THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2023-000432

The Estate of Jo Eva Rice, deceased by her personal representative Sonya Lovett, …….. Respondent

v.

Fundamental Clinical and Operational Services, LLC, Fundamental Administrative Services, LLC, THI of South Carolina at Magnolia Manor-Spartanburg a/k/a Physical Rehab and Wellness of Spartanburg …….. Appellants.

INITIAL BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether a nursing home can bind a nursing home resident to an arbitration contract to which she did not assent.

2. Whether a nursing home resident received the "direct benefit" required to support equitable estoppel from an arbitration contract she never saw and which purported to take her right to a jury trial.

3. Alternatively, whether a nursing home resident's assent to arbitration affects a wrongful death claim that compensates the resident's beneficiaries for their losses.

STATEMENT OF THE CASE

Sonya Lovett, appointed as personal representative of the Estate of her mother Jo Eva Rice, filed a Summons and Complaint in the Spartanburg County Court of Common Pleas on October 28, 2021. (Compl. ¶ 1). The Complaint alleged wrongful death and survival claims against THI of South Carolina at Magnolia Place—Spartanburg a/k/a Physical Rehab and Wellness of Spartanburg ("the Facility") along with related entities (Appellants Fundamental Clinical and Operational Services, LLC ("FCOS") and Fundamental Administrative Services, LLC ("FAS")) the Complaint alleged to have operational or managerial control over the Facility. (Compl. ¶¶ 2-3; 31).

All three Appellants filed separate answers on December 3, 2021. On January 28, 2022, the Facility moved to compel arbitration. (Magnolia Manor Mot. to Compel Arb.). Motions to stay were filed by FCOS and FAS that same day. (FCOS Mot. to Stay; FAS Mot. to Stay). A hearing on the motions was held before the Honorable J. Derham Cole on April 1, 2022. On November 21, 2022, the circuit court entered an order denying the Facility's motion to compel arbitration and dismissing as moot the other Appellants' motions to stay. (Order, dated Nov. 21, 2022). The Facility, FCOS, and FAS served a notice of appeal on March 14, 2023.

STATEMENT OF THE FACTS

Jo Eva Rice was admitted to the Facility on December 30, 2017, following a hospitalization for a stroke. (Compl. ¶ 6(a)). On January 5, 2018, her daughter Sonya Lovett was presented with two adhesion contracts at the Facility. (S. Lovett Aff.). The first contract was an "Admission Agreement" governing the type of care Ms. Rice would receive at the Facility and Ms. Rice's financial obligation to pay for those services. On the Admission Agreement's final page, labeled as "Page 12 of 12," there was an "Entire Agreement" provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Ms. Rice's admission to the Facility. Ms. Lovett signed the Admission Agreement on the "Representative" signature line. The Facility's representative did not ask Ms. Lovett for proof of authority to act on Ms. Rice's behalf, and Ms. Lovett had never been named Ms. Rice's power of attorney or held any other legal authority to act on Ms. Rice's behalf. (S. Lovett Aff. ¶¶ 3-4).

On the same day, Ms. Lovett signed a contract called "Arbitration Agreement." This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate contract (labeled "Page 1 of 1") with its own signature blocks. The Arbitration Agreement, purportedly a contract between the Facility and either Ms. Rice or Ms. Lovett, provided for alternative dispute resolution for any claim a party may bring against another arising out of Ms. Rice's admission in the Facility. Ms. Lovett signed the Arbitration Agreement on the line labeled "Resident/Representative Signature." Appellants admit agreeing to the Arbitration Agreement was not a condition or prerequisite to admission at the Facility. (App. Br at 31).

The Complaint alleges Ms. Rice received substandard care at the Facility in several respects. For example, the Facility's failure to properly meet Ms. Rice's daily needs, she developed multiple advance-stage decubitus ulcers. (Compl. ¶ 6(g)). Ms. Rice also had history of seizure

disorder which the Facility failed to properly monitor and treat. (Compl. ¶ 6(c)-(e)). On June 17, 2018, Ms. Rice suffered from seizure-like tremors and was found unresponsive at the Facility. (Compl. ¶ 6(j)). While Ms. Rice was transferred to a hospital, she passed away from her injuries. (Compl. ¶ 7). The Complaint alleges the Facility, under the control of FCOS and FAS, were liable for Ms. Rice's decubitus ulcers because they failed to properly turn and reposition Ms. Rice on a regular basis and in their failure to use pressure-relieving devices specifically designed to prevent bedsore development. (Compl. ¶ 8(c)-(n)). The Complaint further alleges the Facility failed to timely and properly respond to Ms. Rice's June 2018 seizure event. (Compl. ¶ 8(r)-(u)).

Relying on the Arbitration Agreement Ms. Rice did not sign, the Facility's motion to compel arbitration argued her estate must arbitrate rather than litigate its claims. (Facility Mem. in Supp. of Mot. to Compel. Arb.) The circuit court denied the motion, finding Ms. Lovett lacked authority to enter the Arbitration Agreement on Ms. Rice's behalf. (Order, dated Nov. 21, 2022). The order also found the Facility failed to prove Ms. Rice or her estate is estopped from opposing arbitration. Id. at 7-12. The circuit court went on to hold that, even if the Arbitration Agreement was generally valid, it could not be enforced for the wrongful death claim brought for the benefit of Ms. Rice's statutory beneficiaries. Id. at 13-14. In light of these rulings, the FCOS and FAS motions to stay were denied as moot. Id. at 15. Appellants filed a motion to alter or amend judgment on December 1, 2022, which the circuit court denied on March 1, 2023. (Form 4 Order, dated Mar. 1, 2023). This appeal followed.

STANDARD OF REVIEW

Appellate courts apply a *de novo* review to a circuit court's finding on whether a nonsignatory is bound to an arbitration contract. Wilson v. Willis, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019) (citing Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 707

(2007) and Pearson v. Hilton Head Hosp., 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012)). However, under a *de novo* review, the circuit court's factual findings will not be reversed so long as "any evidence reasonably supports those findings." Wilson, 426 S.C. at 335, 827 S.E.2d at 172. While the Federal Arbitration Act ("FAA") imposes a presumption favoring arbitration, the presumption does not apply to the "identity of the parties who may be bound to such an agreement." Id. at 337-38, 827 S.E.2d at 173. In fact, there is a presumption against arbitration when enforcement is sought against a non-signatory. Id.

