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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2021-CP-15-00516
Appellate Case No. 2023-001282

Gabrielle Washington
as Personal Representative of the Estate of Walter Washington, Jr.,

Respondent,

v.

St. George Health Care, LLC, d/b/a St. George Healthcare Center and Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center,

Defendants,

Of which St. George Health Care, LLC, d/b/a St. George Healthcare Center is

Appellant.

INITIAL BRIEF OF APPELLANT

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(1) Did the circuit court misapprehend the nature of the Facility's merger/equitable estoppel argument?

(2) Is the circuit court's merger analysis erroneous?

(a) Is this Court's merger analysis in *Solesbee v. Fundamental Clinical and Operational Services, LLC*,[4] erroneous?

(3) Is the circuit court's equitable estoppel analysis erroneous?

(4) Did the circuit court violate the FAA's "equal footing" rule by charging the Facility with a heightened duty to

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[1] The "Facility" refers to Defendant/Appellant, St. George Health Care, LLC, d/b/a St. George Healthcare Center. It is a skilled nursing facility.

[2] "Plaintiff" is Plaintiff/Respondent, Gabrielle Washington ("Ms. Washington") as Personal Representative of the Estate of Walter Washington, Jr. "Mr. Washington" refers to the decedent, Walter Washington, Jr.

[3] To be clear, out of an abundance of caution, this issue, and the corresponding argument, covers circuit court error in terms of both the denial of the Facility's principal motion and the denial of the Facility's motion to alter, amend, and/or reconsider the denial of its principal motion.

[4] 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023).

determine the existence Ms. Washington's authority that does not exist under South Carolina's general contract law and, at the same time, disregarding applicable state law in respect of the legal significance of Ms. Washington's act of signing the Arbitration Agreement and her duty of good faith and fair dealing?

(5) Did the circuit court err in asserting that, at most, the Arbitration Agreement would be enforceable as to the survival claim and would not be enforceable as to the wrongful death claim?

B. At a minimum, should the circuit court have granted the Facility's alternative request for permission to conduct limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability under an agency theory?

STATEMENT OF THE CASE

With the help of Ms. Washington, his niece, Mr. Washington was admitted as a resident of the Facility on October 13, 2017. (Admission Agreement; Aff. of Gabrielle Washington ¶ 2.) Ms. Washington handled the paperwork in conjunction with Mr. Washington's admission and, in doing so, signed an Admission Agreement[5] and an Arbitration Agreement[6] on his behalf.

Plaintiff commenced this wrongful death and survival action against the Facility in the Colleton County Court of Common Pleas on August 19, 2021, based on allegedly deficient care/treatment Mr. Washington received during his residency at the Facility. (Summons; Compl.; Expert Affidavit.)[7] The Facility timely answered Plaintiff's complaint on September 30, 2021, denying the alleged

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[5] (Admission Agreement.)

[6] (Arbitration Agreement.) Without question, the Federal Arbitration Act, 9 U.S.C. §§ 1–16 (the "FAA"), applies to the Arbitration Agreement. The FAA applies "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress's power under the Commerce Clause); *id.* at 273–77 (1995) (explaining that, unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce). And 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).

liability, raising numerous affirmative defenses, and expressly reserving its right to compel arbitration, which it also raised as an affirmative defense. (Facility's Answer.)

On December 2, 2021, the Facility moved to compel Plaintiff's claims against it to arbitration based on the Arbitration Agreement that Ms. Washington signed on behalf of Mr. Washington in conjunction with his admission (the "Motion to Compel Arbitration"). (Facility's Motion to Compel Arbitration; Memo in Support of the Facility's Motion to Compel Arbitration, including Exhibits 1 & 2.)[8]

Following a hearing on May 19, 2022,[9] the circuit court, the Honorable Bentley D. Price presiding, denied the Motion to Compel Arbitration by order directed filed December 7, 2022. (Order Denying Motion to Compel Arbitration.)

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[7] As the above caption reflects, Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center, is also a defendant in the case, but it is not a party to this appeal.

