court erred in denying the Motions to Stay, which are not properly viewed as moot and should have been (or,

alternatively, on remand should be) granted. *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. However, the Circuit Court included in its order the requirement that all parties be included in one arbitration proceeding. Federal has signed no arbitration agreement and cannot be forced into compulsory arbitration. We feel it was erroneous to condition the relief to which respondents are plainly

entitled upon the voluntary submission of Federal to arbitration proceedings. This provision has been deleted from the foregoing Order of the lower court.”).

D. The Court erred in not reaching the Facility’s equitable estoppel argument.

As explained in the Subject Opinion, the Court did not reach the Facility’s equitable estoppel argument because of its finding that the Arbitration Agreement and the Admission Agreement did not merge. (Subject Opinion p. 3 (“Because we find the documents did not merge, we need not address Appellants’ equitable estoppel argument . . . .”).) Therefore, for the same reasons that the Court erred in affirming the circuit court’s finding that these documents did not merge, it likewise erred in not reaching the Facility’s equitable estoppel argument.

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

The circuit court’s analysis of equitable estoppel misapprehends or overlooks South Carolina’s favorable view of the applicability of the direct benefits test for equitable estoppel in arbitration cases.

The circuit court relies on the “traditional” six-factor test for equitable estoppel employed in *non*-arbitration cases, while casting aside the direct benefits test as a federal standard that “look[s] past South Carolina contract law.” (R. pp. 38–39.) South Carolina law, however, undeniably recognizes the potential for

equitable estoppel to be successfully invoked to enforce an arbitration agreement against a nonsignatory under the direct benefits test. *See Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel); *id.* at 340–345, 827 S.E.2d at 175–177 (favorably discussing the framework of the so-called direct benefits test—which was the test that the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, following its (the Court of Appeals') prior decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which test the Facility contends Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Ms. Owens received direct benefits (in the form of her admission and care/treatment at the Facility, to include, without limitation, room and board) from the Admission Agreement with which the Arbitration Agreement merged); *id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added). In other words, contrary to the circuit court's analysis, *Wilson*—

as well as logic itself—supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration 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 the Arbitration Agreement as merged, Ms. Owens (who was, according to Plaintiff herself, competent and possessed contractual capacity at all relevant times[24]) 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 alleges this. (*See* R. pp. 46–108.)

Respectfully, given that the Admission Agreement and the Arbitration Agreement should have been found to merge, this Court should have found that the circuit court erred in not finding Plaintiff equitably estopped to deny the Arbitration Agreement's enforceability, Ms. Owens having effectively embraced the contract with the Facility for the purpose of her admission only to later, via her estate, attempt

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[24] (R. p. 183:17–20.)

to repudiate the Arbitration Agreement with which her Admission Agreement merged.[25]

Lastly, in this regard, out of an abundance of caution, to the extent it may be relevant in regard to the circuit court's treatment of the Facility's equitable estoppel argument, the court's analysis relies on the incorrect assertion that Ms. McCraw did not represent to the Facility that she was authorized to sign the Arbitration Agreement on behalf of her mother and the improper imposition of an investigatory burden on the Facility to determine Ms. McCraw's authority. (*See* R. p. 39.)

There is, of course, an implied covenant of good faith and fair dealing in every contract. *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995). Moreover, "one who has signed a contract is presumed to have read, understood, and assented to its terms." *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019). And, again, when she signed the Arbitration Agreement, Ms. McCraw expressly represented that she had authority to sign on Ms. Owens's behalf. The circuit court wrongfully overlooked all this, unjustly punishing the Facility both for Ms. McCraw's false representations and for supposedly failing to meet some unspecified duty to investigate them. No such duty is in fact

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

recognized under South Carolina law—and, indeed, no legal authority is cited by the circuit court. Moreover, because the Arbitration Agreement is covered by the FAA, it "must [be] place[d] . . . on equal footing with other contracts . . . and enforce[d] . . . according to [its] terms[.]" *AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333, 339 (2011). By holding the Facility to an elevated standard of determining Ms. McCraw's authority to contract, the circuit court fails to place the Arbitration Agreement on equal footing with other contracts and, thus, violates the FAA.