ARGUMENT

The Facility's motion sought to deny Respondent the constitutionally-guaranteed right to a jury trial based on an invalid arbitration contract. Arbitration applies only when the parties voluntary agree to it. Here, Ms. Rice never signed the Arbitration Agreement, and the Facility produced nothing to show Ms. Rice daughter (Sonya Lovett) had the authority to bind her mother (or her estate) to the Arbitration Agreement. South Carolina appellate courts have repeatedly rejected nearly all of the legal and equitable theories the Facility now proposes to create a binding contract where there is not one. Earlier this year, this Court rejected those same theories in an appeal by many of these same Appellants for the Facility's sister nursing home. Solesbee v. Fundamental Clinical & Operational Servs., LLC, 426 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023). Solesbee[1], which builds on a long-standing line of precedent, is controlling here because it

[1] While Appellants note that a petition for writ of certiorari is still pending in Solesbee (App. Br. at 43 n. 37), the Supreme Court has denied nearly identical cert petitions by Facility's sibling nursing homes in Columbia and Charleston this year. Daniels v. THI of S.C. at Columbia, Case No. 2022-001503, *cert denied* May 24, 2023; Ladson v. THI of S.C. at Charleston, Case No. 2022-001286, *cert denied* Apr. 18, 2023.

addresses the exact same arguments regarding identical nursing home admission and arbitration contracts. Accordingly, the circuit court correctly denied the motion to compel arbitration.[2]

1. The Independently-Invalid Arbitration Agreement does not Merge with the Admission Agreement.

The Facility argues Ms. Rice's estate must arbitrate its claims against Appellants, but Ms. Rice never agreed to do so. Ms. Rice never signed or otherwise assented to the Arbitration Agreement on which the Facility relies to support its motion to dismiss the estate's civil action. Ms. Lovett's signature on the Arbitration Agreement is ineffective because she did not have authority to bind Ms. Rice to a dispute resolution contract. Moreover, as the circuit court concluded, Ms. Rice's presence at the Facility does not estop the estate from contesting arbitration under South Carolina or federal equitable estoppel principles.

This appeal centers on core components of contract formation. Since the Facility points only to the Arbitration Agreement as a basis for dismissing Respondent's claims, it cannot prevail without first establishing the Arbitration Agreement is a properly formed, binding contract. However, while the Facility offered the Arbitration Agreement as an alternative means for settling disputes, Ms. Rice never accepted that offer. Moreover, as established in South Carolina precedent, Ms. Rice lacked authority to enter the Arbitration Agreement.

a. The Facility Cannot Show the Core Requirements to Form a Contract.

A contract is formed only when one party makes an offer, the other manifests acceptance, and the contract's promises are supported by valuable consideration. Sauner v. Pub. Serv. Auth.

[2] For the same reasons, the Court should affirm the circuit court's ruling dismissing the remaining Appellants' motions to stay as moot. (Order at 16). As made clear in Appellants' Brief, the motions to stay are wholly dependent on the outcome of Magnolia Manor's motion to compel arbitration. Also, even if the Court were to reverse the circuit court's ruling on the Facility's motion, the motions to stay should be remanded for resolution by the circuit court in the first instance.

of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). Acceptance requires an "objective manifestation of . . . assent at the time the contract was made." Laser Supply & Services, Inc. v. Orchard Park Assoc., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009). The Arbitration Agreement was not signed by Ms. Rice or even offered for her signature. Since Ms. Rice never personally assented to the Arbitration Agreement, the Facility argues the signature of her daughter (Ms. Lovett) assented on her behalf. However, the Facility presents nothing to show Ms. Lovett had authority to contract for Ms. Rice. Instead, the Facility argues that, even though no with authority signed the Arbitration Agreement, Ms. Rice's estate is estopped from opposing arbitration. The circuit court correctly refused this argument because it was rejected in Solesbee and in a number of other South Carolina appellate court opinions.

South Carolina's Adult Health Care Consent Act ("the Act") empowers designated family members of some vulnerable adults to sign a contract admitting the vulnerable adult to a skilled nursing facility and agreeing to pay the fees imposed by that facility for its services. S.C. Code Ann. § 44-66-60(A); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450, 453 (2014). But, since the Act is limited to "health care" decisions, it provides no authority for separate contracts like the Arbitration Agreement. Id. at 354, 755 S.E.2d at 454; Thompson v. Pruitt Corp., 416 S.C. 43, 51, 784 S.E.2d 679, 684 (Ct. App. 2016) (citing Coleman and agreeing an "Arbitration Agreement does not deal with healthcare decisions"). Additionally, a family member signing a nursing home admission contract pursuant to authority derived from the Act does not estop a later argument that the same family member lacked authority to sign a separate arbitration contract. Coleman, 407 S.C. at 354-56, 755 S.E.2d at 455; Thompson, 416 S.C. at 60, 784 S.E.2d at 688. The Act was never meant to affect anything other than "health care" decisions and, the Arbitration Agreement was not a health care decision because Ms. Rice could get all the

health care services covered in the Admission Agreement without agreeing to arbitrate. (App. Br. at 31) ("the Arbitration Agreement is not necessary to the Admission Agreement").

Coleman did acknowledge the possibility that equitable estoppel could be invoked if the disputed arbitration language was actually or effectively part of the same admission contract. 407 S.C. at 355, 755 S.E.2d at 455. This narrow path to a successful estoppel argument requires several steps. Preliminarily, the Facility must establish the Act empowered Ms. Lovett to enter the Admission Agreement on Ms. Rice's behalf. See Hodge, 422 S.C. at 574, 813 S.E.2d at 308 (finding that there can be no estoppel argument where signatory family member lacked authority under Act to enter admission contract). Then, the Facility must meet multiple requirements to apply the common law contract law interpretation principle by which courts interpret multiple writings as a single contract. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. This "merger" principle cannot apply unless the writings in question were executed "at the same time, by the same parties, for the same purpose, and in the course of the same transaction." Id. (quoting Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). Even then, merger does not apply if there is "*anything* indicating a contrary intention." Id. (emphasis added). Thus, simultaneously executed writings relating to the same general subject matter will not be viewed as a single or merged agreement if either their language or the circumstances even hint that the parties actually intended the writings to be distinct, separate contracts. Several nursing homes have previously attempted but failed to meet these robust requirements, and South Carolina's appellate courts have never applied merger to nursing home admission and arbitration contracts. See generally Coleman, Thompson, and Hodge.

b. The Admission Agreement and Arbitration Agreements Serve Different Purposes.

First, the Facility cannot show the Admission Agreement and Arbitration Agreement were executed for the same purpose. The Admission Agreement was formed because its "parties wish to admit [Ms. Rice] to" the Facility. (Admission Agreement at 1). That purpose is borne out in the Admission Agreement's twelve pages. The Facility agreed to "[f]urnish room, routine meals, nursing care, personal care, or custodial care" (Admission Agreement at 2, § (A)(3)) to Ms. Rice who, in turn, agreed to "[p]ay all fees and charges" for those skilled nursing services. Id. at 3, § (B)(4). The Admission Agreement's provisions referred to Medicaid eligibility, bed hold policies, late fees for unpaid service charges, etc. The Arbitration Agreement covers a completely different issue. It is solely devoted to directing an alternative dispute resolution method and purporting to eliminate its parties' right to seek relief through the courts. (Arbitration Agreement). These two contracts cannot have the same purpose because, as Appellants' counsel admits, the Arbitration Agreement was not a pre-condition for admission. (App. Br. at 31).

c. The Terms and Context Show the Parties Intended the Admission Agreement and Arbitration Agreement to be Separate Contracts.

Third, even if the Court were to find the prerequisites to merger were present, the Facility's argument fails because the language and circumstances of the Admission Agreement and Arbitration Agreement show the parties intended they be construed as separate contracts. Coleman, Thompson, and Hodge are key precedent here because they illustrate the type of contract language or structure showing parties do not intend multiple agreements to be interpreted as one. For example, an arbitration contract does not merge with an admission contract in which a nursing home and its resident chose to insert an "entire agreement" or integration provision (aka "merger clause") limiting its parameters and excluding other writings. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. Coleman held one such provision proved "on its face" that merger does not apply.

