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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2019-CP-42-03075

Court of Appeals Case No. 2020-000500
Unpublished Opinion No. 2023-UP-299 (S.C. Ct. App. filed August 23, 2023)

Supreme Court Case No. 2023-001815

Betty Nanney,
by and through her Attorney-in-Fact, Leslie Nanney,

Respondent,

v.

THI of South Carolina at Spartanburg, LLC,
d/b/a Magnolia Manor-Spartanburg, Rusty Flathmann,
Laura Anne Winn, and Olishia Gaffney,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

By and through their undersigned counsel, pursuant to Rule 242(d)(1), SCACR, the Facility[1], Flathmann[2], and Gaffney[3] (collectively, "Petitioners"), certify that the Court of Appeals filed its opinion in this matter on August 23, 2023 (the "Subject Opinion," a copy of which, with page numbers added for ease of reference, is attached hereto as **Exhibit A**), affirming the circuit court's denial of their motions to compel arbitration of Plaintiff's[4] claims (collectively, the "Motion to Compel Arbitration"); that Petitioners timely petitioned for rehearing; and that the Court of Appeals denied rehearing by order filed October 23, 2023.[5]

QUESTIONS PRESENTED

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

A. Did the Court of Appeals erred in affirming the circuit court on the basis that there is no merger of the Admission Agreement and the Arbitration Agreement?

B. Did the Court of Appeals err in not reaching the remaining issues/arguments regarding the merger/equitable estoppel argument?

C. Had the Court of Appeals reached the remaining issues/arguments regarding the merger/equitable estoppel argument (as, most respectfully, Petitioners

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

[2] "Flathmann" refers to Defendant/Petitioner Rusty Flathmann.

[3] "Gaffney" refers to Defendant/Petitioner Olishia Gaffney.

[4] "Plaintiff" is Plaintiff/Respondent, Betty Nanney, by and through her Attorney-in-Fact, Leslie Nanney. "Ms. Nanney" refers to Betty Nanney herself.

[5] To be clear, Petitioners do not include Defendant Laura Anne Winn, because the Subject Opinion rules in her favor, confirming that the appealed orders do not dispose of her motion to dismiss and that her motion should be decided on the merits after this matter is remanded to the circuit court. (**Ex. A** p. 5 ("Initially, we note that all parties agree that non-arbitration issues should be addressed by the circuit court on remittitur. We are proceeding on the anticipation that the circuit court will address Winn's motion on its merits at that point."); *id.* at p. 11 ("For the foregoing reasons, we affirm the circuit court's order with the caveat that Winn's motion for dismissal should receive a ruling on the merits.").) This petition does not challenge the Subject Opinion with respect to the disposition of Winn's appeal.

contend it should have), should the Court of Appeals have found that the circuit court erred in not finding Plaintiff equitably estopped to deny the enforceability of the Arbitration Agreement and that the circuit court erred in finding that the Arbitration Agreement lacks consideration and mutuality, erred in finding that the Arbitration Agreement lacks material terms, and erred in finding that the Arbitration Agreement is unconscionable?

II. At a minimum, did the Court of Appeals err in not finding that the circuit court erred in denying Petitioners' alternative request for limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability?

STATEMENT OF THE CASE

With the help of her son, Kaileb Horn ("Mr. Horn"), Ms. Nanney was admitted to the Facility on October 28, 2016. (*See* R. p. 157 ("[Mr. Horn,] Ms. Nanney's son, was the individual who signed all the admissions paperwork."), pp. 232–43.) In conjunction with Ms. Nanney's admission, Mr. Horn signed an Admission Agreement[6] and an Arbitration Agreement[7] on Ms. Nanney's behalf. By his signature on the Arbitration Agreement, Mr. Horn "represent[ed] that . . . he . . . ha[d] the authority to sign on [Ms. Nanney's] behalf so as to bind [Ms. Nanney] as well as [himself]." (R. p. 151.)

On September 4, 2019, Plaintiff commenced this nursing home malpractice action against Petitioners in the Court of Common Pleas, Spartanburg County, alleging deficient care/treatment of Ms. Nanney during her residency. (*See* R. pp. 24–58.)[8] On November 11, 2019, Petitioners

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[6] (R. pp. 232–43.)