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

Apparently under the impression that the Facility only sought discovery to question McCraw "concerning her alleged *apparent* authority to bind Owens to arbitration,"[26] the Court erroneously affirmed the circuit court in this regard on the basis that "McCraw's testimony alone could not establish she had apparent authority to act on Owens's behalf because *apparent* agency relies on the actions and representation of the principal, not the agent." (Subject Order p. 3 (emphasis added).)

The Arbitration Agreement is valid on its face, containing Ms. McCraw's express representation of her authority to bind her mother, Ms. Owens. (*See* R. p.

[26] (Subject Opinion p. 3 (emphasis added).)

280.) The only evidence that Ms. McCraw lacked authority to bind Ms. Owens is her own affidavit (filed July 23, 2019, just two days before the hearing on the Motion to Compel Arbitration (*See* R. pp. 331–32) contradicting her prior representation that she had authority to sign the Arbitration Agreement on her mother's behalf. Without this affidavit, Plaintiff would have no evidence to upset the facial validity of the Arbitration Agreement. In other words, the testimony presented via this affidavit constitutes the only evidentiary basis for the trial court's denial of the Facility's motion to compel arbitration, and the Facility has thus far been forced to take it at face value, without any opportunity to examine the affiant.

Assuming, *arguendo*, the circuit court did not err in denying the primary request for relief (i.e., the grant of the Motion to Compel Arbitration and, in turn, the Motions to Stay), the interests of justice required that it allow the Facility to conduct targeted discovery on the Arbitration Agreement's enforceability based on agency or related concepts. Otherwise, the Facility is left in the impossible Catch-22 of, on the one hand, being vulnerable to Plaintiff's argument that it has not presented sufficient evidence to prove the Arbitration Agreement is enforceable (whether by

true agency,[27] estoppel,[28] or ratification,[29] each a fact-intensive inquiry), while, on the other hand, being vulnerable to Plaintiff's argument that it waived its arbitration rights by making use of the tools of litigation (i.e., discovery) to prove them.

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

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

[29] Authority can be supplied to an agent retroactively by express or implied ratification. *See Brazell Bros. Contractors v. Hill*, 245 S. C. 69, 74, 138 S.E.2d 835, 837 (1964) ("Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent."). "Ratification, as it relates to the law of agency, may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into on his behalf by another who at the time assumed to act as his agent." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S. C. 75, 89, 124 S.E.2d 602, 608 (1962). It is not necessary for a principal to be present at the time of the commission of his agent's act in order

It is manifestly unfair and unjust for the circuit court to rely on Ms. McCraw's unchecked affidavit without allowing the Facility any opportunity to question her about it or otherwise follow pertinent evidentiary leads. It cannot be the case that the proponent of arbitration (who, it must be remembered, may well be attempting to vindicate a valid right to arbitrate that the arbitration opponent has wrongfully denied) has the burden to establish that right in a fact-based judicial proceeding in which it is disallowed use of the fact-finding tools (discovery procedures) available in other judicial proceedings. Obviously, if this were an action to determine the validity of a contract other than an arbitration agreement there would be no question about the Facility's ability to conduct discovery relevant to the facts/circumstances bearing on the contract's validity. To force the Facility into a situation where its arbitration rights are at the mercy of an unchecked affidavit (filed by an affiant directly contradicting her own prior representations) and where it cannot otherwise conduct relevant discovery to vindicate those rights without risking waiving them at the same time as it proves them is not only patently unjust but also a violation of the FAA's requirement that arbitration agreements must be placed on equal footing with other contracts. *See Concepcion*, 563 U.S. at 339.

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for him to ratify that act. *See State v. Waldrop*, 73 S. C. 60, 52 S.E. 793, 795 (1905) ("The presiding judge ruled that he could ratify the act of the agent, whether he was present or not, and in this we see no error.").

The proponent of discovery must show "a likelihood that further discovery will uncover additional evidence relevant to the issue" at hand. *Cf. Baughman v. American Telephone and Telegraph Company*, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991). And without question, the Facility showed this. The Facility duly showed (1) that the enforceability of the Arbitration Agreement based on agency or related concepts (whether by true agency, estoppel, or ratification—not merely the subset of agency law that is apparent agency) presents a fact-intensive inquiry; (2) that, as plainly evidenced by the very fact of Plaintiff's submission of Ms. McCraw's affidavit in opposition to the Facility's motion to compel arbitration, Ms. McCraw was a material witness in this regard; and (3) that, instead allowing the Facility to depose Ms. McCraw, the circuit court allowed her affidavit, which directly contradicted the express representation of authority she made to the Facility when she signed the Arbitration Agreement for Ms. Owens, to stand unchecked. "'Relevant evidence' means evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE (emphasis added). Without question, the Facility showed that deposing Ms. McCraw, and following any pertinent evidentiary leads discovered in the process, was likely to uncover relevant evidence bearing on the question of authority and agency.