Id. Also, admission and arbitration contracts cannot merge if they contain inconsistent terms, especially provisions related to how each contract may be terminated. Id.; Thompson, 416 S.C. at 53, 784 S.E.2d at 685. Moreover, courts look at the way the contracts are structured, finding it is unlikely parties intended two contracts to be treated as one if they chose separate titles, required separate signatures, and numbered each contract's pages differently. Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Finally, Hodge held a nursing home cannot argue for merger when it chose to separate arbitration and admission into two agreements while taking the position that agreeing to the former was not required to obtain the benefits of the latter. 422 S.C. at 562-63, 813 S.E.2d at 302.

The Facility preemptively dismisses all of these factors, arguing none of them suggest the parties intended the Admission Agreement and Arbitration Agreement not merge. Appellants' Br. at 27-28. However, by rejecting or discounting these factors, the Facility is arguing against well-established, recent precedent (Coleman, Thompson, and Hodge) without offering the Court any reason why it should so dramatically and quickly reverse course. All four of these examples apply to the Admission Agreement and Arbitration Agreement in this case and provide extensive evidence the contracts do not merge. In fact, Solesbee found each of the indicators of separateness from Coleman and its progeny are present in the same form Admission Agreement and Arbitration Agreement at issue here.

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

The Admission Agreement concludes with an "Entire Agreement" provision identifying the limited scope of that contract. (Admission Agreement at 12, § XVIII). Specifically, this provision states "this Agreement represents the entire . . . understanding between the parties." "Agreement" is capitalized because it is a defined term, which the Admission Agreement's

opening line limits to "THIS ADMISSION AGREEMENT." (Admission Agreement at 1) (emphasis in original). Thus, the Admission Agreement's "Entire Agreement" provision is similar to the admission contracts in Coleman, Thompson, and Hodge. In fact, the Admission Agreement's "Entire Agreement" provision is just as probative against merger as those in earlier cases. It specifically limits the contract's interpretation to the "Agreement" and then defines that term narrowly in a way that does not include the Arbitration Agreement or any other writing. In this sense, the "Entire Agreement" provision is consistent with the fundamental purpose an integration provision serves in a contract. See Palmetto State Sav. Bank of S.C. v. Barr, 293 S.C. 252, 253-54, 359 S.E.2d 531, 532 (Ct. App. 1987) (finding purpose of integration provision is to create "strong implication the whole intentions of the parties has been expressed" in the writing containing the clause); Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984) (citing Armour Fertilizer Works v. Hyman, 120 S.C. 375, 113 S.E. 330 (1922) (the terms of a completely integrated contract "cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing")).

Plus, there is contract language here that tracks Coleman and progeny almost word for word. In Coleman, the court focused on the fact that the admission contract's "Entire Agreement" provision referenced "[t]his Agreement . . . and the Arbitration Agreement." Referencing the two writings distinctly was "the admission agreement's recognition of the arbitration agreement as a separate document." Thompson, 416 S.C. at 52, 784 S.E.2d at 684 (citing Coleman, 407 S.C. at 355, 755 S.E.2d at 455). Hodge applied the same principle using language from an arbitration contract that referenced an admission contract in distinct terms. 422 S.C. at 562, 813 S.E.2d at 302. If an arbitration contract explains its scope extends to disputes arising from "this Agreement or the . . . Admission Agreement," then the parties "recognized a separateness" between the two

contracts. Id. The Arbitration Agreement in this case does exactly what Coleman, Thompson, and Hodge identify as proof that defeats the Facility's merger argument. In describing its term, the Arbitration Agreement states that its effect will continue even after the termination of "this Agreement ***or the Admission Agreement***." (Arbitration Agreement) (emphasis added).

Finally, the Facility argues the "Entire Agreement" provision supports merger because it incorporates "other Admissions Materials." Appellants' Br. at 30 (quoting Admission Agreement at 12 § XVIII). To the extent the Facility implies the Arbitration Agreement was incorporated by reference into the Admission Agreement, the Facility has offered nothing in either contract to support this conclusion. "Admissions Materials" is not a defined term and there is nothing to suggest the Arbitration Agreement was intended to be included within it. Plus, since the Facility admits agreeing to arbitration was not required for admission, it would be counterintuitive to conclude the Arbitration Agreement was an "admissions material." Thompson rejected a similar argument when a nursing home argued its admission contract's "entire agreement" provision incorporated a separate arbitration contract by referring broadly to "exhibits." Since "exhibit" was undefined and not referenced elsewhere in either contract, the term was ambiguous and was interpreted against the nursing home who drafted it. 416 S.C. at 53-54, 784 S.E.2d at 685 (citing Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455).

ii. Inconsistent Termination Provisions

Two contracts executed at the same time do not merge if they contain inconsistent terms. The parties likely did not intend for the two be read as one if they chose to, for example, apply different substantive law to the two agreements. Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Coleman, Thompson, and Hodge made special note of inconsistent provisions in admission and arbitration contracts regarding when each contract may be cancelled at the resident's urging.

Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 551, 813 S.E.2d at 296. In each instance, the arbitration contract allowed the resident to disclaim or revoke its provisions within thirty days but the admission contract did not include a similar right. Id.

The contracts' termination provisions are just as inconsistent here as in those cases. The Arbitration Agreement states that its effect on disputes between the parties would survive even if both the Admission Agreement and Arbitration Agreement are cancelled. (Arbitration Agreement). As structured by the Facility, there does not seem to be any means by which a resident could unilaterally cancel the Arbitration Agreement. The Admission Agreement is very different in that it allows a resident to unilaterally terminate that contract "at any time." (Admission Agreement at 6, § IV, ¶ 1). Thus, the way in which the contracts end is more evidence of separateness because the Arbitration Agreement and Admission Agreement have inconsistent termination provisions that rebut any argument the parties intended these two separate contracts merge into one. Solesbee, 438 S.C. at 649, 885 S.E.2d at 149 (finding the drafter of this Admission Agreement and Arbitration Agreement "recognized the two documents were separate" as evidenced by the contracts' varying termination provisions).

iii. Contract Formatting and Structure

Thompson and Hodge prove it is not just specific contract language that shows a nursing home and its resident did not intend for admission and arbitration contracts to merge. Intent can be derived from the way a contract is formatted or structured. Rather than adding an arbitration provision to the admission contract or attaching that language as an exhibit, the nursing home in Thompson chose to place it in an entirely separate document with its own, distinct "Arbitration Agreement" label. 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1. That choice was in itself further

proof of "the parties' intent for [the arbitration contract] to stand by itself as an independent contract." Id. The Facility did the same here, and the Arbitration Agreement announces itself as a distinctive contract from its very title. Hodge also noted the importance of formatting choices a nursing home makes when constructing its admission and arbitration contracts. 422 S.C. at 562, 813 S.E.2d at 302. An arbitration contract looks more and more like its own independent document if entering it requires a separate signature than the admission contract and the documents have separate pagination. Id.; Solesbee, 438 S.C. at 649, 885 S.E.2d at 149 (applying same principle to contracts at issue here). Here, the Arbitration Agreement required separate signatures. Plus, the Admission Agreement ran from "Page 1 of 12" to "Page 12 of 12," while the Arbitration Agreement was all on its own as "Page 1 of 1."

iv. Admission is not Dependent on Arbitration Agreement

The Facility's merger argument is also rebutted by its counsel's admissions. The purported interaction between two separate contracts can be judged not only by their language but also by how their parties treat each contract. An arbitration contract is far less likely to merge with an admission contract if the nursing home admits arbitration is not required for admission. Thus, in Hodge, this Court cited as further evidence against merger an arbitration contract provision stating that arbitration was not a precondition to a resident's acceptance into the nursing home. 422 S.C. at 562-63, 813 S.E.2d at 302; Solesbee, 438 S.C. at 649, 885 S.E.2d at 149 (applying same principle to contracts at issue here). Similarly, the Facility does not treat the Admission Agreement and Arbitration Agreement as if they are interdependent or even as related to the same purpose. The Facility's admits executing the Arbitration Agreement was not mandatory and not a precondition to admission. (App. Br. at 31).

