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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2021-CP-42-03701
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; and
THI of South Carolina at Magnolia Place–Spartanburg, a/k/a
Physical Rehab and Wellness of Spartanburg,

Appellants,

INITIAL REPLY BRIEF OF APPELLANTS

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Appellants make the following points in reply to Plaintiff's brief.[1]

ARGUMENT IN REPLY

1. Coupled with the doctrine of merger (under which the Admission Agreement and the Arbitration Agreement should be considered and construed as one), equitable estoppel provides a workable theory for enforcement of an arbitration agreement against a nonsignatory like Ms. Rice, as indeed Plaintiff herself acknowledges.

Plaintiff makes much of the fact that Ms. Rice did not herself sign the Arbitration Agreement. (*See, e.g.,* Br. of Resp. p. 3 ("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."); *id.* at p. 4 ("Ms. Rice never signed the Arbitration Agreement . . . ."); *id.* at p. 5 ("Ms. Rice never signed or otherwise assented to the Arbitration Agreement.").) It is, of course, true that Ms. Rice did not sign the Arbitration Agreement; however, it is also beside the point.

[1] Shorthand references already defined in Appellants' principal brief are continued in this reply brief (e.g., the "Facility" refers to Defendant/Appellant THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Physical Rehabilitation and Wellness Center of Spartanburg (misidentified in this action as "THI of South Carolina at Magnolia Place–Spartanburg, a/k/a Physical Rehab and Wellness of Spartanburg"); the "Other Appellants" refers to Defendants/Appellants Fundamental Clinical and Operational Services, LLC, and Fundamental Administrative Services, LLC, collectively; "Appellants" refers to the Facility and the Other Appellants, collectively; "Plaintiff" refers to Plaintiff/Respondent, The Estate of Jo Eva Rice, deceased, by her Personal Representative Sonya Lovett; "Ms. Lovett" refers to Sonya Lovett, personally; and "Ms. Rice" refers to the decedent, Jo Eva Rice).

As explained in Appellants' principal brief, conceptually, the Facility's merger/equitable estoppel argument is not an argument for the *enforceability* of the Arbitration Agreement per se—in other words, it is not an argument that depends on the Facility showing that the Arbitration Agreement *is enforceable*—but rather an argument for Plaintiff to be *estopped to deny the enforceability* of the Arbitration Agreement. *See Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354, 755 S.E.2d 450, 455 (2014) ("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.") (emphasis added). Accordingly, when Plaintiff claims the Facility is "seeking contract enforcement,"[2] she simply misunderstands the Facility's argument, and when she attempts to shoot down the Facility's argument by arguing that the Arbitration Agreement is not a "properly formed" contract,[3] she simply misses the mark.

And as even Plaintiff acknowledges,[4] South Carolina law recognizes that equitable estoppel can be successfully invoked to enforce an arbitration agreement against a nonsignatory like Ms. Rice, and, in turn, Plaintiff, her estate. *Wilson v.*

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[2] (Br. of Resp. p. 31.)

[3] (Br. of Resp. p. 5.)

[4] (*See* Br. of Resp. p. 7 ("Coleman did acknowledge the possibility that equitable estoppel could be invoked if the disputed arbitration language was actually or effectively in the same admission contract.").)

Willis, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) ("South Carolina has recognized several theories that could bind *nonsignatories* to arbitration agreements under general principles of contract and agency law, including . . . estoppel.") (emphasis added); *see also id.* at 340–45, 827 S.E.2d at 175–77 (favorably discussing the application of the direct benefits test for equitable estoppel—which test this Court, following its earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), had applied in the decision that was before the *Wilson* Court on writ of certiorari, and under which test the Facility contends that Ms. Rice, or, more precisely, her estate, i.e., Plaintiff, is estopped to deny the validity of the instant Arbitration Agreement where Ms. Rice received direct benefits (in the form of room, board, various amenities/services, and the care/treatment she received at the Facility about which Plaintiff does not complain) from the Admission Agreement with which the Arbitration Agreement merged);[5] *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*

[5] To deny Ms. Rice's receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of her residency: every night's stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even Plaintiff's complaint does not go nearly so far as that. (*See* Compl.) Indeed, Plaintiff acknowledges that the Admission Agreement provided for Ms. Rice to be "'[f]urnish[ed] room, routine meals, nursing care, personal care, or custodial care.'" (Br. of Resp. p. 8.)

