THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Florence County
Court of Common Pleas

William H. Seals Jr., Circuit Court Judge

Case No. 2020-CP-21-02290
Court of Appeals Case No. 2021-000586
Unpublished Opinion No. 2024-UP-005 (S.C. Ct. App. filed January 3, 2024)
Supreme Court Case No. 2024-000615

Mary Tisdale,
as Personal Representative of the Estate of Earlene Seabrook,

Respondent,

v.

Palmetto Lake City Operating, LLC
d/b/a Lake City-Scranton Healthcare Center
and Jeffrey Gibbs,

Defendants,

Of whom Palmetto Lake City Operating, LLC
d/b/a Lake City-Scranton Healthcare Center is the

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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INDEX

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SC Court of Appeals

CERTIFICATION OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, the Facility[1], by and through its undersigned counsel, certifies that the Court of Appeals filed its opinion in this matter on January 3, 2024 (the "Subject Opinion"), affirming the circuit court's denial of the Facility's motion to compel arbitration of Plaintiff's[2] claims; that the Facility timely petitioned for rehearing; and that the Court of Appeals denied rehearing by order filed March 18, 2024.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in affirming the circuit court's denial of the Motion to Compel Arbitration?[3]

A. Did the Court of Appeals erred in affirming the circuit court on the basis that the Admission Agreement and the Arbitration Agreement did not merge?

B. Did the Court of Appeals err in not reaching the Facility's remaining arguments, including especially, but not limited to, its equitable estoppel argument?

C. Had the Court of Appeals reached the Facility's remaining arguments, including especially, but not limited to, its equitable estoppel argument, as, respectfully, it should have, should the Court of Appeals have found that the circuit court erred in not finding Plaintiff equitably estopped to deny the enforceability of the Arbitration Agreement and that it (the circuit court) should have granted the Motion to Compel Arbitration?

D. Separate and apart from the Facility's merger/equitable estoppel argument, and while most respectfully recognizing the binding effect that this Court's decision in *Arredondo v. SNH SE Ashley River Tenant, LLC*[4] had on the Court

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[1] The "Facility" refers to Defendant/Petitioner, Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center, which is a skilled nursing facility.

[2] "Plaintiff" refers to Plaintiff/Respondent, Mary Tisdale ("Ms. Tisdale"), as Personal Representative of the Estate of Earlene Seabrook. "Ms. Seabrook" refers to the decedent, Earlene Seabrook.

[3] Out of an abundance of caution, as in the Facility's briefing to the Court of Appeals, this question and the corresponding argument includes and challenges the circuit court, and the Court of Appeals' affirmance thereof, in respect of the adverse rulings on both the Facility's principal motion and its subsequent Rule 59(e), SCRCP, motion.

[4] 433 S.C. 69, 856 S.E.2d 550 (2021).

of Appeals (as well as on the circuit court), should the Arbitration Agreement be deemed validly executed on Ms. Seabrook's behalf by her attorney-in-fact, Ms. Tisdale, pursuant to the HCPOA[5]?[6]

E. At a minimum, should the Court of Appeals have found that the circuit court erred in denying the Facility's alternative request for limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability under an agency theory?

STATEMENT OF THE CASE

With the help of her niece Ms. Tisdale, Ms. Seabrook was admitted to the Facility on or about June 25, 2019. (*See* R. pp. 133–144.) In conjunction with Ms. Seabrook's admission to the Facility, Ms. Tisdale, who handled the paperwork, and was indeed Ms. Seabrook's attorney-in-fact pursuant to the HCPOA, signed an Admission Agreement[7] and an Arbitration Agreement[8] on Ms. Seabrook's behalf.

