THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Calhoun County
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No. 2019-CP-09-00220
Appellate Case No. 2021-000700

Jeffery White,
individually and as Personal Representative
of the Estate of Lizzie White,

Respondent,

v.

St. Matthews Healthcare, LLC,
d/b/a Calhoun Convalescent Center,

Appellant.

FINAL BRIEF OF APPELLANT

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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?[3]

A. Did the circuit court err in rejecting the Facility's merger/equitable estoppel argument? More specifically, did it err in not finding (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Ms. White[4] effectively embraced and directly benefitted from the Admission Agreement, Plaintiff should be estopped to deny the enforceability of the Arbitration Agreement merged therewith?[5]

B. While recognizing the binding effect (on not only the circuit court but also this Court) of our Supreme Court's recent decision in *Arredondo v. SNH SE Ashley River Tenant, LLC*,[6] the Facility nonetheless wishes to preserve the following issue: Did the circuit court err in rejecting the Facility's argument that the Arbitration Agreement was validly executed by Ms. White's attorney-in-fact, Ms. Nunnally,[7] pursuant to the HCPOA?[8] [9]

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[1] The "Facility" is Defendant/Appellant, St. Matthews Healthcare, LLC, d/b/a Calhoun Convalescent Center, which is a skilled nursing facility.

[2] "Plaintiff" is Plaintiff/Respondent, Jeffery White, individually and as Personal Representative of the Estate of Lizzie White.

[3] This issue, and the corresponding argument, includes and challenges the circuit court's adverse rulings both with respect to the Facility's principal motion and with respect to its subsequent Rule 59(e), SCRCP, motion.

[4] "Ms. White" is the decedent, Lizzie White.

[5] This issue, and the corresponding argument, specifically includes and challenges, without limitation, the circuit court's errors in using the wrong test for equitable estoppel and in focusing its estoppel analysis on Plaintiff (i.e., Jeffery White), as opposed to on Ms. White herself.

[6] 433 S.C. 69, 856 S.E.2d 550 (2021).

[7] "Ms. Nunnally" is Ms. White's daughter Darlene Nunnally.

[8] The "HCPOA" is the South Carolina Health Care Power of Attorney that Ms. Nunnally held as to Ms. White.

[9] This issue, and the corresponding argument, specifically includes and challenges, without limitation, the correctness of the *Arredondo* decision.

STATEMENT OF THE CASE

With the help of Ms. Nunnally, Ms. White was admitted to the Facility in early June 2017. (*See* R. pp. 167-178; R. p. 34 ¶ 34.) In conjunction with Ms. White's admission to the Facility, Ms. Nunnally, who handled all the paperwork, and indeed was her mother's attorney-in-fact pursuant to the HCPOA,[10] signed an Admission Agreement[11] and an Arbitration Agreement[12] on Ms. White's behalf.[13]

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[10] (R. pp. 119-123.)

[11] (R. pp. 167-178.)

[12] (R. p. 118.)

[13] Without question, the Arbitration Agreement is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1–16 (the "FAA"). To begin with, it expressly states that the FAA applies (R. p. 118 ("The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the [FAA]")), and this must be enforced like any other contract term. *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 196, 844 S.E.2d 66, 70 (Ct. App. 2020) ("We first consider whether the FAA applies. We hold it does, for two reasons. First, the [subject contract] provides the parties 'specifically agree that this transaction involves interstate commerce.' We must enforce this agreement like any other contract term.") (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001) (finding FAA applied because parties had agreed contract involved interstate commerce)). Moreover, 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*, 343 S.C. at 538, 542 S.E.2d at 363; *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), and nursing home residency agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) ("Since the Supreme Court decided *Allied–Bruce*, many—if not all—federal and state courts have held that nursing home residency contracts similar to the one at issue here implicate interstate commerce and the FAA. Generally, these holdings center on a common theme: nursing home residency contracts usually entail providing residents