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).[6]

[6] Plaintiff incorrectly asserts that the *Wilson* Court could not have meant what it said when it expressly linked the traditional six-factor test for estoppel to non-arbitration cases because it would violate the FAA's equal treatment rule. (Br. of Resp. p. 15 n.3.) First off, the principle that "a party may not 'rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage,'" *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012) (quoting *Jackson v. Iris.com*, 524 F. Supp. 2d, 742, 749 (E.D. Va. 2007) (quoting *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981))), is neither expressly nor implicitly confined to the context of arbitration agreements. And in any event, "the basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate," *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270 (1995) and "ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). The FAA's equal treatment mandate requires that arbitration agreements be placed on *at least* equal footing with all other contracts under state law, i.e., it prohibits states from singling out arbitration agreements for *disfavored* treatment relative to other contracts under state law. It does not prohibit states from *favoring* arbitration agreements under state law.

2. Our Supreme Court has already confirmed that, insofar as the question of merger is concerned, the Admission Agreement and the Arbitration Agreement constitute documents executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, giving rise to the presumption of merger.

Plaintiff's contention that the Admission Agreement and the Arbitration Agreement serve different purposes[7] has already been debunked by our Supreme Court. *See Coleman*, 407 S.C. at 354–55, 755 S.E.2d at 455 (confirming the validity of the general proposition of law on which the arbitration proponents (the appellants) based their merger/equitable estoppel argument: "Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. . . . *[T]he 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.*") (emphasis added). While the material facts of this case are different from *Coleman* as to whether the presumption of merger is upset by evidence of a contrary intention (the facts do not support such a conclusion here), the material facts (admission agreements and arbitration agreements signed upon a resident's admission to a skilled nursing facility) are the very same as to whether the presumption of merger arises in the first place, as *Coleman* confirms it does.

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[7] (Br. of Resp. p. 8.)

3. Despite Plaintiff's attempt to water down the standard for rebutting the merger presumption, unless the merger doctrine is to be rendered meaningless, "anything indicating a contrary intention"[8] must be at least evidence capable of supporting a reasonable, non-speculative inference that the parties' intention was contrary to merger.

The presumption of merger arises only where the four elements of time, parties, purpose, and transaction coincide—as they all do here. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. If even one of these is lacking there is no merger. This is why, as explained in the Facility's principal brief, for the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—*notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)*—can nonetheless support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). 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

[8] (Br. of Resp. p. 7 (emphasis omitted).)

concurrence) the presumptive intent of merger.

4. The Facility would underscore the point that the circuit court failed to recognize material differences between the facts and arguments involved in the instant case and those that controlled (or, conversely, were simply not involved in) *Coleman*[9], *Thompson*[10], and *Hodge*[11].[12]

The *Coleman* Court found against merger of the admission agreement and arbitration agreement before it because the admission agreement contained language in an "Entirety of Agreement" section that referenced the arbitration agreement in a way that "recognize[d] the 'separatedness' of the [arbitration agreement] and the admission agreement" and because "the [arbitration agreement] could be disclaimed within thirty days of signing while the admission agreement could not;" thus, "[b]y their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply." 407 S.C. at 355, 755 S.E.2d at 455.

The instant case is materially different from *Coleman* because (a) the "Entire Agreement" clause in the Admission Agreement does not reference the Arbitration

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[9] 407 S.C. 346, 755 S.E.2d 450.

[10] *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016).

[11] *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

[12] Of course, as explained in Appellants' principal brief, the Facility also contends, most respectfully, that this Court's merger analysis in *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E. 2d 144 (Ct. App. 2023), is erroneous and should not control the disposition of this matter.

Agreement as a separate contract, but rather expressly states that "other Admissions materials" are part of the Admission Agreement,[13] thereby expressly contemplating the lack of its own supposed "separatedness," and (b) the Arbitration Agreement does not contain a disclaimer/revocation provision. (Arbitration Agreement.)

As for the language in *Coleman* stating, "Even if the 'Entirety' clause creates an ambiguity as to merger, the law is clear that any ambiguity in such a clause is construed against the drafter, in this case, appellants,"[14] it is, by its own terms ("Even if"), not essential to the Court's holding and, thus, dicta. *See Nash v. Tindall Corp.*, 375 S.C. 36, 40, 650 S.E.2d 81, 83 (2007) ("Judicial dicta is 'not essential to the decision.'") (quoting *Black's Law Dictionary* 465 (7th ed. 1999)); *id.* at 40–41, 650 S.E.2d 81, 83 ("Dicta or, as it is also known, dictum 'is a statement on a matter not necessarily involved in the case, and is not binding as authority. Dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, is not the court's decision.'") (quoting 21 C.J.S. *Courts* § 227 (2006)). And besides the fact that this part of *Coleman* is dicta (as well as, of course, the fact that, as explained in Appellants' principal brief, the merger of the Admission Agreement and the Arbitration Agreement is indeed unambiguous), the *Coleman* Court's dicta did not address the Facility's argument

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13 (Admission Agreement p. 12.)

