THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2021-CP-15-00657
Appellate Case No. 2022-001242

Jennifer Rahn, as Personal Representative of the Estate of
Robert Ramsey.....Respondent,

v.

Priority Home Care, LLC and
St. George Health Care, LLC d/b/a St. George Healthcare Center.....Defendants,

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

FINAL BRIEF OF RESPONDENT

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INTRODUCTION

At its core, this Appeal presents a narrow issue that this Court, and the Supreme Court of South Carolina, have conclusively determined on numerous occasions in the recent past: whether a healthcare facility may bind a nonsignatory resident, or his estate, to an arbitration agreement when there is ambiguity as to whether the arbitration agreement and a separate facility admission agreement ever merged. In fact, in the past year this Court has previously looked at the exact same admission and arbitration agreements that are now presented to the Court by Appellant and held that the subject agreements did not merge and that the personal representative of a resident's estate would not be precluded by estoppel from denying the validity of the arbitration agreement if it was not signed by the decedent or a properly authorized representative. *See Estate of Solesbee by Bayne v. Fundamental Clinical and Operational Servs., LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023).

The Court's, and the Supreme Court's, prior decisions have clearly set forth that in order for a healthcare facility to rely on estoppel doctrines to prevent an estate from arguing that it would not be bound by an arbitration agreement signed by a third party, the admission and arbitration agreements must avoid any ambiguity in their terms that would indicate an intention contrary to merger. If a healthcare facility as drafter of the admission and arbitration agreements purposefully muddies the water and makes such terms unclear, presumably so that it may conveniently argue, depending on the circumstances, that the agreements are alternatively separate or merged, it has created an ambiguity that must be construed against the

healthcare facility as the drafter of the documents. This exact scenario is presented by the subject agreements, and that is exactly why this Court has previously looked at these exact same agreements and held that they do not merge, and that a resident (or his estate) as a nonsignatory of the agreements is not estopped from denying the arbitration agreement's validity. For these and the following reasons, the Circuit Court's Orders should be affirmed.

COUNTERSTATEMENT OF THE CASE

This action was commenced on November 4, 2021, by filing a Summons and Complaint in the Colleton County Court of Common Pleas. (R. pp. 17-23). Respondent Jennifer Rahn, as Personal Representative of the Estate of Robert Ramsey ("the Estate"), alleged that the decedent passed away after suffering numerous pressure ulcers while under the care of Appellant St. George Health Care, LLC, d/b/a St. George Healthcare Center ("the Facility"). (R. p. 20 ¶¶ 6-12). The Estate properly complied with the Notice of Intent and affidavit requirements of S.C. Code Ann. §§ 15-79-125 and 15-36-100 prior to filing suit.[1] The Facility answered the Complaint on December 15, 2021, and generally denied all allegations pertaining to any liability for the decedent's treatment while he was in the Facility's care. (R. pp. 26-31). The Facility raised as an affirmative defense the potential arbitrability of this action and reserved the right to file a motion to dismiss and compel arbitration. (R. p. 28 ¶ 10).

On March 7, 2022, the Facility filed a Motion to Compel Arbitration, arguing that a valid arbitration agreement had been entered between the parties. (R. pp. 47-

[1] *Rahn v. Priority Home Health LLC et al*, Case No. 2021-NI-15-00010.

49). The Facility contended that Rahn was the decedent's attorney-in-fact at the time she signed the Facility's admission and arbitration agreements on behalf of Robert Ramsey, such that she would have had authority to enter the agreement, and that the Federal Arbitration Act ("FAA"), as opposed to the South Carolina Uniform Arbitration Act, applied to the arbitration agreement.[2] (*Id.*). The Facility also requested that the Circuit Court stay all discovery, pretrial motions practice, and any requirements to file any responsive pleadings until its Motion could be resolved. (*Id.*).

The Facility's Motion was set for hearing by the Circuit Court on May 19, 2022. The Facility filed a supporting memorandum, with the arbitration agreement and admission agreement attached as exhibits, further arguing that the FAA governed the arbitration agreement, that arbitration agreements are favored and under state law are required to be placed on equal footing with all other contracts, that the arbitration agreement was not facially invalid or unconscionable, and that the Estate's claims were within the scope of the arbitration agreement. (R. pp. 50, 61-74, 90-101). In the alternative, the Facility argued that even if the arbitration agreement was not valid, that the arbitration agreement and admission agreement merged such

[2] The Circuit Court did not specifically find in its June 29, 2022 Order that the agreements involve or affect interstate commerce and are thus governed by the FAA. (R. pp. 1-13). The Facility did not raise the issue in its July 11, 2022 Motion for Reconsideration and it was never ruled upon by the Circuit Court, so the Facility's argument that the FAA applies to the arbitration agreement is not preserved for review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal"); *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006) (stating that an issue not ruled upon by the trial court must be raised in a Rule 59(e) motion to preserve it for review). Regardless, the FAA does not give "the party seeking arbitration a leg up" in determining whether arbitration should be compelled. *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 229, 847 S.E.2d 268, 271 (Ct. App. 2020).

that it would be inequitable for the Estate to be permitted to argue that the arbitration agreement was not valid. (R. pp. 74-86). Lastly, the Facility requested that the Circuit Court permit it to conduct limited discovery on the issue of agency if the Court were inclined to deny the Facility's Motion on the issue of agency. (R. pp. 86-88).

The Estate submitted a memorandum in opposition to the Facility's Motion, arguing in particular that in Rahn's individual capacity she did not have authority under any agency theory or other source of authority to enter the arbitration agreement at the time it was signed, that an executed health care power of attorney was not valid and even if it were it would not have granted her authority to enter the arbitration agreement, that the arbitration agreement and admission agreement were separate agreements that did not merge, that the Estate was not estopped from denying the validity of the arbitration agreement under any theory of estoppel, that the arbitration agreement did not reach the wrongful death claims of the wrongful death beneficiaries, and that additional discovery was not necessary as the power of attorney was facially invalid and no other source of authority existed. (R. pp. 194-217).

