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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
Grace Gilchrist Knie, Circuit Court Judge

Case No. 2022-CP-42-01163
Appellate Case No. 2023-001612

Timothy Hutley, Guardian for Jane Doe,

Respondent,

v.

THI of South Carolina at Magnolia Manor Inman, LLC, THI of Baltimore, Inc., THI of South Carolina, LLC, Hunt Valley Holdings, LLC, THI of South Carolina at Inman, LLC, Murray Forman, and Kathy Scroggs, Individually,

Defendants.

Of which THI of South Carolina at Magnolia Manor Inman, LLC, THI of Baltimore, Inc., THI of South Carolina, LLC, and Hunt Valley Holdings, LLC, are the

Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in denying the Facility's[1] motion to compel Plaintiff's[2] claims to arbitration and, in turn, denying the Other Appellants'[3] corresponding motions to stay this lawsuit pending the outcome of the Facility's motion and any resulting arbitration between Plaintiff and the Facility?[4]

A. Did the circuit court err in rejecting the Facility's merger/equitable estoppel argument? More specifically, should the circuit court have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Jane Doe effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith—and, thus, granted the Facility's motion to compel arbitration and, in turn, the Other Appellants' motions to stay?

1. Is the circuit court's merger analysis erroneous?

(a) Did the circuit court err in relying on *Solesbee v. Fundamental Clinical and Operational Services,*

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[1] The "Facility" refers to Defendant/Appellant THI of South Carolina at Magnolia Manor–Inman, LLC (named in this action as "THI of South Carolina at Magnolia Manor Inman, LLC," i.e., without the dash), which is the sole licensee and operator of the skilled nursing facility known as Magnolia Manor Inman.

[2] "Plaintiff" refers to Plaintiff/Respondent, Timothy Hutley ("Mr. Hutley"), Guardian for Jane Doe.

[3] The "Other Appellants" refers to Defendants/Appellants THI of Baltimore, Inc. ("THIB"), THI of South Carolina, LLC ("THISC"), and Hunt Valley Holdings, LLC ("HVH"), collectively. Together, the Facility and the Other Appellants are referred to collectively as "Appellants."

[4] To be clear, out of an abundance of caution, this issue and the corresponding argument includes not only Appellants' challenge to the circuit court's denial of their respective principal motions but also their challenge to the circuit court's denial of reconsideration with respect to their respective principal motions.

***LLC*[5]—indeed, is the *Solesbee* Court's merger analysis itself erroneous—and should *Solesbee* control the disposition of this case?**

2. Is the circuit court's equitable estoppel analysis erroneous?

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 principles relating to the law of agency?

II. Out of an abundance of caution, to the extent that Appellants might somehow be prejudiced if this is not challenged on appeal, where the Facility admits that it is the sole licensee and operator of Magnolia Manor Inman and the Other Appellants deny that they manage, operate, or control any skilled nursing facility, including the Facility, or have ever delivered nursing care to any person, including Jane Doe, did the circuit court err in using the plural noun "Defendants" in referring to Magnolia Manor Inman as "Defendants' facility," and in any way otherwise that it might be said to have blurred distinctions between Appellants?

STATEMENT OF THE CASE

With the help of Mr. Hutley, her son, Jane Doe was admitted as a resident of the Facility on August 22, 2018. (Admission Agreement.) Mr. Hutley handled the paperwork in conjunction with the admission, and in so doing, he signed an Admission Agreement[6] and an Arbitration Agreement[7] on Jane Doe's behalf.

Plaintiff filed this lawsuit in the Spartanburg County Court of Common Pleas on March 31, 2022, alleging Appellants are liable for injuries Jane Doe

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5 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023).

6 (Admission Agreement.)

7 (Arbitration Agreement.)

suffered during her residency at the Facility. (Summons; Compl.; Am. Compl.; Expert Aff.) The Facility timely answered Plaintiff's operative complaint on May 18, 2022, denying the alleged liability, raising numerous affirmative defenses, and expressly reserving its right to compel arbitration, which it also raised as an affirmative defense. (Facility's Answer.) The Other Appellants also timely answered on May 18, 2022, denying the alleged liability and raising numerous affirmative defenses. (Other Appellants' Answers.)

On January 17, 2023, the Facility moved to compel Plaintiff's claims against it to arbitration based on the Arbitration Agreement Mr. Hutley signed on behalf of Jane Doe in conjunction with her 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] At the same time, the Other Appellants moved to stay the litigation pending the outcome of the Motion to Compel Arbitration and any resulting arbitration between Plaintiff and the

[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 [Jane Doe's] stay at [the] Facility, or to the provisions of care or services to [Jane Doe] . . . ." (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.").

