THE STATE OF SOUTH CAROLINA
In the Supreme Court

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May 15 2024
S.C. SUPREME COURT

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2024-000307

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

v.

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

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

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the Petition presents special and important reasons for the Court to grant a writ of certiorari as required by Rule 242(b), SCACR.

II. Whether the Court of Appeals erred in affirming the Circuit Court's finding that the subject admission and arbitration agreements did not merge.

COUNTERSTATEMENT OF THE CASE

On July 27, 2019, the decedent, Robert Ramsey, fractured his femur after falling at home while in the care of Defendant Priority Home Care. (R. pp. 20, 24). Due to the nature of his injuries, it was no longer advisable that Mr. Ramsey be left at home, and he was admitted to Petitioner St. George Health Care, LLC's facility, St. George Healthcare Center ("the Facility"). (*Id.*). Upon admission, an initial skin assessment noted several areas where Mr. Ramsey had skin tears, redness and blisters. (*Id.*). While in the Facility's care, the wounds rapidly became necrotic, and Mr. Ramsey began to experience severe and rapid weight loss. (R. pp. 20, 25). Additional pressure ulcers developed on his sacrum, hip, and heels, with the heel wound quickly becoming so severe that amputation was recommended. (*Id.*). Mr. Ramsey passed away approximately one month later. (*Id.*).

Mr. Ramsey executed a South Carolina health care power of attorney designating Respondent Jennifer Rahn as his health care agent on August 25, 2016. (R. pp. 51-57). There is no evidence that a general durable power of attorney was ever executed by Mr. Ramsey. The health care power of attorney granted Rahn the authority to consent to medical care on Mr. Ramsey's behalf, to authorize his admission to a medical facility, and to take other actions *necessary* to making decisions concerning Mr. Ramsey's health care. (*Id.*). It did not contain a broad grant of authority empowering Rahn to do anything Mr. Ramsey may have done in situations concerning the provision of health care to Mr. Ramsey.[1] The Facility did

[1] The Facility has never contested the Estate's position that the health care power of attorney was ineffective as a grant of authority to waive the Estate's right to a jury trial. (R. p. 2). The

not appeal the Circuit Court's finding that there was no evidence of any actual or apparent agency relationship between Rahn and Mr. Ramsey, it did not appeal the Circuit Court's finding that the health care power of attorney was insufficient to grant authority to Rahn to enter an arbitration agreement on behalf of Mr. Ramsey, and it did not appeal the Circuit Court's finding that Rahn had no authority to execute the arbitration agreement, so these findings are the law of the case.[2]

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

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

[2] The authority conveyed by a principal to an agent to make health care decisions or handle finances does not encompass executing an agreement to arbitrate. *Hodge v. UniHealth Post-Acute Care of Bamberg*, 422 S.C. 544, 572, 813 S.E.2d 292, 307 (Ct. App. 2018).

"Admission Agreement – South Carolina", and is separately paginated as pages one through 12. (*Id.*).

The arbitration agreement sets forth that all claims arising out of or relating to the Facility's admission agreement are to be resolved by arbitration and provides the governing law for the arbitration agreement. The arbitration agreement has its own separate signature page, is entitled "Facility – Resident/Representative Arbitration Agreement", and is paginated as "Page 1 of 1". (R. p. 50). The Facility does not dispute that the arbitration agreement is optional, and it contains no provision for medical, nursing, or health care services to be provided to residents, nor does it require any financial commitment to pay for such services.

This action was commenced on November 4, 2021, by filing a Summons and Complaint in the Colleton County Court of Common Pleas. (R. pp. 17-23). Rahn alleged that the decedent passed away after suffering numerous pressure ulcers while he was a resident of the Facility (R. p. 20). Rahn properly complied with the Notice of Intent and affidavit requirements of S.C. Code Ann. §§ 15-79-125 and 15-36-100 prior to filing suit.[3] The Facility answered the Complaint on December 15, 2021, and generally denied all allegations pertaining to any liability for the decedent's treatment while he was in the Facility's care. (R. pp. 26-31). The Facility raised as an affirmative defense the potential arbitrability of this action and reserved the right to file a motion to dismiss and compel arbitration. (R. p. 28).

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

On March 7, 2022, the Facility filed a Motion to Compel Arbitration, arguing that a valid arbitration agreement had been entered between the parties. (R. pp. 47-49). The Facility contended that Rahn was the decedent's attorney-in-fact at the time she signed the Facility's admission and arbitration agreements on behalf of Mr. Ramsey, such that she would have had authority to enter the agreement, and that the Federal Arbitration Act ("FAA"), as opposed to the South Carolina Uniform Arbitration Act, applied to the arbitration agreement.[4] (*Id.*). The Facility also requested that the Circuit Court stay all discovery, pretrial motions practice, and any requirements to file any responsive pleadings until its Motion could be resolved. (*Id.*).

