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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2021-CP-42-03701
Appellate Case No. 2023-000432

The Estate of Jo Eva Rice, deceased,
by her Personal Representative Sonya Lovett,

Respondent,

v.

Fundamental Clinical and Operational Services, LLC;
Fundamental Administrative Services, LLC; and
THI of South Carolina at Magnolia Place–Spartanburg, a/k/a
Physical Rehab and Wellness of Spartanburg,

Appellants,

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in denying the Facility's[1] motion to compel Plaintiff's[2] claims to arbitration and, in turn, denying the Other Appellants'[3] corresponding motions to stay this litigation pending the outcome of the Facility's motion to compel arbitration and any resulting arbitration between Plaintiff and the Facility?[4]

A. Did the circuit court misstate the burden on the Facility when it stated, "[t]he party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement" and, "[f]urther, the party seeking enforcement of the [arbitration] agreement bears the burden to prove a valid arbitration agreement exists that is enforceable, knowing, voluntary, and intentional"?

B. Did the circuit court err in stating that "unless there is a valid, irrevocable, and enforceable contract, the [FAA[5]] does not even apply"?

C. Did the circuit court, and the unpublished trial court decisions

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[1] The "Facility" refers to Defendant/Appellant THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Physical Rehabilitation and Wellness Center of Spartanburg (misidentified in this action as "THI of South Carolina at Magnolia Place–Spartanburg, a/k/a Physical Rehab and Wellness of Spartanburg"). It is a skilled nursing facility.

[2] "Plaintiff" refers to Plaintiff/Respondent, The Estate of Jo Eva Rice, deceased, by her Personal Representative Sonya Lovett. "Ms. Lovett" refers to Sonya Lovett, personally, and "Ms. Rice" refers to the decedent, Jo Eva Rice.

[3] The "Other Appellants" refers to Defendants/Appellants Fundamental Clinical and Operational Services, LLC, and Fundamental Administrative Services, LLC, collectively. "Appellants" refers to the Facility and the Other Appellants, collectively.

[4] To be clear, out of an abundance of caution, this issue, and the corresponding argument, covers circuit court error in terms of both the denial of Appellants' principal motions and the denial of Appellants' motion to alter, amend, and/or reconsider the denial of their principal motions.

[5] The "FAA" refers to the Federal Arbitration Act, 9 U.S.C. §§ 1–16 (the "FAA").

that it cites, misapprehend the Fourth Circuit Court of Appeals' decision in *Galloway v. Santander Consumer USA, Inc.*, 819 F.3d 79 (4th Cir. 2016)?

D. Is the existence of a policy favoring arbitration consequential?

E. Does the purported presumption against arbitration where the party resisting arbitration is a nonsignatory violate the FAA?

F. Did the circuit court err in finding that there was a "requirement" that Ms. Rice sign the Arbitration Agreement and that Ms. Lovett did not sign the Arbitration Agreement on her own behalf in addition to on Ms. Rice's behalf?

G. Did the circuit court err in finding that the Arbitration Agreement is not enforceable as to wrongful death beneficiaries?

H. Did the circuit court err in ruling against the Facility on the basis of authentication?

I. Is the circuit court's merger/equitable estoppel analysis erroneous, to include, without limitation, its citation to irrelevant authority that pertains to the wrong test for equitable estoppel, and led the circuit court to wrongly deny the Motion to Compel Arbitration and, in turn, the Motions to Stay? In other words, should the circuit court should have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Ms. Rice effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith?

(a) Most respectfully, is this Court's merger analysis in *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E. 2d 144 (Ct. App. 2023), erroneous, such that it should not control the disposition of this matter?

STATEMENT OF THE CASE

With the help of her daughter Ms. Lovett, Ms. Rice was admitted as a resident of the Facility in January 2018. Ms. Lovett handled the paperwork in conjunction with Ms. Rice's admission, and in doing so, she signed an Admission Agreement[6] and an Arbitration Agreement[7] on her behalf.

Plaintiff commenced this wrongful death and survival action in the Spartanburg County Court of Common Pleas on October 28, 2021, claiming Appellants are liable for allegedly deficient care/treatment Ms. Rice received during her residency at the Facility. (R. pp. 19-36.)[8] Appellants timely answered Plaintiff's complaint, denying the alleged liability and raising a number of affirmative defenses. (R. pp. 37-67.)

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[6] (R. pp. 164-175.)

[7] (R. p. 133.) Without question, the Federal Arbitration Act, 9 U.S.C. §§ 1–16 (the "FAA"), applies to the Arbitration Agreement. 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); *id.* at 273–77 (1995) (explaining that unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce). Here, the Arbitration Agreement expressly states that the FAA applies. (R. p. 133.) 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).