And to be clear, even if the only discovery the Facility seeks were to depose Ms. McCraw concerning "apparent authority" (which it is not), the Court nonetheless erred in concluding that "McCraw's testimony alone could not establish she had apparent authority to act on Owens's behalf because apparent agency relies on the actions and representation of the principal, not the agent." (Subject Order p. 3.) While it is true that "an agency may not be established solely by the declarations and conduct of an alleged agent,"[30] it does not follow that Ms. McCraw would necessarily be incapable of giving deposition testimony that would provide an evidentiary basis on which to find apparent authority. In other words, the Court conflated the limits of Ms. McCraw's declarations and conduct at or about the time of Ms. Owens's admission to the Facility with the limitations of Ms. McCraw's ability to give deposition testimony about, not only her own declarations and conduct, but about her knowledge of her mother's declarations and conduct at or about that time.

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

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[30] *Hodge*, 422 S.C. at 577, 813 S.E.2d at 310.

II. The Court erroneously dismissed Appellants' appeal of the Subject Confidentiality Order on the basis that it is a discovery order and, therefore, not immediately appealable.

While the Subject Confidentiality Order is perhaps technically a "discovery" order, the "Sharing Provision" has literally nothing to do with the discovery needs of this case. Although embedded within a motion made in this case in Plaintiff's name, as a practical matter, the request for the "Sharing Provision" was the separate and independent request of a non-party, Plaintiff's counsel, made for their own sake, as well as on behalf of other vaguely identified non-parties (generic litigants from parts unknown who may at some point meet Plaintiff's counsel's definition of "similarly positioned"), for relief that (a) is not aimed at protecting Plaintiff's confidential information but rather disclosing Appellants' and (b) is wholly disconnected from any actual need in this case, the grant of which affects Appellants' substantial rights. The nature and effect of the relief granted via the "Sharing Provision" is such that it is or is akin to a judgment on the merits of an action or quasi-action/cause of action/claim unto itself in the nature of a request for a declaratory judgment or special remedy, and thus it is appealable under S.C. Code Ann. § 14-3-330. *See Blakely & Copeland v. Frazier*, 11 S.C. 122, 134 (1878) ("The term 'merits' is not very clearly defined. It certainly embraces more than the questions of law and fact, constituting the cause of action or defen[s]e.") (emphasis added); Rule 2, SCRCP, Official Note ("This Rule . . . abolishes the mostly cosmetic differences between 'actions' and 'special

proceedings'. A special proceeding is really only a civil action in which some special remedy is sought; i.e., writ of mandamus, writ of habeas corpus, etc.").[31] Moreover, Appellants' opposition thereto amounts to a countervailing request for a form of injunctive relief to protect them from the prospect of irreparable harm, if not permanently, at least on such a temporary basis as may be necessary to ensure that Appellants are afforded a meaningful opportunity to pursue any/all available legal avenues (to include, without limitation, any/all rights to appeal) to try to protect their property, rights, and/or interests, which is likewise appealable under § 14-3-330. *Cf. Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001) (the sole purpose of a temporary injunction is to preserve the status quo to avoid potential irreparable injury to the aggrieved party pending litigation.); Jean Hoefer Toal et al., Appellate Practice in South Carolina 154 (3d ed. 2016) ("If an order requires a party to turn over documents that the party feels are privileged or contain proprietary or confidential matters, and the party does not have a right to an immediate appeal, compliance renders the protections afforded by the privilege or confidentiality a nullity."). While the Subject Opinion does address this argument somewhat, it does so only by citing to the case of *Richardson v. Halcyon Real Estate Services*, Op. 5981

[31] The Subject Opinion does not address this point (that the nature and effect of the relief granted via the "Sharing Provision" is such that it is or is akin to a judgment on the merits of an action or quasi-action/cause of action/claim unto itself in the nature of a request for a declaratory judgment or special remedy, and thus it is appealable under § 14-3-330) and Appellants expressly ask that the Court do so.