In sum, the Arbitration Agreement and Admission Agreement have the same four indicators South Carolina courts have cited in the past to find the parties did not intend for simultaneously-executed contracts to merge into one. Moreover, contrary to the Facility's arguments, any uncertainty about these four indicators as applied to this case must be resolved in Respondent's favor, not to her detriment. The Facility argues merger is the default position and must be applied absent an affirmative showing of contrary intent. Appellants' Br. at 28-29. But, that argument overlooks two key holdings from Coleman. First, to the extent merger is a presumption, it is an easily rebuttable one because "***anything*** indicating a contrary intention" means a court will not apply merger. 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts, 268 S.C. at 88, 232 S.E.2d at 24) (emphasis added). Thus, the Facility's task on appeal is not to successfully oppose one of the four indicators discussed above but to prove all four are absent here. Second, since the Facility drafted these form contracts of adhesion, any ambiguities must be construed against the Facility. Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455. Coleman applied this rule to a nursing home's quibbles over the effect of an "entire agreement" clause, and Thompson used it to reject a nursing home's argument that an arbitration contract was incorporated into an admission contract. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53-54; 784 S.E.2d at 685.

Accordingly, the Facility's merger argument is flawed not only in the specific ways described above but also in its very conception of when and how the merger doctrine operates. The circuit court properly applied extensive South Carolina law in this field and rejected the Facility's contention that the Arbitration Agreement and Admission Agreement merged.

2. Respondent is not Equitably Estopped from Opposing Arbitration.

Ms. Rice did not sign the Arbitration Agreement or authorize anyone to sign for. Yet, the Facility argues South Carolina Supreme Court precedent suggests Ms. Rice's estate is equitably estopped from opposing arbitration. Appellants' Br. at 37-41 (citing Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167 (2019)). However, the Facility does not even cite or attempt to apply the elements of equitable estoppel imposed by South Carolina law.[3] Plus, Wilson actually refused to compel arbitration against a non-signatory, holding there is a presumption *against* forcing someone to arbitrate based on a contract she did not sign. 426 S.C. at 338, 827 S.E.2d at 173. Wilson even went on record to say equitable estoppel is rarely appropriate to force arbitration. Id. at 345, 827 S.E.2d at 177 (finding equitable estoppel "should be used sparingly"). Finally, the Facility cannot meet the "direct benefits" test considered in Wilson because Respondent's claims in no sense rely on the Arbitration Agreement's terms, and the Facility's argument to the contrary expressly links its estoppel claim to its fatally flawed merger argument.

[3] As Wilson recognized, whether a non-signatory may be bound to an arbitration contract is a state law issue. 426 S.C. at 348, 827 S.E.2d at 174 (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630-31 n. 5 (2009)). Under South Carolina law, equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id. Wilson did not dismiss or eliminate this test for equitable estoppel but only found its application was an issue that had not been preserved for appellate review. The Facility argues Wilson concluded this test only applies to "non-arbitration cases." Appellants' Br. at 14 (citing Wilson, 426 S.C. at 340 n. 9, 827 S.E.2d at 175 n. 9). However, that could not have been Wilson's meaning because applying different rules to arbitration and non-arbitration contracts would violate the U.S. Supreme Court's equal-treatment principle. See Prima Paint Corp. v. Flood Conklin Mfg. Co., 388 U.S. 395, 404 n. 12 (1967) (finding intent of Federal Arbitration Act was "to make arbitration agreements as enforceable as other contracts, but not more so").

The "direct benefits estoppel" discussed in Wilson could only apply if Respondent has "consistently maintained that other provisions of the same contract should be enforced to benefit" her. 426 S.C. at 340, 827 S.E.2d at 175 (quoting Pearson, 400 S.C. at 290, 733 S.E.2d at 601). When rejecting a "direct benefits" estoppel in the context of nursing home arbitration, this Court has held that the party asserting estoppel must make three distinction showings. Weaver v. Brookdale Sr. Living, Inc., 431 S.C. 223, 230, 847 S.E.2d 223 (Ct. App. 2020). Appellants would have to show (1) Ms. Rice's claim arose from a contractual relationship; (2) Ms. Rice "exploited" other parts of the contract by reaping its benefits; and (3) her claim "relies solely on the contract terms to impose liability." Id. (citing Wilson, 426 S.C. at 340-44, 827 S.E.2d at 175-77).

Applying these elements, Weaver found a nursing home's resident does not gain a "direct benefit" for estoppel purposes simply by accepting the services obtained upon admission to the home. 431 S.C. at 230-31, 847 S.E.2d at 272-73. The estate's personal injury claims also do not "arise from" the Admission Agreement. There is no breach of contract claim, and the Admission Agreement is not referenced at all in the Complaint. Id. at 231, 847 S.E.2d at 272 (finding "arising from" requirement is not met just because claim would not exist "but for" a contract's existence). Instead, the estate grounds its claims in duties arising from common law with no reference to any contract. Id. at 232, 847 S.E.2d at 273 (finding nursing home resident's claims "rely on general tort duties . . . not any provision of the residency agreement"). Under those circumstances, estoppel cannot apply because the claims do not "arise from" a contract and certainly do not "rely solely" on a contract's terms. Id. at 232-33, 847 S.E.2d at 273 (citing Hodge as further support to show "direct benefit" estoppel does not apply to nursing home resident's common law tort claim). The Facility points to nothing to distinguish Weaver or to address its holding which forecloses the estoppel argument. Thus, Weaver is strong precedent against applying estoppel in this context.

Moreover, this Court rejected a nursing home's attempt to use direct benefits estoppel to compel a non-signatory nursing home resident to arbitrate even before Weaver. Thompson, 416 S.C. at 58-59, 784 S.E.2d at 687-88; see also Hodge, 422 S.C. at 556-57, 813 S.E.2d at 299-300 (applying Thompson). After surveying Pearson and Fourth Circuit cases, Thompson refused to apply this form of estoppel because it generally requires proof of some benefit to the party opposing estoppel in "*the contract that includes the arbitration provision*." 416 S.C. at 59, 784 S.E.2d at 688 (emphasis added). The Facility, therefore, cannot build an estoppel argument by citing supposed benefits Ms. Rice gained in the Admission Agreement. Thompson also rejected any effort to argue Ms. Rice gained a "direct benefit" from the Arbitration Agreement. Id. at 60, 784 S.E.2d at 688 ("any possible benefit emanating from the [Arbitration Agreement alone is offset by the [Arbitration Agreement's] requirement that Mother waive her right of access to the courts . . ."). In any event, the Facility's estoppel claim is wholly dependent on a merger argument it cannot prove. Appellants' Br. at 41 (arguing estoppel applies because Admission Agreement and Arbitration Agreement merged). As discussed in Argument 1 above, there is no merger here because the contracts were created for different purposes and there are many indications from the contracts' language they were not intended to be construed as one.

