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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Case No. 2020-CP-23-01728
Appellate Case No. 2022-000398

Debbie Stroud,
Guardian ad Litem for James C. Stroud,

Respondent,

v.

THI of South Carolina at Greenville, LLC
d/b/a Magnolia Manor-Greenville,
THI of Baltimore, Inc., and
THI of South Carolina, LLC,

Appellants.

APPELLANTS' PETITION FOR REHEARING

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By and through their undersigned counsel, pursuant to Rule 221(a), SCACR, the Facility[1] and the Other Appellants[2] (collectively, "Appellants") hereby petition this Honorable Court for rehearing of this matter, which it decided via Unpublished Opinion No. 2024-UP-084 (S.C. Ct. App. filed March 20, 2024) (the "Subject Opinion"), affirming the circuit court's denial of the Facility's motion to compel arbitration of Plaintiff's[3] claims and the Other Appellants' corresponding motions for a stay. As explained below, Appellants most respectfully contend that the Court misapprehended or overlooked a number of material points.

BACKGROUND

With Mrs. Stroud's help, Mr. Stroud was admitted as a resident of the Facility in March of 2017 and later readmitted to the Facility in October of 2018, following a two-week hospital stay. Mrs. Stroud handled the paperwork both times, and both times she signed an Admission Agreement[4] and an Arbitration Agreement[5] on Mr. Stroud's behalf.

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

[2] The "Other Appellants" refers to Defendants/Appellants THI of Baltimore, Inc., and THI of South Carolina, LLC, collectively.

[3] "Plaintiff" refers to Plaintiff/Respondent, Debbie Stroud ("Mrs. Stroud"), as guardian ad litem for her husband, James C. Stroud ("Mr. Stroud").

[4] (R. pp. 163–186.) The Admission Agreement that Mrs. Stroud signed in 2017 is the same as the one she signed in 2018. Hereinafter, for the sake of convenience, this petition simply refers to "the" Admission Agreement, in the singular.

Representing to the Facility that she was authorized to act on behalf of Mr. Stroud, Mrs. Stroud identified herself as Mr. Stroud's attorney-in-fact pursuant to a Durable Power of Attorney (the "Power of Attorney"), a copy of which she provided to the Facility at the time of Mr. Stroud's admission. (R. p. 83:2–3, pp. 96–115, p. 189.) But unbeknownst to the Facility—and although it grants Mrs. Stroud broad authority over Mr. Stroud's affairs, to expressly include over his legal affairs, indeed, to expressly include the power to "arbitrate" on his behalf—the Power of Attorney contains a provision, located near the end, that prohibits Mrs. Stroud from entering into arbitration agreements on Mr. Stroud's behalf and disavows any other provision to the contrary.[6]

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[5] (R. p. 95, p. 187.) The Arbitration Agreement that Mrs. Stroud signed in 2017 is the same as the one she signed in 2018. Hereinafter, for the sake of convenience, this petition simply refers to "the" Arbitration Agreement, in the singular.

[6] All told, the Power of Attorney is 20 pages long. (R. pp. 96–115.) The provision that prohibits Mrs. Stroud from entering into arbitration agreements on Mr. Stroud's behalf and disavows any other provision to the contrary does not begin until page 14. It is in Article VII(6), and it states, "[n]otwithstanding any provision herein to the contrary . . . I reserve unto myself and do not grant unto my Attorney in Fact the power to waive my right to jury trial and enter into Arbitration Agreements. I do not favor Arbitration, and for that reason I do not grant unto my Attorney in Fact the power to enter Arbitration Agreements." (R. pp. 109–110.) Earlier, however, on page 5, in Article I(12), headed "Power with Respect to Legal and Other Actions" (R. p. 100 (original bold print and underlining omitted)), the Power of Attorney expressly states that Mrs. Stroud has the power to "arbitrate" on Mr. Stroud's behalf. (R. p. 100 (granting Mrs. Stroud the power "[t]o institute, supervise, prosecute, defend, intervene in, abandon, compromise, *arbitrate*, settle, dismiss, and appeal from *any and all* legal, equitable, judicial or administrative hearings, actions, suits, proceedings, attachments, arrests or distresses, *involving [Mr. Stroud] in any way* . . .

Besides the Power of Attorney, Mrs. Stroud also represented herself to the Facility as authorized to act for Mr. Stroud via the Admission Agreement and the Arbitration Agreement. Mrs. Stroud signed both the Admission Agreement and the Arbitration Agreement as "'Resident's[7] Durable Power of Attorney for Health Care'/'Resident's Legal Guardian'/'Resident's Responsible Party.'" (R. p. 95, p. 163, p. 175, p. 187.) In signing the Admission Agreement, Mrs. Stroud "verifie[d] that all information submitted to [the] Facility . . . is true and correct"[8] and expressly acknowledged that the "promises and representations [she made therein were] in order to induce [the] Facility to enter into this Agreement" and that the "Facility [wa]s relying upon the truthfulness of the promises and representations [she] made." (R. p. 174, p. 186.) And in signing the Arbitration Agreement itself, Mrs. Stroud

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."') (emphasis added).) Additionally, on page 3, in Article I(6), headed "Power to Operate Businesses" (R. p. 98 (original bold print and underlining omitted)), the Power of Attorney expressly states that Mrs. Stroud has the power "to defend, *submit to arbitration*, settle or compromise any action or other legal proceeding to which [Mr. Stroud is] a party because of [his] membership in [a] partnership." (R. p. 98 (emphasis added).) Also on page 3, in Article I(8), headed "Power to Demand and Receive" (R. p. 98 (original bold print and underlining omitted)), the Power of Attorney expressly states that Mrs. Stroud has the power "[t]o demand, *arbitrate*, settle, sue for, collect, receive, deposit, expend for [Mr. Stroud's benefit] benefit, reinvest or make such other appropriate disposition of as [Mrs. Stroud] deems appropriate, all cash, rights to the payment of cash, property . . . rights and/or benefits to which [Mr. Stroud is] now or may in the future become entitled . . . ." (R. p. 98 (emphasis added).)