The Circuit Court denied the Facility's Motion by way of a formal Order filed June 29, 2022. (R. pp. 1-13). The Order finds that arbitration agreements are not favored and that the FAA, if applicable, only requires that a state court place an arbitration agreement on equal footing with any other contract governed by state law, that Rahn did not have authority to enter the arbitration agreement under common

law agency principles, a valid power of attorney, or the South Carolina Adult Health Care Consent Act, that the arbitration agreement and admission agreement did not merge, that the Estate was not estopped from denying that Rahn had authority to enter the arbitration agreement, that the wrongful death claims did not belong to the Estate, and that further discovery was not necessary for the Circuit Court to determine whether Rahn had authority to act on the decedent's behalf in executing the arbitration agreement. (R. pp. 1-13).

Notably, the Circuit Court did not rule on whether the FAA actually applied to the subject arbitration agreement. The Facility filed a Motion for Reconsideration on July 11, 2022. (R. pp. 289-311). In its Motion, the Facility contended that the Circuit Court had misapprehended the distinction between the Facility's merger/estoppel arguments and state law agency principles. (R. pp. 291-93). Further, the Facility argued that the Circuit Court's merger analysis was erroneous, that a theory of direct benefits estoppel would preclude the Estate from denying that Rahn had authority to enter the arbitration agreement, that the June 29, 2022 Order violated the FAA's "equal footing" rule, that the arbitration agreement would be enforceable against the wrongful death claims, and that discovery into the nature of the decedent and Rahn's relationship should have been permitted to determine if there was any evidence supporting an actual or apparent agency theory. (R. pp. 293-311). The Facility did not contest that Rahn did not in fact have authority to execute the arbitration agreement under any theory, and solely based its arguments on the issues of merger, estoppel,

whether the wrongful death claims were precluded from arbitration, and whether further discovery was necessary prior to a ruling on its Motion.

On July 19, 2022, the Estate filed a memorandum in opposition to the Facility's Motion for Reconsideration, arguing generally that the Facility had not raised any new issues for consideration, had not introduced any new evidence, and had not demonstrated how the Circuit Court had misapprehended any dispositive points in making its decision. (R. pp. 312-314). On August 3, 2022, the Circuit Court denied the Facility's Motion for Reconsideration. (R. pp. 14-16). This Appeal followed. (R. pp. 315-322).

STANDARD OF REVIEW

An appeal from an order denying a motion to compel arbitration is subject to de novo review. *Solesbee*, 438 S.C. at 645, 885 S.E.2d at 147. "Whether an arbitration agreement may be enforced against a nonsignatory to the agreement is a matter subject to de novo review by an appellate court" with no presumption in favor of arbitration. *Wilson v. Willis*, 426 S.C. 326, 335, 337, 827 S.E.2d 167, 172-73 (2019). Under de novo review, a circuit court's underlying factual findings will not be reversed on appeal if any evidence reasonably supports those findings. *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 228, 847 S.E.2d 268, 271 (Ct. App. 2020).

ARGUMENT

The Circuit Court's June 29, 2022 and August 3, 2022 Orders should be affirmed by the Court because they do not contain any clear legal errors, and the factual findings of the Circuit Court are reasonably supported by the evidence in the

record. Under this Court's precedents, the exact same arbitration agreement and admission agreement at issue have been previously found by this Court not to merge, and that a nonsignatory would not be precluded from denying the validity of the arbitration agreement.[3] And since the Facility has not contested the Circuit Court's finding that Rahn did not have authority, either by way of the Adult Health Care Consent Act, a valid power of attorney, or common law agency principles, to enter the arbitration agreement, it is now the law of the case, and the Facility can only argue that the Estate should have been estopped from opposing arbitration. *See Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case.").

The Facility also argues that the wrongful death claims are derivative in nature and belong to the Estate, and that the Circuit Court erred in denying its request to conduct limited discovery on the issue of agency. As to the first argument, it is not necessary for the Court to consider the issue since resolution of the merger/estoppel issue is dispositive. *See Hagood v. Sommerville*, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (declining to address an issue when the resolution of a

[3] The Facility argues in its Brief that the Circuit Court misapprehended the distinction between the issue of authority and the issue of estoppel, and that it erroneously failed to recognize that estoppel is a standalone argument that is independent of authority. The Circuit Court's Order clearly treats the issue of estoppel/merger separately from its analysis of authority, and even if the Circuit Court wrongly believed that the Facility was required to prove authority and merger/estoppel in order to prevail, it would have no practical significance because the Circuit Court correctly found that Rahn did not have authority to enter the arbitration agreement and that the arbitration agreement and admission agreement did not merge. The Facility's argument is somewhat irrelevant as well because the only issue before the Court on Appeal is whether the agreements merged such that the Estate should have been estopped from denying the validity of the arbitration agreement; the Facility has not appealed the Circuit Court's finding that Rahn did not have actual or apparent authority to enter the arbitration agreement.

prior issue is dispositive). As to the second, Facility has mooted its own argument by not contesting the Circuit Court's finding that Rahn did not have authority to enter the arbitration agreement. If the remaining parts of the Circuit Court's Orders were reversed, the Circuit Court's factual finding of no authority would still be valid, and there would be no need for discovery on the issue.

The Court may decline to affirm or reverse the Circuit Court on these last two issues, but even if it does not, the case law is clear that wrongful death claims do not belong to the decedent's estate, and since there is no evidence in the form of an affidavit or recorded power of attorney substantiating that Rahn was the decedent's agent, further discovery in the form of a deposition of Rahn would have been insufficient to prove agency. *See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 579, 813 S.E.2d 292, 311 (Ct. App. 2018) (finding that discovery would be futile where the only discoverable evidence on the issue of agency would have been the agent's testimony). For these and the following reasons, the Circuit Court's Orders denying Facility's motion to compel arbitration should be affirmed.

I. Statement of Facts.

On July 27, 2019, the decedent, Robert Ramsey, fractured his femur after falling at home while in the care of Defendant Priority Home Care. (R. pp. 20 ¶ 5, 24 ¶ 5). Due to the nature of his injuries, it was no longer advisable that Mr. Ramsey be left at home, and he was admitted to the Facility on August 9, 2019. (R. pp. 20 ¶ 6, 24 ¶ 6). Upon admission, an initial skin assessment noted several areas where Mr. Ramsey had skin tears, redness and blisters. (*Id.*). While in the Facility's care, the

wounds rapidly became necrotic and Mr. Ramsey began to experience severe and rapid weight loss. (R. pp. 20 ¶ 7, 25 ¶ 7). Additional pressure ulcers developed on his sacrum, hip, and heels, with the heel wound quickly becoming so severe that amputation was recommended. (R. pp. 20 ¶¶ 8-9, 25 ¶¶ 8-9). Mr. Ramsey passed away approximately one month later. (R. pp. 20 ¶ 12, 25 ¶ 12).