In sum, the circuit court correctly rejected the Facility's equitable estoppel argument because the Facility has not cited or applied the proper elements, cannot show Respondent obtained any "direct benefit," and bases its estoppel claim on its flawed merger argument. As it did in Thompson and Hodge, this Court should reject the Facility's equitable estoppel argument.

3. Alternatively, Ms. Rice's Purported Consent to Arbitration Does Not Extend to the Wrongful Death Claim Covering Her Family Members' Losses.

As an alternative finding[4], the circuit court correctly concluded the Arbitration Agreement did not cover Respondent's wrongful death claim. The Facility insists Ms. Rice had the power to waive the right to a jury trial on a claim that did not exist when the Arbitration Agreement was presented, would never belong to her, and covered injuries suffered exclusively by other people. No South Carolina authority supports these propositions. In fact, even if Ms. Rice could agree to arbitrate her own claims, the history and structure of South Carolina's wrongful death and survival statutes show wrongful death is a distinct, independent claim she could not force to arbitration because it solely benefits family members who never agreed to forego a jury trial.

a. South Carolina Law does not Allow a Nursing Home Arbitration Contract to be Enforced Against Unconsenting Non-Parties.

The group of Ms. Rice's wrongful death beneficiaries were not parties to the Arbitration Agreement and Appellants may not rely on this contract to dismiss the wrongful death claim without overcoming the presumption that a contract may be enforced only by its parties. Touchberry v. City of Florence, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988). A South Carolina contract may be enforced against a non-party only with proof of (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; or (5) estoppel. Wilson, 426 S.C. at 338, 827 S.E.2d at 174 (citing Malloy v. Thompson, 409 S.C. 57, 561-62, 762 S.E.2d 690, 692 (2014)). Since the Facility cannot prevail on any of these theories, the Arbitration Agreement does not apply to the wrongful death claim.

[4] The Court need not reach this portion of the Facility's appeal if it affirms the circuit court's order on merger and equitable estoppel. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

b. South Carolina Courts Define Wrongful Death as a Distinct, Independent Claim that is Not Derivative of Claims Held by a Decedent at her Death.

Unable to claim Ms. Rice's family members are parties, the Facility is left to argue the wrongful death claim actually belongs to Ms. Rice's estate rather than the statutorily designated beneficiaries. However, this argument incorrectly lumps together the wrongful death claim and the survival of tort claims Ms. Rice had against Appellants at the time of her death. The history and development of South Carolina's wrongful death and survival statutes show wrongful death is something entirely different than tort claims surviving a person's death. South Carolina courts have long recognized these are two very different theories of liability with distinct origins, purposes, and results. Even in more modern cases, their distinct nature is evidenced in how the claims are litigated and how juries resolve them.

The differences begin with the statutes themselves. The wrongful death statute, originally known as Lord Campbell's Act, is now codified beginning at S.C. Code Ann. § 15-51-10 and it creates a cause of action for tortious conduct causing death. A wrongful death claim covers losses and awards damages exclusively to statutorily-defined beneficiaries consisting of the decedent's children, parents, or heirs. S.C. Code Ann. § 15-51-20. Damages are paid to these beneficiaries because a wrongful death claim is directed at their losses suffered as a result of the decedent's absence. Scott v. Porter, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000) (citing F. P. Hubbard & R. L. Felix, The South Carolina Law of Torts 610 (2d ed 1997) (holding wrongful death damages consist of (1) pecuniary loss; (2) mental shock and suffering; (3) wounded feelings; (4) grief and sorrow; (5) loss of companionship; and (6) deprivation of the use and comfort of the decedent's society, experience, knowledge, and judgment).

In contrast, the legislature positioned the survival statute in a completely different code chapter. Both wrongful death and survival relate to "civil remedies and procedures" (Title 15) but,

while wrongful death is a distinct claim warranting its own designation (Chapter 51), the survival statute is classified within an existing chapter (Chapter 5) identifying the proper "parties" for pursuing legal claims. A plaintiff may cite the survival statute to support a suit for any number of legal claims. When that claim is based on the decedent's personal injury, the available damages include "medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." Scott, 340 S.C. at 170, 530 S.E.2d at 395. Thus, while courts and parties often refer to a "survival claim," this term is a misnomer because the survival statute does not create a claim, it only corrects a misguided common-law rule that assumed a person's existing legal claims died with her. Bemis v. Waters, 170 S.C. 432, 170 S.E. 475, 476 (1933) (holding that survival statute exists as a "correct[ion]" to common-law rule). The statutory scheme alone shows wrongful death and survival are distinct claims accruing at different times and governed by different statutes of limitation. S.C. Code Ann. § 15-3-560(6) (measuring three-year limitations period for wrongful death claims from date of death).

The statutes' history also shows their independence. In Grainger v. Greenville, S. & A. Railway Co., the South Carolina Supreme Court traced the divergent tracks wrongful death and survival claims have taken over their development. 101 S.C. 399, 85 S.E. 968 (1915). In that case, the trial court had dismissed a survival action because the decedent's administrator (equivalent to the modern "personal representative") had previously recovered on a wrongful death claim. Id. at 968. The wrongful death statute in place then was nearly identical to current section 15-51-10 and it provided a claim "in favor of the beneficiaries" but nothing for "the deceased or his estate." Id. at 969. When the legislature recognized this abnormality, it responded by creating the predecessor to the modern survival statute. Id. (citing 1912 Code section 3693). Grainger held this legislative history conclusively established wrongful death and survival claims are distinct and independent.

Id. The claims are distinct because "[t]he beneficiaries, the cause of action, the measure of damages, are all different." Grainger, 85 S.E. at 969.

Building on Grainger and other similar cases, Bass further highlighted the claims' distinctiveness by holding judgment in a wrongful death claim does not have claim preclusive effect on survival claims. 229 S.C. at 611-12, 93 S.E.2d at 914; see also Gleaton v. Southern Ry. Co., 212 S.C. 186, 192, 46 S.E.2d 879 (1948) ("verdict and judgment for defendant in an action under the survival statute will not estop the personal representative of the deceased in an action under Lord Campbell's Act"). Bass also addressed a reason why wrongful death claims are often erroneously perceived as derivative of survival claims. In both, the decedent's personal representative is the named plaintiff. 229 S.C. at 612, 93 S.E.2d at 914. But this fact alone is not determinative because, when asserting wrongful death and survival claims, a personal representative "function[s] under two separate and distinct trusteeships." Id. In other words, while it is the personal representative's name in the caption for a wrongful death claim, "it is clear . . . the real parties to the action were the beneficiaries." Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539, 541 (1928).