7 Mr. Stroud is the referenced "Resident."

8 (R. p. 163, p. 175.)

expressly "represent[ed] that . . . she ha[d] authority to sign on [Mr. Stroud's] behalf so as to bind [him] as well as [herself]." (R. p. 95, p. 187.)

Plaintiff commenced this action in the Greenville County Court of Common Pleas on March 19, 2020, alleging Appellants are liable for money damages because of deficient care/treatment Mr. Stroud received during his residency at the Facility. (R. pp. 15–25.)

On February 12, 2021, the Facility moved to compel Plaintiff's claims against it to arbitration based on the Arbitration Agreement (the "Motion to Compel Arbitration"),[9] and the Other Appellants moved to stay this lawsuit pending the outcome of the Motion to Compel Arbitration and of any resulting arbitration between Plaintiff and the Facility, i.e., until the issue of arbitrability is finally

[9] (R. pp. 93–94, pp. 125–162.) Without question, Plaintiff's claims against the Facility are within the scope of the Arbitration Agreement. (R. p. 95, p. 187 ("[A]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 [Mr. Stroud's] stay at [the] Facility, or to the provisions of care or services to [Mr. Stroud], including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively 'Disputes'), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration . . . .").) This plain language clearly embraces the subject matter of Plaintiff's claims against the Facility, but even if there were "any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration . . . ." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) ("[U]nless the court can say with positive assurance that the arbitration clause is not

determined and any arbitration proceedings resulting from that determination are themselves finally concluded (collectively, the "Motions to Stay"). (R. pp. 116–119.)[10] Together, the Motion to Compel Arbitration and the Motions to Stay are referred to collectively as the "Underlying Motions."

Following a hearing on the Underlying Motions on June 29, 2021, the circuit court, the Honorable Alex Kinlaw, Jr., presiding, directed counsel (i.e., all counsel, Plaintiff's and Appellants') to submit proposed orders, which they did. (R. pp. 1–3, pp. 52–92, pp. 188–213.) The circuit court then denied the Underlying Motions by order filed August 17, 2021. (R. pp. 4–13.) On August 27, 2021, pursuant to Rule 59(e), SCRCP, Appellants timely moved the circuit court to alter, amend, and/or reconsider its decision. (R. pp. 214–228.) The circuit court denied the motion by order filed March 1, 2022. (R. p. 14.)

By notice served and filed March 30, 2022, this appeal timely follows. (R. pp. 229–235.) In due course, the appeal was briefed and made ready for decision and decided without oral argument via the Subject Opinion, filed March 20, 2024.

This petition for rehearing timely follows.

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susceptible to an interpretation that covers the dispute, arbitration should be ordered.").

[10] Prior to making the Motion to Compel Arbitration, the Facility timely answered Plaintiff's complaint, denying the alleged liability, raising a number of affirmative defenses, and expressly reserving its right to compel arbitration. (R. pp. 26–35.) The Other Appellants likewise timely answered Plaintiff's complaint before making the Motions to Stay. (R. pp. 36–51.)

STANDARD OF REVIEW

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

ARGUMENT

I. Most respectfully, the Court erred in affirming the circuit court's denial of the Motion to Compel Arbitration and, in turn, the Motions to Stay.

A. Like the circuit court,[11] this Court mistakenly viewed the Power of Attorney as dispositive of the Motion to Compel Arbitration and, in turn, the Motions to Stay,[12] and the Court has erred by

[11] (R. p. 12 ("The actual language of the Power of Attorney . . . is dispositive.").)

[12] (Subject Opinion ("We hold the circuit court did not err by denying the Facility's motion to compel arbitration because the power of attorney document expressly reserved the power to waive a jury trial to James, thus restricting Debbie

> **not addressing (a) Appellants' threshold argument that the circuit court erred in finding the language of the Power of Attorney dispositive and (b) Appellants' other arguments, including especially, but not limited to, the merger/equitable estoppel argument,[13] which is a standalone argument that should prevail regardless of whether Mrs. Stroud had the authority under the powers granted to her in the Power of Attorney to bind Mr. Stroud to arbitration.**

The Facility duly raised its merger/equitable estoppel argument to the circuit court in support of the Motion to Compel Arbitration,[14] and this argument is unscathed by the language in the Power of Attorney disallowing Mrs. Stroud authority to agree to arbitration on Mr. Stroud's behalf. Conceptually, the Facility's merger/equitable estoppel argument is not an argument for the *enforceability* of the Arbitration Agreement but rather for Mr. Stroud and, in turn, Plaintiff, his guardian ad litem, who is proceeding on his behalf, to be *estopped to deny the enforceability* of the Arbitration Agreement. *See Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354, 755 S.E.2d 450, 455 (2014) ("Appellants contend that *even if* Sister lacked capacity to execute the [arbitration agreement] under the [Adult Health Care Consent] Act, she is *nevertheless equitably estopped*

Stroud (Debbie) from entering into arbitration agreements on James's behalf. Thus, the arbitration agreement Debbie signed as power of attorney for James is not valid or enforceable.").)