Ms. Tisdale signed both the Admission Agreement and the Arbitration Agreement as "'Resident's [(i.e., Ms. Seabrook's[9])] Durable Power of Attorney for Health Care'/'[Ms. Seabrook's] Legal Guardian'/'[Ms. Seabrooks's] Responsible Party.'" (R. pp. 98, 133.) By signing the Admission Agreement, Ms. Tisdale expressly acknowledged that the "promises and representations [she made therein were] in order to induce Facility to enter into th[e] Agreement" and that the "Facility [wa]s relying upon the truthfulness of the promises and representations [she] made." (R. p. 144.) By signing the Arbitration Agreement, Ms. Tisdale expressly "represent[ed]

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[5] The "HCPOA" refers to the South Carolina Health Care Power of Attorney that Ms. Tisdale held as to Ms. Seabrook. (R. pp. 125–132.)

[6] This question and the corresponding argument specifically includes, without limitation, the Facility's respectful contention that *Arredondo* was wrongly decided.

[7] (R. pp. 133–144.)

[8] (R. p. 98.)

[9] Both the Admission Agreement and the Arbitration Agreement refer to Ms. Seabrook as "Resident." (R. pp. 98, 133.)

that . . . she ha[d] the authority to sign on [Ms. Seabrook's] behalf so as to bind [Ms. Seabrook] as well as [herself]." (R. p. 98.)

Alleging that Ms. Seabrook received deficient care/treatment during her residency at the Facility,[10] Plaintiff filed this wrongful death and survival action on October 8, 2020, in the Court of Common Pleas, Florence County. (*See* R. pp. 22–46.)[11]

Citing the Arbitration Agreement Ms. Tisdale signed for Ms. Seabrook, the Facility moved to compel Plaintiff's claims to arbitration (the "Motion to Compel Arbitration"). (R. pp. 96–98; *see also* R. pp. 99–144.)

The circuit court heard the Motion to Compel Arbitration on February 9, 2021, the Honorable William H. Seals Jr. presiding. (*See generally* R. pp. 58–94.) The court denied the motion by formal order filed March 1, 2021. (R. pp. 4–16.)[12] By order filed May 4, 2021, the court thereafter denied the Facility's motion for reconsideration. (R. pp. 17–19.)[13]

By notice served and filed June 2, 2021, this appeal timely follows. (*See* R. pp. 172–177.) In due course, the appeal was briefed and made ready for decision and decided without oral argument via the Subject Opinion, filed January 3, 2024.

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[10] In particular, Plaintiff alleges Ms. Seabrook did not receive proper care with respect to the prevention and/or treatment of pressure ulcers. (*See* R. p. 145 ("While Ms. Seabrook was a resident and under the [Facility's] care, she was allowed to develop pressure ulcers which became infected, leading to her decline and eventual death . . . on August 31, 2019."); *see also* R. p. 30 ¶ 31 ("While at the [F]acility . . . Ms. Seabrook . . . develop[ed] preventable injuries which the [Facility] had a duty to prevent, caused by a breach of that duty, including but not limited to pressure sores . . . .").)

[11] Subject to and without waiving its right to compel the matter to arbitration, the Facility timely answered Plaintiff's complaint, denying the material allegations against it and raising a number of affirmative defenses. (*See* R. pp. 47–57.)

[12] In a Form 4 order filed February 9, 2021, the court had previously stated that the Motion to Compel Arbitration was denied and that a formal order would follow. (R. pp. 1–3.)

[13] Pursuant to Rule 59(e), on March 11, 2021, the Facility had timely moved the court to alter, amend, and/or reconsider its order of March 1, 2021. (R. pp. 155–171.)

As certified above, the Facility timely petitioned for rehearing, and the Court of Appeals denied rehearing by order filed March 18, 2024.

This petition for a writ of certiorari timely follows.

STANDARD OF REVIEW

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

ARGUMENT

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

A. The Court of Appeals erred in affirming the circuit court on the basis that the Admission Agreement and the Arbitration Agreement did not merge.[14]

The Facility's merger/equitable estoppel argument is a standalone argument that does not depend on any showing of authority (actual or apparent or otherwise) on the part of Ms. Tisdale or otherwise on the existence of any per se valid and enforceable agreement between the parties.