[8] As the above caption reflects, Priority Home Care, LLC, is also a defendant in the case, but it is not a party to this appeal.

Based on the Arbitration Agreement that Ms. Lovett signed on behalf of Ms. Rice in conjunction with her admission, the Facility then moved to compel Plaintiff's claims against it to arbitration (the "Motion to Compel Arbitration"). (R. pp. 130-132, 134-136.)[9] [10] At the same time, the Other Appellants moved to stay the litigation as to them pending the outcome of the Motion to Compel Arbitration and any resulting arbitration between Plaintiff and the Facility (collectively, the "Motions to Stay"). (R. pp. 137-144.) Collectively, the Motion to Compel Arbitration and the Motions to Stay are referred to as the "Underlying Motions."

Following a hearing on April 1, 2022, the circuit court, the Honorable J. Derham Cole presiding, denied the Underlying Motions by order directed filed November 21, 2022. (R. pp. 68-107; R. pp. 1-16.) Pursuant to Rule 59(e), SCRCP, on December 1, 2022, Appellants timely moved the circuit court to alter, amend,

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[9] The Facility's answer to Plaintiff's complaint expressly reserved its right to compel arbitration (R. p. 37) and raised its right to arbitration as an affirmative defense. (R. p. 43 ¶ 36.)

[10] Without question, Plaintiff's claims against the Facility are within the scope of the Arbitration Agreement, the plain language of which clearly embraces the subject matter of Plaintiff's claims against the Facility. (*See* R. p. 133 (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 [Ms. Rice's] stay at [the] Facility, or to the provisions of care or services to [Ms. Rice], including but not limited to . . . .").) And 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 susceptible to an interpretation that covers the dispute, arbitration should be ordered.").

and/or reconsider its decision. (R. pp. 179-207.) The circuit court denied the motion by order filed March 1, 2023. (R. pp. 17-18.)

By notice served and filed March 14, 2023, this appeal timely follows. (R. pp. 210-216.)

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 circuit court erred in denying the Motion to Compel Arbitration and, in turn, the Motions to Stay.

The relationship between the Motion to Compel Arbitration and the Motions to Stay is such that, as indeed the circuit court recognized, the denial of the former dictated the denial (as moot) of the latter. (*See* R. p. 15 (concluding that, in light of the denial of the Motion to Compel Arbitration, the Motions to Stay "are as a result denied as these issues are moot").) Accordingly, in showing that the circuit court erred in denying the Motion to Compel Arbitration, the argument below also shows its error in denying 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.").

A. The circuit court misstated the burden on the Facility when it stated, "[t]he party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement"[11] and, "[f]urther, the party seeking enforcement of the [arbitration] agreement bears the burden to prove a valid arbitration agreement exists that is enforceable, knowing, voluntary, and intentional."[12]

This statement is erroneous to the extent that it suggests the only way the proponent of arbitration can prevail is via an arbitration agreement that is "enforceable" per se. This is not so. Coupled with the merger of the Admission Agreement and the Arbitration Agreement, equitable estoppel provides a workable theory for enforcement of an arbitration agreement against a nonsignatory. *See Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel).

Conceptually, the Facility's merger/equitable estoppel argument is not an argument for the *enforceability* of the Arbitration Agreement but rather for Plaintiff 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 to deny* the [arbitration agreement's] enforceability.") (emphasis added). In

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[11] (R. p. 3.)
[12] (R. p. 4.)

short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and because Ms. Rice effectively embraced and directly benefitted from the Admission Agreement, Plaintiff, as personal representative of Ms. Rice's estate, 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 Ms. Lovett's lack of authority, actual or apparent, or because of another alleged defect in contract formation, or because of the inapplicability of the South Carolina Adult Health Care Consent Act or of Ms. Lovett's lack of authority thereunder) is beside the point and unavailing to refute the Facility's merger/equitable estoppel argument, which, again, turns not on the question of whether it showed that the Arbitration Agreement is enforceable but whether it showed that Ms. Rice and, in turn, Plaintiff, as personal representative of Ms. Rice's estate, should be estopped to deny that the Arbitration Agreement is enforceable—and, most respectfully, it did so.

Additionally, out of an abundance of caution, to the extent that the "knowing, voluntary, and intentional" part of the statement purports to place any burden on the Facility to prove the absence of a ground for revocation, it is improper burden shifting. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) ("[A] party," i.e., the party opposing arbitration, not the proponent, "may seek revocation of the contract under 'such grounds as exist at law or in equity,'

including fraud, duress, and unconscionability."). For that matter, no such ground for revocation has even been raised here, and indeed, the knowing, voluntary, and intentional nature of Ms. Lovett's signing of the Arbitration Agreement is presumed by virtue of her signing it. *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.").