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

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

90-101). In the alternative, the Facility argued that even if the arbitration agreement was not valid, that the arbitration agreement and admission agreement merged such that it would be inequitable for the Estate to be permitted to argue that the arbitration agreement was not valid. (R. pp. 74-86). Lastly, the Facility requested that the Circuit Court permit it to conduct limited discovery on the issue of agency if it was inclined to deny the Facility's Motion on the issue of agency. (R. pp. 86-88).

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

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

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

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

arbitration, and whether further discovery was necessary prior to a ruling on its Motion.

On July 19, 2022, Rahn filed a memorandum in opposition to the Facility's Motion for Reconsideration, arguing generally that the Facility had not raised any new issues for consideration, had not introduced any new evidence, and had not demonstrated how the Circuit Court had misapprehended any dispositive points in making its decision. (R. pp. 312-314). On August 3, 2022, the Circuit Court denied the Facility's Motion for Reconsideration. (R. pp. 14-16). The Facility filed its Notice of Appeal on September 2, 2022. (R. pp. 315-322). The Facility's Appeal asserted that the Circuit Court erred on essentially three grounds: (1) the Circuit Court's finding on merger was erroneous, (2) the Circuit Court's equitable estoppel analysis was erroneous, and (3) the Circuit Court should have granted the Facility's request for limited discovery instead of denying the motion outright. (Br. of Appellant 1-2). In an unpublished decision, the Court of Appeals affirmed the Circuit Court's finding that the admission agreement and arbitration agreement did not merge, affirmed the Circuit Court's finding that further discovery was not warranted, and stated that it did not reach the issues of estoppel or the arbitrability of wrongful death claims because the merger issue was dispositive of the Appeal. (Opinion, Dec. 13, 2023).

ARGUMENT

I. The Facility has made no effort to identify any special or important reasons justifying this Court's review of the Court of Appeals' Opinion.

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. The South Carolina Appellate Court Rules present five scenarios encompassing the characteristics of cases that will be considered by the Court on review, including:

> (1) Where there are novel questions of law.
>
> (2) Where there is a dissent in the decision of the Court of Appeals.
>
> (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
>
> (4) Where substantial constitutional issues are directly involved.
>
> (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), SCACR.

The Facility's Petition presents no questions or issues justifying review of the Court of Appeals in this instance. There are no novel questions of law presented by the Petition. The Facility has essentially put a single question before the Court, whether the Court of Appeals erred in affirming the Circuit Court's finding of no merger. The issue of merger within the context of health care facility admission and arbitration agreements has already been adequately addressed by this Court in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014), and that decision is dispositive of the issues that have been raised by the Facility on appeal and in its Petition. Additionally, to the best of the undersigned's knowledge, the Facility's questions on merger and estoppel concerning this exact same arbitration

and admission agreement have already been presented to the Court at least four times for review, and the Court has denied certiorari in each case.[5]

Further, the merger/estoppel question with regards to the exact same arbitration and admission agreements at issue here has been presented numerous times to the Court of Appeals for review and has been the subject of a recently published decision, *Estate of Solesbee by Bayne v. Fundamental Clinical and Operational Servs., LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023), in which the Court of Appeals unanimously found that the subject arbitration and admission agreements did not merge and that a nonsignatory estate would not be precluded from denying the validity of the arbitration agreement. The Court of Appeals' reasoning in *Solesbee* is in accord with this Court's reasoning in *Coleman* and carefully follows *Coleman*'s logic.

And to the contrary of the Facility's arguments, *Solesbee* is not contrary to this Court's prior decisions because there is no presumption of merger when a party is attempting to enforce an arbitration agreement against a nonsignatory, regardless of whether the arbitration agreement and admission documents are signed at the same time. *See Wilson v. Willis*, 426 S.C. 326, 337-38, 827 S.E.2d 167, 173 (2019) ("[A] presumption *against* arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate."). Again, this Court has *never* held that there is a presumption in favor of merger when admission and arbitration

[5] *Ladson v. THI of S.C. at Charleston*, Case No. 2022-001286; *Daniels v. THI of S.C.*, Case No. 2022-001503; *The Estate of Solesbee v. Fundamental Clinical and Operational Services, LLC*, Case No. 2023-000777; *Estate of Barbara Owens v. Fundamental Clinical and Operational Services, LLC*, Case No. 2023-001605.

agreements are entered in the same transaction that would shift the burden of proof to the party seeking to deny the validity of an arbitration agreement.