[8] Without question, Plaintiff's claims against the Facility are within the scope of the Arbitration Agreement, the plain language of which calls for arbitration of "any controversy or dispute between the parties arising out of or relating to [the] Facility's Admission Agreement, or breach thereof, or relating in any way to [Mr. Washington's] stay at [the] Facility, or to the provisions of care or services to [Mr. Washington] . . . ." (Arbitration Agreement.) But even if there were "any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration . . . ." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) ("[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.").

Pursuant to Rule 59(e), SCRCP, on December 19, 2022, the Facility timely moved the circuit court to alter, amend, and/or reconsider its decision. (Facility's Motion to Alter, Amend, and/or Reconsider.) The circuit court denied the motion by order filed July 11, 2023. (Order Denying Facility's Motion to Reconsider.)

By notice served and filed August 10, 2023, this appeal timely follows. (Notice of Appeal; Proof of Service.)

STANDARD OF REVIEW

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

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[9] (Transcripts of Hearings on May 19, 2022 (*Washington* and *Rahn*).)

one of law. *See Bain v. Self Mem'l Hosp.*, 281 S.C. 138, 152, 314 S.E.2d 603, 611 (Ct. App. 1984).

ARGUMENT

I. The circuit court erred in denying the Motion to Compel Arbitration.

A. The circuit court erred in rejecting the Facility's merger/equitable estoppel argument, to include, without limitation, in relying on irrelevant authority that pertains to the wrong test for equitable estoppel. More specifically, the circuit court should have found that the Admission Agreement and the Arbitration Agreement merged and that, because Mr. Washington effectively embraced and directly benefitted from the Admission Agreement, he and, in turn, Plaintiff (his estate) is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.

(1) The circuit court misapprehended the nature of the Facility's merger/equitable estoppel argument.

As evidenced by the language of its order denying the Motion to Compel Arbitration,[10] the circuit court failed to appreciate that the Facility's merger/equitable estoppel argument is a standalone argument that does not depend on any showing of authority (actual or apparent or otherwise) on the part of Ms.

[10] (*See* Order Denying Motion to Compel Arbitration p. 2 ("The basis of [the Facility's] Motion is that a valid and enforceable arbitration agreement exists between the parties."); *id.* at p. 5 ("Since Ms. Washington lacked legal authority, the Arbitration Agreement is void an unenforceable."); *id.* at p. 3 ("[T]he Court must determine (1) if the Arbitration Agreement merged with and was a part of the Admission Agreement such that Plaintiff in her capacity as personal representative would be equitably estopped from denying the Arbitration Agreement's validity, and (2) if Ms. Washington had actual or apparent authority to enter the Arbitration Agreement on behalf of [Mr. Washington].").)

Washington or otherwise on the existence of any valid and enforceable agreement between the parties. *Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 ("South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including . . . estoppel."); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–55, 755 S.E.2d 450, 455 (2014) (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel); *id.* (explaining that "Appellants' equitable estoppel argument," which "[wa]s premised on [Appellants'] contention that, under state law, the admission agreements and the [arbitration agreements] merged," as follows: "Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] . . . , she is nevertheless *equitably estopped to deny the [arbitration agreement's] enforceability*.") (emphasis added).

Conceptually, the Facility's merger/equitable estoppel argument is *not* an argument *for the enforceability* of the Admission Agreement/Arbitration Agreement *but rather* an argument *for Mr. Washington and, in turn, Plaintiff (his estate) to be estopped to deny the enforceability* of the Admission Agreement/Arbitration Agreement. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Mr. Washington having effectively embraced and directly benefitted from the Admission Agreement, his

estate is now estopped to deny the enforceability not only of the Admission Agreement but also the Arbitration Agreement merged therewith.

Accordingly, as to the Facility's merger/equitable estoppel argument, any contrary analysis regarding the Admission Agreement/Arbitration Agreement's supposed lack of enforceability—e.g., that Ms. Washington lacked authority to sign the Admission Agreement/Arbitration Agreement on behalf of Mr. Washington under the law of agency[11] and/or under the South Carolina Adult Health Care Consent Act (the "AHCCA"), S.C. Code Ann. §§ 44-66-10 to -80,[12] and/or because Ms. Washington lacked power of attorney or guardianship over Mr. Washington[13]—is beside the point and unavailing to refute the Facility's merger/equitable estoppel argument, which, again, turns not on the question of whether the Arbitration Agreement is enforceable but whether Mr. Washington and, in turn, Plaintiff (his estate) is estopped to deny its enforceability.