In light of the history and structure of wrongful death and survival claims, a number of other reported opinions have rejected the notion that the former is derivative of the latter. As early as 1907, the South Carolina Supreme Court recognized a wrongful death action is not the survival of an action which the deceased had in his lifetime, but is a "new cause of action." Osteen v. Sothern Ry., Carolina Division, 76 S.C. 368, 57 S.E. 196, 200 (1907). Claussen held a wrongful death claim is "not a continuation" of any claim the decedent had before her death. 145 S.E. at 540. A wrongful death claim is "independent" of claims the decedent had during her life and "wholly different" than any other claim available at her death. Wellman v. Bethea, 243 F. 222

(E.D.S.C. 1917); In re Mayo's Estate, 60 S.C. 401, 38 S.E. 634, 638 (1901). Wrongful death and survival claims are "separable and distinct." Keel v. Seaboard Air Line Ry., 122 S.C. 17, 114 S.E. 761, 762 (1922). In sum, Appellants err in asking the Court to find wrongful death is derivative of survival claims because "[t]he object, scope, and measure of damages" is different for the two claims. In re Mayo's Estate, 38 S.E. at 638.

These distinctions remain valid even in more modern cases. This Court continues to recognize the wrongful death statute created a new cause of action that did not exist at common law, accrues only at the decedent's death, and which is subject to its own statute of limitation. Weaver v. Lentz, 348 S.C. 672, 678, 561 S.E.2d 360, 363 (Ct. App. 2002). Accordingly, wrongful death actions and survival claims consider the losses related to a person's death from completely different perspectives. Boyle v. U.S., 948 F. Supp. 2d 577, 580 (D.S.C. 2012). Their distinctiveness is even plainer in practice. Since they compensate different groups for different losses, wrongful death and survival claims can result in dramatically different verdicts. For example, in Scott, the jury awarded $ 600,000 in actual damages on a medical malpractice claim alleged under the survival statute and $ 1.5 million in punitive damages for the same claim. 340 S.C. at 162, 530 S.E.2d at 391. On a wrongful death claim in the same action, the jury awarded $ 1.5 million in actual damages and $ 2 million in punitive damages. Id. Since these two claims addressed such different losses by different people, the disparate awards were not inconsistent, and this Court affirmed the verdict in its entirety. Id. at 169-71, 530 S.E.2d at 394-96; see also Welch v. Epstein, 342 S.C. 279, 303-05, 536 S.E.2d 408, 420-21 (Ct. App. 2000) (affirming verdict of less than $29,000 for survival claim and $ 3 million for wrongful death claim).

In sum, extensive South Carolina precedent rejects Appellants' contention that wrongful death claims are derivative of claims a person holds at the time of her death. South Carolina's

appellate courts have held wrongful death claims are "distinct," "independent," "separate," "wholly different," and "not a continuation" of claims a decedent could have filed during her lifetime. These cases show Ms. Rice did not bind her wrongful death beneficiaries to arbitration. Those beneficiaries are the "real parties" to the wrongful death claim, and they did not sign the Arbitration Agreement or otherwise consent to waive their right to a jury trial.

c. None of the South Carolina Authority the Facility Cites Supports Arbitration in this Case.

The Facility does not address any of this extensive South Carolina case law showing wrongful death is a distinct, independent claim. Instead, the Facility cites an indiscriminate collection of case law and secondary sources to suggest South Carolina courts have already ruled wrongful death is a derivative claim. None of the authorities the Facility cites support that conclusion and none squarely address the question now before the Court. Instead, it is the precedent cited in Argument 3(b) that is most helpful for showing the true nature of a wrongful death claim under South Carolina law.

The Facility claims the South Carolina Supreme Court addressed the arbitrability of wrongful death claims in Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014). (App. Br. at 19). However, Dean addressed a very different issue related to forum selection clauses. Id. at 382, 759 S.E.2d at 733 (finding "outcome of this appeal turns" on effect of arbitral forum provision). Plus, Dean did not even compel arbitration in the case before it. The Supreme Court rejected a few reasons cited for invalidating a nursing home arbitration contract but remanded the matter to the circuit court to address two others. Id. at 387, 759 S.E.2d at 736. The Facility relies on a sentence in one of Dean's footnote but read far too much into that sentence. Id. at 378 n. 3, 759 S.E.2d at 731 n. 3 ("We note that courts may not refuse to compel arbitration simply because a wrongful death claim is involved").

This footnote addressed an overly broad pronouncement in the appealed order suggesting wrongful death claims are categorically excluded from arbitration. Id. (citing circuit court order statement stating that "wrongful death actions are not something that's arbitrated"). That type of rule would violate the FAA's equal-treatment principle. Id. (citing Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 532-33 (2012)); see also Kindred Nursing Ctrs., Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1426 (2017). However, that is not the argument Respondent makes here. A wrongful death claim may be arbitrable in instances where the statutory beneficiaries agree to do so. Respondent simply argues an individual's consent to arbitrate may not be grafted into a wrongful death claim that pays different people for different losses. Dean does not reject that argument or even consider it.

Moreover, the Facility errs in arguing the circuit court's order violates the equal-treatment principle. Appellants' Br. at 19. Several other courts have held that rejecting arbitration for wrongful death claims in similar cases does not violate Marmet or any other Supreme Court precedent on the equal-treatment principle.[5] Refusing to compel arbitration here does not mean wrongful death claims can never be arbitrated. Instead, as other courts have recognized, it simply means the nursing home violated a generally-applicable contract law rule by failing to get consent for arbitration from the proper people. Finally, reading Dean's footnote to have any bearing on the parties' dispute does not adequately account for either side's arguments on the key issue. As discussed in Argument 3(d) below, the interaction of wrongful death and survival claims for

[5] See Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 360 (Ill. 2012) (unlike Marmet, Illinois was not applying a categorical anti-arbitration rule but was rather applying "common law principles governing all contracts"); Vickers v. Canal Pointe Nursing Home & Rehab Ctr., 2016 Ohio 3244, 2016 WL 3080329 (Ohio App. June 1, 2016) (finding that Ohio Supreme Court precedent preventing arbitration of wrongful death claims did not create categorical ban Marmet bars because it applied generally applicable contract law rule against enforcing contract against person who had not assented).

arbitrability purposes requires a careful analysis of statutory language and history as well as case law interpreting the two claims. Dean had no reason to undertake this analysis and has nothing to offer the Court in resolving this appeal.

The Facility also asks the Court to declare wrongful death a "derivative" claim based on one sentence in *South Carolina Jurisprudence*. Appellants' Br. at 20. However, the Facility fails to direct the Court to the most pertinent entry. In a chapter devoted to wrongful death claims, this secondary source includes a section entitled "[s]eparate, independent cause of action" which notes the existence of two claims at the tortious death of a person and, crucially, "***the wrongful death action and the survival action involve different, independent claims***." 28 S.C. Jur. Wrongful Death § 5 (emphasis added). Finally, the Facility contends that, since section 15-51-10 permits wrongful death claims only when the decedent would have had a claim if she survived, South Carolina law intends to give an individual control over a wrongful death claim which includes the right to determine the method by which it will be resolved. Appellants' Br. at 19-20 (citing Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. 1988)); see also Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 699 S.E.2d 143 (2010) (citing Quattlebaum). But, Quattlebaum (and Stokes) did not address arbitration at all. Instead, they simply held that if an individual allows the statute of limitations on a personal injury claim to lapse during her life, then a wrongful death claim may not be used after her death to "revive" the stale claim. Stokes, 389 S.C. at 349, 699 S.E.2d at 146.