There are no substantial constitutional issues directly involved in the questions presented to the Court by the Petition. Nor are there any federal questions involved; the only issue arguably encompassing a federal question, whether the Federal Arbitration Act governs the subject arbitration agreement, was not ruled upon by the Court of Appeals, was not ruled upon by the Circuit Court, and was not precisely raised to the Circuit Court by the Facility in its Motion for Reconsideration, so the issue is not preserved for review. And even if the issue had been properly preserved, it is completely irrelevant to the questions presented to the Court by the Facility. Given this, it is unsurprising that the Facility has made no effort to convince the Court there is anything special or important inherent in its Appeal, because it has no such arguments to make, necessitating a denial from this Court. *See S.C. Dep't of Social Servs. v. Benjamin*, 430 S.C. 235, 236, 430 S.E.2d 373 (2020) ("This Court has held it will grant certiorari to the court of appeals only where special reasons justify the exercise of that discretion.").

II. The Court of Appeals correctly affirmed the Circuit Court's finding that the arbitration agreement and admission agreement did not merge.

Because arbitration exists solely by agreement of the parties, a presumption against arbitration arises where the party resisting arbitration (the Estate) is a nonsignatory to the written agreement to arbitrate.[6] *Wilson*, 426 S.C. at 337, 827

[6] Rahn was acting in her individual capacity, and not in her capacity as personal representative of Mr. Ramsey's Estate, at the time she entered the arbitration agreement.

S.E.2d at 173. State law provides when an arbitration agreement may be enforced against a nonsignatory, and South Carolina permits a nonsignatory to be bound by an arbitration agreement under several theories: incorporation by reference, assumption, agency, veil piercing/alter ego, and estoppel. *Solesbee*, 438 S.C. at 647, 885 S.E.2d at 148. Only the issue of estoppel was preserved for review by the Court of Appeals. Therefore, the Facility could only prevail if it could show there was no evidence reasonably supporting the Circuit Court's finding that the Estate was not estopped from denying the validity of the arbitration agreement.

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

See Thompson v. Pruitt Corp., 416 S.C. 43, 61, 784 S.E.2d 679, 689 (Ct. App. 2016) (recognizing the concept that a person may act separately in individual and representative capacities).

minimum, create an ambiguity as to merger that must be construed against the Facility.

> In South Carolina, "[t]he general rule is that, *in the absence of anything indicating a contrary intention*, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). Here, there is no evidence that the agreements were signed in the course of the same transaction and at the same time, so the Circuit Court and Court of Appeals were not required to construe the documents together. And even if there was such evidence, the terms of the agreements indicate an intent that the doctrine of merger would not apply to the agreements, and at minimum create an ambiguity as to merger. *See id.* at 355-56, 755 S.E.2d at 455 (stating that ambiguity as to merger must be construed against the drafter).

In determining whether a health care facility's admission and arbitration agreements merge, the Court of Appeals, relying in part on *Coleman*, has looked to the following factors: (1) whether the two agreements are governed by separate bodies of law, (2) whether the language of the agreements recognizes the two agreements as separate, (3) whether the agreements contain different terms regarding revocation and termination, (4) whether the agreements are separately paginated and have their own signature pages, and (5) whether both agreements are required for the execution of the other, or whether one agreement is optional. *Hodge*, 422 S.C. at 562-63, 813

S.E.2d at 302. The Court of Appeals has previously analyzed the subject admission and arbitration agreements in *Solesbee* and found the agreements do not merge.

In *Solesbee*, the Court of Appeals found that the admission agreement is governed by South Carolina law, while the arbitration agreement is governed by federal law. *Solesbee*, 438 S.C. at 648, 885 S.E.2d at 149. To be precise, the admission agreement is governed by "applicable Federal regulations" and South Carolina law. (R. pp. 90-101). The arbitration agreement, on the other hand, purports to be governed by the FAA's statutes and specifically not by South Carolina law.[7] Therefore, the two agreements are not governed by identical spheres of law: one is subject to state law and the federal code of regulations, while the other claims to only be subject to the statutes contained within the FAA.

Second, the Court of Appeals has previously found that the language of the agreements recognizes that they are separate: "The Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement 'shall survive any termination or breach of this Agreement or the Admission Agreement.'" *Solesbee*, 438 S.C. at 648-49, 885 S.E.2d at 149. This language mirrors that addressed in *Coleman* and *Thompson*, in which this Court and the Court of Appeals found such language to be proof that an admission agreement was separate and did not merge with an arbitration agreement:

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

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

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

The Facility argues that the admission agreement's "Entire Agreement" clause contains language indicating that the agreements merged, specifically the statement that "[t]he undersigned further acknowledges that he/she has received and read the *Admission Handbook* and other Admissions materials and understand that these documents are made a part of this Agreement by reference *herein*." (R. p. 101) (emphasis added). Problematically, there is no evidence in the record that the arbitration agreement is part of the "Admissions materials" Rahn presumably received upon signing the admission agreement, and there is no evidence in the record that the arbitration agreement was executed at the same time as the admission agreement.