(2) The circuit court's merger analysis is erroneous.

In *Coleman*, even though our Supreme Court found against merger on the particular *facts* of the case, it nonetheless confirmed the validity of the general

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[11] (*See* Order Denying Motion to Compel Arbitration pp. 8–9 (regarding principles of agency).)

[12] (*See* Order Denying Motion to Compel Arbitration pp. 3–6, 8 (regarding the AHCCA).)

[13] (*See* Order Denying Motion to Compel Arbitration pp. 2, 5–6 (regarding power of attorney and guardianship).)

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,
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> > The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
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> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction*. *Unless there is a contrary intention, appellants are correct that there was a merger*.

407 S.C. at 354–355, 755 S.E.2d at 455 (emphasis added).

Here, the circuit court erred in rejecting the Facility's merger argument, failing to recognize material differences between the facts and arguments involved

in the instant case and those that controlled (or were simply not addressed in) *Coleman* and its progeny *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

The circuit court wrongfully concluded that the Admission Agreement and the Arbitration Agreement are separate contacts that do not merge[14] and, likewise, that there is ambiguity as to merger. (Order Denying Motion to Compel Arbitration p. 5 ("While the Admission Agreement purports to incorporate admissions materials into itself 'by reference herein', when viewed alongside the other details of the agreements, it creates at best ambiguity as to merger when taken in context of the totality of the circumstances, and 'the law is clear that any ambiguity in such a clause is construed against the drafter', i.e., [the Facility].").)

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,"[15] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[16] there is evidence to upset the *presumption in favor of*

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[14] (Order Denying Motion to Compel Arbitration p. 7 ("[T]he Admission Agreement and optional Arbitration Agreement are separate documents that did not merge.").)

[15] *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

[16] 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

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.

It must be remembered that, where, as here, the instruments in question were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For the merger presumption to mean anything in practice it cannot be upset based on mere conjecture, but only by actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. 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

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same transaction: they were. As the *Coleman* Court expressly observed regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), "the documents *were* 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).

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.

Unlike the arbitration agreement at issue in *Coleman*—and, for that matter, the arbitration agreements at issue in *Coleman's* progeny *Thompson* and *Hodge*, all of which cases involved arbitration agreements that contained a provision allowing them to be disclaimed or revoked within 30 days of signing while the corresponding admission agreements did not—the instant Arbitration Agreement has no disclaimer/revocation provision. (Arbitration Agreement.) Moreover, while the instant Admission Agreement does contain an "Entire Agreement" clause, it does not reference the Arbitration Agreement as a separate contract. (Admission Agreement p. 12.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[17]), the "Entire Agreement" clause in the instant Admission Agreement expressly states that "other Admissions materials" are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed "separatedness." (Admission Agreement p. 12.) Without question, the Arbitration Agreement is among these other materials. *See*

[17] 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike the instant case—the "Entire Agreement" clause expressly referred to a separate arbitration agreement and, thus, "recognize[d] the '*separatedness*' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.") (emphasis added).

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)).[18] The circuit court's conclusory finding that there is ambiguity in this regard is unsupported and erroneous.

[18] To be clear, the Facility's point here is not that the holding of either *Stott* or *Hodge* established a legal standard for what counts as admission paperwork, but rather that the very fact that the language that the *Stott* and *Hodge* Courts used in discussing the facts of the cases so readily made the natural and logical connection between arbitration agreements signed in conjunction with admission and "admission documentation" / "documents related to . . . admission" that it illustrates that, in its plain, ordinary, and popular sense, "Admissions materials" plainly includes the Arbitration Agreement. *See Beaufort Cnty. Sch. Dist. v. United Nat'l Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) ("If the contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect."). Moreover, this connection between the Admission Agreement and the Arbitration Agreement (with the Arbitration Agreement being understood in the plain, ordinary, and popular sense as included in the term "Admissions materials") is underscored by the *Coleman* Court's recognition that an admission agreement and arbitration agreement signed in conjunction with resident's admission to a nursing facility are 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). Further still, Ms. Washington herself admits that she signed the Admission Agreement and the Arbitration

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required as a precondition of Mr. Washington's residency at the Facility. But all this means is that the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become part of the admissions materials once it was in fact executed. 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).