14 407 S.C. at 35–56, 755 S.E.2d at 455.

that to construe supposed ambiguity against merger—to upset the merger presumption based on 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 still susceptible to a reasonable conclusion in favor of merger[15]—makes no sense and allows the exception to devour the rule.

The *Thompson* Court's entire discussion of merger is, in fact, dicta. 416 S.C. at 49–50, 784 S.E.2d at 683 ("Appellants argue the [arbitration agreement] 'merged' with the Admission Agreement, which Son was authorized to execute under the Act, making both agreements one and the same. We disagree. Initially, we note *this issue is not preserved for our review*.") (emphasis added); 416 S.C. at 50, 784 S.E.2d at 683; *id.* ("Based on the foregoing, Appellants are *precluded from arguing the doctrine of merger in this appeal*.") (emphasis added); *id.* ("*Even if* Appellants' merger argument had been properly preserved, we would affirm on the merits.") (emphasis added).

Beyond this, the *Thompson* Court's dicta regarding the merits of the merger argument largely relies on the proposition in *Coleman* that "separatedness" is evidenced by the presence of the disclaimer/revocation provision in the arbitration agreement and the lack of such a provision in the admission agreement:

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[15] *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).

> Here, as in *Coleman*, the [arbitration agreement] contained language that provided it could be disclaimed within thirty days, yet the Admission Agreement did not include such a provision. Appellants argue the Admission Agreement could have been "disclaimed" at any time by Mother leaving the facility and thus, the right to disclaim the [arbitration agreement] does not show the parties intended for the AA to be separate from the Admission Agreement. This is not a valid comparison. Because there are no provisions in the Admission Agreement allowing Mother to disclaim it, leaving the facility would be the only way she could "disclaim" the agreement, whereas the [arbitration agreement] allows the patient to disclaim the [arbitration agreement] unconditionally. Therefore, Mother's right to disclaim the [arbitration agreement] without having to terminate her residency at the facility indicates the parties' intent to keep the [arbitration agreement] separate from the Admission Agreement. This is consistent with the [arbitration agreement's] statement that its execution was not a condition precedent for being admitted to the nursing home: "The signing of this Agreement is not a precondition to admission, expedited admission, or the furnishing of services to the Patient/Resident by the Healthcare Center[.]" This demonstrates the parties' intent that the two agreements retain their separate identities.

Thompson, 416 S.C. at 53, 784 S.E.2d at 685.

As explained above (and elsewhere), the instant Arbitration Agreement does not contain a disclaimer/revocation provision. (Arbitration Agreement.) Thus, the critical factual premise underpinning the *Thompson* Court's reasoning—which premise the *Thompson* Court used both to liken the case before it to *Coleman* and to support its view that the lack of a disclaimer/revocation provision in the

admission agreement was consistent with the arbitration agreement not being a condition precedent to admission, which, taken in tandem, the court viewed to demonstrate an intent for the two agreements to retain their separate identifies—is simply not present in the instant case.

Additionally, the *Thompson* Court, again, in dicta, rejected the appellants' argument that the admission agreement incorporated the arbitration by reference as an "exhibit," explaining that "the Admission Agreement is ambiguous on this point because (1) it does not define the term 'exhibit' or cross-reference any specific exhibits and (2) the [admission agreement] does not include any labels or other language indicating it serves as an exhibit or addendum to the Admission Agreement" and, "[t]herefore, the Admission Agreement's provision incorporating all 'exhibits' must be construed against Appellants," pursuant to *Coleman*. *Thompson*, 416 S.C. at 53–54, 784 S.E.2d at 685.[16]

As explained above, the part of *Coleman* stating, "Even if the 'Entirety' clause creates an ambiguity as to merger, the law is clear that any ambiguity in such a clause is construed against the drafter, in this case, appellants,"[17] it is, by its own terms ("Even if"), not essential to the Court's holding and, thus, dicta. *See*

[16] The *Thompson* Court also cited *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 94, 594 S.E.2d 485, 493 (Ct. App. 2004), but only for the proposition that "[a] contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear," not for the proposition that the admission agreement must be construed against the appellants. *Thompson*, 416 S.C. at 53–54, 784 S.E.2d at 685.