The Facility wholly relies on dicta from prior decisions of this Court discussing that arbitration agreements can be part of admissions documentation to support that its arbitration agreement was an "Admissions material" that was incorporated into its admission agreement, but those decisions have no evidentiary value to this Petition. Additionally, the "Entire Agreement" provision purports to incorporate the Admissions materials by reference within the admission agreement itself, but nowhere within the admission agreement, including the "Entire Agreement" provision, does it ever refer to the arbitration agreement. As noted by the Circuit

Court, the "Entire Agreement" provision "creates at best an ambiguity as to merger when taken in context of the totality of the circumstances." (R. p. 4).

Third, the Court of Appeals has found that the arbitration agreement contains no language indicating that it may be revoked or terminated, but the admission agreement provides that a resident may terminate the admission agreement at any time. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149. Fourth, the Court of Appeals has found that the agreements at issue are separately paginated and have their own signature pages. *Id.* Since the arbitration and admission contracts have different pagination with different signature pages, and the arbitration contract is entitled "Arbitration Agreement" at the top of its first page, these factors further indicate the drafter's intent for the arbitration agreement to stand by itself as an independent contract, at least when it suits the Facility for it to do so. *See Thompson*, 416 S.C. at 53 n.1, 784 S.E.2d at 685 n.1 (noting that a separately labeled arbitration agreement indicates the drafter's intent for the agreement to stand by itself as an independent contract). Lastly, the Court of Appeals has found that the arbitration agreement is optional and voluntary, while the admission agreement is required for admission. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149. The Facility does not dispute in this case that the arbitration agreement is voluntary and optional.

In this case, the text of the agreements constitutes "actual evidence" and at minimum creates ambiguity as to whether the agreements merged. The Facility misconstrues that there is a legal presumption of merger, and that the above-discussed factors are not sufficient to overcome this presumption. However, the

language of *Coleman* never states that there is a presumption of merger in the context of health care facility arbitration agreements, or that one interpretation as to merger or the other is favored in any way, and in fact the Court's precedents, including *Wilson*, state that there is a presumption *against* merger when attempting to enforce an arbitration agreement against a nonsignatory. *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173. Instead, *Coleman* dictates that the Court can construe separately signed contracts together only if the agreements were made at the same time, by the same parties, for the same purpose, and in the course of the same transaction, so long as there is no language or other indications within the agreements of a contrary intent.

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

The Facility argues that this evidence is not "actual evidence", and that the Circuit Court's and Court of Appeals' former decisions were based on speculation. This begs the question of what else courts are supposed to rely on to determine if

there is an intent contrary to merger that can be gleaned from admission and arbitration agreements. Additionally, if the above-discussed evidence is not indicative of a contrary intent, and the Facility intended the documents to merge, then why hasn't it made the arbitration agreement a provision of the admission agreement, or merged the two documents with an explicit merger provision? Why make separate documents to begin with? The answer to these questions is that for certain purposes, the Facility and other skilled nursing facilities want the agreements to be separate. The language of the agreements purposefully creates an ambiguity that must be construed against the drafter and required the Circuit Court and Court of Appeals to find that in this instance there was no merger of the documents. The Court of Appeals had previously reached the same conclusion numerous times based on the same language and agreements. The Court should not disturb the Court of Appeals' recent decision in *Solesbee* and the unpublished Opinion at issue in this case and should deny the Facility's Petition for a Writ of Certiorari.

The Court need not reach the additional issues raised by the Facility before the Court of Appeals, as the merger issue is dispositive. However, even if the documents did merge, the Court of Appeals correctly affirmed the Circuit Court's finding that estoppel theories would not preclude Mr. Ramsey's Estate from denying the validity of the arbitration agreement, and that further discovery on the issue of authority was not warranted. To the extent that the Court does grant the Facility's Petition, Rahn asserts and preserves all arguments concerning these issues as described in her Respondent's Brief before the Court of Appeals, including her

arguments that a direct benefits theory of estoppel, as well as the traditional equitable estoppel test, do not preclude her from denying the arbitration agreement's validity, and that further discovery on the issue of agency would be futile.

CONCLUSION

For the foregoing reasons, the Court should affirm the Court of Appeals Opinion affirming the Circuit Court's Orders denying the Facility's Motion to Compel Arbitration.

Respectfully submitted,

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May 15, 2024
Hampton, South Carolina