Moreover, 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*

Agreement "in relation to my uncle [Mr.] Washington's admission to the[]

makes sense together with the Admission Agreement, which is its (the Arbitration Agreement's) sole reason for being. (Arbitration Agreement (providing for arbitration of "any controversy or dispute between the parties arising out of or relating to [the] Facility's Admission Agreement, or breach thereof, or relating in any way to [Mr. Washington's] stay at [the] Facility, or to the provisions of care or services to [Mr. Washington] . . . ."); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at [the] 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 Mr. Washington's relationship with the Facility, the Admission Agreement setting forth the terms of his admission, the Arbitration Agreement providing for arbitration of disputes arising out of his admission. (*Compare* Admission Agreement (setting forth the terms of Mr. Washington's admission to the Facility) *with* Arbitration Agreement (providing for arbitration of disputes arising out of Mr. Washington's admission in the Facility).)

Also absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements

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[F]acility." (Aff. of Gabrielle Washington ¶ 2.)

before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* Admission Agreement p. 10 ("This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located.") *with* Arbitration Agreements (providing that, "because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action," but also providing that arbitration shall be "as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules").) Essentially, both instruments provide that South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, and contrary to the view expressed by the circuit court,[19] the survival of the Arbitration Agreement is no evidence of "separatedness." Again, the only reason for the Arbitration Agreement is the Admission Agreement, as the point of the Arbitration Agreement is to cover disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated

[19] (Order Denying Motion to Compel Arbitration p. 5 ("Further, the Arbitration Agreement by its very language distinguishes between itself and the

even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intention contrary to merger. Respectfully, to point to such things, as the circuit court does,[20] 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 whether they are intended to 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

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Admission Agreement, stating that the Arbitration Agreement will survive any 'breach of this Agreement or the Admission Agreement.'").)

[20] (Order Denying Motion to Compel Arbitration p. 4.)

intention contrary to merger. The very nature of *merger* is to *merge* separate documents.

And—besides the fact that there is indeed no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement—to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that *merger is the default position*, i.e., it is presumed, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention.

The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." 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, (a) it did so in dicta[21] and (b) it never addressed the logical

[21] *Id.* at 407 S.C. at 355–56, 755 S.E.2d at 455 ("By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply. *Even if* the 'Entirety' clause creates an ambiguity as to merger,

inconsistency—which thus remains fair game as an argument in this case[22]—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., evidence 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.") (emphasis added).

Respectfully, the circuit court's finding against merger relies on improper speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding intent. The presumption of merger arises from the concurrence of the four elements of time, parties, purpose, and transaction. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. This is why for the merger presumption to mean

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the law is clear that any ambiguity in such a clause is construed against the drafter, in this case, appellants.") (emphasis added) (internal citation omitted); *see Nash v. Tindall Corp.*, 375 S.C. 36, 40–41, 650 S.E.2d 81, 83 (Ct. App. 2007) ("Judicial dicta is not essential to the decision. Dicta . . . is a statement on a matter not necessarily involved in the case, and is not binding as authority.") (internal citations and quotations marks omitted).

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

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

The circuit court should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Mr. Washington's admission to the Facility and would not have been done at all but for his admission to the Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent.

(a) Most respectfully, this Court's merger analysis in *Solesbee* is erroneous and it should not control the disposition of this case.

During the pendency of this appeal, this Court decided *Solesbee*, 438 S.C. 638, 885 S.E.2d 144, wherein it affirmed the circuit court's denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as at present. Indeed, the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*.

In affirming the circuit court's denial of the motion to compel arbitration in *Solesbee*, this Court likened that case to *Coleman* and *Hodge* and found that the circuit court had correctly determined that there was no merger of the Admission Agreement and the Arbitration Agreement and, in turn, had properly denied the Facility's equitable estoppel argument. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149 ("Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and [the Facility's] equitable estoppel argument was properly

denied.").)[23] Most respectfully, this Court's decision in *Solesbee* is erroneous, and it should not control the disposition of this appeal.[24]

First, the *Solesbee* Court erroneously found against merger on the basis that "the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law." But it is not true that "the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law."