[13] (Subject Opinion ("Based on the foregoing, we also hold the circuit court did not err by failing to grant Appellants' motions to stay. Moreover, because we find the Arbitration Agreement not valid or enforceable, we decline to reach the Facility's remaining arguments.").)

to deny the [arbitration agreement's] enforceability.") (emphasis added). In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and because Mr. Stroud effectively embraced and directly benefitted from the Admission Agreement, Plaintiff (who stands in place of Mr. Stroud) is estopped to deny the enforceability of the Arbitration Agreement merged therewith. Accordingly, any contention about the Arbitration Agreement's supposed lack of enforceability (whether because of Mrs. Stroud's lack of authority per the language of the Power of Attorney or because of another alleged defect in contract formation) 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 showed that the Arbitration Agreement is enforceable but whether it showed that Plaintiff should be estopped to deny that the Arbitration Agreement is enforceable—and, most respectfully, the Facility did so. Indeed, Plaintiff's responsive brief contains no argument to the contrary, only the mistaken contention that the Power of Attorney "is dispositive, [so] Appellants' arguments about merger simply do not apply,"[15] which, again, is simply not so.

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[14] (R. pp. 58:12–59:14, pp. 64:19–77:7, pp. 84:18–89:19, pp. 146–156, pp. 205–211.)

[15] (*See* Br. of Respondent p. 8; *see also id.* pp. 4–11 (revealing no argument against the Facility's merger/equitable estoppel argument other than the mistaken contention that the Facility's merger/equitable estoppel argument does not apply because the Power of Attorney is dispositive).)

Like the circuit court, this Court has mistakenly viewed the Power of Attorney as dispositive of the Motion to Compel Arbitration and, in turn, the Motions to Stay.[16] Indeed, the Court has erred in not addressing Appellants' threshold argument that the circuit court erred in finding the language of the Power of Attorney dispositive,[17] and the Court should address this argument now. And based upon the mistaken view that the Power of Attorney is dispositive, the Court

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[16] The relationship between the Motion to Compel Arbitration and the Motions to Stay is such that, insofar as the circuit court was concerned, the denial of the former mooted the latter. The fates of these motions are likewise intertwined in this Court: If the Motion to Compel Arbitration was properly denied, so too were the Motions to Stay, but if the Motion to Compel Arbitration should have been granted—and, respectfully, it should have—so too should have the Motions to Stay. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, *upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.") (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties."); *see also Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) ("The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement."). Accordingly, to show that the circuit court erred in denying the Motion to Compel Arbitration is also to show that the circuit court erred in denying the Motions to Stay, which are not properly viewed as moot but rather should have been granted along with the Motion to Compel Arbitration.

[17] (*See* Final Br. of Appellants pp. 1, 9–10; Final Reply Br. of Appellants pp. 1–3.)

has erred by not addressing Appellants' other arguments, including especially, but not limited to, the merger/equitable estoppel argument, which are arguments are, out of an abundance of caution, both incorporated by reference herein and restated herein below.

B. Had it reached the Facility's merger/equitable estoppel argument, as, respectfully, it should have, the Court should have found that the circuit court erred in not granting the Underlying Motions based on this argument. More specifically, it should have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Stroud effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Arbitration Agreement merged therewith.

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."); *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel: "Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. . . . 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.").

Even though Mr. Stroud is a nonsignatory to the Arbitration Agreement, i.e., even though he did not sign the Arbitration Agreement himself, the circuit court should have nonetheless found it enforceable against him and, in turn, against his guardian ad litem, Plaintiff, via merger and equitable estoppel.

Merger

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

> Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] under the [Adult Health Care Consent] Act, she is nevertheless equitably estopped to deny the [arbitration agreement's] enforceability. The circuit court held there was no estoppel here, and we agree.
>
> Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. In South Carolina,
>
> > The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and

> construe the documents together. The theory is that the instruments are effectively one instrument or contract.
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> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction*. *Unless there is a contrary intention, appellants are correct that there was a merger.*

407 S.C. at 354–355, 755 S.E.2d at 455 (emphasis added).

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,"[18] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[19] there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the instruments were intended to be construed together as effectively one contract. This is a question of intention. *Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a contrary *intention* . . .")

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

[19] To be clear, *Coleman* unequivocally answers the question of whether the instant Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly observed regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), "the documents *were* executed at *the same time, by the same parties, for the same purposes, and in*

(emphasis added). And "in attempting to ascertain th[e] [parties'] intention," our courts "endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into." *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

It must be remembered that, where, as here, the instruments in question were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For the merger presumption to mean anything in practice it cannot be upset based on mere conjecture, but only by actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. 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, under the circumstances, the idea that there would have been an intention contrary to merger does not make sense.

Unlike the arbitration agreement at issue in *Coleman*—and, for that matter, the arbitration agreements at issue in *Coleman's* progeny *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care*

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the course of the same transaction." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis

of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), all of which cases involved arbitration agreements that contained a provision allowing them to be disclaimed or revoked within 30 days of signing while the corresponding admission agreements did not—the instant Arbitration Agreement has no disclaimer/revocation provision. (R. p. 95, p. 187.) 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. 174, p. 186.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[20]), 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. 174, p. 186.) Without question, the Arbitration Agreement is among these other materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) ("The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's *admission documentation––including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 ("Her husband . . . executed

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added).