Facility (collectively, the "Motions to Stay"). (Other Appellants' Motions to Stay; Other Appellants' Memos in Support of Motions to Stay.) Collectively, the Motion to Compel Arbitration and the Motions to Stay are referred to as the "Underlying Motions."

Following a hearing on March 1, 2023,[9] the circuit court, the Honorable Grace Gilchrist Knie presiding, denied the Underlying Motions by order filed May 15, 2023. (Formal Order filed May 15, 2023.)[10] Pursuant to Rule 59(e), SCRCP, on May 25, 2023, Appellants timely moved the circuit court to alter, amend, and/or reconsider its decision. (Appellants' Motion to Alter, Amend, and/or Reconsider.) The circuit court heard the motion on September 5, 2023,[11] and denied it by order filed September 13, 2023. (Order Regarding Defendants' Motion for Reconsideration.)

By notice served and filed October 12, 2023, and amended notice served and filed October 13, 2023, this appeal timely follows. (Notice of Appeal and Proof of Service; Am. Notice of Appeal and Proof of Service.)

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[9] (Transcript of Hearing on March 1, 2023.)

[10] The circuit court's formal order denying the Underlying Motions was preceded by a form order, filed March 21, 2023, announcing the court's decision and directing Plaintiff's counsel to submit a proposed formal order. (Form Order filed March 21, 2023.)

[11] (Transcript of Hearing on September 5, 2023.)

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 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 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 and, in turn, denying the Motions to Stay.

A. The circuit court erred in rejecting the Facility's merger/equitable estoppel argument. The circuit court should have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Jane Doe effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith—and, thus, granted the Motion to Compel Arbitration and, in turn, the Motions to Stay.

The relationship between the Motion to Compel Arbitration and the Motions to Stay is such that, as indeed reflected by the circuit court's principal order's primary focus on the Motion to Compel Arbitration, the denial of the Motion to Compel Arbitration dictated the denial (as moot) of the Motions to Stay. Accordingly, to show why the circuit court should have granted the Motion to Compel Arbitration is, in turn, to show why it should have granted the Motions to Stay. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with

such arbitration.") (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties.").

The core question here is this: Is the Arbitration Agreement (which Mr. Hutley signed for Jane Doe[12]) enforceable against Jane Doe—or, more precisely,

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[12] Out of an abundance of caution, Appellants include in this issue/argument their challenge to the circuit court's reference in its principal order to "Defendants" having "had" Mr. Hutley sign the Admission Agreement and Arbitration Agreement. (5/15/23 Order p. 2.) Although this reference is only in a background section of the court's order and does not actually purport to determine any factual issue, out of an abundance of caution, to the extent that it might potentially expose Appellants to any threat of prejudice going forward if they do not challenge it on appeal, Appellants object to any suggestion that Mr. Hutley was in any way required to sign the Admission Agreement or the Arbitration Agreement. Indeed, the Arbitration Agreement expressly states, "It is understood by Resident/Representative that he/she is not required to use the aforesaid Facility for Resident's healthcare needs and that there are numerous other health care providers in the State where the Facility is located that are qualified to provide such care to Resident" (Arbitration Agreement), and by virtue of his signature thereon, Mr. Hutley "is presumed to have read, understood, and assented to" the same. *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."). The Arbitration Agreement was optional and was not required as a condition of Jane Doe's admission to the Facility, and there is no evidence in the record to the contrary. *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."). Lastly, to the extent that the circuit court's use of "had" might suggest any duress, which is, of course, denied, duress is an affirmative defense to contract enforceability, *see* Rule 8(c), SCRCP ("[A] party shall set forth affirmatively the defense[] [of] . . . duress . . .

against Plaintiff, who brings this action on Jane Doe's behalf as her guardian—even though it was not signed by Jane Doe herself? The answer is yes. The Arbitration Agreement is enforceable against Plaintiff—or, more precisely, Plaintiff is estopped to deny that the Arbitration Agreement (and, for that matter, the Admission Agreement) is enforceable.

To be clear, the Facility's merger/equitable estoppel argument is a standalone argument. It does not depend on any showing of authority (actual or apparent or otherwise) on the part of Mr. Hutley or otherwise on the existence of any valid agreement per se. *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] . .

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and any other matter constituting an avoidance or affirmative defense."); *Gainey v. Gainey*, 382 S.C. 414, 428, 675 S.E.2d 792, 799 (Ct. App. 2009), that Plaintiff would have to have raised and proved, neither of which he did. (*See generally* Pl.'s Mem. in Opp'n to the Underlying Motions.)