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." (Admission Agreement.) 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.

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[23] To be clear, the Court's decision in *Solesbee* turned on its affirmance of the circuit court's ruling against *merger* of the Arbitration Agreement and the Admission Agreement. Consequently, the *Solesbee* Court did not address the substance of the *equitable estoppel* prong of the merger/estoppel argument.

[24] In this regard, the Facility would also note that it is still possible that the Supreme Court might review *Solesbee* via a writ of certiorari.

(Arbitration Agreement.)

As explained above, 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. *Allied-Bruce*, 513 U.S. at 273–77. Moreover, even under the FAA, the general state law of contracts continues to apply. *Id.* 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. (Arbitration Agreement.)

Again, essentially, the provisions of the Admission Agreement and the Arbitration Agreement regarding governing law are to the effect that South Carolina law applies except where displaced by federal law, and they do not support any reasonable inference of any intent contrary to merger.

Second, the *Solesbee* Court erroneously found against merger on the basis that "[t]he Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement 'shall survive any termination or breach of this Agreement or the Admission Agreement.'" 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger here. Unlike in *Coleman* and *Hodge*, the supposed textual recognition of the Admission Agreement as being separate from the Arbitration Agreement is not included in any "Entire Agreement" provision. Rather, the "Entire Agreement" provision of the Admission Agreement expressly states, "other Admissions materials . . . are made a part of this Agreement by reference." (Admission Agreement p. 12.) And as in the instant case, the Arbitration Agreement that was signed in conjunction with the admission is clearly among these "other Admissions materials." Moreover, that the Arbitration Agreement "shall survive any termination or breach of this Agreement or the Admission Agreement" just means that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. Again, this is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument.

See Phillips, 39 F. Supp. 2d at 612–13 ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

Third, the *Solesbee* Court erroneously found against merger on the basis that "[t]he Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, 'Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.'" 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. The absence of a "revocation" provision is one way in which the Arbitration Agreement is materially different from those at issue in *Coleman* and *Hodge*, and, for that matter, *Thompson*. Moreover, the *Solesbee* Court drew a false equivalency between the concept of "revocation" and that of "termination." A "revocation" is an annulment (i.e., to make something a nullity),[25] whereas "termination" is to put or bring something to an end. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. at 612–13.

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

Fourth, the *Solesbee* Court erroneously found against merger on the basis that "the Admission Agreement and Arbitration Agreement were separately paginated and had their own signature pages." 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. Again, the fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. The very nature of *merger* is to *merge* separate documents.

Finally, the *Solesbee* Court erroneously found against the Facility on merger on the basis that Arbitration Agreement was voluntary. 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. Again, to be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. But all this means

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

To say that the Arbitration Agreement was not required for admission, which it was not, is not to say that it was not intended to be part of the admissions materials in the event it was agreed to, which it was, by Mr. Dover on Ms. Solesbee's behalf in *Solesbee* and by Ms. Washington on Mr. Washington's behalf in the instant case. 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* Arbitration Agreement (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 the resident'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* Admission Agreement (setting forth the terms of the admission) *with* Arbitration Agreement (providing for arbitration of disputes arising out of the admission).)

(3) The circuit court's equitable estoppel analysis is erroneous.

The circuit court's view of equitable estoppel misapprehends our Supreme Court's decision in *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). The *Wilson* Court favorably discussed the framework of the direct benefits test—which test this Court had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed this Court's earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which the Facility contends Mr. Washington and, in turn, Plaintiff (his estate) is estopped from refusing to comply with the Arbitration Agreement here, where Mr. Washington received direct benefits (in the form of his admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement was merged. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added).