[20] 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike the instant case—the "Entire Agreement" clause expressly referred to a separate arbitration agreement and, thus, "recognize[d] the '*separatedness*' of the

various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement*.") (emphasis added)).[21]

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required as a precondition of Mr. Stroud's residency at the Facility. But all that this means is that the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become part of the admissions materials once it was in fact executed. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove.

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

[21] To be clear, Appellants' point here is not that the holding of either *Stott* or *Hodge* established a legal standard for what counts as admission paperwork, but rather that the very fact that the language that the *Stott* and *Hodge* Courts used in discussing the facts of the cases so readily made the natural and logical connection between arbitration agreements signed in conjunction with admission and "admission documentation" / "documents related to . . . admission" that it illustrates that, in its plain, ordinary, and popular sense, "Admissions materials" includes the Arbitration Agreement. *See Beaufort Cnty. Sch. Dist. v. United Nat'l Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) ("If the contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect."). Moreover, this connection between the Admission Agreement and the Arbitration Agreement (with the Arbitration Agreement being understood in the plain, ordinary, and popular sense as included in the term "Admissions materials") is underscored by the *Coleman* Court's recognition that an admission agreement and arbitration agreement signed in conjunction with resident's admission to a nursing facility are indeed "executed at the same time, by the same parties, *for the same purposes, and in the course of the same transaction*." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

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—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement's) sole reason for being. (R. p. 95, p. 187 (providing for arbitration of "any controversy or dispute between the parties arising out of or relating to [the] Facility's Admission Agreement, or breach thereof, or relating in any way to [Mr. Stroud's] stay at [the] Facility, or to the provisions of care or services to [Mr. Stroud] . . . ."); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at [the] Facility . . . .").)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Mr. Stroud's relationship with the Facility, the Admission Agreement setting forth the terms of his admission, the Arbitration Agreement providing for arbitration of disputes arising out of his admission. (*Compare* R. pp. 163–186 (setting forth the terms of Mr. Stroud's admission to the Facility) *with* p. 95, p. 187 (providing for arbitration of disputes arising out of Mr. Stroud's admission in the Facility).)

Also absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* R. pp. 172, 184 ("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. pp. 95, 187 (providing that, "because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action," but also providing that arbitration shall be "as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules").) Essentially, both

instruments provide that South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, the termination provisions provide no evidence of "separatedness." Again, the only reason for the Arbitration Agreement is the Admission Agreement, as the point of the Arbitration Agreement is to cover disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intention contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not

actually suggest anything probative about whether they are intended to be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. The very nature of *merger* is to *merge* separate documents.

And to be clear—besides the fact that there is no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement—to fall back on any notion that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that *merger is the default position*, i.e., it is presumed, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention.

The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." 407 S.C. at 355, 755 S.E.2d at 455. While it is

true that the *Coleman* Court also cited the rule that ambiguity is construed against the drafter,[22] (a) it did so in dicta and (b) it never addressed the logical inconsistency—which thus remains fair game as an argument in this case[23]—in recognizing a rule of law creating a presumption in favor of merger (i.e., in recognizing the occurrence of a set of circumstances (same time, parties, purpose, and transaction) as sufficiently probative to affirmatively tip the scales in favor of merger) while at the same time allowing that presumption to be completely overturned by evidence that is merely ambiguous, i.e., that does not even go so far as to clearly indicate a contrary intention and, indeed, is actually still susceptible to a reasonable conclusion in favor of merger. *See S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are *reasonably* susceptible of more than one interpretation.") (emphasis added).

Respectfully, 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. It must be remembered that the presumption of merger arises only where the four elements of time, parties, purpose, and transaction coincide—as the all do here. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. If one of these is lacking there is no merger. This is why, for the

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

merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). The merger presumption is "earned," so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

Respectfully, like the circuit court, this Court should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Mr. Stroud's admission to the Facility and would not have been done at all but for his admission to the Facility. Any finding against merger improperly relies on speculation, not

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

evidence from which a reliable conclusion can reasonably be drawn regarding intent.

Equitable Estoppel

In *Wilson*, our Supreme Court observed that South Carolina has recognized a number of theories under which a nonsignatory can be bound to an arbitration agreement, including under the theory of estoppel. 426 S.C. at 338, 827 S.E.2d at 174. The *Wilson* Court favorably discussed the framework of the so-called direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court for review on writ of certiorari, which followed the Court of Appeals' 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 that Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Mr. Stroud received direct benefits (in the form of his admission to 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).

Wilson supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration case like this, and it instructs that the key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability but whether benefits to the nonsignatory are direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 ("Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause. In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. Stated another way, [u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement . . . .") (internal citations and quotation marks omitted); *id.* at 343, 827 S.E.2d at 176 ("It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual

relationship of the parties, but does not exploit (and thereby assume) the agreement itself.") (internal citations omitted). Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration clause (which is the case here because the Admission Agreement and the Arbitration Agreement merge) while at the same time denying that the arbitration clause is enforceable.

As set forth in our Supreme Court's controlling decision in *Wilson*, and consistent with this Court's decision in *Pearson*, which the *Wilson* Court favorably cites, the essence of the test for direct benefits estoppel is simply whether the nonsignatory has exploited other parts of the contract by reaping its benefits. Indeed, to require more than this—or, in other words, to limit the applicability of direct benefits estoppel to only instances where the nonsignatory's claim relies solely on the contract terms to impose liability—is to invite the very sort of have-your-cake-and-eat-it-too inequity that the doctrine aims to prevent in the first place. Neither *Wilson* nor this Court's decision in *Pearson* nor general notions of equity countenance,[24] much less call for, such a result.