Mr. Ramsey executed a South Carolina health care power of attorney designating Rahn as his health care agent on August 25, 2016. (R. pp. 51-57). There is no evidence that a general durable power of attorney was ever executed by Mr. Ramsey. The health care power of attorney grants Rahn the authority to consent to medical care on Mr. Ramsey's behalf, to authorize his admission to a medical facility, and to take other actions **necessary** to making decisions concerning Mr. Ramsey's health care. (*Id.*). It does not contain a broad grant of authority empowering Rahn to do anything Mr. Ramsey may have done in situations concerning the provision of health care to Mr. Ramsey.[4] The Facility has not appealed the Circuit Court's finding that there was no evidence of any actual or apparent agency relationship between Rahn and Mr. Ramsey, it has not appealed the Circuit Court's finding that the health

[4] The Facility has never contested the Estate's position that the health care power of attorney was ineffective as a grant of authority to waive the Estate's right to a jury trial. (R. p. 2 n.1). The health care power of attorney, to the extent the Facility may have construed it as granting authority to agree to arbitration, would have been a general power of attorney. The subject power of attorney was executed prior to the enactment of South Carolina's Uniform Power of Attorney Act (S.C. Code Ann. §§ 62-8-101 through -403), so the previous version of the statute regarding the recording of powers of attorney, section 62-5-501, applies to the subject power of attorney. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 574 n.4, 828 S.E.2d 82, 85 n.4 (Ct. App. 2019). The subject power of attorney was never recorded as required by section 62-5-501. *See Timmons v. Starkey*, 380 S.C. 590, 593 n.2, 671 S.E.2d 101, 103 n.2 (Ct. App. 2008) ("S.C. Code Ann. § 62-5-501(C) . . . require[d] a durable power of attorney to be recorded to be effective, unless the authority of the attorney-in-fact relates solely to the person of the principal.").

care power of attorney was insufficient to grant authority to Rahn to enter an arbitration agreement on behalf of Mr. Ramsey, and it has not appealed the Circuit Court's finding that Rahn had no authority to execute the arbitration agreement, so these finding are the law of the case.[5]

Rahn signed the Facility's arbitration agreement and admission agreement on August 9, 2019. (R. pp. 50, 90-101). There is no evidence in the record that these agreements were entered at the same time and in the course of the same transaction, other than the fact they were entered on the same date. The admission agreement contains provisions regarding the Facility's obligations, Mr. Ramsey's obligations, and a financial agreement, as well as provisions regarding the termination of the admission agreement, governing law, and an entirety of agreement provision. (R. pp. 90-101). The admission agreement has its own signature page, is separately entitled "Admission Agreement – South Carolina", and is separately paginated as pages one through 12. (*Id.*).

The arbitration agreement sets forth that all claims arising out of or relating to the Facility's admission agreement are to be resolved by arbitration and provides the governing law for the arbitration agreement. The arbitration agreement has its own separate signature page, is entitled "Facility – Resident/Representative Arbitration Agreement", and is paginated as "Page 1 of 1". (R. p. 50). The Facility has acknowledged that the arbitration agreement is optional, and it contains no provision

[5] The authority conveyed by a principal to an agent to make health care decisions or handle finances does not encompass executing an agreement to arbitrate. *Hodge*, 422 S.C. at 572, 813 S.E.2d at 307.

for medical, nursing, or health care services to be provided to residents, nor does it require any financial commitment to pay for such services. Since it is undisputed that Rahn did not have authority to enter the arbitration agreement, the Court's analysis is confined to whether the Estate should have been precluded from denying the validity of the arbitration agreement under a merger/estoppel theory.

II. The Circuit Court correctly found that the arbitration agreement and admission agreement did not merge because they are governed by separate bodies of law, the contract terms recognize them as separate documents, they have separate procedures for termination, they are separately paginated and have their own signature pages, and the arbitration agreement was optional and not a precondition to admission.

Because arbitration exists solely by agreement of the parties, a presumption against arbitration arises where the party resisting arbitration (the Estate) is a nonsignatory to the written agreement to arbitrate.[6] *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173. State law provides when an arbitration agreement may be enforced against a nonsignatory, and South Carolina permits a nonsignatory to be bound by an arbitration agreement under several theories: incorporation by reference, assumption, agency, veil piercing/alter ego, and estoppel. *Solesbee*, 438 S.C. at 647, 885 S.E.2d at 148. Only two of these theories were at play before the Circuit Court, and the Facility has declined to appeal any issues concerning agency. Therefore, the Facility may only prevail if it can show there is no evidence reasonably supporting

[6] Rahn was acting in her individual capacity, and not in her capacity as personal representative of Mr. Ramsey's Estate, at the time she entered the arbitration agreement. *See Thompson v. Pruitt Corp.*, 416 S.C. 43, 61, 784 S.E.2d 679, 689 (Ct. App. 2016) (recognizing the concept that a person may act separately in individual and representative capacities).

the Circuit Court's finding that the Estate was not estopped from denying the validity of the arbitration agreement.

A nonsignatory may be estopped from denying the validity of an arbitration agreement when it receives a direct benefit from a contract containing an arbitration clause. *Solesbee*, 438 S.C. at 647, 885 S.E.2d at 148. It is undisputed in this case that the Facility's arbitration agreement was not a clause in its admission agreement, and neither Rahn nor the Estate have received any direct benefit from the arbitration agreement itself. The Facility thus argues that under a theory of merger, the arbitration agreement and the admission agreement became a unified contract once they were executed, and since Mr. Ramsey benefited from the terms of the admission agreement, his Estate is precluded from denying the validity of the arbitration agreement. However, the language and formatting of the agreements serve as evidence that the two agreements were intended to be separate documents, and at minimum, create an ambiguity as to merger that must be construed against the Facility.

> In South Carolina, "[t]he 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.

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (emphasis added). Here, there is no evidence in the record that the agreements were signed in the course of the same transaction and at the same time, so the Circuit

Court was not required to construe the documents together.[7] And even if there was such evidence, the terms of the agreements indicate an intent that the doctrine of merger would not apply to the agreements, and at minimum create an ambiguity as to merger. *See id.* at 355-56, 755 S.E.2d at 455 (stating that ambiguity as to merger must be construed against the drafter).