Wilson supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration case like this, without any resort to another test for equitable estoppel, such as that addressed in the *Kelly* and *Binkley* cases cited

by the circuit court. (Order Denying Motion to Compel Arbitration pp. 5–6 ("Further, Plaintiff cannot be equitably estopped from denying enforcement of the Arbitration Agreement. 'Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements.' *Kelly v. Logan, Jollev & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). [The Facility] has not and cannot meet its burden to establish these elements, primarily because [the Facility] cannot demonstrate that Mr. Washington's estate made any false representations as far as the subject power of attorney is concerned . . . ."); *id.* at 6 ("A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 70–71, 558 S.E.2d 902, 908–09 (Ct. App. 2001).").)[26]

Moreover, the circuit court incorrectly interpreted *Wilson* as follows:

> [A]s the Supreme Court explained in *Wilson*, to successfully assert direct benefits estoppel, the arbitration agreement must be a clause within the larger admissions agreement, and the plaintiff must be seeking to assert causes of action that arise from and are created by the contract. Here, as explained above and below, the Admission Agreement and optional Arbitration

[26] To be clear, neither *Kelly* nor *Binkley* was an arbitration case, and both cases relied on the traditional six-factor test for estoppel, not the direct benefits test. *Kelly*, 383 S.C. at 638, 682 S.E.2d at 7; *Binkley*, 348 S.C. at 70, 558 S.E.2d at 09; *id.* at n.15.

> Agreement are separate documents that did not merge. Second, Plaintiff does not assert breach of contract, or a violation of contractual duties, and instead has brought her lawsuit under a negligence theory arising from common law duties.

(Order Denying Motion to Compel Arbitration pp. 7–8.)

What *Wilson* actually explains is that 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. *See Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.") (citation and internal quotation marks omitted).

Here, Mr. Washington was a direct beneficiary. To deny his receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of his residency: every night's stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even his complaint does not go nearly so far as that. (*See* Compl.)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Mr. Washington received the benefit of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein. Respectfully, the circuit court should have found that the Arbitration Agreement merged with the Admission Agreement and that Mr. Washington and, in turn, Plaintiff (his estate) is estopped to deny the Admission Agreement/Arbitration Agreement's enforceability, Mr. Washington having effectively embraced the contract with the Facility for the purpose of his admission and receipt of the benefits thereof.[27]

(4) The circuit court violated the FAA's "equal footing" rule by charging the Facility with a heightened duty to determine the existence Ms. Washington's authority that does not exist under South Carolina's general contract law and, at the same time, disregarding applicable state law in respect of the legal significance of Ms. Washington's act of signing the Arbitration Agreement and her duty of good faith and fair dealing.

According to the circuit court, "Ms. Washington in her individual capacity had no legal authority to sign the Arbitration Agreement, and [the Facility] knew or should have known this fact, as she did not present [it] with documentation demonstrating power of attorney or guardianship." (Order Denying Motion to

[27] To be clear, 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.

Compel Arbitration p. 5; *see also id.* at p. 6 ("[The Facility] had the ability to determine whether [Ms. Washington] had authority to sign an arbitration agreement on Mr. Washington's behalf. It should be clear to health care entities such as [the Facility] that a daughter without a recorded general durable power of attorney at best only has authority to make healthcare decisions and does not have authority to waive other rights when a potential resident lacks capacity."); *id.* at p. 6 ("[The Facility] is a sophisticated business entity frequently interacting with residents and their families during the rehabilitation center admission process. [The Facility] is or should be familiar with the legal concepts of guardianship and powers-of-attorney.").)

This violated the FAA's "equal footing" rule by charging the Facility with a heightened duty to determine the existence Ms. Washington's authority that does not exist under South Carolina's general contract law. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (Under the FAA, "courts *must* place arbitration agreements on *equal footing with other contracts* . . . ."); *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (While a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not do so based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.") (citing *Concepcion*, 563 U.S. at 339); *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)).

At the same time, the circuit court disregarded applicable state law in respect of the legal significance of Ms. Washington's act of signing the Arbitration Agreement and her duty of good faith and fair dealing. Ms. Washington submitted an affidavit stating that she "never represented to the [Facility] that [she] had any legal authority to act on [Mr. Washington's] behalf . . . ." (Aff. of Gabrielle Washington ¶ 7.) But this is not so. The Arbitration Agreement itself reflects (by virtue of her signature upon it) Ms. Washington's express representation to the Facility that she had all due authority to sign it for Mr. Washington. (Arbitration Agreement ("By . . . her signature below, the executing party [(i.e., Ms. Washington)] represents that . . . she has the authority to sign on [Mr. Washington's] behalf so as to bind [Mr. Washington] as well as [herself].").) There is no question raised as to Ms. Washington's competency. She is thus

"presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement,[28] including, of course, the terms whereby she represented herself to the Facility as having authority to act on Mr. Washington's behalf. Moreover, the covenant of good faith and fair dealing implied in every contract[29] is no less binding on Ms. Washington than the Facility.