Here, Mr. Stroud was a direct beneficiary. Indeed, to deny his receipt of such benefits is illogical and objectively unreasonable, as it would require wholly

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

discrediting the entirety of his residency: every night's stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even Plaintiff's complaint does not go nearly so far as that. (*See* R. pp. 16–25.)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Mr. Stroud received the benefit of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein. Respectfully, like the circuit court, this Court should have found that the Arbitration Agreement merged with the Admission Agreement and that Plaintiff is estopped to deny the Admission Agreement/Arbitration Agreement's enforceability, Mr. Stroud having effectively embraced the contract with the Facility for the purpose of his admission and receipt of the benefits thereof.[25]

(1) Most respectfully, this Court's decision in *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023), should not control the disposition of this case.

After all initial briefs were filed in this case, this Court decided *Solesbee*, wherein it affirmed the denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as the Facility's here.

[25] To be clear, 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.

Indeed, the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*.

In affirming the denial of the motion to compel arbitration in *Solesbee*, this Court likened that case to *Coleman* and *Hodge* and found that the circuit court had correctly determined that there was no merger of the Admission Agreement and the Arbitration Agreement and, in turn, had properly denied the Facility's equitable estoppel argument. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149 ("Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and [the Facility's] equitable estoppel argument was properly denied.").)[26] Most respectfully, the merger analysis in *Solesbee* is erroneous and incomplete and should not control the disposition of this case.

First, the *Solesbee* Court erroneously found against merger on the basis that "the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law." 438 S.C. at 648, 885 S.E.2d at 149. It is simply not true that "the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law."

[26] To be clear, this Court' decision in *Solesbee* turned on its affirmance of the circuit court's ruling against *merger* of the Arbitration Agreement and the Admission Agreement. Consequently, the *Solesbee* Court did not address the substance of the *equitable estoppel* prong of the merger/equitable estoppel argument.

Regarding governing law, what the Admission Agreement actually states is this: "This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which the Facility is located." (R. p. 172, p. 184.) And what the Arbitration Agreement actually states is this:

> 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 is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law.

(R. p. 95, p. 187.)

Without question, the FAA[27] applies to the Arbitration Agreement, as it does "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction"[28]—and this is so even where an arbitration clause is included in a

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[27] The "FAA" refers to the Federal Arbitration Act, 9 U.S.C §§ 1 et seq.

[28] *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); *Allied-Bruce*, 513 U.S. at 273–77 (explaining that, unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce). And our Supreme Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

single instrument that is otherwise governed by South Carolina law. *See Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (The FAA "create[d] a body of federal substantive law," which is "applicable in state and federal courts."); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) ("[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."). Moreover, even under the FAA, the general state law of contracts continues to apply. *Allied-Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted). Further still, the Arbitration Agreement expressly calls for the arbitration proceedings to be conducted pursuant to the South Carolina ADR Rules. (R. p. 95, p. 187.)

Essentially, the provisions of the Admission Agreement and the Arbitration Agreement regarding governing law are to the effect that South Carolina law applies except where displaced by federal law, and indeed, even if the Arbitration

Agreement had been included as a provision within the Admission Agreement itself, the FAA would still apply separately to the Arbitration Agreement. In other words, any difference between the governing law as to the Arbitration Agreement and the governing law as to the Admission Agreement would still exist even if the Arbitration Agreement had been included as a provision within the Admission Agreement itself. Accordingly, the supposed difference in the governing law cannot support any reasonable inference of an intent contrary to merger.

Second, the *Solesbee* Court erroneously found against merger on the basis that "[t]he Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement 'shall survive any termination or breach of this Agreement or the Admission Agreement.'" 438 S.C. at 648–49, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger here. Unlike in *Coleman* and *Hodge*, the supposed textual recognition of the Admission Agreement as being separate from the Arbitration Agreement is not included in any "Entire Agreement" provision. Rather, the "Entire Agreement" provision of the Admission Agreement expressly states, "other Admissions materials . . . are made a part of this Agreement by reference." (R. p. 174, p. 186.) And as in the instant case, the Arbitration Agreement that was signed in conjunction with the admission is clearly among these "other Admissions materials." Moreover, that the Arbitration Agreement "shall survive any termination or breach of this

Agreement or the Admission Agreement" just means that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. Again, this is simply how arbitration agreements work—and it would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. 2d at 612–13 ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

Third, the *Solesbee* Court erroneously found against merger on the basis that "[t]he Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, 'Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.'" 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. The absence of a "revocation" provision is one way in which the Arbitration Agreement is materially different from those at issue in *Coleman* and *Hodge*, and, for that matter, *Thompson*. Moreover, the *Solesbee* Court drew a false equivalency between the concepts of "revocation" and "termination." A

"revocation" is an annulment (i.e., making something a nullity),[29] whereas "termination" is putting or bringing something that properly exists to an end—which is materially different from making something a nullity, i.e., void and never having properly existed in the first place. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and it would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. at 612–13.

Fourth, the *Solesbee* Court erroneously found against merger on the basis that "the Admission Agreement and Arbitration Agreement were separately paginated and had their own signature pages." 438 S.C. at 648, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. Again, the fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about whether they were intended to be construed together. Indeed, the question of merger will not arise in the first place unless

[29] *Black's Law Dictionary* p. 1321 revocation (7th ed. 1999); *id.* at 89

there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. Again, the very nature of *merger* is to *merge* multiple things together as one.