Ms. Nunnally signed both the Admission Agreement and the Arbitration Agreement as "'Resident's [(i.e., Ms. White's[14])] Durable Power of Attorney for Health Care'/'[Ms. White's] Legal Guardian'/'[Ms. White's] Responsible Party.'" (R. p. 167; R. p. 118.) By signing the Admission Agreement, Ms. Nunnally expressly acknowledged that the "promises and representations [she made therein were] in order to induce Facility to enter into th[e] Agreement" and that the "Facility [wa]s relying upon the truthfulness of the promises and representations [she] made." (R. p. 178.) By signing the Arbitration Agreement, Ms. Nunnally expressly "represent[ed] that . . . she ha[d] the authority to sign on [Ms. White's] behalf so as to bind [Ms. White] as well as [herself]." (R. p. 118.)

Alleging that Ms. White received deficient care/treatment during her residency at the Facility,[15] Plaintiff filed this wrongful death and survival action on December 16, 2019, in the Court of Common Pleas, Calhoun County. (*See* R. pp. 27-45.)[16]

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with meals and medical supplies that are inevitably shipped across state lines from out-of-state vendors. We likewise find the terms of the residency agreement implicate interstate commerce and, thus, the FAA.").

[14] Both the Admission Agreement and the Arbitration Agreement refer to Ms. White as "Resident." (R. p. 167; R. p. 118.)

[15] In particular, Plaintiff alleges Ms. White did not receive proper care with respect to the prevention and/or treatment of pressure ulcers. (*See* R. pp. 52-56 ¶¶ 7–8.)

[16] Subject to and without waiving its right to compel the matter to arbitration, the Facility timely answered Plaintiff's complaint, denying the material allegations against it and raising a number of affirmative defenses. (*See* R. pp. 57-70.)

Citing the Arbitration Agreement that Ms. Nunnally signed for Ms. White, the Facility moved to compel Plaintiff's claims to arbitration (the "Motion to Compel Arbitration"). (R. pp. 115-117; *see also* R. pp. 140-166.)[17]

The circuit court heard the Motion to Compel Arbitration on August 12, 2020, the Honorable Maite Murphy presiding. (*See generally* R. pp. 71-97.) By order filed November 24, 2020, the court initially granted the motion,[18] but thereafter, on Plaintiff's motion for reconsideration,[19] and following a hearing thereon on February 10, 2021,[20] the court reversed itself, granting Plaintiff's motion and, in turn, denying the Motion to Compel Arbitration by order filed

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[17] Without question, Plaintiff's claims against the Facility are within the scope of the Arbitration Agreement. The plain language of the Arbitration Agreement clearly embraces the subject matter of Plaintiff's claims. (*See* R. p. 118 ("It is the intention of the parties to this [Arbitration] Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of [Ms. White]."); R. p. 118 ("It is . . . understood that in the event 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 [Ms. White's] stay at [the] Facility, or to the provisions of care or services to [Ms. White] . . . and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration . . . .").) Moreover, 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).

[18] (R. pp. 1-15.)

[19] (R. pp. 185-194; *see also* R. pp. 195-196.)

[20] (*See generally* R. pp. 98-114.)

March 31, 2021. (R. pp. 16-23.) By order filed June 2, 2021, the court denied the Facility's motion for reconsideration. (R. pp. 24-26.)[21]

By notice served and filed July 1, 2021, this appeal timely follows. (*See* R. pp. 221-227.)

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 trial 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).

[21] Pursuant to Rule 59(e), on Monday, April 12, 2021, the Facility had timely moved the court to alter, amend, and/or reconsider its order filed March 31, 2021. (R. pp. 197-213.)