(S.C. Ct. App. Apr. 19, 2023) (Howard Adv. Sh. No. 15 at 84, 89), for its "rejection of [an] argument that a *discovery sanctions* order was immediately appealable because the circuit court's prohibition on conduct in violation of Rule 30(j)(8), SCRCP, was in the nature of an injunction." (Subject Opinion p. 4 (emphasis added).) The Court decision in that case anchored its analysis in the specific context of a sanction for discovery misconduct, noting in particular that, "The circuit court found MTB's counsel's deposition conduct violated the discovery rules. If MTB's counsel engaged in the same conduct in Deponents' reconvened depositions, it is logical to conclude the circuit court would have imposed additional discovery sanctions on MTB." The context of the instant case is materially different from that of *Richardson* and the Subject Opinion does recognize this.

Alternatively, the Court should exercise its discretion to consider the Subject Confidentiality Order on appeal since it is accompanied by orders that are undeniably properly before it on appeal. *See Weaver*, 431 S.C. at 234, 847 S.E.2d 274 (declining to exercise, but implicitly recognizing, discretion to address orders not immediately appealable along with proper appeal of immediately appealable orders). Unlike in *Weaver*, where the Court declined to exercise its discretion because it believed the issues raised would benefit from further factual development, review of the Subject Confidentiality Order will not be aided by further factual development. Moreover, there is a nexus between the Subject Confidentiality Order and the denial of the

Motion to Compel Arbitration, because if the circuit court should have granted the motion—and, in turn, the Motions to Stay—the circuit court should not have proceeded to enter the Subject Confidentiality Order—or at a bare minimum, should not have entered it as to the Facility.

III. Had it reached Appellants' appeal of the Subject Confidentiality Order, as it should have, the Court should have found that the circuit court erred in the court erred in entering the Subject Confidentiality Order and should have entered Appellants' proposed confidentiality order instead, or at least omitted the Sharing Provision from the Subject Confidentiality Order.

Through discovery, Plaintiff seeks access to sensitive business and financial information, ultimately from all Appellants, and has served extensive requests for financial documentation/information, including operating budgets, financial statements, subleases, loan agreements, business communications, staffing methods and analytical data, policies and procedures, employee rosters, personnel files, and commercial contracts with non-parties ("Confidential Materials"). The Confidential Materials contain private, financially sensitive, personally sensitive, health-related, or proprietary commercial information. Assuming, *arguendo*, it was appropriate under the circumstances for the circuit court to enter a confidentiality order, the court erred in entering the Subject Confidentiality Order. It should have entered Appellants' proposed confidentiality order instead, or at least omitted the Sharing Provision from the Subject Confidentiality Order.

A. The Subject Confidentiality Order versus the Standard Federal Order

While Plaintiff's counsel utilized the Standard Federal Order as the "base" of the Subject Confidentiality Order, the Subject Confidentiality Order does *not* actually protect the Confidential Materials from disclosure, indeed, very much the opposite.

The Subject Confidentiality Order deviates from the Standard Federal Order in a number of ways that (1) undermine any meaningful notion of confidentiality, (2) prejudice Appellants in multiple ways, and (3) do not benefit Plaintiff in the prosecution of *this* case.

(1) The Subject Confidentiality Order severely limits the protections of the Standard Federal Order.

(a) The Subject Confidentiality Order is unduly limited in its scope.

The Standard Federal Order by its express terms applies to "all documents produced in the course of discovery, all responses to discovery requests and all deposition testimony and deposition exhibits and any other materials which may be subject to discovery." (*See* R. p. 485 ¶ 1.) Further, the Standard Federal Order permits a party to designate documents as "Confidential" if an attorney has reviewed and determined that such documents "contain information protected from disclosure

by statute, trade secrets or confidential research, development or commercial information." (*See* R. p. 486 ¶ 3.)[32]

Conversely, the Subject Confidentiality Order, by its express terms, applies only to "confidential documents produced in the course of discovery," omitting the language in the Standard Federal Order covering "all responses to discovery requests and all deposition testimony and exhibits, and any other materials which may be subject to discovery" and thereby leaving these materials outside its scope and unprotected. (R. p. 21 ¶ 1.) The circuit court should have rejected this undue limitation of the Subject Confidentiality Order.