Finally, the *Solesbee* Court erroneously found against the Facility on merger on the basis that Arbitration Agreement was voluntary. 438 S.C. at 648, 885 S.E.2d at 149. While, again, it is certainly true that the Arbitration Agreement was voluntary, this fact provides no reasonable inference of an intent contrary to merger. Again, to be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. But all this means is that it did not have to be agreed to for the resident to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was signed. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. Again, the two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

To say that the Arbitration Agreement was not required for admission, which it was not, is not to say that it was not intended to be part of the admissions

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annulment ("The act of nullifying or making void.").

materials in the event it was agreed to, which it was, by Mr. Dover on Ms. Solesbee's behalf in *Solesbee* and by Mrs. Stroud on Mr. Stroud's behalf in the instant case. While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitrations Agreement's) sole reason for being. (*See* R. p. 95, p. 187 (providing for arbitration of "any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident . . . ."); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at Facility . . . .").)

Again, even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission, whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of the resident's relationship with the Facility: the Admission Agreement setting forth the terms of the admission, the Arbitration Agreement providing for arbitration of disputes arising out of the admission. (*Compare* R. pp. 163–186 (setting forth the terms of the admission) *with* Arbitration Agreement (providing for arbitration of disputes arising out of the admission).)

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

C. The Facility maintains that, had it reached this argument, as, respectfully, it should have, the Court should have found that the circuit court erred in characterizing the Arbitration Agreement as a "mandatory" agreement that "Defendants' representative" "required" Mrs. Stroud to sign as a "condition" of Mr. Stroud's residency at the Facility and, in turn, finding that the Arbitration Agreement runs afoul of federal law governing Medicare and Medicaid reimbursements.[30]

As an initial matter, it is erroneous for the circuit court to refer to the Facility's personnel as "Defendants'" representative.[31] Defendants are separate and distinct entities. The Facility's personnel are the Facility's personnel and not the Other Defendants' personnel, and there is no evidence otherwise.

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[30] (R. p. 5 ("As part of the admissions process, Defendants' representative required Mrs. Debbie Stroud, Mr. Stroud's wife, to sign the Facility-Resident/Representative Arbitration Agreement . . . ."); p. 10 (referring to "Defendants' representative['s] . . . obligation of due diligence"); p. 10 (referring to the Arbitration Agreement as a "mandatory agreement") (bold print in original omitted); R. p. 10 (finding that "the purported agreement for binding arbitration which the facility mandated that Mrs. Stroud sign is not valid or enforceable because by its terms it violates federal law," specifically, federal law regarding Medicare and Medicaid reimbursements, which prohibits the Facility from "'charg[ing], solicit[ing], accept[ing], or receiv[ing] . . . any other consideration as a precondition of admitting (or expediting the admission of) [a resident] . . . or as a requirement for the [resident's] continued stay . . .'") (quoting 42 U.S.C. § 1396r(c)(5)(A)(iii)); p. 11 ("The clear language of the purported arbitration agreement makes clear that Defendants required Mrs. Stroud to sign as [a] condition of admission to the [F]acility. As such, this requirement was a clear violation of Federal Law. 42 U.S.C. Section 1396r(c)(5)(A)(iii) prohibits a facility such as Defendants' from soliciting or accepting 'any other consideration' as a condition to admission outside of the Medicare payments when admitting a patient in Mr. Stroud's position.").)

[31] To be clear, this goes not only for this specific instance but also for all other instances where Defendants' separate and distinct nature is unduly disregarded or blurred.

Additionally, it is erroneous for the circuit court to state that Mrs. Stroud was "required" to sign the Arbitration Agreement—or other words to that effect, to include specifically, but without limitation, the circuit court's reference to the Arbitration Agreement as a "mandatory" agreement that Mrs. Stroud had to sign as a "condition" of Mr. Stroud's residency. The Facility denies that the Arbitration Agreement was required—for Mr. Stroud or any other resident—to gain admission to the Facility (or to remain admitted therein), and there is zero evidence in the record to the contrary.[32]

Lastly, the circuit court's finding that the Arbitration Agreement is founded on illegal consideration in violation of federal law governing Medicare and Medicaid reimbursements is plainly without merit. The essential premise of this finding is that the Arbitration Agreement was required as a precondition of Mr. Stroud's residency and, therefore, constitutes improper additional consideration in violation of federal law that prohibits the Facility from "charg[ing], solicit[ing], accept[ing], or receiv[ing] . . . any other consideration as a *precondition* of admitting (or expediting the admission of) [a resident] . . . or as a requirement for

[32] And to be clear, the record provides no support for the idea that the Facility required that Mrs. Stroud be the one who signed the Arbitration Agreement (or any other document). Rather, the record shows that, in acting on her husband's behalf, Mrs. Stroud expressly represented to the Facility that she was authorized to do so in the Arbitration Agreement itself and that Mrs. Stroud further represented her authority to act on Mr. Stroud's behalf by presenting the Power of Attorney to the Facility.

the [resident's] continued stay . . . ." 42 U.S.C. § 1396r(c)(5)(A)(iii) (emphasis added). This finding fails of its essential premise because, again, the Facility denies that the Arbitration Agreement was "required" for, or otherwise a condition of, Mr. Stroud's residency, and there is nothing in the Arbitration Agreement itself or anywhere else in the record to support a reasonable conclusion otherwise.