[7] (R. p. 151.)

[8] Flathmann is alleged to have been an agent of the Facility at all relevant times. (R. p. 27.) Gaffney is alleged to have been a managing employee of the Facility and a member of its governing body at all relevant times. (R. p. 27.) Flathmann and Gaffney are covered by the subject Arbitration Agreement as agents or employees of the Facility. (*See* R. p. 151 ("This Agreement is made between [the Facility], its agents, employees, and servants, and . . . .").) The Facility, Flathmann, and Gaffney's positions in this appeal are the same. For the sake of simplicity, the Motion to Compel Arbitration and the issues/arguments in this appeal related thereto are phrased in singular terms, but to be clear, this covers—and applies with equal force to—not only the Facility but also Flathmann and Gaffney.

filed the Motion to Compel Arbitration, based on the above-referenced Arbitration Agreement. (R. pp. 149–55.)[9] Following the parties' submission of briefs[10] and a hearing on December 16, 2019,[11] the circuit court, the Honorable Grace Gilchrist Knie presiding, denied the Motion to Compel Arbitration by order filed January 7, 2020. (R. pp. 1–19.)

Pursuant to Rule 59(e), SCRCP, on January 17, 2020, Petitioners timely moved the circuit court to alter, amend, and/or reconsider its decision. (R. pp. 257–74.) The circuit court denied the motion without a hearing by order filed February 13, 2020. (R. pp. 20–23.)

By notice served March 16, 2020, this appeal timely followed,[12] and in due course, it was briefed and made ready for decision.

The case was heard March 16, 2023, and decided on August 23, 2023, via the Subject Opinion, which (but for the aforementioned caveat in favor of Winn) affirmed the circuit court. (*See generally* **Ex. A**.)

As certified above, the Court of Appeals denied Petitioners' timely petition for rehearing on October 23, 2023.

This petition for a writ of certiorari timely follows.

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[9] Without question, Plaintiff's claims against Petitioners are within the scope of the Arbitration Agreement. (*See* R. p. 151 ("[A]any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively 'Disputes'), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration . . . .").) This plain language clearly embraces the subject matter of Plaintiff's claims against Petitioners, and even were there "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).

[10] (R. pp. 156–84, pp. 195–231.)

[11] (R. pp. 102–46.)

[12] (*See* R. pp. 275–79.)

STANDARD OF REVIEW

A circuit court's determination of whether a claim is subject to arbitration is reviewed de novo on appeal. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). This includes de novo review of the determination of whether an arbitration agreement is enforceable against a nonsignatory. *Wilson v. Willis*, 426 S.C. 326, 334, 827 S.E.2d 167, 172 (2019). "Under de novo review, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Id.* Issues of law, however, are reviewed without any particular deference to the lower court. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016). Even where a ruling is on a matter within 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 one of law. *See Bain v. Self Mem'l Hosp.*, 281 S.C. 138, 152, 314 S.E.2d 603, 611 (Ct. App. 1984).

ARGUMENT

I. The Court of Appeals erred in affirming the circuit court's denial of the Motion to Compel Arbitration.

A. The Court of Appeals erred in affirming the circuit court on the basis that there is no merger of the Admission Agreement and the Arbitration Agreement.[13]

To be clear, coupled with the merger of the Admission Agreement and the Arbitration Agreement, equitable estoppel provides a workable theory for enforcement of an arbitration agreement against a nonsignatory. *See Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174

[13] (**Ex. A** p. 6 ("[Petitioners] contend that the circuit court should have found that the Arbitration Agreement merged with the Admission Agreement. . . . As we will explain, there is no merger [of the Admission Agreement and the Arbitration Agreement]."); *id.* at p. 10 ("Because these considerations [regarding whether the Admission Agreement and the Arbitration Agreement merge] control whether the Arbitration Agreement bound [Ms. Nanney], we decline to reach [Petitioners'] remaining issues on that point.").)