B. The circuit court erroneously stated that "unless there is a valid, irrevocable, and enforceable contract, the Federal Arbitration Act does not even apply."[13]

Again, without question, the FAA applies here. The FAA applies "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363; *see also Allied-Bruce*, 513 U.S. at 268 (holding that the reach of the FAA extends to the broadest permissible exercise of Congress's power under the Commerce Clause). Here, the Arbitration Agreement expressly states that the FAA applies. (R. p. 133.) And our Supreme Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean*, 408 S.C. at 381–82, 759 S.E.2d at 732–33.

[13] (R. p. 4.)

C. The circuit court, and the unpublished trial court decisions that it cites, misapprehended the Fourth Circuit Court of Appeals' decision in *Galloway*, 819 F.3d 79.[14]

In saying that "[t]his standard is akin to the burden on summary judgment," the *Galloway* Court was not referring to the standard for the moving party to prevail on a motion to compel arbitration, but rather the standard for a party seeking a jury trial regarding whether there is a binding arbitration agreement to prevail. *See Galloway*, 819 F.3d at 85 ("We first address Galloway's contention that she is entitled to a jury trial regarding whether she and CitiFinancial entered into a binding contract that included the arbitration agreement. Under the FAA, the party seeking a jury trial must make an unequivocal denial that an arbitration agreement exists—and must also . . . provide sufficient evidence in support of its claims such that a reasonable jury could return a favorable verdict under applicable law. Thus, to obtain a jury trial, the parties must show genuine issues of material fact regarding the existence of an agreement to arbitrate.") (internal citation and quotations marks

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[14] (R. pp. 4-5 ("'A motion to compel arbitration pursuant to the FAA is akin to the burden on summary judgment.' Thomas v. Progressive Leasing, Civ. No. 17-1249, 2017 WL 4805235, at (D. Md. Oct. 25, 2017) (internal quotation marks omitted) (quoting Galloway v. Santander Consumer USA, Inc., 819 F.3d 79, 85 (4th Cir. 2016)). Therefore, the burden is on the moving party to demonstrate the absence of any genuine dispute of material fact, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970), and that the movant is 'entitled to judgment [compelling arbitration] as a matter of law.' Burrell v. 911 Restoration Franchise Inc., 2017 WL 5517383, at (D. Md. November 17, 2017) (citing Fed. R. Civ. P. 56(a)).").)

omitted); *id.* at n.3 ("We have noted that this standard is akin to the burden on summary judgment.") (internal citation and quotation marks omitted).

D. Whether or not there is a policy favoring arbitration is inconsequential.

The circuit court cited our Supreme Court's decision in *Palmetto Construction Group, LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 856 S.E.2d 150 (2021), wherein it stated that "statements [in our appellate jurisprudence] that the law 'favors' arbitration," which are indeed numerous,[15] "mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions" and that "[t]here is . . . no public policy—federal or state–'favoring' arbitration."[16]

Candidly, it is impossible to square this "no public policy . . . 'favoring' arbitration" language in *Palmetto Construction Group* with language in other Supreme Court decisions, for instance, the language in *Zabinski* (which the Court

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[15] *E.g., Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016) ("The policy of the United States and of South Carolina is to favor arbitration of disputes."); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (same); *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012) ("'There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration.'") (quoting *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999)).

[16] (R. p. 5 ("Further, 'there is, however, no public policy – federal or state – favoring arbitration.' Simmons v. Benson Hyundai, LLC, 2022 S.C. App. LEXIS 37, 22WL791174 quoting Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021).").)

thereafter echoed in *Parsons*) that "[t]he policy of the United States and South Carolina is to *favor arbitration of disputes*." 346 S.C. at 596, 553 S.E.2d at 118 (emphasis added). More than just recognizing that contractual provisions to arbitrate must be respected and enforced in the same way as other contractual provisions, this plain language expressly recognizes the existence of a public policy—federal and state—that "favor[s]" arbitration *as a method of dispute resolution*. Moreover, the *Zabinski* Court instructs that "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration;" that, "unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered;" and that "[a] motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." *Id.* at 597, 553 S.E2d at 118–19. These rules do not merely ensure that contractual provisions to arbitrate are respected and enforced in the same way as other contractual provisions: They affirmatively tip the scales in favor of arbitration. Indeed, citing our Supreme Court's decision in *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 747 S.E.2d 461 (2013), this Court has expressly recognized that "*[d]ue to the strong South Carolina and federal policy favoring arbitration*, arbitration agreements are *presumed valid*." *Doe v. TCSC,*

LLC, 430 S.C. 602, 607, 846 S.E.2d 874, 877 (Ct. App. 2020) (emphasis added) (citing *Cape Romain Contractors*, 405 S.C. at 125, 747 S.E.2d at 466)).