(b) The Subject Confidentiality Order unduly adds a requirement of showing economic harm to label a document "Confidential."

The Subject Confidentiality Order forces Appellants to prove "economic harm" in conjunction with a "Confidential" designation by adding that only such documents that "contain information protected from disclosure by statute, trade secrets, or confidential research, development, or commercial information *that will cause economic harm if made public*" would be able to be designated "Confidential." (R. p. 22 ¶ 3 (emphasis added).) Of course, economic harm from the improper dissemination of these documents is what Appellants are trying to avoid and

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[32] This language in the Standard Federal Order tracks both Federal Rule 26(c)(1)(G) and Rule 26(c)(7), SCRCP, which are identical to each other.

requiring proof of harm prior to disclosure would be unwieldly and further complicate the litigation. This "economic harm" element is inconsistent with the Standard Federal Order and the express language Rule 26(c)(7), which does not contain that additional, and arbitrary, "economic harm" qualifier.

But as it is, with its limited scope and unwieldly "economic harm" requirement, the Subject Confidentiality Order permits Plaintiff and Plaintiff's counsel to disclose Appellants' private, proprietary, and sensitive information if it is either: (a) discovered in this case by means other than through document production (deposition exhibits, discovery responses, etc.) or (b) not be able to be tied to "economic harm" from its disclosure (e.g., personnel files, private information of other individual persons, tax returns, staffing information, employee rosters, financial statements, business communications, etc.).[33] This is prejudicial error.

(c) The Standard Federal Order has no Sharing Provision.

The Standard Federal Order prohibits Confidential Materials from being used or disclosed by the parties or their counsel for any purposes other than preparing for and conducting the subject lawsuit. (*See* R. pp. 487–88 ¶ 5(b).) In addition, the Standard Federal Order permits very limited third-party disclosures to: (1) counsel

[33] Appellants strongly believe strongly that disclosure of such information beyond this lawsuit would indeed cause "economic harm." The point here, however, is that there is private, proprietary, and sensitive information that is worthy of protection regardless of express/readily calculable economic harm (e.g., competitive disadvantage).

and employees of counsel who have responsibility for the preparation and trial of the lawsuit; (2) parties and employees of a party to the order, upon certification that such person's assistance is necessary to the subject lawsuit; (3) court reporters and persons engaged for the limited purpose of photocopying; (4) consultants, investigators, or experts employed to assist the parties in the preparation and trial of the subject lawsuit; and (5) other persons only upon consent of the producing party or upon order of the court. (*See* R. pp. 487–88 ¶ 5(b).)

The Subject Confidentiality Order permits third-party disclosures to the same persons listed in Paragraph 6(b) of the Standard Federal Order *plus* "other attorneys involved in *similar litigation* against the same parties so long as the receiving attorney first signs an acknowledgement of agreement to be bound by the Court's jurisdiction and this Order." (R. pp. 22–23 ¶ 5(b)(5) (emphasis added).) "Similar litigation" is not a defined term. Also, where the Confidential Materials go is apparently left up to the sole discretion of Plaintiff's counsel. Additionally, a component of the Sharing Provision is a "non-return" provision that allows Plaintiff's counsel, and those with whom the Subject Confidentiality Order allows Confidential Materials to be shared, to simply keep the Confidential Materials. This is prejudicial error.

B. The Subject Confidentiality Order should not have been entered because Plaintiff failed to satisfy her burden to prove the Sharing Provision was warranted.

The Subject Confidentiality Order should not have been entered because it expressly permits the disclosure of Appellants' Confidential Materials (1) *beyond this lawsuit (2) to unknown parties and (3) in other jurisdictions*, in violation of Appellants' rights to protect commercially sensitive or otherwise confidential/proprietary information. Moreover, omission of the "Sharing Provision" from the Subject Confidentiality Order would have caused Plaintiff no prejudice or other harm whatsoever, while the only benefit of its inclusion is that conferred on Plaintiff's counsel and those with whom they decide to "share."

(1) Plaintiff did not, and could not, show that the Standard Federal Order would prevent her from securing "relevant and necessary" information for this lawsuit.