In determining whether a health care facility's admission and arbitration agreements merge, this Court has looked to the following factors: (1) whether the two agreements are governed by separate bodies of law, (2) whether the language of the agreements recognizes the two agreements as separate, (3) whether the agreements contain different terms regarding revocation and termination, (4) whether the agreements are separately paginated and have their own signature pages, and (5) whether both agreements are required for the execution of the other, or whether one agreement is optional. *Hodge*, 422 S.C. at 562-63, 813 S.E.2d at 302. This Court has previously analyzed the subject admission and arbitration agreements in *Solesbee* and found the agreements do not merge.

In *Solesbee*, the Court found that the admission agreement is governed by South Carolina law, while the arbitration agreement is governed by federal law. *Solesbee*, 438 S.C. at 648, 885 S.E.2d at 149. To be precise, the admission agreement is governed by "applicable Federal regulations" and South Carolina law. (R. pp. 90-101). The arbitration agreement, on the other hand, is governed by the FAA's statutes

[7] The Estate raises this argument as an additional sustaining ground presented by the record. *See Sims v. Amisub of S.C., Inc.*, 408 S.C. 202, 214, 758 S.E.2d 187, 194 (Ct. App. 2014) (citing Rule 220(c), SCACR).

and specifically not by South Carolina law.[8] Therefore, the two agreements are not governed by identical spheres of law: one is subject to state law and the federal code of regulations, while the other is only subject to the statutes contained within the FAA.

Second, the Court has previously found that the language of the agreements recognizes that they are separate: "The 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.'" *Solesbee*, 438 S.C. at 648-49, 885 S.E.2d at 149. This language mirrors that addressed in *Coleman* and *Thompson*, in which the Supreme Court and this Court found such language to be proof that an admission agreement was separate and did not merge with an arbitration agreement:

> The court then explained the evidence of the parties' intent to keep the two agreements separate by highlighting the admission agreement's recognition of the arbitration agreement as a separate document, i.e., "This Agreement, including all Exhibits hereto, and the Arbitration Agreement . . . ."

Thompson, 416 S.C. at 52, 784 S.E.2d at 685.

The Facility argues that the admission agreement's "Entire Agreement" clause contains language indicating that the agreements merged, specifically the statement that "[t]he undersigned further acknowledges that he/she has received and read the

[8] The Facility argues that both agreements are broadly governed by South Carolina and federal law; however, the arbitration agreement specifically states it will only be enforced under the FAA. To the extent that the arbitration agreement provides that the arbitration **proceedings** will be governed by the South Carolina Alternate Dispute Resolution/Mediation Rules, these Rules only govern the proceedings and are irrelevant to the enforcement of the arbitration agreement and the Court's determination of merger.

Admission Handbook and other Admissions materials and understand that these documents are made a part of this Agreement by reference **herein**." (R. p. 101) (emphasis added). Problematically, there is no evidence in the record that the arbitration agreement is part of the "Admissions materials" Rahn presumably received upon signing the admission agreement, and there is no evidence in the record that the arbitration agreement was executed at the same time as the admission agreement.[9]

The Facility wholly relies on dicta from prior decisions of this Court discussing that arbitration agreements can be part of admissions documentation to support that its arbitration agreement was an "Admissions material" that was incorporated into its admission agreement, but those decisions have no evidentiary value to this Appeal. Additionally, the "Entire Agreement" provision purports to incorporate the Admissions materials by reference within the admission agreement itself, but nowhere within the admission agreement, including the "Entire Agreement" provision, does it ever refer to the arbitration agreement. As noted by the Circuit Court, the "Entire Agreement" provision "creates at best an ambiguity as to merger when taken in context of the totality of the circumstances." (R. p. 4).

Third, the Court has found that the arbitration agreement contains no language indicating that it may be revoked or terminated, but the admission agreement provides that a resident may terminate the admission agreement at any time. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149. Fourth, the Court has found that

[9] *See supra* note 5 and accompanying text.

the agreements at issue are separately paginated and have their own signature pages. *Id.* Since the arbitration and admission contracts have different pagination with different signature pages, and the arbitration contract is entitled "Arbitration Agreement" at the top of its first page, these factors further indicate the drafter's intent for the arbitration agreement to stand by itself as an independent contract, at least when it suits the Facility for it to do so. *See Thompson*, 416 S.C. at 53 n.1, 784 S.E.2d at 685 n.1 (noting that a separately labeled arbitration agreement indicates the drafter's intent for the agreement to stand by itself as an independent contract). Lastly, the Court has found that the arbitration agreement is optional and voluntary, while the admission agreement is required for admission. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149. The Facility does not dispute in this case that the arbitration agreement is voluntary and optional.

In this case, the text of the agreements constitutes "actual evidence" and at minimum creates ambiguity as to whether the agreements merged. The Facility misconstrues that there is a legal presumption of merger, and that the above-discussed factors are not sufficient to overcome this presumption. However, the language of *Coleman* never states that there is a presumption of merger in the context of health care facility arbitration agreements, or that one interpretation as to merger or the other is favored in any way, and in fact the Court's precedents state that there is a presumption against merger when an arbitration agreement is attempted to be enforced against a nonsignatory. *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173. Instead, *Coleman* dictates that the Court can assume merger only if the agreements were

made at the same time, by the same parties, for the same purpose, and in the course of the same transaction, so long as there is no language or other indications within the agreements of a contrary intent.

The Facility cannot demonstrate through record evidence that the agreements were made at the same time and within the course of the same transaction, so the Court has no obligation to assume the documents merged. The fact that there is ample evidence that the agreements were drafted in such a manner that they could, if necessary, be construed as separate contracts only strengthens the Circuit Court's reasoning and cautions against a finding of merger. The language, pagination, and formatting of the admission agreement and arbitration agreement evince an intent for the agreements to be considered separate, presumably when such a position would work to the advantage of the Facility.