See Wilson, 426 S.C. at 338, 827 S.E.2d at 174 (observing that South Carolina has recognized numerous theories that can bind nonsignatories to arbitration agreements, including estoppel); *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–55, 755 S.E.2d 450, 455 (2014) (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel); *id.* (explaining "Appellants' equitable estoppel argument," which "[wa]s premised on [Appellants'] contention that, under state law, the admission agreements and the [arbitration agreements] merged," as follows: "Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] . . . , she is nevertheless *equitably estopped to deny the [arbitration agreement's] enforceability*.") (emphasis added).

Conceptually, the merger/equitable estoppel argument is not an argument for the *enforceability* of the Arbitration Agreement per se but rather for Plaintiff to be *estopped to deny the enforceability* of the Arbitration Agreement. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and because Ms. Seabrook effectively embraced and directly benefitted from the Admission Agreement, Ms. Seabrook, and, therefore, Plaintiff, who stands in Ms. Seabrook's shoes, is estopped to deny the enforceability of the Arbitration Agreement merged therewith. Accordingly, any lack of authority on the part of Ms. Tisdale is beside the point and unavailing to refute the merger/equitable estoppel argument, which, again, turns not on the question of whether the Arbitration Agreement is enforceable per se but whether Ms. Seabrook, and, in turn, Plaintiff, should be estopped to deny that the Arbitration Agreement is enforceable—and, most respectfully, the answer is yes.

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[14] (Subject Opinion ("[W]e hold the Admission Agreement and the Arbitration Agreement did not merge.").)

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

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

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

Here, like the circuit court, the Court of Appeals erred in rejecting the Facility's merger argument, failing to recognize material differences between the facts and arguments involved in the instant case and those that controlled (or were simply not addressed in) *Coleman* and its progeny *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018),

and the Court of Appeals' more recent decision in *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E. 2d 144 (Ct. App. 2023), concluding:

> Here, as in *Solesbee*[15] and *Hodge*[16], (1) the two agreements were governed by different bodies of law because the Admission Agreement was governed by state law and the Arbitration Agreement was governed by federal law; (2) each document was separately labeled, numbered, and contained its own signature page; (3) 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"; and (4) the Facility acknowledged that signing the Arbitration Agreement was not a prerequisite to admission to the Facility.

(Subject Opinion.)

The Subject Opinion erroneously concludes that the Admission Agreement and the Arbitration Agreement are separate contracts that do not merge. The merger question examines whether, "where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,"[17] as indeed the Admission Agreement and

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[15] In affirming the circuit court's denial of the motion to compel arbitration at issue in *Solesbee*, the *Solesbee* 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 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.").) While the Facility concedes that the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*, most respectfully, as further addressed below, the merger analysis in *Solesbee* is erroneous and incomplete and should not control the disposition of this case.

[16] To be clear, the admission agreement and arbitration agreement in *Hodge* were materially different from the instant Admission Agreement and Arbitration Agreement. Moreover, the plain language of *Hodge* makes clear that its finding against merger is based on its assessment of a multitude of particular factors taken together, 422 S.C. at 563, 813 S.E.2d at 302 ("*Based on all of this*, we find the Admissions Agreement and Arbitration Agreement did not merge.") (emphasis added)), and does not support the view that any of the cited factors standing alone—without regard to their context or the impact of other factors—can support a reasonable, non-speculative finding against merger.

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

the Arbitration Agreement were here,[18] there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the instruments should be construed together as effectively one contract. This is a question of intention. *Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a contrary *intention* . . .") (emphasis added). And "in attempting to ascertain th[e] [parties'] intention," our courts "endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into." *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

For the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). No such inference can be drawn here. Indeed, it does not even make sense that there would have been an intention contrary to merger of the Admission Agreement and the Arbitration Agreement.