(2019) (observing that South Carolina has recognized numerous theories that can bind nonsignatories to arbitration agreements, including estoppel); *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 "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 merger/equitable estoppel argument is not an argument for the *enforceability* of the Arbitration Agreement per se but rather for Plaintiff to be *estopped to deny the enforceability* of the Arbitration Agreement. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and because Ms. Nanney effectively embraced and directly benefitted from the Admission Agreement, Ms. Nanney, and, therefore, Plaintiff, who stands in Ms. Nanney's shoes as her attorney-in-fact, is estopped to deny the enforceability of the Arbitration Agreement merged therewith. Accordingly, any contention about the Mr. Horn's lack of authority is beside the point and unavailing to refute the merger/equitable estoppel argument, which, again, turns not on the question of whether the Arbitration Agreement is enforceable per se but whether Ms. Nanney, and, in turn, Plaintiff, should be estopped to deny that the Arbitration Agreement is enforceable—and, most respectfully, she should.

In *Coleman*, even though this Court found against merger on the particular *facts* of the case, it nonetheless confirmed the validity of the general proposition of *law* on which the *Coleman* appellants based their merger/equitable estoppel argument:

> Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] under the [Adult Health Care Consent] Act, she is nevertheless equitably estopped to deny the [arbitration agreement's] enforceability. The circuit court held there was no estoppel here, and we agree.
>
> Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. In South Carolina,
>
> > The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
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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, like the circuit court, the Court of Appeals has erred in rejecting Petitioners' 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), and the Court of Appeals' more recent decision in *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E. 2d 144 (Ct. App. 2023).

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,"[14] as indeed the Admission Agreement and the Arbitration Agreement were here,[15] there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the contracting parties intended the instruments to be construed together as effectively one contract. This is a question of intention. *Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a contrary *intention* . . .") (emphasis added). And "in attempting to ascertain th[e] [parties'] intention," our courts "endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into." *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

For the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption 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."). No such inference can be drawn here. Indeed, it does not even make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement not to merge.

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

[15] 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 [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).

Unlike the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (*See* R. p. 151.) Moreover, while the instant Admission Agreement does contain an "Entire Agreement" clause, it does not reference the Arbitration Agreement as a separate contract. (R. p. 243.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[16]), the "Entire Agreement" clause in the instant Admission Agreement expressly states that "other Admissions materials" are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed "separatedness." (R. p. 243.) And without question, the Arbitration Agreement is among these other Admissions materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) ("The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's *admission documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 ("Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement*.") (emphasis added)).

Respectfully, the Subject Opinion misapprehends how the above-quoted language in *Stott* and *Hodge* supports Petitioners' merger argument.[17] It is not that the holding of either *Stott* or *Hodge* established a "legal standard for what counts as admission paperwork," but rather the very

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[16] 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).

[17] (**Ex. A** p. 8 n.1 ("[W]e do not think the phraseology in either *Hodge* or *Stott* was intended to become the legal standard for what counts as admission paperwork in nonspecific contracts across the state.").)

fact that the language that the Court of Appeals 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).

As the circuit court pointed out, the Arbitration Agreement was optional, i.e., agreeing to arbitration is not required to gain admission to the Facility. (R. pp. 15–16.) But all this means is that it did not have to be agreed to for Ms. Nanney 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 in fact agreed to. 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). Although not expressly relied in the Subject Opinion, this notion of voluntariness as evidence of intention contrary to merger was,

respectfully, wrongly relied on by the *Solesbee* Court, which the Court of Appeals cited in the Subject Opinion.

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 Arbitration Agreement's) sole reason for being. (*See* R. p. 151 (providing for arbitration of "any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident . . . ."); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at Facility . . . .").)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Ms. Nanney's relationship with the Facility: the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission. (*Compare* R. pp. 232–43 (setting forth the

terms of Ms. Nanney's admission to the Facility) *with* p. 151 (providing for arbitration of disputes arising out of Ms. Nanney'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 before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* R. p. 241 (providing "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* p. 151 (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.