The Facility argues that this evidence is not "actual evidence", and that the Circuit Court's and this Court's former decisions were based on speculation. This begs the question of what else was the Circuit Court supposed to rely on to determine if there was an intent contrary to merger that could be gleaned from the agreements. Additionally, if the above-discussed evidence is not indicative of a contrary intent, and the Facility intended the documents to merge, then why hasn't it made the arbitration agreement a provision of the admission agreement, or merged the two documents with an explicit merger provision? Why make separate documents to begin with? The answer to these questions is that for certain purposes, the Facility and other skilled nursing facilities want the agreements to be separate. The language of

the agreements purposefully creates an ambiguity that must be construed against the drafter and required the Circuit Court to find that in this instance there was no merger of the documents. This Court has previously reached the same conclusion based on the same language and agreements. The Court should adhere to stare decisis and uphold its recent decision in *Solesbee* by affirming the Circuit Court's Orders.

III. Even if the arbitration agreement and admission agreement did merge, the Estate still would not be estopped from denying the validity of the arbitration agreement.

Equitable estoppel is "a theory designed to prevent injustice, and it should be used sparingly." *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177. Equitable estoppel is only available when the party seeking to invoke the doctrine "was misled to his injury". *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916 (2017). Even if Rahn did not have authority to enter the arbitration agreement, the Estate would have been estopped from denying its validity only if the Facility could have proven the elements of estoppel to the Circuit Court. The Facility failed to do so.

A. A theory of direct benefits estoppel does not preclude Rahn from denying the validity of the arbitration agreement.

A nonsignatory such as the Estate is estopped from refusing to comply with an arbitration clause "when it receives a direct benefit from a contract containing an arbitration clause." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000)). The direct benefits test is frequently used to determine whether a theory of estoppel is applicable within the arbitration

context. *Solesbee*, 438 S.C. at 647, 885 S.E.2d at 148. Here, the arbitration agreement is not a clause within the admission agreement, and the two agreements did not merge. However, even if the agreements did merge, the Facility cannot satisfy the remaining requirements of the direct benefits estoppel test.

Direct benefits estoppel precludes a nonsignatory from denying the validity of an arbitration **provision** of a contract if "(1) the nonsigner's claim arises from the contractual relationship, (2) the nonsigner has "exploited" other parts of the contract by reaping its benefits, **and** (3) the claim relies solely on the contract terms to impose liability. *Weaver*, 431 S.C. at 230, 847 S.E.2d at 272. Thus, even if the arbitration agreement and admission agreement merged, the Facility would still have to demonstrate that the Estate's negligence claims rely solely on the terms of the admission agreement to impose liability in order to benefit from a direct benefits estoppel theory.

The Estate has not asserted a breach of contract claim, or a violation of contractual duties, and instead has brought its lawsuit under a negligence theory arising from common law duties. *See Wilson*, 426 S.C. at 342, 827 S.E.2d at 176 (noting that a claim may rely on general principles of South Carolina law in addition to or to the exclusion of contractual rights). The Estate does not claim that the Facility breached a contractual duty created by the admission agreement, but that it breached a duty owed by all healthcare practitioners, regardless of any contractual agreements, not to negligently care for their patients. Any contractual duties between the decedent and the Facility are irrelevant as to whether the Facility breached common

law tort duties owed to the decedent. The Estate's claims rely on common law tort duties owed by the Facility to everyone and not solely on any provision of the admission agreement and as such, the claims do not rely solely on the contract terms to impose liability, and the Estate is not precluded by direct benefits estoppel from denying the validity of the arbitration agreement. *Weaver*, 431 S.C. at 232-33, 847 S.E.2d at 273-74.

Simply because the alleged conduct would not have arisen in the absence of the admission agreement (and Mr. Ramsey's admission to the Facility) does not mean that direct benefits estoppel is implicated.

> When a claim depends on the contract's existence and cannot stand independently – that is, the alleged liability "arises solely from the contract or must be determined by reference to it" – equity prevents a person from avoiding the arbitration clause that was part of that agreement. But "when the substance of the claim arises from general obligations imposed by state law, including statutes, torts, and other common law duties, or federal law," direct benefits estoppel is not implicated even if the claim refers to or relates to the contract *or would not have arisen "but for" the contract's existence*.

Wilson, 426 S.C. at 343, 827 S.E.2d at 176 (quoting *Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 637 (Tex. 2018)). Therefore, just because Mr. Ramsey benefited from the admission agreement by receiving "every night's stay, every meal, every amenity/service provided, every instance of care/treatement" as argued by the Facility, it does not mean that his Estate's tort claim against the Facility depends on the agreement's existence. This lawsuit is predicated on the breach of common law duties owed by the Facility to Mr. Ramsey, and would be justiciable even if Rahn did not have authority to enter the admission agreement.

Despite the Facility's contentions, the analysis does not stop and start with whether Mr. Ramsey, and thus his Estate, received any benefits from the admission agreement. There are other requirements that must be met before direct benefits estoppel is implicated. The Circuit Court correctly found that direct benefits estoppel was not applicable because the Estate's claims derive from common law duties and are not solely derived from contractual claims. (R. pp. 7-8). The Circuit Court also correctly found that since the documents did not merge, and the arbitration agreement was not a clause imbedded within the admission agreement, the Estate was not estopped from denying the arbitration agreement's validity. The Court should affirm the Circuit Court's finding that direct benefits estoppel is inapplicable under the facts of this case.

B. The Facility cannot demonstrate that a traditional theory of equitable estoppel would apply either.

The Facility argues that the Circuit Court's June 29, 2022 Order is erroneous because it also analyzes the facts under a traditional equitable estoppel theory and concludes that it would not apply either. The Facility contends that the Circuit Court incorrectly interpreted *Wilson* and should not have engaged in a traditional equitable estoppel analysis. According to the Facility, the direct benefits estoppel test is the only applicable test under the instant circumstances. There is no authority abolishing the traditional equitable estoppel approach within the arbitration context.

Wilson does not forbid the use of the traditional six-factor equitable estoppel test in arbitration cases. *See Wilson*, 426 S.C. at 340 n.9, 827 S.E.2d at 175 n.9 (declining to express an opinion on the applicability of the six-factor test). The

Supreme Court has endorsed its use in prior cases. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001). The Circuit Court appropriately found that in addition to a direct benefits estoppel theory, under the traditional six-factor test the Estate was not estopped from denying the arbitration agreement's validity either. The Facility has not raised on appeal the issue of whether the Circuit Court's traditional analysis was erroneous, and instead has only argued, contrary to *Zabinski*, that the traditional test does not apply in arbitration cases.