In any event, however, even in the absence of a public policy favoring arbitration, the Underlying Motions are still meritorious, as the circuit court should have found.

E. The FAA requires arbitration agreements to be placed on equal footing with all other contracts under South Carolina law, and the purported presumption against arbitration where the party resisting arbitration is a nonsignatory violates the FAA.

"[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate"[17] and "ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). To that end, the FAA provides that an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "By its terms, the [FAA] leaves no place for the exercise of discretion by a . . . court, but instead *mandates* that . . . courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis added); *see also* 9 U.S.C. § 4 ("The court shall hear the parties, and upon being satisfied that the making of the agreement for

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[17] *Allied-Bruce*, 513 U.S. at 270.

arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement*.") (emphasis added).

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." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (citing *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* . . . ." *Concepcion* at 339 (emphasis added); *see also 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).

The circuit court cited *Wilson*, 426 S.C. 326, 827 S.E.2d 167, for the proposition that, under South Carolina law, there is a presumption against arbitration

when enforcement is sought against a non-signatory.[18] But the FAA requires arbitration agreements to 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." *Concepcion*, 563 U.S. at 339. Thus, under the FAA, there cannot be a presumption against enforcement of arbitration agreements against nonsignatories unless the same presumption also applies to enforcement of all other contracts against nonsignatories. The Facility is aware of no such general presumption under South Carolina law, and the Subject Order cites none. Indeed, where the *Wilson* Court itself referenced "a presumption *against* arbitration . . . where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate,"[19] it cited no South Carolina authority and the authority it did cite addressed arbitration in particular, not contracts generally. *Id.* ("*Global Pac., LLC v. Kirkpatrick*, 88 N.E.3d 431, 435 (Ohio Ct. App. 2017) ('Because no party can be required to submit to arbitration when it has not first agreed to do so, in a case where the party resisting arbitration is not a signatory to any written agreement to arbitrate, a presumption against arbitration arises.'); *cf. Comer v. Micor, Inc.*, 436 F.3d 1098, 1103–04 (9th Cir. 2006) (noting 'the general rule that a nonsignatory is

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[18] (R. p. 5 ("'…A presumption against arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate.' Wilson v. Willis, 426 S.C. 326 at 339, 827 S.E.2d 167 (2019).").)

[19] 426 S.C. at 337–38, 827 S.E.2d at 173 (emphasis in original).

not bound by an arbitration clause').”). The supposed presumption against arbitration violates the FAA's equal footing rule and was erroneously applied by the circuit court in this case.

F. The circuit court erroneously found that there was a “requirement” that Ms. Rice sign the Arbitration Agreement[20] and that Ms. Lovett did not sign the Arbitration Agreement on her own behalf in addition to on Ms. Rice's behalf.[21]

The Facility did not “ha[ve]” Ms. Lovett sign the Arbitration Agreement. Rather, Ms. Lovett voluntarily did so, as her own affidavit implicitly admits and, indeed, her own memo in opposition to the Motion to Compel Arbitration

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[20] (R. pp. 13-14 (“[T]he agreement by its very own terms required that the Defendants have Ms. Rice sign the Arbitration Agreement. Arbitration Agreement, p. 7. This section of the Arbitration Agreement required that if the resident was competent, then the resident was required to sign same. However, despite the fact that Ms. Rice was competent, the Defendants failed to have her sign the Arbitration Agreement. Despite knowing the requirement to have Ms. Rice sign the Arbitration Agreement and the knowledge that she was competent, the Defendants instead had Ms. Lovett who had no authority, sign the Arbitration Agreement on Ms. Rice's behalf. Because Ms. Rice was required to sign the Arbitration Agreement in the first place for it to be enforceable, no arbitration agreement could have existed as to Ms. Lovett as the terms of the Agreement required Ms. Rice, not Ms. Lovett, to sign.”).)

[21] (R. p. 14 (“Additionally, the explicit language in the Arbitration Agreement indicates that the Agreement is between Jo Eva Rice or ‘Durable Power of Attorney for Healthcare'/‘Resident's Legal Guardian'/‘Resident's Responsible Party' (hereinafter collectively ‘Representative'). The signature line does not reflect that Ms. Lovett was signing on behalf of herself individually for her own claims, or that of any Wrongful Death Beneficiaries. Furthermore, in the Arbitration Agreement the paragraph above the signature line, the Arbitration Agreements states, ‘Resident/Representative Signature'. As a result, the Arbitration Agreement is explicitly clear that Ms. Lovett was not attempting to sign on the behalf Herself.”).)