Plaintiff did not, and could not, show that she needed, or would even be benefited by, the inclusion of the Sharing Provision in the Subject Confidentiality Order in respect of her prosecution of *this* cae. (*See* R. pp. 22–23 ¶ 5(a) & ¶ 5(b)(5), 25–26 ¶ 9.) Plaintiff will have access to confidential documents regardless of whether she can share them with other lawyers. *See Biazari v. DB Industries*, *LLC*, 2017 WL 1498122 at *3 (W.D. W.Va. April 26, 2017); *see also Steede v. Gen. Motors, LLC*, 2012 WL 2089761 at *4 (W.D. Tenn. June 8, 2012) ("For her part Plaintiff has not shown how entry of a 'non-sharing' protective order results in hardship for her case," as this restriction did not "prejudice[] her ability to obtain discovery in support of her own claims.").

Plaintiff had to show that that *her* case would be harmed if Appellants' Confidential Materials were not discoverable as she proposed. *Biazari*, *supra*, at *1 (citing *In re Deutsche Bank Tr. Co. Ams.*, 605 F.3d 1373 (Fed. Cir. 2010); *Pfizer, Inc. v. Apotex, Inc.*, 744 F. Supp. 2d 758, 762 (N.D. Ill. 2010)). Plaintiff's case will not be harmed because the provisions in dispute concern solely the ability to use and share Confidential Materials discovered in *this* lawsuit *beyond this* lawsuit. Accordingly, Plaintiff did not, and could not, demonstrate that the inclusion of the disputed provisions would benefit her in this lawsuit or, alternatively, that their omission would harm her in this lawsuit.

(2) "Sharing Provisions" as to confidential documents are disfavored and should have been rejected here in the absence of a legitimate public interest.

In the absence of a *consent* order by the parties agreeing to a sharing provision, many courts disallow the unrestricted sharing of discovery documents with lawyers from other jurisdictions. *See, e.g., In Re Remington Co.*, 952 F.2d 1029, 1033 (8th Cir. 1991) ("use of discovered information should be limited to the *particular lawsuit* in which it has shown to be both relevant and necessary to the prosecution of the action.") (emphasis added); *Scott v. Monsanto Co.*, 868 F.2d 786, 792 (5th Cir. 1989) ("although Plaintiff's claim harm from the inability to share and compare information with other litigants in other cases, no prejudice has been shown"); *Williams v. Taser Int'l, Inc.*, 2006 WL 1835437 (N.D. Ga. 2006) ("the Court declines

to allow Plaintiffs to either retain confidential documents upon the conclusion of this litigation, or to share confidential documents with other attorneys or experts involved in litigation against [Defendants]"); *Blanchard & Co. v. Barrick Gold Corp.*, 2004 WL 737485 (E.D. La. Apr. 5, 2004) (rejecting discovery sharing given "challenges driven by attorneys not involved in this case"); *see also Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297 (N.D. Ill. 1993); *Massachusetts v. Mylan Labs, Inc.*, 246 F.R.D. 87, 90–91 (D. Mass. 2007); *Biazari*, *supra*, at *1.

Some courts have approved sharing provisions in specific, limited circumstances relative to *non-confidential* information, but this typically occurs when the same product is at issue in products liability litigation. Importantly, these opinions are easily distinguishable as they are referring to *non-confidential* information and NOT the issue here: the sharing of *confidential* information. *See Culinary Foods, Inc.*, 151 F.R.D. at 306 ("We agree that case law encourages sharing of non-confidential information with other litigants, *but this does not apply to the sharing of confidential information* under a protective order that limits access to certain identified individuals.") (emphasis added).

C. The Subject Confidentiality Order violates Appellants' due process rights to protect the dissemination of confidential information beyond this lawsuit.

Plaintiff has necessarily conceded that there is "good cause" for a confidentiality order in this case to protect Appellants' rights in their

confidential/commercially sensitive/propriety material from disclosure to the public. Allowing Plaintiff's counsel to decide how to use and and/or share Appellants' Confidential Materials *beyond this lawsuit* and in *currently unknown but "similar" future litigation* would undoubtedly eviscerate Appellants' procedural and substantive due process rights as the documents will be shared, as determined by Plaintiff's counsel, with unknown lawyers, unknown experts, unknown consultants, in unkown cases, about unkown residents with absolutely no chance afforded to Appellants to object. And it is "a matter of simple probability, the risk of such disclosure (whether intentional or inadvertent) increases as more individuals gain access to this material." *Biazari*, *supra*, at *4.