Regardless, the Circuit Court correctly applied the facts of this case to the traditional six-factor equitable estoppel test. "Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements." *Kelly v. Logan, Jollev & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that **the party to be estopped** (1) acted in a way amounting to a false representation; (2) intended that such conduct be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting the estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on the conduct of the party to be estopped. *Id.* The Circuit Court correctly found that the Facility could not demonstrate that Mr. Ramsey's Estate made any false representations as far as the arbitration agreement and admission agreement were concerned, because Rahn was

acting in her individual capacity, and not in a representative capacity on behalf of the Estate, at the time she signed the arbitration agreement.

The fact that Rahn signed the arbitration agreement in her individual capacity and is now a party to this action as a nonsignatory in her capacity as personal representative of the Estate does not bind the Estate to the arbitration agreement, at least as far as equitable estoppel is concerned. The Court addressed this concept in *Thompson v. Pruitt Corp.*:

> Respondent is attempting to use equitable estoppel against [the patient's] estate based on actions that [patient's daughter] took *in her individual capacity*. The fact that [the patient's daughter] is *now the personal representative for [the patient's] estate* is of no moment; we will not hold this circumstance against [the patient's] estate. Simply put, [the patient's] estate is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] estate, that has affected Respondent's position. This, too, is a necessary element of an equitable estoppel defense.

Thompson, 416 S.C. 43, 61, 784 S.E.2d 679, 689 (Ct. App. 2016). Likewise, there is no evidence in the record, nor were any arguments made to the Circuit Court, demonstrating that some conduct on the part of the Estate affected the Facility's position in a detrimental manner.

The Facility mistakenly believes that the Circuit Court, in requiring the Facility to demonstrate that it lacked knowledge and the means of knowledge of the truth concerning Rahn's authority, placed the Facility on unequal footing by imposing a burden on the Facility that does not exist under general contract law. To the contrary of the Facility's argument, this requirement is the fourth element of the traditional equitable estoppel test, and must be proved by all litigants asserting the

doctrine. In finding that the Facility should have known that Rahn may not have had authority to enter the arbitration agreement and that the Facility was a sophisticated entity with the ability to ascertain whether Rahn had a guardianship, valid power of attorney, or actual authority to enter the agreement, the Circuit Court was not unequally applying general contract law or placing a "heightened duty" on the Facility; it was simply analyzing the facts of the case under the specific elements of equitable estoppel, which require that every party asserting estoppel, in both arbitration and nonarbitration cases, must demonstrate that they did not have the means of knowledge of the truth of the facts in question. There is no evidence in the record demonstrating that the Facility did not have the means to determine whether Rahn had authority to enter the agreements.

The Circuit Court's Order does not create a policy which places the arbitration agreement on unequal footing with general contract law; it only finds that the Facility had not carried its burden of proving one of the requisite elements of the traditional equitable estoppel test, which is generally applicable to all actions. Since the Facility has not raised with specificity the issue of why the Circuit Court's six-factor analysis was erroneous, and instead has only asserted that the analysis placed the arbitration agreement on unequal footing with general contract law or was inapplicable to start with, the issue of the correctness of the Circuit Court's analysis is not preserved for review, and the Orders should be affirmed.

IV. The wrongful death beneficiaries' claims do not belong to the Estate.

The Court need not reach this issue as the previously addressed issues are dispositive to the resolution of this Appeal. However, even if a resident's estate was estopped from denying the validity of a facility's arbitration agreement, or if the arbitration agreement was valid, the wrongful death claims of the statutory beneficiaries would not strictly as a matter of law be subject to arbitration. South Carolina law is very clear that wrongful death claims belong to the statutory beneficiaries and are distinct and separate from survival claims belonging to the estate. *Bennett v. Spartanburg Ry. Gas and Elec. Co.*, 97 S.C. 27, 81 S.E. 189, 190 (1914). Wrongful death actions are brought by the personal representative of the decedent directly for the benefit of the statutory beneficiaries and include pecuniary loss, mental shock and suffering, grief and sorrow, and loss of companionship: all losses suffered by the beneficiaries themselves. S.C. Code Ann. §§ 15-51-10 and -20; *Self v. Goodrich*, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App. 1989). Survival actions, on the other hand, are separate claims for separate injuries, and belong to the estate, not the statutory beneficiaries. *See Bennett*, 97 S.C. at 27, 81 S.E. at 189-90.

The Facility argues that the wrongful death claims actually belong to the personal representative of an estate and not the statutory beneficiaries, and that the wrongful death claim is derivative of claims belonging to the decedent; ergo, a personal representative would have authority to waive jury trial rights belonging to all statutory beneficiaries. This argument mistakenly conflates the wrongful death

claim and survival claims.[10] The history and development of South Carolina's wrongful death and survival statutes show that wrongful death is something entirely different from the survival of tort claims after an individual's death. South Carolina courts have long recognized that these are two disparate theories of liability with distinct origins, purposes, and results. *See Grainger v. Greenville, S. & A. Ry. Co.*, 101 S.C. 399, 85 S.E. 968, 969 (1915). The statutory scheme shows wrongful death and survival are distinct claims accruing at different times and are governed by different statutes of limitation. *See* S.C. Code Ann. § 15-3-560(6).

Wrongful death claims are often erroneously perceived as derivative of survival claims. In both types of claims, the decedent's personal representative is the named plaintiff. *Complete Auto Transit, Inc. v. Bass*, 229 S.C. 607, 612, 93 S.E.2d 912, 914 (1956). However, this fact alone is not determinative of any derivative nature the wrongful death claim may have. When asserting wrongful death and survival claims, a personal representative "function[s] under two separate and distinct trusteeships." *Id.* In other words, while it is the personal representative's name in the caption for a wrongful death claim, "it is clear . . . the real parties to the action were the beneficiaries." *Claussen v. Brothers*, 148 S.C. 1, 145 S.E. 539, 541 (1928).

In light of the history and structure of wrongful death and survival claims, a number of other reported opinions have rejected the notion that the former is derivative of the latter. As early as 1907, the South Carolina Supreme Court recognized a wrongful death action is not the survival of an action which the deceased

[10] Rahn was obviously not personal representative of the Estate at the time she executed the arbitration agreement.

had in his lifetime, but is a "new cause of action." *Osteen v. Southern Ry., Carolina Division*, 76 S.C. 368, 57 S.E. 196, 200 (1907). *Claussen* held a wrongful death claim is "not a continuation" of any claim the decedent had before her death. *Claussen*, 145 S.E. at 540. And contrary to the Facility's assertion that wrongful death claims belong to the personal representative, *Claussen* states that "as has been pointed out, the party in whose favor the right of action in reality exists under Lord Campbell's Act **is not the personal representative of the deceased person**." *Id.* at 541 (emphasis added).