Like the *Solesbee* Court, the Court of Appeals' finding against merger on the basis of the intention contrary to merger supposedly evidenced by choice of law provisions is erroneous. In the Subject Opinion, the Court of Appeals disagrees with Petitioners' contention that, essentially, both instruments provide that South Carolina law applies except where displaced by federal law, stating, "[t]hat is not so" because "[t]he Arbitration Agreement includes a statement that it '*is not subject to the South Carolina Uniform Arbitration Act* and shall be governed by the Federal Arbitration Act . . . , *notwithstanding any contrary provision of the Agreement or contrary state law*.'" (**Ex. A** p. 9 n.2 (emphasis added by the Court of Appeals).) Respectfully, the Court of Appeals overlooks or misapprehends the fact that the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (the "FAA"), applies to the Arbitration Agreement (and displaces South Carolina law) whether or

not the Arbitration Agreement says so because the FAA applies to any arbitration agreement involving interstate commerce and, without question, the Arbitration Agreement here does so. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (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."); *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); *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014) (expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA).

Moreover, and in any event, this provides no probative evidence of any intent contrary to merger because the circumstances would be exactly same if Admission Agreement had included an arbitration clause within in: In other words, the FAA applies (and displaces state law) whenever an arbitration agreement involves interstate commerce, and because this is so even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law, the fac that the FAA applies to the Arbitration Agreement cannot logically be deemed probative of an intent contrary to merger. Further still, even under the FAA, the general *state* law of contracts continues to apply, so it is not as if the applicability of the FAA completely removes South Carolina substantive law from the equation. *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). Even further, the Arbitration Agreement expressly calls for the arbitration proceedings to be conducted pursuant to the *South Carolina* ADR Rules. (R. p. 151.)

Additionally, the FAA requires arbitration agreements to be placed on equal footing with all other contracts under South Carolina law, and the purported presumption, relied on by the Court of Appeals, against arbitration where the party resisting arbitration is a nonsignatory violates the FAA.[18]

"[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate"[19] 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). To that end, the FAA provides that an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "By its terms, the [FAA] leaves no place for the exercise of discretion by a . . . court, but instead *mandates* that . . . courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis added); *see also* 9 U.S.C.

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[18] (**Ex. A** p. 5 ("'[B]ecause arbitration . . . exists solely by agreement of the parties, a presumption against arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate.' *Wilson v. Willis*, 426 S.C. 326, 337–38, 827 S.E.2d 167, 173 (2019).").)

[19] *Allied-Bruce*, 513 U.S. at 270.

§ 4 ("The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement*.") (emphasis added).

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." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (citing *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* . . . ." *Concepcion* at 339 (emphasis added); *see also 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).

The FAA requires arbitration agreements to be placed on equal footing with all other contracts under state law and prohibits courts from setting aside arbitration agreements based on state-law defenses "that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. Thus, 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. Petitioners are aware of no such general presumption under South Carolina law, and the Subject Order cites none. Indeed, where the *Wilson* Court itself referenced "a presumption *against* arbitration . . . where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate,"[20] it cited no South Carolina authority and the authority it did cite addressed arbitration in particular, not contracts generally. *Id.* ("*Global Pac., LLC v. Kirkpatrick*, 88 N.E.3d 431, 435 (Ohio Ct. App. 2017) ('Because no party can be required to submit to arbitration when it has not first agreed to do so, in a case where the party resisting arbitration is not a signatory to any written agreement to arbitrate, a presumption against arbitration arises.'); *cf. Comer v. Micor, Inc.*, 436 F.3d 1098, 1103–04 (9th Cir. 2006) (noting 'the general rule that a nonsignatory is not bound by an arbitration clause').") The supposed presumption against arbitration violates the FAA's equal footing rule and cannot be applied in this case.

Also like the *Solesbee* Court, the Court of Appeals' finding against merger on the basis of the intention contrary to merger supposedly evidenced by the supposed textual recognition of the Admission Agreement as being separate from the Arbitration Agreement[21] and the survival of the Arbitration Agreement after termination of the Admission Agreement is erroneous.[22] 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

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[20] 426 S.C. at 337–38, 827 S.E.2d at 173 (emphasis in original).

[21] (**Ex. A** p. 7 ("The two agreements in this case indicate a contrary intention. For example, the language of the Arbitration Agreement suggests some separation in identity between the two contracts. The Arbitration Agreement states that it 'shall survive any termination or breach of this Agreement *or* the Admission Agreement.'") (emphasis added by the Court of Appeals).)