expressly states. (*See* R. p. 145 ¶ 4 (implicitly admitting that she, Ms. Lovett, signed the documents in conjunction with Ms. Rice's admission to the Facility); R. p. 148 ("Ms. Lovett signed the Facility's 'Arbitration Agreement' on the same day as the Arbitration Agreement." [*sic*]).) And she, as "Representative," did so expressly attesting, by her signature on the Arbitration Agreement, that she "ha[d] the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative." (R. p. 133.) This may not mean that it was in fact true that Ms. Lovett was duly authorized to sign for Ms. Rice, but it does mean that Ms. Lovett in fact represented to the Facility that it was true when she signed the Arbitration Agreement, which, again, she is presumed to have "read, understood, and assented to,"[22] and as to which she owes the Facility a duty of good faith that is no less than that owed to her by the Facility. *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) ("There exists in every contract an implied covenant of good faith and fair dealing.").

There was no "requirement" that Ms. Rice sign the Arbitration Agreement herself. Ms. Lovett voluntarily signed for Ms. Rice, expressly representing to the Facility that she was duly authorized to sign for her. Indeed, the citation that the circuit court gave in support of the idea that there was a "requirement" that Ms. Rice sign the Arbitration Agreement herself is "Arbitration Agreement p. 7." (R.

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[22] *Gibson*, 426 S.C. at 352, 827 S.E.2d at 181.

p. 13.) As the Arbitration Agreement is only a one-page document, there is no page 7, and it contains no requirement that it be signed by Ms. Rice.

G. The circuit court erroneously found that the Arbitration Agreement is not enforceable as to wrongful death beneficiaries.[23]

The Arbitration Agreement applies with equal force to the wrongful death claim. A wrongful death claim does not belong to the wrongful death beneficiaries. It belongs to the decedent's personal representative, and a specific rule prohibiting enforcement of otherwise valid agreements to arbitrate wrongful death claims would violate the FAA's requirement that arbitration agreements be placed on equal footing with other contracts,[24] as indeed our Supreme Court has already recognized in *Dean*, 408 S.C. at 389, 759 S.E. at 737 n.3 ("[C]ourts *may not* refuse to compel arbitration simply because a wrongful death claim is involved.") (emphasis added).

"The right of action for wrongful death is purely statutory and did not exist at common law . . . ." *Glenn v. E. I. DuPont Nemours & Co.*, 254 S.C. 128, 133, 174 S.E.2d 155, 157 (1970). Per the plain language of the wrongful death statute, a wrongful death claim must be a claim that, had the decedent lived, they could have maintained themselves. S.C. Code Ann. § 15-51-10 ("Whenever the death of a person shall be caused by the wrongful act, neglect or default of another *and the act, neglect or default is such as would, if death had not ensued, have entitled the party*

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[23] (R. pp. 13-14.)

[24] *See Concepcion*, 563 U.S. at 339.

injured *to maintain an action and recover damages in respect thereof*, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.") (emphasis added); *see also Maxey v. Sauls*, 242 S.C. 247, 250, 130 S.E.2d 570, 572 (1963) ("[T]he right to maintain the [wrongful death] action is based upon the condition that 'the act, neglect or default' must be 'such as would, if death had not ensued, have entitled the person injured to maintain an action and recover damage in respect thereof.' In other words, '*if the deceased never had a cause of action, none accrues under the wrongful death statute*.'") (discussing prior statutory language that is identical to that in present § 15-51-10) (quoting *Scott v. Greenville Pharmacy*, 212 S.C. 485, 489, 48 S.E. 324, 326 (1948) (emphasis added). Accordingly, a claim of wrongful death is derivative in nature, in that it derives from (and does not arise without) a cause of action arising in favor of the *decedent*. *See Id.*; *see also* 26 S.C. Jur. Limitation of Actions § 32 ("A wrongful death action is derivative in nature . . . ."); *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 942 (D.S.C. 1988) ("If the decedent never had a cause of action, none accrues under the wrongful death statute. Furthermore, anything that would have defeated the decedent's recovery had he survived the accident, such as contributory negligence, a valid release, or similar acts on his part, would defeat the right of recovery in behalf of his family in case of his death. It follows logically that the decedent's failure to file a timely claim . . . is an act, or omission, on his part

which should defeat the right of recovery of his personal representative.") (internal citations and quotation marks omitted); *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010) ("*Quattlebaum* was correctly decided and adheres to the principle that a decedent's estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived.'").