The statute of limitations is not at issue here and Quattlebaum/Stokes have never been cited as justification for binding non-parties to an arbitration contract. Plus, the legal provisions holding that an individual may prevent a wrongful death claim by ignoring or settling a personal injury suit during her life do not mean the individual may control the manner in which the wrongful death

claim will be resolved *should she choose to leave it intact*. Several courts have made this distinction explicitly. Oklahoma, like South Carolina, bars a wrongful death suit if the decedent ended a personal injury claim during her lifetime based on the same wrongdoing. Boler v. Sec. Health Care, LLC, 336 P.3d 468, 477 (Okla. 2014) (citing Haws v. Luethje, 503 P.2d 871 (Okla. 1972)). Even so, Boler refused to apply a nursing home arbitration contract to a wrongful death claim because doing so would violate contract principles on mutual assent. Id. at 471 and n. 5.

Pennsylvania also bars wrongful death claims if the decedent allowed her personal injury claim to lapse. Pisano v. Extendicare Homes, Inc., 77 A.3d 651, 657 (Pa. Super. 2013) (citing Moyer v. Rubright, 651 A.2d 1139 (Pa. Super. 1994)). Yet, just like Oklahoma, Pennsylvania does not extrapolate from that rule the notion that an individual can bind her wrongful death beneficiaries to arbitration. Pisano, 77 A.3d at 657, 662 (refusing to find wrongful death beneficiaries lost jury trial right "where they did not waive it of their own accord"). Thus, Quattlebaum/Stokes and their interpretation of section 15-51-10 do not require arbitration in this case. Had Ms. Rice settled her claims against Appellants before her death, Respondent could not bring a wrongful death claim on behalf of the statutory beneficiaries. But it does not follow that Ms. Rice had the ability to direct the wrongful death claim to arbitration. Since Ms. Rice had a viable dispute with Appellants when she died, a proposed arbitration of the wrongful death claim must consider whether the beneficiaries agreed to waive a jury trial.

In short, none of the South Carolina authority the Facility cites support arbitration in this case. The cases in Argument 3(b) are more apt precedent showing South Carolina recognizes wrongful death is a distinct, independent, and non-derivative legal claim.

d. Many Other Jurisdictions Have Refused to Compel Arbitration of Wrongful Death Claims Based on a Decedent's Arbitration Contract.

In light of the historical and structural differences between South Carolina's wrongful death and survival statutes, as well as substantial case law defining and treating the resulting claims distinctly, the Court should reject the Facility's attempt to use Ms. Rice's purported assent to the Arbitration Agreement to force arbitration on a wrongful death claim. At least a dozen other jurisdictions have rejected the Facility's argument.[6] While some jurisdictions have taken a contrary view[7], South Carolina's statutory language and case law discussed above are more in line with the states that refuse to compel arbitration under similar circumstances. In the aggregate, to the extent the Court looks beyond South Carolina law, persuasive authority supports the circuit court's order.

The en banc Missouri Supreme Court addressed a similar case in Lawrence v. Beverly Manor. Similar to the Arbitration Agreement, the contract in Lawrence purported to bind both a nursing home resident and "all persons whose claim is derived through or on behalf" of the resident including family members, legal representatives, and heirs. Id. Shortly after admission, the nursing home's staff members allegedly dropped the mother and caused fatal injuries. Id. Just like this

[6] FutureCare NorthPoint, LLC v. Peeler, 143 A.3d 191, 209-10, 213 (Md. App. 2016); Taylor v. Extendicare Health Facilities, Inc., 147 A.3d 490, 494 and n. 1 (Pa. 2016) (citing Pisano v. Extendicare Homes, Inc., 77 A.3d 651, 660 (Pa. Super. 2013)); Boler v. Sec. Health Care, LLC, 336 P.3d 468, 477 (Okla. 2014); Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc., 316 P.3d 607, 614 (Ariz. Ct. App. 2014); Daniels v. Sunrise Sr. Living, Inc., 212 Cal. App. 4th 674, 151 Cal. Rptr. 3d 273 (2013); Carter v. SSC Odin Operating Co, LLC, 976 N.E.2d 344, 355-58 (Ill. 2012); Ping v. Beverly Enters., Inc., 376 S.W.3d 581 (Ky. 2012); Woodall v. Avalon Care Center-Federal Way, LLC, 231 P.3d 1252 (Wash. App. 2010); Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009); Bybee v. Abdulla, 189 P.3d 40 (Utah 2008); Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007); Chapman v. Cardiac Pacemakers, Inc., 673 P.2d 385 (Idaho 1983); see also Strickholm v. Evangelical Lutheran Good Samaritan Soc'y, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011).

[7] E.g. Laizure v. Avante at Leesburg, Inc., 109 So.3d 752 (Fla. 2013); In re Labatt Food Serv., L.P., 279 S.W.3d 640 (Tex. 2009); Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661 (Ala. 2004); Ballard v. Southwest Detroit Hosp., 327 N.W.2d 370 (Mich. App. 1982).

case, the family filed wrongful death and other legal claims, the nursing home cited the contract in an effort to compel arbitration, and the trial court denied the motion. Id. at 526-27.

The Missouri Supreme Court affirmed, finding wrongful death is not derived from any claim the resident may have had at or before her death. Id. at 529. All of the key components cited in Lawrence to show a wrongful death is not derivative are also present under South Carolina law. Lawrence started by reviewing the wrongful death statute's language. Id. at 527 (quoting Mo. Rev. Stat. § 537.080). Missouri's statute is substantially similar to its South Carolina counterpart, and Lawrence interpreted that language to create a new cause of action that is distinct from survival claims and not a transmitted right from a decedent to her family members. Lawrence, 273 S.W.3d at 527. South Carolina precedent makes these same points. Weaver, 348 S.C. at 678, 561 S.E.2d at 363 ("[t]he wrongful death statute . . . created a new cause of action"); Keel, 114 S.E. at 762 (wrongful death and survival claims are "separable and distinct"). Considering both the statutory language and precedent, Lawrence concluded a wrongful death claim is "separate and distinct." 273 S.W.3d at 528. Its holding was buttressed by the fact that Missouri wrongful death claims compensate different people for different losses. Id. at 528-29. South Carolina cites the same factors to highlight a wrongful death claim's independence. Scott, 340 S.C. at 168-70, 530 S.E.2d at 394-95 (listing available damages in wrongful death and survival claims); In re Mayo's Estate, 38 S.E. at 638 (finding "object, scope, and measure of damages" in wrongful death claims is "wholly different").

Lawrence followed and was soon joined by a number of other states in rejecting the notion that a nursing home resident could contract away a jury trial on a wrongful death claim compensating her family members or heirs for their unique damages. These cases often point to a common set of factors to show a wrongful death claim is not derivative of the decedent's claims.