. , 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 Jane Doe, and, in turn, Plaintiff (her guardian), 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 Jane Doe having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff (who stands in her shoes as her guardian) is now estopped to deny the enforceability not only of the Admission Agreement but also the Arbitration Agreement merged therewith. And by its very nature, i.e., because the Facility's argument in favor of direct benefits estoppel is based on the direct benefits Jane Doe received under the Admission Agreement (with which the Arbitration Agreement merged), this argument applies with equal force to estop Plaintiff, i.e., Jane Doe's guardian, from denying the enforceability of the Admission Agreement and 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 validity—e.g., that Mr. Hutley lacked authority to sign the

Admission Agreement/Arbitration Agreement on behalf of Jane Doe under the law of agency[13] and/or under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80 (the "AHCCA"),[14] and/or because Mr. Hutley lacked power of attorney over Jane Doe[15]—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 Admission Agreement/Arbitration Agreement is enforceable per se but whether Jane Doe, and, in turn, Plaintiff (her guardian), is estopped to deny its enforceability.

1. 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 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 [AHCCA], 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

[13] (*See* 5/15/23 Order pp. 3, 8–9 (referring to lack of express or apparent authority).)

[14] (*See* 5/15/23 Order p. 8 (referring to lack of authority under the AHCCA).)

[15] (*See* 5/15/23 Order pp. 2, 7–8 (referring to lack of power of attorney).)

> 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, 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).[16]

[16] The circuit court also erred in its reliance on the more recent case of *Solesbee*, 438 S.C. 638, 885 S.E.2d 144, which is separately addressed below.

The circuit court wrongly concluded that the Admission Agreement and the Arbitration Agreement are separate contracts that do not merge. (5/15/23 Order p. 7.) 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,"[17] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[18] there is evidence to upset the *presumption in favor of 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

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

[18] To be clear, *Coleman* unequivocally answers the question of whether the instant Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly 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).

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. 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."). No such inference can be drawn here. Indeed, under the circumstances, the very idea that there would have been an intention contrary to merger does not make sense.

Unlike the arbitration agreements at issue in *Coleman*, *Thompson*, and *Hodge*, all of which 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[19]),

[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

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 plain and ordinary meaning of the language "other Admissions materials" is such as to embrace the Arbitration Agreement. *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)).[20] And any notion that there is ambiguity in this regard is unsupported and erroneous.

[arbitration agreement] and the admission agreement, not a merger of the two contracts.") (emphasis added).

[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" 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

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required as a precondition of Jane Doe'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

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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 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. (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 [Jane Doe's] stay at [the] Facility, or to the provisions of care or services to [Jane Doe] . . . ."); *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 Jane Doe'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 Jane Doe's admission to the Facility) *with* Arbitration Agreement (providing for arbitration of disputes arising out of Jane Doe'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* 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 Agreement (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, 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 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 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 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 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

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[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, 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.

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. It must be remembered that 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 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 Jane Doe's admission to the Facility and would not have been done at all but for her admission to the Facility.

(a) The circuit court erred in relying on *Solesbee*, 438 S.C. 638, 885 S.E.2d 144[23]—indeed, most respectfully, the *Solesbee* Court's merger analysis is itself erroneous—and *Solesbee* should not control the disposition of this case.

During the pendency of this case, this Court decided *Solesbee*, wherein it affirmed the denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as the Facility's here. Indeed, the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*.

In affirming the 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

[23] (5/15/23 Order p. 7 (tracking the language of *Solesbee*, 438 S.C. at 648–49, 885 S.E.2d at 149, en route to the conclusion that "there was no merger in this case and Defendants' equitable estoppel argument is denied"); *id.* at pp. 8–9 ("Earlier this year our Court of Appeals issued an Order addressing the precise Resident/Representative Arbitration Agreement in the present case. . . . In *Solesbee*, the Court construed the agreement and relied on *Coleman* . . . ; *Hodge* . . . ; and *Thompson* . . . to rule the Arbitration Agreement in question in the present case was unenforceable. The critical circumstances are virtually identical and therefore the result is the same in the present case.").)

Facility's] equitable estoppel argument was properly denied.").)[24] Most respectfully, the circuit court erred in its reliance on *Solesbee*—indeed, the *Solesbee* Court's merger analysis is itself erroneous—and *Solesbee* should not control the disposition of the Underlying Motions.[25]

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." 438 S.C. at 648, 885 S.E.2d at 149. It is simply 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 p. 10.) And what the Arbitration Agreement actually states is this:

> The parties acknowledge and agree that, because the services and reimbursement thereof effects a

[24] To be clear, this 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/equitable estoppel argument.