ARGUMENT

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

A. The circuit court erred in rejecting the Facility's merger/equitable estoppel argument. More specifically, it erred in not finding (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Ms. White effectively embraced and directly benefitted from the Admission Agreement, Plaintiff should be estopped to deny the enforceability of the Arbitration Agreement merged therewith.[22]

First off, to be clear, the Facility's merger/equitable estoppel argument is not an argument for the *enforceability* of the Arbitration Agreement but rather an argument for Plaintiff—as personal representative of Ms. White's estate—to be *estopped* from denying its enforceability. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Ms. White having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Arbitration Agreement merged therewith. Accordingly, any contention about the Arbitration Agreement's supposed lack of enforceability 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 Facility can show that the Arbitration Agreement is enforceable but

[22] Again, as noted above, this argument specifically includes and challenges, without limitation, the circuit court's errors in using the wrong test for equitable estoppel and in focusing its estoppel analysis on Plaintiff (i.e., Jeffery White), as opposed to on Ms. White herself.

whether it can show that Plaintiff should be estopped to deny that the Arbitration Agreement is enforceable—and, most respectfully, the Facility did so.

Re: Merger

Even though Ms. White is a nonsignatory to the Arbitration Agreement,[23] it is nonetheless enforceable against her estate, i.e., against Plaintiff.

South Carolina recognizes numerous theories under which a nonsignatory can be bound to an arbitration agreement. *See 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 (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel."); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel).

In *Coleman*, even though our Supreme Court found against merger on the *specific 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 AA under the Act, she is nevertheless

[23] For present purposes, the Facility assumes, *arguendo*, that (contrary to its position in respect of Issue/Argument I.B.) the Arbitration Agreement was not validly executed by Ms. Nunnally as Ms. White's attorney-in-fact pursuant to the HCPOA.

> equitably estopped to deny the AA's enforceability. The circuit court held there was no estoppel here, and we agree.
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> Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the AAs merged. In South Carolina,
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> > The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
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> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction*. *Unless there is a contrary intention, appellants are correct that there was a merger*.

407 S.C. 346, 354–55, 755 S.E.2d 450, 455 (2014) (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 or otherwise appreciated in) *Coleman* and its progeny, *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

The circuit court wrongly concluded that the Admission Agreement and the Arbitration Agreement are separate contacts that do not merge. (*See* R. p. 21 ("Here, this Court finds that the plain language of the facility admissions agreement and the arbitration agreement indicates that the agreements were to be construed independent of one another. The instruments are separately paginated, the facility admissions agreement contains an Entire Agreement clause, and the arbitration agreement was not a condition precedent to entry into Defendant's facility, whereas the facility admission agreement was a prerequisite to admission. This Court therefore finds no merger occurred between these two distinct instruments.").)

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,"[24] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[25] there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the contracting parties intended the instruments to

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

[25] To be clear, *Coleman* unequivocally answers the question of whether the 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).

be construed together as effectively one contract. This is a question of the parties' intention. *See 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. The circuit court's assertion that, "[t]he [*Coleman*] Court recognized . . . that certain factors support the separateness of documents, even to the extent the instruments were signed at roughly the same time,"[26] is overbroad and incorrect. Neither *Coleman* nor the other case the court cited in this regard, *Thompson*, sets forth "factors" of general application; rather, those decisions turn on case-specific facts analyzed in case-specific context.

For the merger presumption to actually mean anything, it cannot be upset based on mere conjecture, 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,

[26] (R. p. 20.)

it does not even make sense that the parties would not have intended the Admission Agreement and the Arbitration Agreement to merge.

Unlike the arbitration agreements at issue in *Coleman*, *Thompson*, and *Hodge*, 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. 118.) 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. 178.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[27]), 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. 178.) 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

[27] 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike in 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).

authorized representative, signed White Oak's *admission documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted).

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 Ms. White 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).

Moreover, while it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—and indeed, 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. pp. 118 (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 . . . ."); R. p. 118 ("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. White'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. 167-178 (setting forth the terms of Ms. White's admission to the Facility) *with* R. p. 118 (providing for arbitration of disputes arising out of Ms. White's admission in the Facility).)