[17] 407 S.C. at 35–56, 755 S.E.2d at 455.

Nash, 375 S.C. at 40, 650 S.E.2d at 83. Moreover, and, again, as explained above, besides the fact that this language from *Coleman* is dicta (as well as, of course, the fact that, as explained in Appellants' principal brief, the merger of the Admission Agreement and the Arbitration Agreement is indeed unambiguous), the *Coleman* Court's dicta did not address the Facility's argument that to construe supposed ambiguity against merger—to upset the merger presumption based on 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 still susceptible to a reasonable conclusion in favor of merger[18]—makes no sense and allows the exception to devour the rule. Nor, of course, did the *Thompson* Court address this, either.

Further still, the facts are materially different from *Thompson* here. Here, the "Entire Agreement" clause in the instant Admission Agreement does not merely purport to incorporate unspecified "exhibits," but rather, as already explained in Appellants' principal brief, in language directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[19]), expressly states that "other Admissions materials" are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed "separatedness." (Admission

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[18] *See Town of McClellanville*, 345 S.C. at 623, 550 S.E.2d at 302.

[19] 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).

Agreement p. 12.) And, without question, the plain and ordinary meaning of the language "other Admissions materials" is such as to embrace the Arbitration Agreement. *See, e.g., 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)).[20] Even further, the Facility's argument in favor of merger here includes pointing out

[20] 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" 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).

the undeniable lack of "separatedness" evidenced by the fact that the instant Admission Agreement expressly incorporates "other Admissions materials" therein, and there is no indication that the *Thompson* Court considered anything of this sort (nor, to be clear, did the *Coleman* or *Hodge* Courts do so).

Lastly, in a footnote, the *Thompson* Court stated—in conclusory fashion (with no citation to any supporting authority)—that the fact that "the front page of the [arbitration agreement] is labeled 'Arbitration Agreement,' indicat[es] the parties' intent for it to stand by itself as an independent contract." 416 S.C. at 53, 784 S.E.2d at 685 n.1. As already explained in Appellants' principal brief, to point to the fact that the Admission Agreement and the Arbitration Agreement have their own titles (or are separately paginated or signed) provides no reasonable inference of an intent contrary to merger, as 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 intent relative to merger. Indeed, the question of merger will not arise in the first place unless multiple instruments are involved. Obviously, it cannot be the case that the very existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intent contrary to merger, as such a rule would effectively do away with the merger doctrine altogether. The very nature of *merger* is to *merge* separate documents. And aside from the

decision in *Thompson* being illogical (and, again, conclusory) in this regard, here again, there is no indication that the *Thompson* Court considered any argument in challenge to the view that the mere title of the arbitration agreement constitutes probative evidence of an intent contrary to merger (nor, to be clear, did the *Coleman* or *Hodge* Courts do so).

The *Hodge* Court's finding against merger was based on a number of factors taken in totality:

> In the present case, [1] the Admissions Agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law. [2] Like in *Coleman*, the Arbitration Agreement recognized a separatedness as it referenced the two documents separately, stating "[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement." [3] Also, the Arbitration Agreement stated it could be revoked within thirty days, whereas the Admission Agreement contained no such indication and instead provided the Admissions Agreement could only be amended by the patient with written agreement executed by the Facility and the patient in the same manner as the Admissions Agreement was executed or if the Facility sent a notice of the amendment to the patient and the patient did not reject the amendment within thirty days. [4] Further, each document was separately paginated and had its own signature page. [5] Additionally, the Arbitration Agreement stated signing it was not a precondition to admission. *Based on all of this*, we find the Admissions Agreement and Arbitration Agreement did not merge.

422 S.C. at 562–63, 813 S.E.2d at 302 (numbering and emphasis added).

As already explained in Appellants' principal brief, the instant case is materially different from *Hodge* on the facts and/or involves arguments that were not addressed by the *Hodge* Court. Moreover, the plain language of *Hodge* makes clear that its finding against merger is based on its assessment of a multitude of particular factors taken together and provides no support for Plaintiff's view that any of these factors standing alone—without regard to their context or the impact of other factors—can support a reasonable, non-speculative finding against merger.

5. The survival of the Arbitration Agreement is no evidence of "separatedness" (in the parlance of the *Coleman* Court[21]).