A wrongful death claim is "independent" of claims the decedent had during his life and "wholly different" than any other claim available at his death. *Wellman v. Bethea*, 243 F. 222 (E.D.S.C. 1917); *In re Mayo's Estate*, 60 S.C. 401, 38 S.E. 634, 638 (1901). Wrongful death and survival claims are "separable and distinct." *Keel v. Seaboard Air Line Ry.*, 122 S.C. 17, 114 S.E. 761, 762 (1922). In sum, the Facility would mislead the Court into finding that a wrongful death claim is derivative of survival claims and belongs to the personal representative, despite the fact that "[t]he object, scope, and measure of damages" is different for the two claims. *In re Mayo's Estate*, 38 S.E. at 638.

South Carolina's appellate courts have held wrongful death claims are "distinct," "independent," "separate," "wholly different," and "not a continuation" of claims a decedent could have filed during his lifetime. The Facility does not address any of the extensive South Carolina law showing wrongful death as a distinct, independent claim that solely belongs to the statutory beneficiaries. Instead, the Facility cites to federal case law to suggest South Carolina courts have already held

that wrongful death is a derivative claim. None of the authorities the Facility cites support that conclusion and none squarely address the question now before the Court.

The Facility claims the Supreme Court of South Carolina addressed the arbitrability of wrongful death claims in *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 759 S.E.2d 727 (2014). However, *Dean* addressed a very different issue related to forum selection clauses. *See id.* at 382, 759 S.E.2d at 733 (finding the "outcome of this appeal turns" on effect of arbitral forum provision). Plus, *Dean* did not even compel arbitration in the case before it. The Facility relies on a sentence in one of *Dean*'s footnotes but reads far too much into that sentence. *See id.* at 378 n.3, 759 S.E.2d at 731 n.3 ("We note that courts may not refuse to compel arbitration simply because a wrongful death claim is involved").

This footnote addressed an overly broad pronouncement in the appealed order suggesting wrongful death claims are categorically excluded from arbitration. *Id.* (citing circuit court order statement stating that "wrongful death actions are not something that's arbitrated"). That type of rule would violate the FAA's equal footing principle. *Id.* (citing *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532-33, 132 S. Ct. 1201, 1203-04, 182 L. Ed. 2d 42 (2012)); *see also Kindred Nursing Ctrs., Ltd. P'ship v. Clark*, 581 U.S. 246, 251, 137 S. Ct. 1421, 1426, 197 L. Ed. 2d 806 (2017). However, that is not the argument the Estate makes here. A wrongful death claim may be arbitrable in instances where the statutory beneficiaries agree to do so. Rahn simply argues an individual's consent to arbitrate may not be grafted into a wrongful

death claim that pays different people for different losses. *Dean* does not reject that argument or even consider it.

Moreover, the Facility incorrectly argues that the Circuit Court's Order violates the "equal footing" principle. Several other courts have held that rejecting arbitration for wrongful death claims in similar cases does not violate *Marmet* or any other Supreme Court precedent on the equal footing principle.[11] Refusing to compel arbitration here does not mean wrongful death claims can categorically never be arbitrated. Instead, as other courts have recognized, it simply means the Facility violated a generally applicable contract law rule by failing to prove it had consent for arbitration from all of the proper parties. Finally, reading *Dean*'s footnote to have any bearing on the parties' dispute does not adequately account for either side's arguments on the key issue. *Dean* had no reason to undertake this analysis and has nothing to offer the Court in resolving this Appeal.

The Facility also asks the Court to declare wrongful death a "derivative" claim based essentially on one sentence in *South Carolina Jurisprudence* that has been cited in various authorities. However, the Facility fails to direct the Court to the most pertinent entry. In a chapter devoted to wrongful death claims, a section entitled "[s]eparate, independent cause of action" notes the existence of two claims at the

[11] *See Carter v. SSC Odin Operating Co., LLC*, 976 N.E.2d 344, 360 (Ill. 2012) (unlike *Marmet*, Illinois was not applying a categorical anti-arbitration rule but was rather applying "common law principles governing all contracts"); *Vickers v. Canal Pointe Nursing Home & Rehab Ctr.*, 2016-Ohio-3244, 2016 WL 3080329 (Ohio App. June 1, 2016) (finding that Ohio Supreme Court precedent preventing arbitration of wrongful death claims did not create a categorical ban that would run afoul of *Marmet* because it applied generally applicable contract law rule against enforcing contract against person who had not assented).

tortious death of a person and, crucially, "**the wrongful death action and the survival action involve different, independent claims**." 28 S.C. Jur. *Wrongful Death* § 5 (emphasis added).

Finally, the Facility contends that, since S.C. Code Ann. § 15-51-10 permits wrongful death claims only when the decedent would have had a claim if he survived, then the decedent, or the estate's personal representative, has the authority to waive the statutory beneficiaries' right to a jury trial, citing *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939 (D.S.C. 1988) and *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 699 S.E.2d 143 (2010). However, *Quattlebaum* (and *Stokes*) did not address arbitration at all. Instead, they simply held that if an individual allows the statute of limitations on a personal injury claim to lapse during his life, then a wrongful death claim may not be used after his death to "revive" the stale claim. *Stokes*, 389 S.C. at 349, 699 S.E.2d at 146.

The statute of limitations is not at issue here and neither *Quattlebaum* nor *Stokes* have ever been cited as justification for binding nonsignatories to an arbitration contract. Plus, the legal authority holding that an individual may forfeit a wrongful death claim by ignoring or settling a personal injury suit during his life do not mean the individual, or someone acting on his behalf, may control the manner in which valid future wrongful death claims will be resolved. Several courts have made this distinction explicitly. Oklahoma, like South Carolina, bars a wrongful death suit if the decedent ended a personal injury claim during his lifetime based on the same wrongdoing. *Boler v. Sec. Health Care, L.L.C*, 2014 OK 80, 336 P.3d 468,

477 (Okla. 2014) (citing *Haws v. Luethje*, 1972 OK 146, 503 P.2d 871 (Okla. 1972)). Even so, the court in *Boler* refused to apply a nursing home resident's arbitration contract to a wrongful death claim because doing so would violate contract principles requiring mutual assent. *Id.* at 471.