(5) The circuit court erroneously asserts that, at most, the Arbitration Agreement would be enforceable as to the survival claim and would not be enforceable as to the wrongful death claim.[30]

The Arbitration Agreement applies with equal force to the wrongful death claim. A wrongful death claim does not belong to the wrongful death beneficiaries. It belongs to the decedent's personal representative, and a specific rule prohibiting enforcement of otherwise valid agreements to arbitrate wrongful death claims would violate the FAA's requirement that arbitration agreements be placed on equal footing with other contracts,[31] as indeed our Supreme Court has already recognized in *Dean*, 408 S.C. at 389, 759 S.E.2d at737 n.3 ("[C]ourts *may*

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

[29] *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995) (South Carolina law implies a covenant of good faith and fair dealing in every contract).

[30] (Order Denying Motion to Compel Arbitration pp. 9–11.)

[31] *See Concepcion*, 563 U.S. at 339.

not refuse to compel arbitration simply because a wrongful death claim is involved.") (emphasis added).

"The right of action for wrongful death is purely statutory and did not exist at common law . . . ." *Glenn v. E. I. DuPont Nemours & Co.*, 254 S.C. 128, 133, 174 S.E.2d 155, 157 (1970). Per the plain language of the wrongful death statute, a wrongful death claim must be a claim that, had the decedent lived, they could have maintained themselves. S.C. Code Ann. § 15-51-10 ("Whenever the death of a person shall be caused by the wrongful act, neglect or default of another *and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof*, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.") (emphasis added); *see also Maxey v. Sauls*, 242 S.C. 247, 250, 130 S.E.2d 570, 572 (1963) ("[T]he right to maintain the [wrongful death] action is based upon the condition that 'the act, neglect or default' must be 'such as would, if death had not ensued, have entitled the person injured to maintain an action and recover damage in respect thereof.' In other words, '*if the deceased never had a cause of action, none accrues under the wrongful death statute*.'") (discussing prior statutory language that is identical to that in present § 15-51-10) (quoting *Scott v. Greenville Pharmacy*, 212 S.C. 485, 489, 48 S.E. 324, 326 (1948) (emphasis added).

Accordingly, a claim of wrongful death is derivative in nature, in that it derives from (and does not arise without) a cause of action arising in favor of the *decedent*. *See Id.*; *see also* 26 S.C. Jur. Limitation of Actions § 32 ("A wrongful death action is derivative in nature . . . ."); *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 942 (D.S.C. 1988) ("If the decedent never had a cause of action, none accrues under the wrongful death statute. Furthermore, anything that would have defeated the decedent's recovery had he survived the accident, such as contributory negligence, a valid release, or similar acts on his part, would defeat the right of recovery in behalf of his family in case of his death. It follows logically that the decedent's failure to file a timely claim . . . is an act, or omission, on his part which should defeat the right of recovery of his personal representative.") (internal citations and quotation marks omitted); *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010) ("*Quattlebaum* was correctly decided and adheres to the principle that a decedent's estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived.'").

"[T]he substantive right to bring . . . a wrongful death action . . . is determined by the Probate Code." *Fisher on behalf of estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 240, 811 S.E.2d 739, 742 (2018); *see also id.* at 242, 811 S.E.2d at 743 ("The Probate Code defines who may act on behalf of the estate of a

deceased person. The Probate Code, therefore, is the substantive law by which the identity of the *'real party in interest'* is determined for all civil actions *brought on behalf of the estate of a deceased person*.") (emphasis added). "Under the Probate Code . . . *wrongful death actions must be brought by the personal representative* . . ." *Id.* (emphasis added); *see also* S.C. Code Ann. § 15-51-20 ("Every [wrongful death] action shall be brought by or in the name of the executor or administrator of [the] person [whose death was wrongfully caused].");[32] *Glenn*, 254 S.C. at 134, 174 S.E.2d at 158 ("If an action for wrongful death is instituted by one other than the personal representative of a decedent, duly appointed by the Probate Court, it should be dismissed.").