D. The Facility maintains that, had it reached this argument, as, respectfully, it should have, the Court should have found that the circuit court erred in finding that the Arbitration Agreement is not supported by sufficient consideration.[33]

With respect to consideration, the focus of the circuit court's ruling is on the finding, refuted above, that the Arbitration Agreement constitutes improper consideration in violation of federal law governing Medicare and Medicaid reimbursements. To the extent, however, that the circuit court's ruling can be read to include a finding that the Arbitration Agreement is not supported by sufficient consideration as a matter of contract law, it is erroneous. The Arbitration Agreement clearly contains the parties' mutual promises to arbitrate, which is sufficient consideration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997) ("A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement.") (citing *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E. 292 (1996)); *see also Rickborn*, 321 S.C. at 304, 468 S.E.2d at 300 ("Valuable

[33] (R. p. 11.)

consideration for a contract may consist of some forbearance given or detriment suffered.").

Moreover, because the Arbitration Agreement is covered by the FAA, to require more in the way of consideration because an agreement to arbitrate is involved would violate the FAA's "equal footing" rule, which requires that agreements to arbitrate be placed on "equal footing" with all other contracts under state law. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (Under the FAA, "courts *must* place arbitration agreements on *equal footing with other contracts* . . . .") (emphasis added); *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 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."); *Allied-Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal

'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted).

E. The Facility maintains that, had it reached this argument, as, respectfully, it should have, the Court should have found that the circuit court erred in finding that the Facility was not sufficiently diligent in determining whether Mrs. Stroud had authority to sign the Arbitration Agreement for Mr. Stroud.[34]

As an initial matter, while it is true that the Power of Attorney contains a provision, located toward the end of the document, prohibiting Mrs. Stroud from entering into arbitration agreements on Mr. Stroud's behalf and disavowing any other provision therein to the contrary,[35] it cannot reasonably be said that the Power of Attorney is a "simple" document. As explained previously, all told, the Power of Attorney is 20 pages long. On page 5, in Article I(12), headed "Power with Respect to Legal and Other Actions" (original bold print and underlining omitted), it grants Mrs. Stroud the power "[t]o institute, supervise, prosecute, defend, intervene in, abandon, compromise, arbitrate, settle, dismiss, and appeal from *any and all* legal, equitable, judicial or administrative hearings, actions, suits, proceedings, attachments,

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[34] (R. p. 10 ("Defendants' representative had an obligation of due diligence to review the Power of Attorney to determine whether in fact Mrs. Stroud had authority granted to her to sign the Arbitration Agreement. A simple review of the Power of Attorney would make clear that such authority was simply beyond the scope of authority granted to Mrs. Stroud.").)

[35] (R. pp. 109–110 ("Notwithstanding any provision herein to the contrary . . . I reserve unto myself and do not grant unto my Attorney in Fact the power to waive my right to jury trial and enter into Arbitration Agreements. I do

arrests or distresses, involving *[Mr. Stroud] in any way* . . . ." (emphasis added.) Additionally, on page 3, in Article I(6), headed "Power to Operate Businesses" (original bold print and underlining omitted), it grants Mrs. Stroud the power "to defend, *submit to arbitration*, settle or compromise any action or other legal proceeding to which [Mr. Stroud is] a party because of [his] membership in [a] partnership." (emphasis added.) And, again on page 3, in Article I(8), headed "Power to Demand and Receive" (original bold print and underlining omitted), it grants Mrs. Stroud the power "[t]o demand, *arbitrate*, settle, sue for, collect, receive, deposit, expend for [Mr. Stroud's benefit] benefit, reinvest or make such other appropriate disposition of as [Mrs. Stroud] deems appropriate, all cash, rights to the payment of cash, property . . . rights and/or benefits to which [Mr. Stroud is] now or may in the future become entitled . . . ." (emphasis added.) [36]

Beyond this, the Power of Attorney is not the only way in which Mrs. Stroud represented to the Facility her authority to act on Mr. Stroud's behalf. She

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not favor Arbitration, and for that reason I do not grant unto my Attorney in Fact the power to enter Arbitration Agreements.").)

[36] With regard to Mrs. Stroud's presentation of the Power of Attorney to the Facility, presumably she herself was unaware that the Power of Attorney did not actually give her authority to sign the Arbitration Agreement for Mr. Stroud—and this presumption is all the more compelling considering the Power of Attorney's length and complexity and the potential for confusion relating to its express and affirmative language about power to "arbitrate," and even power to "submit to arbitration." But either way, i.e., whether Mrs. Stroud honestly or dishonestly presented the Power of Attorney to the Facility as evidence of her authority to sign the Arbitration Agreement, the Facility should not be faulted for taking her at her word.

signed both the Admission Agreement and the Arbitration Agreement as "'[Mr. Stroud's] Durable Power of Attorney for Health Care'/'[Mr. Stroud's] Legal Guardian'/'[Mr. Stroud's] Responsible Party.'" (R. p. 95, p. 163, p. 175, p. 187.) In signing the Admission Agreement, Mrs. Stroud "verifie[d] that all information submitted to [the] Facility . . . is true and correct"[37] and expressly acknowledged that the "promises and representations [she made therein were] in order to induce [the] Facility to enter into this Agreement" and that the "Facility [wa]s relying upon the truthfulness of the promises and representations [she] made." (R. p. 174, p. 186.) And in signing the Arbitration Agreement itself, Mrs. Stroud expressly "represent[ed] that . . . she ha[d] authority to sign on [Mr. Stroud's] behalf so as to bind [him] as well as [herself]." (R. p. 95, p. 187.)

Mrs. Stroud is "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement, *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms."), including, of course, the express representation therein of her authority to act on Mr. Stroud's behalf. Moreover, there is 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, 85

[37] (R. p. 163, p. 175.)