Pennsylvania also bars wrongful death claims if the decedent allowed his personal injury claim to lapse. *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 657 (Pa. Super. Ct. 2013) (citing *Moyer v. Rubright*, 651 A.2d 1139 (Pa. Super. Ct. 1994)). Yet, just like Oklahoma, Pennsylvania does not extrapolate from that rule the notion that an individual can bind other wrongful death beneficiaries to arbitration. *Pisano*, 77 A.3d at 657, 662 (refusing to find wrongful death beneficiaries lost jury trial right "where they did not waive it of their own accord"). Thus, *Quattlebaum*'s, and by extension, *Stoke*'s, interpretation of section 15-51-10 does not necessarily require arbitration in this case. Had Mr. Ramsey settled any claims against the Facility before his death, or if the statute of limitations had lapsed on his claim, the Estate could not now bring a wrongful death claim on behalf of the statutory beneficiaries. But it does not follow that theoretically Rahn in her individual capacity had the ability to direct the wrongful death claim to arbitration on behalf of any remaining wrongful death beneficiaries.[12] Since Mr. Ramsey had a viable dispute with the Facility when he died, any proposed arbitration of the wrongful death claim must

[12] Ancillary to this argument is the issue of whether there is sufficient consideration for a health care facility's arbitration agreement to bind a nonresident signing in their individual capacity, but this issue is not properly before the Court.

consider whether all beneficiaries agreed to waive a jury trial. In short, none of the authorities cited by the Facility support that a wrongful death claim is derivative.

In light of the historical and structural differences between South Carolina's wrongful death and survival statutes, and the remedies afforded by them, as well as substantial case law defining and treating wrongful death and survival claims distinctly, the Court should reject the Facility's attempt to use Rahn's purported assent to the arbitration agreement to force arbitration on any remaining wrongful death beneficiaries. At least a dozen other jurisdictions have rejected Appellants' argument. *See FutureCare NorthPoint, LLC v. Peeler*, 143 A.3d 191, 209-10, 213 (Md. App. 2016); *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 494 n. 1 (Pa. 2016) (citing *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 660 (Pa. Super. 2013)); *Boler v. Sec. Health Care, LLC*, 336 P.3d 468, 477 (Okla. 2014); *Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc.*, 316 P.3d 607, 614 (Ariz. Ct. App. 2014); *Daniels v. Sunrise Sr. Living, Inc.*, 212 Cal. App. 4th 674, 151 Cal. Rptr. 3d 273 (2013); *Carter v. SSC Odin Operating Co, LLC*, 976 N.E.2d 344, 355-58 (Ill. 2012); *Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581 (Ky. 2012); *Woodall v. Avalon Care Center-Federal Way, LLC*, 231 P.3d 1252 (Wash. App. 2010); *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009); *Bybee v. Abdulla*, 189 P.3d 40 (Utah 2008); *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258, 1262 (Ohio 2007); *Chapman v. Cardiac Pacemakers, Inc.*, 673 P.2d 385 (Idaho 1983); *see also Strickholm v. Evangelical Lutheran Good Samaritan Soc'y*, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011). At best, even if the arbitration agreement was

valid, or if the Estate was precluded from denying its validity, it would only reach the Estate's survival claims. However, since it is not valid, the Circuit Court could not compel arbitration of the wrongful death or survival claims in this action, and its Order should be affirmed.

V. The issue of whether the Circuit Court erred in denying the Facility's alternative request for discovery on the issue of agency is moot because the Facility has failed to challenge the Circuit Court's finding on the issue of agency and it is now the law of the case.

The Facility lastly argues that at minimum the Circuit Court should have granted its request to conduct limited discovery on the issue of agency. This argument is moot. The Circuit Court in its Order found that Rahn did not have actual or apparent authority to enter the arbitration agreement. (R. pp. 3-5). The Facility did not challenge this finding in its Motion for Reconsideration, and it has not challenged this finding in its Brief. (R. pp. 289-311). Since the Facility has not challenged the Circuit Court's finding that Rahn did not have authority to enter the arbitration agreement, it has abandoned the issue, and it is now the law of the case that Rahn did not have authority. *See First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (stating that an unchallenged ruling is the law of the case).

Since it is the law of the case that Rahn did not have authority to enter the arbitration agreement, if the Court were to reverse the Circuit Court's findings and remand the case, the Facility's request to have limited discovery on the issue of agency would be moot, because the Facility can no longer argue that the arbitration agreement is valid under an agency theory, so any discovery on the issue would not

uncover evidence that would be probative of any fact in question. *See Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006) ("If there is no actual controversy, this Court will not decide moot or academic questions."). Further, there is no need for the Court to address this issue, as resolution of the prior issues will be dispositive of this Appeal. *See Solesbee*, 438 S.C. at 651, 885 S.E.2d at 151.

And even if the Court were to address the issue, the Circuit Court did not abuse its discretion in denying the Facility's request for discovery, as any theory of agency in this case would theoretically involve Mr. Ramsey's representations to the Facility, and he has passed away, precluding his deposition. *See Hodge*, 422 S.C. at 577, 813 S.E.2d at 310 ("Apparent authority occurs when the *principal* by written or spoken words . . .causes a third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him"). "A trial court's rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016).

The Facility had a copy of the only existing power of attorney granting any authority to Rahn, and it was available for the Circuit Court's review. Even if Rahn had her deposition taken, and she provided that she was Mr. Ramsey's agent, this would not be enough to prove agency. *Hodge*, 422 S.C. at 579, 813 S.E.2d at 311. And the Facility had the ability prior to its Motion to Compel Arbitration to undertake investigative efforts to ascertain whether any other valid power of attorney had ever been publicly recorded, and whether Rahn or Mr. Ramsey ever made any

representations to the Facility's employees concerning authority. The Circuit Court correctly denied the Facility's request for limited discovery, as further discovery would have been futile.

CONCLUSION

For the foregoing reasons, the Court should affirm the Circuit Court's Orders denying the Appellant's Motion to Compel Arbitration.

Respectfully submitted,

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