Also absent here is the type of discrepancy the *Hodge* Court pointed out regarding 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. 176 (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* R. p. 118 (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 it is displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, the termination provisions provide no evidence of "separatedness." Again, the only reason for the Arbitration Agreement is the Admission Agreement—the only 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 agreements to arbitrate 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 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 multiple instruments are 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.

And 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, as a matter of law, *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. To allow the merger presumption to be upset based on evidence that is merely ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention, but at most might (or might not) reflect a contrary intention—is to allow the exception to devour the rule.

Respectfully, the circuit court's finding against merger relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130. It 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. White's admission to the Facility and would not have been done at all but for her admission to the Facility.

Re: Equitable Estoppel

The circuit court's view of equitable estoppel misapprehends our Supreme Court's decision in *Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel). The *Wilson* Court favorably discussed

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

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, *Ms. White*[28] received the benefit of her admission to the Facility, including,

[28] The circuit court focused its estoppel analysis on Plaintiff (i.e., Jeffery White) instead of on Ms. White, the actual resident of the Facility and the decedent whose estate is pursuing this action. (R. p. 22 ("In this case, Jeffrey White, as the

without limitation, the room, board, care, and treatment she received therein. Not even Plaintiff himself alleges that every single aspect of the residency (every meal, every instance of care/treatment delivered, essentially every moment at the Facility) was deficient. (*See* R. pp. 28-45.)

Respectfully, the circuit court should have found that the Arbitration Agreement merged with the Admission Agreement (the validity of which is not challenged[29]) and that Plaintiff is estopped to deny the Arbitration Agreement's enforceability, Ms. White having effectively embraced the contract with the Facility for the purpose of her admission and receipt of the benefits thereof only to later, via her estate, attempt to repudiate the Arbitration Agreement with which the Admission Agreement merged. If anything, this conclusion is all the more compelling given that, as the circuit court itself recognized in its original decision granting the Motion

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personal representative of his mother's estate, was not a signatory to the arbitration agreement Defendant has sought to enforce. While this does not end the inquiry, Defendant has also failed to establish any of the necessary elements in support of equitable estoppel. Defendant has provided no information about *Mr.* White's conduct in the context of his mother's admission the Defendant's facility, and therefore has failed to demonstrate how Plaintiff's action asserting his mother's legal rights is somehow contrary to equity. This Court therefore finds that Defendant has not met its burden of demonstrating that equitable estoppel should apply to *Mr.* White, and thus the doctrine is inapplicable in this case.") (emphasis added).) The court's analysis of estoppel in terms of Plaintiff (*Mr.* White), the personal representative of Ms. White's estate, is simply misplaced.

[29] Although the dispute here is about the Arbitration Agreement, as opposed to the Admission Agreement, to the extent there were any question about the enforceability of the Admission Agreement, the Facility's equitable estoppel argument applies with equal force to the Admission Agreement.

to Compel Arbitration, in signing the Admission Agreement and the Arbitration Agreement for Ms. White, Ms. Nunnally not only expressly represented to the Facility that she had all due authority to sign for her mother but also bolstered these representations by presenting the Facility with the HCPOA. (*See* R. pp. 1–2.)[30]

B. While recognizing the binding effect (not only on the circuit court but also on this Court) of our Supreme Court's recent decision in *Arredondo*,[31] the Facility nonetheless wishes to preserve the following argument: The circuit court erred in rejecting the Facility's argument that the Arbitration Agreement was validly executed on Ms. White's behalf by her attorney-in-fact.[32]

The FAA requires that arbitration agreements 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." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *see also Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (While a court may invalidate an arbitration agreement based on "generally applicable contract

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[30] In this regard the Facility notes that "one who," like Ms. Nunnally here, "has signed a contract is presumed to have read, understood, and assented to its terms." *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019). Additionally, there is, of course, an implied covenant of good faith and fair dealing in every contract, *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995), and Ms. Nunnally is no less bound by that covenant than the Facility.