Even though it is for their "benefit," a wrongful death claim does not belong to the wrongful death beneficiaries themselves. It is a claim that is brought on behalf of the estate of the deceased person. The substantive right to bring the claim belongs to decedent's personal representative, who must bring the claim and is the real party in interest under South Carolina law. Consistent with Judge

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

Anderson's correct analysis in *Quattlebaum* (which explains that anything that would have defeated the decedent's recovery had he survived, such as, for instance, a valid release, will apply to the wrongful death claim), it follows logically that a valid arbitration agreement must also apply to the wrongful death claim, and the circuit court erroneously asserts otherwise.

B. At a minimum, the circuit court should have granted the Facility's alternative request for permission to conduct limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability under an agency theory.

The circuit court incorrectly ruled—in conclusory fashion, without actually citing any legal or factual support—that "the only relevant and necessary evidence for the Court to make its determination is already available for the Court's review. Any further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, waste judicial resources, and increase costs for both parties unnecessarily." (Order Denying Motion to Compel Arbitration p. 11.)

At a minimum, the circuit court should have allowed the Facility to engage in some appropriately limited discovery to investigate fairly the Arbitration Agreement's enforceability under an agency theory, i.e., the theory that Ms. Washington was authorized to sign the Arbitration Agreement for Mr. Washington as his lawful agent. This would entail, at the least, allowing the Facility to depose

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be brought by . . . the executor or administrator' that still appears in section 15-51-20." *Id.*

Ms. Washington and to follow up on any pertinent evidentiary leads revealed by her deposition. Otherwise, the Facility is in a Catch-22: vulnerable on the one hand to the argument that it has not presented sufficient evidence to prove the Arbitration Agreement is enforceable based on Ms. Washington's agency, which is a necessarily fact-intensive question,[33] while at the same time vulnerable on the other hand to the argument that it waived its arbitration rights by making use of the tools of litigation (i.e., discovery) to prove them.

It must be remembered that the Arbitration Agreement is valid on its face, bearing, as it does, Ms. Washington's express representation of authority to bind Mr. Washington. (Arbitration Agreement ("By . . . her signature below, the executing party [(i.e., Ms. Washington)] represents that . . . she has the authority to

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

sign on [Mr. Washington's] behalf so as to bind [Mr. Washington] as well as [herself].").)[34] 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 it cannot conduct relevant discovery to vindicate its arbitration rights without risking a waiver of those rights by the very act of attempting to vindicate them is not only patently unjust but also a violation of the FAA's requirement that arbitration agreements must be placed on equal footing with other contracts. *Concepcion*, 563 U.S. at 339; *see also Kindred Nursing*, 137 S. Ct. at 1423; *Allied-Bruce*, 513 U.S. at 281.

Principles relating to the law of agency may potentially provide an additional, independent basis on which to grant the Motion to Compel Arbitration. Their application is fact dependent; therefore, it cannot properly be said that "the

[34] Again, having signed the Arbitration Agreement, Ms. Washington "is presumed to have, read, understood, and assented to its terms." *Gibson*, 426 S.C.

only relevant and necessary evidence for the Court to make its determination [thereon] is already available for the Court's review" such that "further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, waste judicial resources, and increase costs for both parties unnecessarily." (Order Denying Motion to Compel Arbitration p. 11.) The allowance of discovery into Mr. Washington and Ms. Washington's course of dealing and the potential creation of an agency relationship between them is only reasonable.

CONCLUSION

For the foregoing reasons, the Facility asks this Honorable Court to reverse the circuit court's denial of the Motion to Compel Arbitration and to stay this lawsuit in favor of arbitration between Plaintiff and the Facility (or to remand this matter to the circuit court with instructions that it stay the lawsuit in favor of arbitration between Plaintiff and the Facility) or, alternatively, to reverse the circuit court's denial of the Motion to Compel Arbitration and remand this matter to the circuit court for the additional discovery requested by the Facility to be conducted; for additional briefing to be submitted to the circuit court in light of such discovery; and, with the benefit of the same, for the circuit court to hear and decide the Motion to Compel Arbitration anew.

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at 352, 827 S.E.2d at 181 ("[O]ne who has signed a contract is presumed to have

Respectfully submitted,

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read, understood, and assented to its terms.").