Unlike the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (*See* R. p. 98.) Moreover, while the

[18] As the *Coleman* Court expressly observed regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), "the documents were [indeed] executed at *the same time, by the same parties, for*

instant Admission Agreement does contain an "Entire Agreement" clause, it does not reference the Arbitration Agreement as a separate contract. (R. p. 144.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[19]), the "Entire Agreement" clause in the instant Admission Agreement expressly states that "other Admissions materials" are part of the Admission Agreement, thereby expressly disclaiming its own "separatedness." (R. p. 144.) And without question, the Arbitration Agreement is among these other admissions materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) ("The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's admission *documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 ("Her husband . . . executed various documents *related to her* admission, including an *Arbitration Agreement* and an *Admission Agreement*.") (emphasis added)).[20]

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

[19] 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike the instant case—the "Entire Agreement" clause expressly referred to a separate arbitration agreement and, thus, "recognize[d] the '*separatedness*' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.") (emphasis added).

[20] To be clear, the Facility's point here is not that the holding of either *Stott* or *Hodge* established a legal standard for what counts as admission paperwork, but rather that the very fact that the language that the *Stott* and *Hodge* Courts used in discussing the facts of the cases so readily made the natural and logical connection between arbitration agreements signed in conjunction with admission and "admission documentation" and "documents related to . . . admission," respectively, 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

Like the *Solesbee* Court (and, for that matter, the *Hodge* Court, even though, again, different admission and arbitration agreements were at issue in *Hodge*), the Court of Appeals erred in finding against merger on the basis that the Admission Agreement and the Arbitration Agreement were governed by different bodies of law "because the Admission Agreement was governed by state law and the Arbitration Agreement was governed by federal law." (Subject Opinion.)

As an initial matter, the Court of Appeals' assertion about state law governing one instrument (the Admission Agreement) while federal law governs the other (the Arbitration Agreement) is simply incorrect. Regarding governing law, the Admission Agreement states, "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. 142.) And the Arbitration Agreement states:

> 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. 98.) Accordingly, the provisions of the Admission Agreement and the Arbitration Agreement regarding governing law are not to the effect that state law governs one and federal law the other, but rather that South Carolina law applies to both except where displaced by federal law.

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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).

Moreover, the FAA[21] applies to the Arbitration Agreement,[22] as it does to "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363 (2001); *see also Allied-Bruce*, 513 U.S. at 268; *id.* at 273–77; *Dean*, 408 S.C. at 381–82, 759 S.E.2d at 732–33. And, of course, this rule—that the FAA applies whenever an arbitration agreement involves interstate commerce—applies even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law. *See Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (The FAA "create[d] a body of federal substantive law," which is "applicable in state and federal courts."); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) ("[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."); *see also Allied-Bruce*, 513 U.S. 265, 270–77.

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

[22] As the Facility duly argued to the Court of Appeals, the FAA applies here, and the circuit court erred in finding that it does not, as well as in relying on South Carolina's Arbitration Act, S.C. Code Ann. §§ 15-48-10 to -240. Besides the fact that, as the Court of Appeals itself correctly noted, "the [A]rbitration Agreement provide[s] it [i]s governed by federal law" (Subject Opinion), i.e., the FAA, the FAA applies "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress's power under the Commerce Clause); *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 this 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) ("Since the Supreme Court decided Allied-Bruce, many—if not all—federal and state courts have held that nursing home residency contracts similar to the one at issue here implicate interstate commerce and the FAA. Generally, these holdings center on a common theme: nursing home residency contracts usually entail providing residents with meals and medical supplies that are inevitably shipped across state lines from out-of-state vendors. We likewise find the terms of the residency agreement implicate interstate commerce and, thus, the FAA.").

Furthermore, 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). And further still, the Arbitration Agreement expressly calls for the arbitration proceedings to be conducted pursuant to the South Carolina ADR Rules. (R. p. 98.)

Again, essentially, the provisions of the Admission Agreement and the Arbitration Agreement regarding governing law are to the effect that South Carolina law applies to both 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. Thus, the supposed difference in the governing law cannot support any reasonable inference of an intent contrary to merger.