[25] 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.

> 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.

(Arbitration Agreement.)

Without question, the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (the "FAA"), applies to the Arbitration Agreement,[26] as it does "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction"[27]—and this is so even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law. *See Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (The FAA "create[d] a body of federal substantive law," which is "applicable in state and federal courts."); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) ("[A]s a matter of substantive federal

[26] 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).

[27] *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363.

arbitration law, an arbitration provision is severable from the remainder of the contract."). Moreover, even under the FAA, the general state law of contracts continues to apply. *Allied-Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted). Further still, the Arbitration Agreement expressly calls for the arbitration proceedings to be conducted pursuant to the South Carolina ADR Rules. (Arbitration Agreement.)

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 indeed, even if the Arbitration Agreement had been included as a provision within the Admission Agreement itself, the FAA would still apply separately to the Arbitration Agreement. In other words, any difference between the governing law as to the Arbitration Agreement and the governing law as to the Admission Agreement would still exist even if the

Arbitration Agreement had been included as a provision within the Admission Agreement itself. Accordingly, the supposed difference in the governing law cannot support any reasonable inference of an 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 648–49, 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 it 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 concepts of "revocation" and "termination." A "revocation" is an annulment (i.e., making something a nullity),[28] whereas "termination" is putting or bringing something that properly exists to an end—which is materially different from making something a nullity, i.e., void and never having properly existed in the first place. *Id.* at p. 1482. And, again, that the

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

Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and it 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.

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 648, 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 whether they were 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 intention contrary to merger. Again, the very nature of *merger* is to *merge* multiple things together as one.

Finally, the *Solesbee* Court erroneously found against the Facility on merger on the basis that Arbitration Agreement was voluntary. 438 S.C. at 648, 885 S.E.2d at 149. While, again, it is certainly true that the Arbitration Agreement was voluntary, this fact 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. Again, 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 Mr. Hutley on Jane Doe'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 . . . .").)

Again, 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 the admission, the Arbitration Agreement providing for

arbitration of disputes arising out of the admission. (*Compare* Admission Agreement (setting forth the terms of the admission) *with* Arbitration Agreement (providing for arbitration of disputes arising out of the admission).)

Accordingly, the merger analysis in *Solesbee* is erroneous and incomplete, and it should not control the disposition of this case.

2. The circuit court's equitable estoppel analysis is erroneous.

The view of equitable estoppel reflected in the circuit court's denial of the Motion to Compel Arbitration 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 the 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 Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Jane Doe received direct benefits (in the form of her admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement 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).

The circuit court's statement that "there [i]s no evidence that Jane Doe did or said anything to mislead the [Facility] so as to support an argument of equitable estoppel"[29] is misplaced, as the direct benefits test does not require the Facility to have been misled. *Wilson* supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration case like this, and it instructs 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

[29] (5/15/23 Order p. 9.)

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.

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 nonsignatory 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 nonsignatory'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 this Court's decision in *Pearson* nor general notions of equity countenance,[30] much less call for, such a result.

Here, Jane Doe was a direct beneficiary. Indeed, to deny her 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* Am. Comp.)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Jane Doe received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment she received therein. Respectfully, the Court should have found that the Arbitration Agreement merged with the Admission Agreement and that Plaintiff is estopped to deny the Admission Agreement/Arbitration Agreement's enforceability, Jane Doe having

[30] *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.").

effectively embraced the contract with the Facility for the purpose of her admission and receipt of the benefits thereof.

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 principles relating to the law of agency.

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 principles relating to the law of agency.[31] [32] [33]

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[31] 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).

[32] "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).

This would entail, at the least, allowing the Facility to depose Mr. Hutley and to follow up on any pertinent evidentiary leads revealed by his 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 Mr. Hutley's agency (or related principles, such as agency by estoppel or ratification), which is a fact-intensive question, 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, Mr. Hutley's express representation of authority to bind Jane Doe. (Arbitration Agreement ("By his . . . signature below, the executing party [(i.e., Mr. Hutley)] represents that he . . . has the authority to sign on [Jane Doe's]

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[33] Moreover, 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.").

behalf so as to bind [Jane Doe] as well as [himself].").)[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. *See AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333, 339 (2011) (Under the FAA, "courts *must* place arbitration agreements on *equal footing with other contracts* . . . ."); *Kindred*

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[34] The Facility would note again here that, having signed the Arbitration Agreement, Mr. Hutley "is presumed to have, read, understood, and assented to its terms." *Gibson*, 426 S.C. at 352, 827 S.E.2d at 181 ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms."); *see also 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).