"[T]he substantive right to bring . . . a wrongful death action . . . is determined by the Probate Code." *Fisher on behalf of estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 240, 811 S.E.2d 739, 742 (2018); *see also id.* at 242, 811 S.E.2d at 743 ("The Probate Code defines who may act on behalf of the estate of a deceased person. The Probate Code, therefore, is the substantive law by which the identity of the *'real party in interest'* is determined for all civil actions *brought on behalf of the estate of a deceased person*.") (emphasis added). "Under the Probate Code . . . *wrongful death actions must be brought by the personal representative* . . . ." *Id.* (emphasis added); *see also* S.C. Code Ann. § 15-51-20 ("Every [wrongful death] action shall be brought by or in the name of the executor or administrator of [the] person [whose death was wrongfully caused].");[25] *Glenn*, 254 S.C. at 134,

[25] As explained by the *Fisher* Court, "Under the Probate Code . . . the terms 'executor' and 'administrator' do not have separate meaning, but are included within the defined term 'personal representative.'" 422 S.C. at 240, 811 S.E.2d at 742 (citing S.C. Code Ann. § 62-1-201 (33) (defining "Personal representative" to "include[] executor, administrator, successor personal

174 S.E.2d at 158 ("If an action for wrongful death is instituted by one other than the personal representative of a decedent, duly appointed by the Probate Court, it should be dismissed.").

Even though it is for their "benefit," a wrongful death claim does not belong to the wrongful death beneficiaries themselves. It is a claim that is brought on behalf of the estate of the deceased person. The substantive right to bring the claim belongs to decedent's personal representative, who must bring the claim and is the real party in interest under South Carolina law. And consistent with Judge Anderson's correct analysis in *Quattlebaum* (which explains that anything that would have defeated the decedent's recovery had he survived, such as, for instance, a valid release, will apply to the wrongful death claim), it follows logically that a valid arbitration agreement must also apply to the wrongful death claim, and the circuit court erred in finding otherwise.

H. The circuit court erroneously ruled against the Facility on the basis of authentication.[26]

As the circuit court itself recognized, the "burden to authenticate is not high." (R. p. 13.) All that is required is a satisfactory foundation from which it can

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representative, special administrator, and persons who perform substantially the same function under the law governing their status.")). "Therefore, wrongful death actions must be brought by the personal representative, despite the language 'shall be brought by . . . the executor or administrator' that still appears in section 15-51-20." *Id.*

[26] (R. pp. 12-13.)

reasonably be found that the evidence is authentic, i.e., that it is it was it purports to be. *Berry v. Span*, 433 S.C. 1, 10, 855 S.E. 309, 315 (Ct. App. 2021). Here, Ms. Lovett's own affidavit necessarily admits that she signed all the paperwork in conjunction with Ms. Rice's admission. (*See* R. p. 145 ¶ 4.) In fact, Plaintiffs' memo in opposition to the Motion to Compel Arbitration expressly states, "*Ms. Lovett signed* the Facility's 'Arbitration Agreement' on the same day as the Arbitration Agreement" [27] and, indeed, accurately describes the documents she admittedly signed, copies of both of which she herself attached to the memo—without ever raising any challenge to their authenticity. (R. pp. 147-162 ("The Admission Agreement was 12 pages and labelled Pages 1-12. . . . The arbitration document was a separate document labeled 'Page 1 of 1.'"); R. pp. 133, 164-175.)

The circuit court erred in not finding the Admission Agreement and Arbitration Agreement authenticated on the existing record, or at the very least in not allowing the Facility to supplement the record to provide an affidavit to authenticate the documents, as allowing it to do so would have worked zero undue prejudice on Plaintiff and would have furthered the interests of justice—and, indeed, to the extent it is necessary for authentication (which, as explained above, the Facility contends it is not) the Court should allow it to do so even now. *See*

[27] (R. p. 148 (emphasis added).)

Rule 1, SCRCP ("These . . . shall be construed to secure the just, speedy, and inexpensive determination of every action.).

I. The circuit court's merger/equitable estoppel analysis is erroneous, to include, without limitation, its citation to irrelevant authority that pertains to the wrong test for equitable estoppel, and led the circuit court to wrongly deny the Motion to Compel Arbitration and, in turn, the Motions to Stay. The circuit court should have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Ms. Rice effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.

The core question here is this: Is the Arbitration Agreement (which Ms. Lovett signed for Ms. Rice) enforceable against Plaintiff (the personal representative of Ms. Rice's estate), even though it was not signed by Ms. Rice herself? The answer is yes: The Arbitration Agreement is enforceable against Plaintiff—or more precisely, Plaintiff is now estopped to deny that the Arbitration Agreement is enforceable.

The Facility's merger/equitable estoppel argument is a standalone argument. It does not depend on any showing of authority (actual or apparent or otherwise) on the part of Ms. Lovett or otherwise on the existence of any valid and enforceable agreement between the parties. *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 . . . estoppel."); *see also Coleman*, 407 S.C. at 354–55, 755 S.E.2d at 455 (acknowledging the possibility of enforcing an arbitration agreement against a

nonsignatory via merger and equitable estoppel); *id.* (explaining that "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).