Like the *Hodge* and *Solesbee* Courts, the Court of Appeals erred in finding against merger on the basis that "each document was separately labeled, numbered, and contained its own signature page." (Subject Opinion.) The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed

provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless 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.

Like the *Solesbee* Court (and, for that matter, the *Hodge* Court, even though, again, different admission and arbitration agreements were at issue in *Hodge*), the Court of Appeals erred in finding against merger on the basis that "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.'" (Subject Opinion.) Unlike in *Hodge*, and, for that matter, *Coleman*, and unaddressed by the *Solesbee* Court, the supposed textual recognition of the Admission Agreement as being separate from the Arbitration Agreement is not included in the "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. 144.) And again, the Arbitration Agreement was signed in conjunction with Ms. Seabrook's admission and 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. This is simply how arbitration agreements work—and would be the same *even were the agreement to arbitrate in the form of a clause included within a single instrument*—so this cannot logically provide probative evidence of an intent contrary to merger. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

Like the *Hodge* and *Solesbee* Courts, the Court of Appeals erred in finding against merger on the basis of the voluntariness of the Arbitration Agreement, i.e., in relying on the fact "that signing the Arbitration Agreement was not a prerequisite to admission to the Facility"[23] as evidence of intention contrary to merger. To be sure, the Arbitration Agreement was indeed optional, i.e., agreeing to arbitration is not required to gain admission to the Facility. But all that this means is that it did not have to be agreed to for Ms. Seabrook to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact executed. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

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

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[23] (Subject Opinion.)

have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement's) sole reason for being. (*See* R. p. 98 (providing for arbitration of "any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident . . . ."); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at Facility . . . .").)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission, whereupon it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Ms. Seabrook's relationship with the Facility: the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission. (*Compare* R. pp. 133–144 (setting forth the terms of Ms. Seabrook's admission to the Facility) *with* p. 98 (providing for arbitration of disputes arising out of Ms. Seabrook's admission to the Facility).)

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,[24] (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[25]—in recognizing a rule of law creating a presumption in favor of merger (i.e., in recognizing the occurrence of a set of circumstances (same time, parties, purpose, and transaction) as sufficiently probative to affirmatively tip the scales in favor of merger) while at the same time allowing that presumption to be completely overturned by evidence that is merely ambiguous, i.e., that does not even go so far as to clearly indicate a contrary intention and, indeed, is actually still susceptible to a reasonable conclusion in favor of merger. *See S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is *ambiguous* when the terms of the contract are *reasonably* susceptible of more than one interpretation.") (emphasis added).

Respectfully, like the circuit court's, this Court of Appeals' finding against merger relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding intent. It must be remembered that the presumption of merger arises only where the

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

four elements of time, parties, purpose, and transaction coincide—as they 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 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 of Appeals should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Ms. Seabrook's admission to the Facility and would not have been done at all but for her admission to the Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent.

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

B. The Court of Appeals erred in not reaching the Facility's remaining arguments, including especially, but not limited to, its equitable estoppel argument.

As explained in the Subject Opinion, the Court of Appeals did not reach the Facility's remaining arguments, including especially, but not limited to, its equitable estoppel argument, because of its finding that the Arbitration Agreement and the Admission Agreement did not merge. (Subject Opinion ("Thus, the Admission Agreement and Arbitration Agreement did not merge. Because we find the documents did not merge, a controlling consideration of whether the Arbitration Agreement bound [Ms.] Seabrook, we decline to reach the Facility's remaining arguments.").) Therefore, for the same reasons that the Court of Appeals erred in affirming the circuit court's finding that these instruments did not merge, it likewise erred in not reaching the Facility's remaining arguments, including especially, but not limited to, its equitable estoppel argument.

C. Had the Court of Appeals reached the Facility's remaining arguments, including especially, but not limited to, its equitable estoppel argument, as, respectfully, it should have, the Court of Appeals should have found that the circuit court erred in not finding Plaintiff equitably estopped to deny the enforceability of the Arbitration Agreement and that it (the circuit court) should have granted the Motion to Compel Arbitration.