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)).

Principles relating to the law of agency may potentially provide an additional, independent basis on which to grant the Motion to Compel Arbitration and, in turn, the Motions to Stay. Their application is fact dependent, and the allowance of discovery—without the threat of waiver—into Jane Doe and Mr. Hutley's course of dealing and the potential creation of an agency relationship between them (or other potential bases for enforcement of the Arbitration Agreement under related principles) is only reasonable.

II. Out of an abundance of caution, to the extent that Appellants might somehow be prejudiced if this is not challenged on appeal, where the Facility admits that it is the sole licensee and operator of Magnolia Manor Inman[35] and the Other Appellants deny that they manage, operate, or control any skilled nursing facility, including the Facility, or have ever delivered nursing care to any person, including Jane Doe,[36] the circuit court erred in using the plural noun "Defendants" in referring to Magnolia Manor Inman as "Defendants' facility,"[37] and in any way otherwise that it might be said to have blurred distinctions between Appellants.[38]

Plaintiff's allegations regarding the Other Appellants' relationship to the Facility/Magnolia Manor Inman are very much in dispute,[39] and obviously, it would be improper, both procedurally[40] and evidentially,[41] for the circuit court to

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[35] (Facility's Answer to Am. Compl. ¶ 7 ("[T]this Defendant admits that it is the sole licensee and operator of the Facility . . . .").)

[36] (HVH's Answer to Am. Compl. ¶ 7 ("[T]his Defendant asserts that it does not manage, operate, or control any skilled nursing facility, including the Facility and has never delivered nursing care to any person, including Jane Doe."); THIB's Answer to Am. Compl. ¶ 7 ("[T]his Defendant asserts that it does not manage, operate, or control any skilled nursing facility, including the Facility and has never delivered nursing care to any person, including Jane Doe."); THISC's Answer to Am. Compl. ¶ 7 ("[T]his Defendant asserts that it does not manage, operate, or control any skilled nursing facility, including the Facility and has never delivered nursing care to any person, including Jane Doe.").)

[37] (5/15/23 Order p. 2.)

[38] (*See, e.g.,* Order filed July 10, 2023 p. 2 ("Decedent fell numerous times between May and December of 2019 after being assessed as a high fall risk by *Defendants*.") (emphasis added).)

[39] (*Compare* Am. Compl. ¶¶ 10–11 *with* HVH's Answer to Am. Compl. ¶ 7 *and* THIB's Answer to Am. Compl. ¶ 7 *and* THISC's Answer to Am. Compl. ¶ 7.)

[40] *See Worsley Companies, Inc. v. Town of Mount Pleasant*, 339 S.C. 51, 528 S.E.2d 657 (2000) ("If triable issues exist, those issues must go to the jury.").

weigh in on the dispute at this time. Accordingly, even though the circuit court does not actually purport to determine any factual issue in this regard, out of an abundance of caution, to the extent that it might potentially expose Appellants to any threat of prejudice going forward, Appellants object to the inclusion of any language in the circuit court's principal order that is inconsistent with the Facility's admission that it is the sole licensee and operator of Magnolia Manor Inman[42] and the Other Appellants' respective denials that they manage, operate, or control any skilled nursing facility, including the Facility, or have ever delivered nursing care to any person, including Jane Doe. (HVH's Answer to Am. Compl. ¶ 7; THIB's Answer to Am. Compl. ¶ 7; THISC's Answer to Am. Compl. ¶ 7.)

CONCLUSION

For the foregoing reasons, Appellants ask that the Court reverse the circuit court's denial of the Underlying Motions and compel Plaintiff's claims against the Facility to arbitration and stay this lawsuit as to the Other Appellants pending the outcome of arbitration between Plaintiff and the Facility (or to remand this matter to the circuit court with instructions that it do so); or, alternatively, reverse the circuit court's denial of the Underlying Motions and remand this matter to the circuit court for the additional discovery requested by the Facility to be conducted,

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[41] *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.").

[42] (Facility's Answer to Am. Compl. ¶ 7.)

for additional briefing to be submitted to the circuit court in light of such discovery, and for the circuit court to hear and decide the Underlying Motions anew with the benefit of the same; and, to the extent that it may be necessary to protect Appellants against any threat of prejudice going forward, reverse the circuit court so as to eliminate any language in the circuit court's principal order that is inconsistent with the Facility's admission that it is the sole licensee and operator of Magnolia Manor Inman and the Other Appellants' respective denials that they manage, operate, or control any skilled nursing facility, including the Facility, or have ever delivered nursing care to any person, including Jane Doe.

Respectfully submitted,

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