First, a wrongful death claim is likely not derivative when wrongful death and survival are expressly distinguished in the statutes. Pisano, 77 A.3d at 656 (reading statutes to mean "two separate and distinct causes of action arise from a single injury" resulting in death); see also Woodall v. Avalon Care Center-Federal Way, LLC, 231 P.3d 1252 (Wash. App. 2010) (describing wrongful death and survival as "conceptually different"). Second, the two claims should be viewed as separate when they are brought by different people to compensate different individuals for different losses. In Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc., an Arizona appellate cited the different claimants, different beneficiaries, and different damages as definitive proof a wrongful death statute "confers an original and distinct claim" and is neither "derived from nor is it a continuation of claims which formerly existed in a decedent." 316 P.3d 607, 613 (Ariz. Ct. App. 2014); see also FutureCare NorthPoint, LLC v. Peeler, 143 A.3d 191, 203 (Md. App. 2016) (holding that survival and wrongful death claims are distinct because they are "by different persons, the damages go into different channels, and are recovered upon different grounds"); Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 599 (Ky. 2012) (concluding wrongful death is independent claim in part because it belongs to the beneficiaries and is "meant to compensate them for their own pecuniary loss").

Third, many of these opinions find wrongful death to be a non-derivative claim because it accrues at a different time than a survival claim. In Carter v. SSC Odin Operating Co, LLC, the Illinois Supreme Court concluded wrongful death is independent because it "does not accrue until death" while the state's survival statute "simply allows a representative . . . to maintain those . . . actions that had already accrued." 976 N.E.2d 344, 354 (Ill. 2012); see also Boler, 336 P.3d at 477; Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007) (finding decedent's wrongful death claim "accrued independently to his beneficiaries for the injuries they personally

suffered"). In other words, a wrongful death claim does not accrue or, as one court put it, "vest" in the statutory beneficiaries until the decedent's death. Strickholm v. Evangelical Lutheran Good Samaritan Soc'y, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011).

Finally, these cases show the error in the Facility's interpretation of a "derivative" claim. The Arbitration Agreement purports to extend to people deriving their claim through Ms. Rice. The Facility seems to argue wrongful death is sufficiently derivative because S.C. Code Ann. § 15-51-10 permits a wrongful death claim only if the decedent could have brought a claim for the same harm before she died. Many cases from other states cited above found wrongful death was not a derivative claim despite statutes like section 15-51-10. Boler, 336 P.3d at 472-77; Carter, 976 N.E.2d at 358-59; Woodall, 231 P.3d at 1259 ("characterizing the wrongful death claims as 'derivative' does not support the proposition that the heirs must arbitrate their claims for wrongful death"). By arguing that a statute like section 15-51-10 was enough to force a wrongful death claim to arbitration, Carter found parties like Appellants "overstate[] the significance of the derivative nature of a wrongful-death action" especially where, here as in Carter, there is extensive case law and structural differences demonstrating wrongful death is an independent claim. Similarly, Boler held that while a statute like 15-51-10 might make wrongful death "partially derivative" in a limited sense, it would still be improper to compel arbitration since wrongful death accrues separately and compensates statutory beneficiaries directly for their personal losses. 336 P. 3d at 472, 477 (finding a resident's signature could not compel arbitration on wrongful death claim unless that claim was "wholly derivative"); see also Pisano, 77 A.3d at 659-60 (providing detailed discussion of definition for "derivative" and rejecting arbitration because while wrongful death claims are inherently "derivative of the decedent's injuries," they "are not derivative of decedent's rights").

In sum, persuasive authority does not support the Facility's argument that South Carolina's wrongful death claim is "derivative" such that a nursing home resident's agreement to arbitrate applies to a wrongful death claim. A dozen states have considered statutes similar to section 15-51-10 and found wrongful death is a distinct, independent claim.

4. The Circuit Court Correctly Stated the Facility's Burden of Proof in Seeking Arbitration.

Along with its various flawed contract law arguments, the Facility also contends it is not seeking to enforce the Arbitration Agreement (App. Br. at 7). That is not the argument the Facility made to the circuit court as its underlying motion cited the Arbitration Agreement as the basis for seeking arbitration. (Facility's Mtn. to Compel Arb. at 2) ("In accordance with the terms of this agreement, the [Facility] respectfully requests that this matter be compelled to arbitration."). The Facility's circuit court argument recognized the inherent nature of the relief it sought. By law, "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute that he or she has not agreed to submit." Faltaous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 48, 693 S.E.2d 434, 435 (Ct. App. 2010) (quoting Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19 (2001)). Since the Facility is claiming a contractual right and positing that the Arbitration Agreement confers that right, it is seeking contract enforcement. South Carolina law imposes on the party seeking contract enforcement the burden to prove an enforceable contract. Fici v. Koon, 372 S.C. 341, 346, 642 S.E.2d 602, 604 (2007) ("The burden of proof is on the party seeking to enforce the contract"). Accordingly, the circuit court's statement of the legal burden is fully consistent with South Carolina law.

5. South Carolina's Generally-Applicable Presumption against Third-Party Contract Enforcement does not Violate Federal Law.

The Facility's Argument 1(E) launches an ill-advised frontal attack on South Carolina Supreme Court precedent. (App. Br. at 13-16) (citing Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167 (2019)). The Facility argues that, by applying a presumption against third party enforcement of an arbitration contract, Wilson ran afoul of the FAA's equal treatment principle. However, Wilson's holding is fully consistent with the FAA.

Section 2 of the FAA created what the U.S. Supreme Court has designated the "equal-treatment principle" by limiting the grounds for invalidating an arbitration contract to "generally applicable contract defenses." Kindred Nursing Centers, 137 S. Ct. at 1426 (citing 9 U.S.C. § 2). Arbitration contracts cannot be singled out for less favorable *or more favorable* treatment than contracts covering any other subject matter. Kindred Nursing Ctrs., 137 S.C. at 1427 (barring state law rule that "singl[es] out [arbitration] contracts for disfavored treatment"); Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1713 (2022) (holding that FAA "does not authorize federal courts to invent special, arbitration-preferring procedural rules because the equal-treatment principle makes "arbitration agreements as enforceable as other contracts, but not more so").

Wilson found there is a presumption against enforcement of a proposed arbitration contract against an individual who did not sign it. 426 S.C. at 337-38, 827 S.E.2d at 173. Wilson is hardly alone in applying this presumption. Id. (citing Global Pac., LLC v. Kirkpatrick, 88 N.E.3d 431, 435 (Ohio Ct. App. 2017) and Comer v. Micor, Inc., 436 F.3d 1098, 1103-04 (9th Cir. 2006)). More importantly, Wilson in no sense violates the equal-treatment principle. The Facility argues Wilson's rule is invalid because a presumption against enforcement against non-parties is arbitration contract-specific. (App. Br. at 15-16) ("The Facility is aware of no such general presumption under South Carolina law . . ."). That simply is not true. See Touchberry, 295 S.C. at

48-49, 367 S.E.2d at 150. In Touchberry, the Supreme Court considered a property owner's attempt to enforce a utility services contract between his local city and county. The property owner prevailed only by overcoming a "presumption that the contract is not enforceable by an individual." Id. Thus, the presumption against third-party contract enforcement is a general principle of South Carolina law, not a rule targeted at proposed arbitration agreements. As such, the Wilson rule fully complies with the equal-treatment principle.

CONCLUSION

Based on the arguments stated above, Respondent respectfully requests the Court affirm the circuit court's order. As this Court held in Solesbee, the merger doctrine does not apply to the form Arbitration Agreement and Admission Agreement offered by the Facility and other nursing homes owned and operated by Appellants. Similarly, the circuit court correctly applied this Court's precedent in Coleman, Thompson, Hodge, and Weaver in finding there is no estoppel to bar Appellant from opposing arbitration.

Respectfully submitted,

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