CONCLUSION

For the foregoing reasons, along with any other or further reason(s) set forth in their appellate briefs already on file, the entirety of which they hereby adopt and incorporate herein by reference and reiterate/reassert in support hereof, Appellants ask this Honorable Court to grant the instant petition, to rehear this matter, to withdraw the Subject Opinion, and to decide this appeal anew via an opinion that reverses the circuit court—as to its rulings on the Motion to Compel Arbitration, the Motions to Stay, and the Subject Confidentiality Order—and to stay this lawsuit in favor of arbitration (or remand the case to the trial court with instructions for it to do so) or, alternatively, remand the case to the trial court for it to engage in or allow any

such other proceedings (including, without limitation, discovery) as may be necessary to properly determine and/or enforce the Facility's rights under the Arbitration Agreement (and the Other Appellants' Motions to Stay) and reverse the circuit court's entry of the Subject Confidentiality Order, or at least its inclusion of the Sharing Provision in the Subject Confidentiality Order.

Respectfully submitted,
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September 5, 2023

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

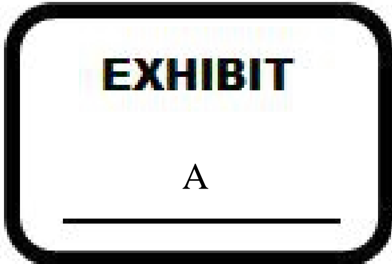
THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Estate of Barbara Owens, by and through her Personal Representative, Mary Jane McCraw, Individually and on behalf of Statutory Beneficiaries, Respondent,

v.

Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC,; THI of South Carolina, LLC; THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg, Appellants.

Appellate Case No. 2020-001107



Appeal From Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Unpublished Opinion No. 2023-UP-272
Submitted June 1, 2023 – Filed July 19, 2023

AFFIRMED IN PART AND DISMISSED IN PART

Stephen Lynwood Brown, Russell Grainger Hines, Donald Jay Davis, Jr., all of Clement Rivers, LLP, of Charleston, for Appellants.

Gary W. Poliakoff and Raymond Paul Mullman, Jr., both of Poliakoff & Assoc., PA, of Spartanburg; Whitney

Boykin Harrison, of McGowan Hood Felder & Phillips, of Columbia; Patrick E. Knie, of Knie & Shealy Attorneys at Law, of Spartanburg; and Edward John Waelde, of Greenville, all for Respondent.

PER CURIAM: Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina, LLC; and THI of South Carolina at Spartanburg, LLC d/b/a Magnolia-Manor Spartanburg (the Facility; collectively, Appellants) appeal the circuit court's denial of their motion to compel arbitration on the wrongful death and survival actions of the Estate of Barbara Owens, by and through her personal representative, Mary Jane McCraw, individually and on behalf of statutory beneficiaries (the Estate). They also appeal the circuit court's confidentiality order concerning discovery (Confidentiality Order). Appellants argue (1) the circuit court erred in denying the motion to compel arbitration and, in turn, the motions to stay; (2) the circuit court erred in rejecting their merger argument; (3) in the alternative to the first two arguments, the circuit court erred in denying Appellants' alternative request for limited discovery; and (4) the circuit court erred in entering the Confidentiality Order. We affirm in part and dismiss in part.

1. We hold the circuit court did not err in denying the motion to compel arbitration because the admission agreement and the arbitration agreement did not merge. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise."); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008) ("Appeal from the denial of a motion to compel arbitration is subject to de novo review"); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002) ("However, the circuit court's factual findings will not be overruled if there is any evidence reasonably supporting them."); *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."); *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 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 admissions agreement and arbitration agreement did not merge because the fact "the [a]dmission [a]greement indicated it was governed by South Carolina law, whereas the [a]rbitration [a]greement stated it was governed by federal law[,]" "each document was separately paginated and had its own signature page[,]" and "the [a]rbitration [a]greement stated signing it was not a precondition to admission" evidenced the parties' intention that the documents be construed as separate instruments). Here, as in *Coleman*, the plain language of the arbitration agreement and the admission agreement indicated the two agreements were to be considered separate from one another. Here, as in *Hodge*, (1) the two agreements were governed by different bodies of laws because the admission agreement was governed by state law and the arbitration agreement was governed by federal law; (2) each document was separately labeled, numbered, and contained its own signature page; and (3) both parties agreed that signing the arbitration agreement was not a prerequisite to admission. Thus, we affirm the circuit court's denial of the motion to compel arbitration.