All of these issues/arguments are already addressed in the Facility's briefs to the Court of Appeals, the entirety of which are adopted and incorporated herein by reference.

D. Separate and apart from the Facility's merger/equitable estoppel argument, and while most respectfully recognizing the binding effect that this Court's decision in *Arredondo* had on the Court of Appeals (as well as on the circuit court), the Arbitration Agreement should be deemed validly executed on Ms. Seabrook's behalf by her attorney-in-fact, Ms. Tisdale, pursuant to the HCPOA.

The FAA requires that arbitration agreements be placed on "equal footing" with all other contracts under state law and prohibits courts from setting aside arbitration agreements based on state-law defenses "that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *see also Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (While a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not do so based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.") (citing *Concepcion*, 563 U.S. at 339).[26]

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

South Carolina law does not require an act to be specifically enumerated in a power of attorney in order for the agent to be authorized to perform the act on behalf of the principal. *See First S. Bank v. Rosenberg*, 418 S.C. 170, 181, 790 S.E.2d 919, 925–26 (Ct. App. 2016) (rejecting appellant's contention "that an agent cannot sign a guaranty on behalf of his principal

pursuant to a power of attorney unless the power of attorney specifically authorized the execution because this assertion is unsupported by South Carolina law"). Accordingly, under the FAA's "equal footing" rule, a power of attorney does not need to explicitly refer to arbitration in order to grant the agent authority to execute an arbitration agreement as long as the powers granted are broad enough to include such an act. *Concepcion*, 563 U.S. at 339.

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

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

(R. p. 129 (emphasis added)); *see also* § 62-5-504 (emphasis added).

The HCPOA explicitly granted Ms. Tisdale the authority to admit Ms. Seabrook to a skilled nursing facility and to take any actions necessary to assure implementation of her health care decisions, including: (i) pursuing legal actions, (ii) settling legal actions, (iii) waiving claims and liability, and (iv) forcing compliance with Ms. Seabrook's wishes.[27] No express limitation is placed upon these broad powers; indeed, to the contrary, they are expressly stated to be *without*

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

[27] The matter of the forum for the enforcement of compliance with Ms. Seabrook's health care wishes, and the selection thereof, is directly related to the matter of forcing

limitation. (R. p. 129.) Ms. Tisdale was duly empowered under the HCPOA to sign the Arbitration Agreement on Ms. Seabrook's behalf. To read the HCPOA to the contrary is to employ an unduly restrictive reading of the HCPOA in violation of the FAA.

Accordingly, the Arbitration Agreement should have been found (and should now be found) validly executed on Ms. Seabrook's behalf by her attorney-in-fact pursuant to the HCPOA.

E. At a minimum, the Court of Appeals should have found that the circuit court erred in denying the Facility's alternative request for limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability under an agency theory.

In ruling against the Facility on this point, the Court of Appeals simply stated as follows:

> Finally, we hold the circuit court did not err in denying the Facility's request to conduct limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability under an agency theory. *See Est. of Solesbee*, 438 S.C. at 651, 885 S.E.2d at 150 ("Because we find the trial court correctly held there was no merger of the Agreements and Magnolia's equitable estoppel argument was properly denied, we also find the court did not err in denying its request for further discovery when it would not have changed the result.").

(Subject Opinion.) It thus appears that the Court of Appeals ruled against the Facility on this point on the basis that allowing the requested discovery "would not have changed the result." Most respectfully, the Court of Appeals overlooked the fact that it is not possible to know in advance whether the requested discovery would or would not change the result.