[31] 433 S.C. 69, 856 S.E.2d 550.

[32] Again, as noted above in the statement of issues on appeal, this argument specifically includes, without limitation, the Facility's respectful contention that *Arredondo* was wrongly decided by our Supreme Court.

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).[33]

In *Kindred Nursing Centers*, the United States Supreme Court rejected Kentucky's "clear statement rule," which provided a power of attorney could not entitle a representative to enter into an arbitration agreement without specific language granting that authority. 137 S. Ct. at 1426–27. The Court explained, "Because that rule singles out arbitration agreements for disfavored treatment . . . it violates the FAA." *Id.* at 1425.

South Carolina law does not require an act to be specifically enumerated in a power of attorney in order for the agent to be authorized to perform the act on behalf of the principal. *See First S. Bank v. Rosenberg*, 418 S.C. 170, 181, 790 S.E.2d 919, 925–26 (Ct. App. 2016) (rejecting appellant's contention "that an agent cannot sign a guaranty on behalf of his principal pursuant to a power of attorney unless the power of attorney specifically authorized the execution because this assertion is unsupported by South Carolina law"). Accordingly, under the FAA's "equal footing" rule, a power of attorney does not need to explicitly refer to arbitration in order to grant the agent authority to execute an arbitration agreement

[33] Again, as explained above, without question, the Arbitration Agreement is governed by the FAA, and without question, Plaintiff's claims against the Facility are within the scope of the Arbitration Agreement.

as long as the powers granted are broad enough to include such an act. *Concepcion*, 563 U.S. at 339.

The HCPOA is a South Carolina Statutory Health Care Power of Attorney, *see* S.C. Code Ann. §§ 62-5-500 to -518 (the "Act"). In accordance with the Act, the HCPOA granted Ms. Nunnally broad authority:

> To take *any* other action necessary to making, documenting, and assuring implementation of decisions concerning [Ms. White's] health care, *including, but not limited to*, granting *any waiver of release from liability* required by any hospital, physician, nursing care provider or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and *pursuing any legal action* in [Ms. White's] name, and at the expense of my estate to force compliance with my wishes as determined by [Ms. White's] agent.

See § 62-5-504 (emphasis added).

The HCPOA explicitly granted Ms. Nunnally the authority to admit Ms. White to a skilled nursing facility and to take any actions necessary to assure implementation of her health care decisions, including: (i) pursuing legal actions, (ii) settling legal actions, (iii) waiving claims and liability, and (iv) forcing compliance with Ms. White's wishes.[34] No express limitation is placed upon these

[34] The matter of the forum for the enforcement of compliance with Ms. White's health care wishes, and the selection thereof, is directly related to the matter of forcing compliance with Ms. White's health care wishes. And, of course, to agree to settle litigation is to agree to forego the right to a jury trial.

broad powers; indeed, to the contrary, they are expressly stated to be *without limitation*. Ms. Nunnally was duly empowered under the HCPOA to sign the Arbitration Agreement on White's behalf. To read the HCPOA to the contrary is to employ an unduly restrictive reading of the HCPOA in violation of the FAA.

CONCLUSION

For the foregoing reasons, the Facility asks this Honorable Court to reverse the circuit court and to stay this lawsuit in favor of arbitration (or remand the case to the trial court with instructions for it to do so).

Respectfully submitted,

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April 4, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Calhoun County
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No. 2019-CP-09-00220
Appellate Case No. 2021-000700

Jeffery White,
individually and as Personal Representative
of the Estate of Lizzie White,

Respondent,

v.

St. Matthews Healthcare, LLC,
d/b/a Calhoun Convalescent Center,

Appellant.

APPELLANT'S CERTIFICATION FOR FINAL BRIEF

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I, Russell G. Hines, do hereby certify that the Final Brief of Appellant complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

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