(1995) ("There exists in every contract an implied covenant of good faith and fair dealing."), and Mrs. Stroud is no less bound by this covenant than the Facility.

And in any event, the Subject Order cites no legal authority to support the proposition that the Facility was required to do the said "due diligence"—and to the best of the Facility's knowledge, there is none—and, here again, to require more because an agreement to arbitrate is involved would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *Concepcion*, 563 U.S. at 339; *see also Kindred Nursing*, 137 S. Ct. at 1423; *Allied-Bruce*, 513 U.S. at 281.

F. The Facility maintains that, had it reached this argument, as, respectfully, it should have, the Court should have found that, at a minimum, the circuit court should have granted the Facility's alternative request for permission to conduct limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability under an agency theory.

At a minimum, the circuit court should have allowed the Facility to engage in some appropriately limited discovery to fairly investigate the Arbitration Agreement's enforceability under an agency theory, i.e., the theory that Mrs. Stroud was authorized to sign the Arbitration Agreement for Mr. Stroud as his lawful agent. This would entail, at the least, allowing the Facility to depose Mrs. Stroud and to follow up on any pertinent evidentiary leads revealed by her deposition. Otherwise, the Facility is in a Catch-22: vulnerable on the one hand to the argument that it has not presented sufficient evidence to prove the Arbitration Agreement is enforceable based on Mrs.

Stroud's agency, which is a necessarily fact-intensive question,[38] while at the same time vulnerable on the other hand to the argument that it waived its arbitration rights by making use of the tools of litigation (i.e., discovery) to prove them.

It must be remembered that the Arbitration Agreement is valid on its face, bearing, as it does, Mrs. Stroud's express representation of authority to bind Mr. Stroud. (R. p. 95, p. 187 ("By . . . her signature below, the executing party [(i.e., Mrs. Stroud)] represents that . . . she has the authority to sign on [Mr. Stroud's] behalf so as to bind [Mr. Stroud] as well as [herself].").)[39] It cannot be the case that the proponent of arbitration (who, it must be remembered, may well be attempting to

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[38] A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth*., 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). "An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145–46, 425 S.E.2d 764, 773 (Ct. App. 1992). The doctrine of apparent authority provides that a principal may be bound by the acts of it agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

[39] Again, having signed the Arbitration Agreement, Mrs. Stroud "is presumed to have, read, understood, and assented to its terms." *Gibson*, 426 S.C. at 352, 827 S.E.2d at 181 ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.").

vindicate a valid right to arbitrate that the arbitration opponent has wrongfully denied) has the burden to establish that right in a fact-based judicial proceeding in which it is disallowed use of the fact-finding tools (discovery procedures) available in other judicial proceedings.

Obviously, if this were an action to determine the validity of a contract other than an arbitration agreement there would be no question about the Facility's ability to conduct discovery relevant to the facts/circumstances bearing on the contract's validity. To force the Facility into a situation where it cannot conduct relevant discovery to vindicate its arbitration rights without risking a waiver of those rights by the very act of attempting to vindicate them is not only patently unjust but also a violation of the FAA's requirement that arbitration agreements must be placed on equal footing with other contracts. *Concepcion*, 563 U.S. at 339; *see also Kindred Nursing*, 137 S. Ct. at 1423; *Allied-Bruce*, 513 U.S. at 281.

CONCLUSION

For the foregoing reasons, along with any other or further reason(s) set forth in their appellate briefs already on file, the entirety of which they hereby adopt and incorporate herein by reference and reiterate/reassert in support hereof, Appellants ask this Honorable Court to grant the instant petition, to rehear this matter, to withdraw the Subject Opinion, and to decide this appeal anew via an opinion that reverses the circuit court and stays Plaintiff's claims against the Facility in favor of

arbitration and stays Plaintiff's claims against the Other Appellants pending the outcome of arbitration between Plaintiff and the Facility (or, alternatively, that reverses the circuit court and remands the case to the circuit court with instructions that it stay Plaintiff's claims against the Facility in favor of arbitration and stay Plaintiff's claims against the Other Appellants pending the outcome of arbitration between Plaintiff and the Facility) or, alternatively, to reverses the circuit court's denial of the Underlying Motions and remands this matter to the circuit court for the additional discovery requested by the Facility to be conducted; for additional briefing to be submitted to the circuit court in light of such discovery; and, with the benefit of the same, for the circuit court to hear and decide the Underlying Motions anew.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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Charleston, South Carolina

May 6, 2024

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Case No. 2020-CP-23-01728
Appellate Case No. 2022-000398

Debbie Stroud,
Guardian ad Litem for James C. Stroud,

Respondent,

v.

THI of South Carolina at Greenville, LLC
d/b/a Magnolia Manor-Greenville,
THI of Baltimore, Inc., and
THI of South Carolina, LLC,

Appellants.

PROOF OF SERVICE

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Attorneys for Appellants

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellants, hereby certify that the **APPELLANTS' PETITION FOR REHEARING** was served on Respondent on May 6, 2024, by emailing (see attached email) a copy of the same to Respondent's counsel of record:

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Respectfully submitted,

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May 6, 2024

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Subject:	Stroud v. THI (2022-000398) -- Petition for Rehearing
Date:	Monday, May 6, 2024 10:35:40 PM
Attachments:	image001.png Stroud v. THI (2022-000398) -- Petition for Rehearing.pdf

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Attached for service in the above-reference matter please find **Appellants' Petition for Rehearing**.

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