As the Facility's duly argued to the Court of Appeals, the Arbitration Agreement is valid on its face, containing Ms. Tisdale's express representation of her authority to bind Ms. Seabrook. (R. p. 98 ("By . . . her signature below, the executing party [(i.e., Ms. Tisdale)]

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compliance with Ms. Seabrook's health care wishes. And, of course, to agree to settle litigation is to agree to forego the right to a jury trial.

represents that . . . she has the authority to sign on [Ms. Seabrook's] behalf so as to bind [Ms. Seabrook] as well as [herself].").) And having signed the Arbitration Agreement, Ms. Tisdale "is presumed to have, read, understood, and assented to its terms." *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms."). Indeed, the idea that Ms. Tisdale lacked authority to bind Ms. Seabrook—which, of course, directly contradicts Ms. Tisdale's own prior representation that she had such authority—only came about in the context of Plaintiff's opposition to the Motion to Compel Arbitration.

Independent of the Facility's arguments based on merger/equitable estoppel and the HCPOA, the law of agency provides a basis on which to find that Ms. Tisdale validly executed the Arbitration Agreement on behalf of Ms. Seabrook. *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.") (emphasis added). Questions of agency, whether in terms of a true agency[28] or of agency by estoppel[29] or of ratification[30], are fact intensive.

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[28] 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

Even though agency may not be established *solely* by the actions of the agent,[31] "such declarations and conduct [by the agent] are admissible as circumstances in connection with other evidence tending to establish the agency." *Fuller*, 240 S.C. at 83, 124 S.E.2d at 606. At the least, there is an ambiguity worthy of investigation as to whether Ms. Seabrook manifested assent for Ms. Tisdale to act as her agent, given the inconsistency between Ms. Tisdale's representation of authority in the Arbitration Agreement and Plaintiff's later disavowal of such authority in opposition to the Motion to Compel Arbitration. Examination of Ms. Tisdale would not be limited to an inquiry into Ms. Tisdale's own declarations and conduct but those of Ms. Seabrook during her lifetime and whether there was any course of dealing whereby Ms. Seabrook had assented to Ms. Tisdale acting on her behalf prior to Ms. Seabrook's admission to the Facility. Inquiry could also be made into whether Ms. Seabrook had any post-admission discussions or other interactions with Ms. Tisdale relating to the documents Ms. Tisdale signed on Ms. Seabrook's behalf during the admissions process, such that Ms. Seabrook could have

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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).

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

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

repudiated them if they were signed without proper authority or, conversely, ratified them by not doing so.

Like the circuit court before it, in affirming the circuit court's denial of discovery (on the basis that, "'further discovery when it would not have changed the result'"[32]), the Court of Appeals misapprehended and/or overlooked the facial validity of the Arbitration Agreement, the unfairness of Plaintiff being able to upset that facial validity in a manner that is unchecked by discovery, and the potential for targeted discovery to reveal evidence (relevant to a fact-intensive inquiry) that could change the result of the Motion to Compel Arbitration based on other theories for enforcing the Arbitration Agreement besides merger/equitable estoppel.

Accordingly, at a minimum, the Court of Appeals erred in affirming the circuit court's denial of the Facility's alternative request for limited discovery to address gaps in the evidentiary record—gaps which undeniably exist and cannot possibly be filled without the requested discovery—bearing on the Arbitration Agreement's enforceability.

CONCLUSION

For the foregoing reasons, along with any other or further reason(s) set forth in its appellate briefs already on file, the entirety of which it hereby adopts and incorporates herein by reference and reiterates/reasserts in support hereof, the Facility asks this Honorable Court to grant the instant petition, reverse the Subject Opinion, and decide this appeal anew via an opinion that reverses the circuit court and stays this lawsuit in favor of arbitration (or remands the case to the circuit court with instructions for it to do so) or, alternatively, that reverses the circuit court and remands the matter for the requested discovery to be conducted and the Motion to Compel Arbitration to be argued and decided anew with the benefit thereof.

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[31] *Cowburn v. Leventis*, 366 S.C. 20, 39–40, 619 S.E.2d 437, 448 (Ct. App. 2005).

Respectfully submitted,

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[32] (Subject Opinion (quoting *Solesbee*, 438 S.C. 651, 885 S.E.2d at 150).)