Because we find the documents did not merge, we need not address Appellants' equitable estoppel argument, and we also dismiss as moot their appeal of the circuit court's denial of the motion to stay. *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").

2. We hold the circuit court did not err in denying Appellants' request to conduct limited discovery to question McCraw concerning her alleged apparent authority to bind Owens to arbitration. McCraw's testimony alone could not establish she had apparent authority to act on Owens's behalf because apparent agency relies on the actions and representation of the principal, not the agent. *See Hodge*, 422 S.C. at 577, 813 S.E.2d at 310 ("[A]n agency may not be established solely by the declarations and conduct of an alleged agent." (alteration in original) (quoting *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996))); *Thompson v. Pruitt Corp.*, 416 S.C. 43, 54-55, 784 S.E.2d 679, 686 (Ct. App. 2016) ("Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." (quoting *Froneberger v. Smith*, 406 S.C. 37, 47, 748 S.E.2d 625, 630 (Ct. App. 2013))); *Snell v. Parlette*, 273 S.C. 317,

322-23, 256 S.E.2d 410, 412-13 (1979) (holding the testimony of the purported agent that she was acting as the agent of her ten nonresident relatives when she signed a listing agreement was entitled to some weight, but was "insufficient without more to establish an agency relationship"); *Hodge*, 422 S.C. at 578, 813 S.E.2d at 310 (holding that because apparent agency involved the patient's representations to the nursing facility, the deposition of the patient's husband, who signed the admission and arbitration agreements, would not add anything to that determination).

3. We dismiss Appellants' appeal of the Confidentiality Order because it is a discovery order and, therefore, not immediately appealable. *See Tucker v. Honda of S.C. Mfg., Inc.*, 354 S.C. 574, 577, 582 S.E.2d 405, 406 (2003) ("[A]n order compelling discovery does not ordinarily involve the merits of the case and may not be appealed."); *id.* at 577, 582 S.E.2d at 406-07 ("Since a contempt order is final in nature, an order compelling discovery may be appealed only after the trial court holds a party in contempt."); *id.* at 577, 582 S.E.2d at 407 ("Thus, a party may comply with the order and waive any right to challenge it on appeal or refuse to comply with the order, be cited for contempt, and appeal."). The possibility of disclosure of confidential information pursuant to a Confidentiality Order does not make the order immediately appealable. *See Wieters v. Bon-Secours-St. Francis Xavier Hosp., Inc.*, 381 S.C. 332, 332-33, 673 S.E.2d 417, 418 (2009) (vacating this court's review of a discovery order that may have resulted in the disclosure of confidential information because the order was not immediately appealable); *Tucker*, 354 S.C. at 577, 582 S.E.2d at 406-07 (holding an order compelling discovery is not immediately appealable even when it may result in the disclosure of confidential communications). Additionally, Appellants' opposition to the Confidentiality Order did not transform a discovery issue into an injunction. *See Richardson v. Halcyon Real Estate Servs.*, Op. 5981 (S.C. Ct. App. Apr. 19, 2023) (Howard Adv. Sh. No. 15 at 84, 89) (rejecting appellant's argument that a discovery sanctions order was immediately appealable because the circuit court's prohibition on conduct in violation of Rule 30(j)(8), SCRCP, was in the nature of an injunction). Furthermore, we decline to accept the appeal of the Confidentiality Order with the appeal of the denial of the motion to compel arbitration because the issues Appellants raise concerning the Confidentiality Order do not have a sufficient nexus to the appeal of the arbitration order. *See Hodge*, 422 S.C. at 575 n.9, 813 S.E.2d at 309 n.9 (noting that while discovery orders generally are not immediately appealable, "courts may accept appeals of interlocutory orders not ordinarily immediately appealable when appealed with a companion issue proper for review but not when the issues appealed lack a sufficient nexus").

AFFIRMED IN PART AND DISMISSED IN PART.[1]

WILLIAMS, C.J., and GEATHERS and VERDIN, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.