Contrary to Plaintiff's contention, the Admission Agreement and the Arbitration Agreement do not have inconsistent termination provisions. As explained elsewhere, the only reason for the Arbitration Agreement is the Admission Agreement, i.e., the Arbitration Agreement covers 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 even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still

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

connected to the Admission Agreement even after the termination of the Admission Agreement. There is nothing inconsistent about this. 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.").

6. 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.

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).

As set forth in our Supreme Court's controlling decision in *Wilson*, and consistent with this Court's decision in *Pearson*, which the *Wilson* Court favorably cites, the essence of the test for direct benefits estoppel is simply whether the non-

signatory has exploited other parts of the contract by reaping its benefits. Indeed, to require more than this—or, in other words, to limit the applicability of direct benefits estoppel to only instances where the non-signatory's claim relies solely on the contract terms to impose liability—is to invite the very sort of have-your-cake-and-eat-it-too inequity that the doctrine aims to prevent in the first place. Neither *Wilson* nor *Pearson* nor general notions of equity countenance,[22] much less call for, such a result.

7. The Arbitration Agreement applies with equal force to the wrongful death claim.

Conceptually, Plaintiff's argument here is completely separate and independent from any other challenge to the enforceability of the Arbitration Agreement. In effect, her contention is that an arbitration agreement—any arbitration agreement—is unenforceable with respect to a claim of wrongful death, even if it is in all other respects a valid and enforceable arbitration agreement under South Carolina's general contact law. The only way this could be true (i.e., legally correct) is if the claim of wrongful death (i.e., the substantive right of action) belongs to the wrongful death beneficiaries themselves. If this were the case, then general principles of contract law would indeed apply to prevent wrongful death beneficiaries from having to arbitrate "their" claims if they

[22] *See Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) ("Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible.").

themselves had not agreed to do so (or were not estopped from denying that they had). As explained in Appellants' principal brief, however, 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,[23] as indeed our Supreme Court has already recognized in *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 389, 759 S.E. 727, 737 n.3 (2014) ("[C]ourts *may not* refuse to compel arbitration simply because a wrongful death claim is involved.") (emphasis added).

8. Plaintiff mischaracterizes *Touchberry v. City of Florence*, 295 S.C. 47, 367 S.E.2d 149 (1988).

As explained in Appellants' principal brief, the circuit court erred in relying on a presumption against enforcement of arbitration agreements against nonsignatories that violates the FAA's "equal footing" rule. As explained, under the FAA, there cannot be a presumption against enforcement of arbitration agreements against nonsignatories unless the same presumption also applies to enforcement of all other contracts against nonsignatories, the Facility is aware of no such general presumption under South Carolina law, and the circuit court cited none.

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

According to Plaintiff, however, such a presumption does exist under South Carolina's general contract law, and she cites *Touchberry* to prove it. (Br. of Resp. pp. 32–33.) But *Touchberry* proves no such thing. The presumption addressed in *Touchberry* is the presumption that a *public* contract (specifically at issue in *Touchberry*, a water and sewer service franchise agreement between the City of Florence and Florence County) is not enforceable by an individual, which presumption the Court held could be overcome by showing that individual was an intended third-party beneficiary of contract. Simply put, the contract and presumption at issue in *Touchberry* has nothing to do with the presumption against the enforcement of arbitration agreements that the circuit court wrongly invoked in the instant case.

CONCLUSION

For the foregoing reasons, together with those already set forth in their principal brief, Appellants ask this Honorable Court to reverse the circuit court, stay Plaintiff's claims against the Facility in favor of arbitration, and stay Plaintiff's claims against the Other Appellants pending the outcome of arbitration between Plaintiff and the Facility (or, alternatively, reverse the circuit court and remand the case to the circuit court with instructions that it stay Plaintiff's claims against the Facility in favor of arbitration and stay Plaintiff's claims against the

Other Appellants pending the outcome of arbitration between Plaintiff and the Facility).

Respectfully submitted,

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November 15, 2023

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2021-CP-42-03701
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; and
THI of South Carolina at Magnolia Place–Spartanburg, a/k/a
Physical Rehab and Wellness of Spartanburg,

Appellants,

PROOF OF SERVICE

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I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellants, hereby certify that the **INITIAL REPLY BRIEF OF APPELLANTS** was served on Respondent on November 15, 2023, by emailing (see attached) a copy of the same to Respondent's counsel of record:

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November 15, 2023

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Date:	Wednesday, November 15, 2023 11:52:53 PM
Attachments:	image001.png Rice v. Fundamental -- Initial Reply Brief of Appellants.pdf

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Attached for service in the above-referenced matter please find the **Initial Reply Brief of Appellants**.

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