Again, conceptually, the Facility's merger/equitable estoppel argument is *not* an argument *for the enforceability* of the Admission Agreement/Arbitration Agreement *but rather* an argument *for Plaintiff to be* *<u>estopped to deny</u>* *the enforceability* of the Admission Agreement/Arbitration Agreement. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Ms. Rice having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability not only of the Admission Agreement and but also the Arbitration Agreement merged therewith. And by its very nature, i.e., because the Facility's argument in favor of direct benefits estoppel is based on the direct benefits Ms. Rice received under the Admission Agreement (with which the Arbitration merged), this argument applies with equal force to estop Plaintiff from denying the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.

Accordingly, as to the Facility's merger/equitable estoppel argument, any contrary analysis/argument regarding the Admission Agreement/Arbitration Agreement's supposed lack of enforceability—e.g., that Ms. Lovett lacked authority to sign the Admission Agreement/Arbitration Agreement on behalf of Ms. Rice under the law of agency and/or under the South Carolina Adult Health Care Consent Act, and/or because Ms. Lovett lacked power of attorney over Ms. Rice—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 Arbitration Agreement is enforceable but whether Plaintiff is estopped to deny its enforceability.

Merger

In *Coleman*, even though our Supreme Court found against merger on the *particular facts* then before it, the Court 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 Agreement]s 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).

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

The circuit court wrongfully concluded that the Admission Agreement and the Arbitration Agreement are separate contacts 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,"[28] as indeed the Admission Agreement and the Arbitration Agreement were here,[29] there is evidence to upset the *presumption* in favor of *merger*, i.e., the presumption that the contracting parties intended the instruments to be construed together as effectively one contract. This is a question of the parties' 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'

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

[29] The circuit court erroneously stated, "the [Arbitration Agreement and the Admission Agreement] were created for different purposes." (R. p. 11.) 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 observes 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 the same purposes, and in the course of the same transaction*." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

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 the parties would have intended the Admission Agreement and the Arbitration Agreement not to merge.

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. 133.) 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. 175.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[30]), 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. 175.) Without question, the Arbitration Agreement is among these other Admissions materials. *See Stott v. White*

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[30] 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).

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)).

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. But all this means is that it did not have to be agreed to for Ms. Rice to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact agreed to. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

Moreover, while it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been

executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—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. 133 (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. Rice'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. 164-175 (setting forth the

terms of Ms. Rice's admission to the Facility) *with* R. p. 133 (providing for arbitration of disputes arising out of Ms. Rice's admission to 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. p. 173 (providing "This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located.") *with* R. p. 133 (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, and contrary to the view expressed in the Subject Order,[31] the respective termination provisions of the Arbitration Agreement and the Admission Agreement provide no evidence of "separatedness." The only reason for the Arbitration Agreement is the Admission Agreement, i.e., the Arbitration Agreement covers disputes relating to/arising out of the Admission Agreement. So

[31] (R. p. 9.)

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 intent contrary to merger. Respectfully, to point to such things, as the Subject Order does,[32] 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

[32] (R. p. 9.)

instruments, shows an intention contrary to merger. The very nature of *merger* is to *merge* separate documents.

And—besides the fact, explained elsewhere, that there is no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement—to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that *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,[33] (a) it did so in dicta and (b) it never addressed the logical inconsistency—which thus remains fair game as an

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

argument in this case[34]—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 even 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

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

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.

The circuit 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 Ms. Rice'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.

Equitable Estoppel

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

arbitration agreements, including estoppel). The *Wilson* Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court 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 Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Ms. Rice received direct benefits (in the form of her admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement was merged. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added). In other words, *Wilson* supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration case like this, not the six-factor test the Court relied on the Subject Order. (*See* R. p. 10 n.1.)

Moreover, the circuit court incorrectly interpreted *Wilson* as follows:

> [T]he Facility cannot meet the "direct benefits" test considered in Wilson because Plaintiff is not attempting to enforce a contractual claim under the Admission Agreement and Plaintiff's claims in no sense rely on the