[22] (**Ex. A** p. 8 ("Additionally, agreements that can be terminated separately do not always merge."); *id.* at. p. 9 ("The Arbitration Agreement could exist even if the Admission Agreement terminated; an intent for the agreements to function separately can easily be inferred from that fact.").)

Admissions materials . . . are made a part of this Agreement by reference." (R. p. 243.) 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*, so this cannot logically provide probative evidence on an intent contrary to merger. *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.").

Similarly, the fact, cited by the *Solesbee* Court, that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. The very nature of *merger* is to *merge* separate documents.

And—besides the fact, explained elsewhere, that there is no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement—to fall back on 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,[23] (a) it did so in dicta[24] and (b) it never addressed the logical inconsistency—which thus remains fair game as an argument in this case[25]—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

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

[24] *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, 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).

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

presumption to be completely overturned by evidence that is merely ambiguous, i.e., that does not even go so far as to clearly indicate a contrary intention and, indeed, is actually still susceptible to a reasonable conclusion in favor of merger. *See S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are *reasonably* susceptible of more than one interpretation.") (emphasis added).

Respectfully, like the circuit court's, the Court of Appeals' finding against merger relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent. It must be remembered that the presumption of merger arises only where the four elements of time, parties, purpose, and transaction coincide—as the all do here. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. If even one of these is lacking there is no merger. This is why, for the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). The merger presumption is "earned," so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

Respectfully, like the circuit court, the Court of Appeals 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 Ms. Nanney's admission to the Facility and would not have been done at all but for her admission to the Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent.

B. The Court of Appeals erred in not reaching the remaining issues/arguments regarding the merger/equitable estoppel argument.

As explained in the Subject Opinion, the Court of Appeals did not reach the remainder of the issues/arguments regarding the merger/equitable estoppel argument because of its finding that the Arbitration Agreement and the Admission Agreement did not merge. (**Ex. A** p. 10 ("Because these considerations control whether the Arbitration Agreement bound Betty, we decline to reach [Petitioners'] remaining issues on that point.").) Therefore, for the same reasons that the Court of Appeals erred in affirming the circuit court's finding that these instruments did not merge, it likewise erred in not reaching the Facility's equitable estoppel argument.

C. Had the Court of Appeals reached the remaining issues/arguments regarding the merger/equitable estoppel argument, as it should have, the Court of Appeals should have found that the circuit court erred in not finding Plaintiff equitably estopped to deny the enforceability of the Arbitration Agreement and that the circuit court erred in finding that the Arbitration Agreement lacks consideration and mutuality, erred in finding that the Arbitration Agreement lacks material terms, and erred in finding that the Arbitration Agreement is unconscionable.

All of these issues/arguments are fully addressed in Petitioners' briefs to the Court of Appeals, which are part of the record in these proceedings[26] and, in the interest of brevity,[27] are adopted and incorporated herein by reference.

II. At a minimum, the Court of Appeals erred in not finding that the circuit court erred in denying Petitioners' alternative request for limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability.

First off, the Court of Appeals erred in finding this argument abandoned as conclusory. As the Court of Appeals recognizes it is supported by legal authority, and this legal authority (regarding the substance of agency law concepts potentially relevant to Mr. Horn's authority) was important to cite so as to demonstrate the fact-intensive nature of these concepts. The argument that Petitioners briefed in this regard cannot reasonably be categorized as one in the nature of that found abandoned in *First Savings Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (describing issue deemed abandoned as one "fail[ing] to provide arguments or supporting authority"). Indeed, the Court of Appeals itself cites Mr. Horn's affidavit, which expressly contradicts his representation in the Admission Agreement of his authority to bind his mother, in

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[26] *See* Rule 242(e)(1), SCACR (providing that the appendix shall include, among other things, the parties' briefs to the Court of Appeals); *see also* Order No. 2020-05-29-02 (RE: Operation of the Appellate Courts During the Coronavirus Emergency) (S.C. Sup. Ct. filed May 29, 2020) (providing, in section (e), that "the necessary documents to comprise the Appendix will be obtained from the electronic records of the case before the Court of Appeals").

[27] *See* Rule 242(d)(4), SCACR (setting petitions for a writ of certiorari to twenty-five (25) pages)).

support of its reasoning in the Subject Opinion,[28] yet overlooks or misapprehends the fact that Mr. Horn's affidavit is unchecked by any deposition.

The Arbitration Agreement is valid on its face, containing Mr. Horn's express representation of her authority to bind his mother, Ms. Nanney. (*See* R. p. 151.) The only evidence that Mr. Horn lacked authority to bind Ms. Nanney is his own affidavit (filed just days before the hearing on the Facility's motion to compel arbitration (*See* R. pp. 244–52) contradicting his prior representation that he had authority to sign the Arbitration Agreement on his mother's behalf. Without this affidavit, Plaintiff would have no evidence to upset the facial validity of the Arbitration Agreement. In other words, the testimony presented via this affidavit constitutes the only evidentiary basis for the trial court's denial of the Facility's motion to compel arbitration, and the Facility has thus far been forced to take it at face value, without any opportunity to examine the affiants.

Assuming, *arguendo*, the trial court did not err in denying the Facility's primary request for relief (as argued above), the interests of justice required that it allow the Facility to conduct targeted discovery on the Arbitration Agreement's enforceability based on agency or related concepts. Otherwise, the Facility is left in the impossible Catch-22 of, on the one hand, being vulnerable to Plaintiff's argument that it has not presented sufficient evidence to prove the

[28] (**Ex. A** p. 4 ("According to a December 7, 2019 affidavit by Horn, he 'did not say [he] was [Betty's] agent' and 'made no statements as to [his] legal authority over [Betty].' Horn also swore that Betty was not present when he signed the forms and she made no representations about whether Horn was empowered to act on her behalf.").)

Arbitration Agreement is enforceable (whether by true agency,[29] estoppel,[30] or ratification,[31] each a fact-intensive inquiry), while, on the other hand, being vulnerable to Plaintiff's argument that it waived its arbitration rights by making use of the tools of litigation (i.e., discovery) to prove them.

It is manifestly unfair and unjust for the circuit court to rely on Mr. Horn's unchecked affidavit without allowing the Facility any opportunity to question him about it or otherwise follow pertinent evidentiary leads. The circuit court itself makes much of the validity of a disputed arbitration agreement being a matter for judicial determination and of it being the Facility's burden

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[29] 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).

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

[31] Authority can be supplied to an agent retroactively by express or implied ratification. *See Brazell Bros. Contractors v. Hill*, 245 S. C. 69, 74, 138 S.E.2d 835, 837 (1964) ("Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent."). "Ratification, as it relates to the law of agency, may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into on his behalf by another who at the time assumed to act as his agent." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S. C. 75, 89, 124 S.E.2d 602, 608 (1962). It is not necessary for a principal to be present at the time of the commission of his agent's act in order for him to ratify that act. *See State v. Waldrop*, 73 S. C. 60, 52 S.E. 793, 795 (1905) ("The presiding judge ruled that he could ratify the act of the agent, whether he was present or not, and in this we see no error.").

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

CONCLUSION

For the foregoing reasons, Petitioners ask this Honorable Court to grant the instant petition, to reverse the Subject Opinion (except insofar as Winn's appeal is concerned), and (again, except insofar as Winn's appeal is concerned) to issue an opinion that reverses the circuit court's denial of the Motion to Compel Arbitration and compels Plaintiff's claims against Petitioners to arbitration (or remands the case to the circuit court with instructions that it do so) or, alternatively, to the extent the Court is not inclined to grant Petitioners' primary requested relief, to issue an opinion that remands the case as may be appropriate for the Motion to Compel Arbitration (and/or this appeal of the denial thereof) to be properly decided, to include, without limitation, remand to the Court of Appeals to address the issues/arguments regarding the merger/equitable estoppel

argument that it did not reach or to the circuit court for limited discovery bearing on the issue of arbitrability (without waiving Petitioners' arbitration rights) and the circuit court's further consideration of the Motion to Compel Arbitration with the benefit of such discovery and argument thereon—again, with any opinion by the Court leaving the disposition of Winn's appeal (as set forth in the Subject Opinion) unchanged.

Respectfully submitted,

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