> Arbitration Agreement's terms, and the Facility's argument to the contrary expressly links its estoppel claim to its fatally flawed merger argument.
>
> The "direct benefits estoppel" discussed in Wilson could only apply if Plaintiff has "consistently maintained that other provisions of the same contract should be enforced to benefit" her. 426 S.C. at 340, 827 S.E.2d at 175 (quoting Pearson, 400 S.C. at 290, 733 S.E.2d at 601). In other words, the Facility's burden is to show Plaintiff has "knowingly exploit[ed]" the Arbitration Agreement to her benefit. Wilson, 426 S.C. at 340, 827 S.E.2d at 175. The Facility makes no attempt to meet this burden and cannot do so. Plaintiff's claims do not cite or rely on the Arbitration Agreement. Instead, the Facility argues Plaintiff received direct benefit of the Admission Agreement and, therefore, should be estopped from denying the Arbitration Agreement.
>
> But, this argument has two key flaws. First, Plaintiff has not obtained a "direct benefit" from the Admission Agreement as that term is used for estoppel purposes. Plaintiff does not allege a breach of contract claim based on the Admission Agreement or otherwise rely on that contract to seek liability against the Facility. The mere fact that Ms. Rice's relationship with the Facility underlying Plaintiff's claims was memorialized in the Admission Agreement is not sufficient for the Facility to invoke estoppel. Wilson, 426 S.C. at 343, 827 S.E.2d at 176 ("direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen 'but for' a contract's existence").

(R. pp. 10-11.)

What *Wilson* says is 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. *See*, 400 S.C. at 290, 733 S.E.2d at 601 ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.") (citation and internal quotation marks omitted).

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,[35] much less call for, such a result.

Here, Ms. Rice was a direct beneficiary. Indeed, to deny her receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of her residency: every night's stay, every meal, every

[35] *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.").

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. 20-36.)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Ms. Rice received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment she received therein. Respectfully, the circuit 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, Ms. Rice having effectively embraced the contract with the Facility for the purpose of her admission and receipt of the benefits thereof.

(a) Most respectfully, this Court's merger analysis in *Solesbee*, 438 S.C. 638, 885 S.E. 2d 144, is erroneous, and should not control the disposition of this matter.

In its recent decision in *Solesbee*, this Court affirmed the denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same the present. Indeed, the Arbitration Agreement and Admission Agreement at issue in the instant case are the same form documents as in *Solesbee*. In affirming the denial of the motion to compel arbitration, 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, 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.").)[36] *Solesbee* was filed after the circuit court denied Appellants' principal motions and before it denied Appellants' motion to alter, amend, and/or reconsider the denial of their principal motions. Although the circuit court did not rely on *Solesbee* in the instant case, the Facility would, most respectfully, make clear its position that the *Solesbee* Court's merger analysis is erroneous and should not control the disposition of this matter.[37]

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." *Solesbee*, 438 S.C. at 648, 885 S.E. 2d at 149. But it is 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."

Regarding governing law, what the Admission Agreement actually states is this: "This Agreement will be governed by and construed in accordance with

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[36] To be clear, the Court's 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/estoppel argument.

[37] In this regard, the Facility would also note that it is still possible that the Supreme Court might review *Solesbee* via a writ of certiorari.

applicable Federal regulations and those laws of the State in which the Facility is located." (R. pp. 164-175.) 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. 133.)

As explained above, the FAA applies whenever an arbitration agreement involves interstate commerce—and this is so even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law. *Allied-Bruce*, 513 U.S. at 273–77. 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. 133.)

Again, 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 they do not support any reasonable inference of any 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.'" *Solesbee*, 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. 175.) 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 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.'" *Solesbee*, 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 concept of "revocation" and that of "termination." A "revocation" is an annulment (i.e., to make something a

nullity),[38] whereas "termination" is to put or bring something to an end. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and 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." *Solesbee*, 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 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

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[38] *Black's Law Dictionary* p. 1321 revocation (7th ed. 1999); *id.* at 89 annulment ("The act of nullifying or making void.").

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.

Finally, the *Solesbee* Court erroneously found against the Facility on merger on the basis that Arbitration Agreement was voluntary. *Solesbee*, 438 S.C. at 649, 885 S.E. 2d at 149. This 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. As explained above, 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). And 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 her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission.

(*Compare* R. pp. 164-175 (setting forth the terms of the admission) *with* R. p. 133 (providing for arbitration of disputes arising out of the admission).)

CONCLUSION

For the foregoing reasons, Appellants ask this Honorable Court to reverse the circuit court, 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, reverse the circuit court and remand 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).

Respectfully submitted,
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January 4, 2024

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2021-CP-42-03701
Appellate Case No. 2023-000432

The Estate of Jo Eva Rice, deceased,
by her Personal Representative Sonya Lovett,

Respondent,

v.

Fundamental Clinical and Operational Services, LLC;
Fundamental Administrative Services, LLC; and
THI of South Carolina at Magnolia Place–Spartanburg, a/k/a
Physical Rehab and Wellness of Spartanburg,

Appellants,

CERTIFICATION FOR FINAL BRIEF OF APPELLANTS

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

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