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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,

APPELLANTS' PETITION FOR REHEARING

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By and through their undersigned counsel, pursuant to Rule 221(a), SCACR, the Facility[1] and the Other Appellants[2] (collectively, "Appellants") hereby petition this Honorable Court for rehearing of this matter, which it decided via Unpublished Opinion No. 2024-UP-083 (S.C. Ct. App. filed March 20, 2024) (the "Subject Opinion"), affirming the circuit court's denial of the Facility's motion to compel arbitration of Plaintiff's[3] claims and the Other Appellants' corresponding motions for a stay. As explained below, Appellants most respectfully contend that the Court misapprehended or overlooked a number of material points.

BACKGROUND

With 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

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

[3] "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.

with Ms. Rice's admission, and in doing so, she signed an Admission Agreement[4] and an Arbitration Agreement[5] 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.) Appellants timely answered Plaintiff's complaint, denying the alleged liability and raising a number of affirmative defenses. (R. pp. 37-67.)

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-

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

[5] (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).

132, 134-136.)[6] [7] 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, 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.)

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[6] 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.)

[7] 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.").

By notice served and filed March 14, 2023, this appeal timely follows. (R. pp. 210-216.) In due course, the appeal was briefed and made ready for decision and decided without oral argument via the Subject Opinion, filed March 20, 2024.

This petition for rehearing timely follows.

STANDARD OF REVIEW

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

ARGUMENT

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

A. The Court erred in affirming the circuit court on the basis that the Admission Agreement and the Arbitration Agreement did not merge.[8]

Appellants' merger/equitable estoppel argument is a standalone argument that does not depend on any showing of authority (actual or apparent or otherwise) on the part of Ms. Lovett or otherwise on the existence of any per se valid and enforceable agreement between the parties. *See Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (observing that South Carolina has recognized numerous theories that can bind nonsignatories to arbitration agreements, including estoppel); *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–55, 755 S.E.2d 450, 455 (2014) (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel); *id.* (explaining "Appellants' equitable estoppel argument," which "[wa]s premised on [Appellants'] contention that, under state law, the admission agreements and the [arbitration agreements] merged," as follows: "Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] . . . , she is

[8] (Subject Opinion ("[W]e hold the circuit court did not err in denying the Facility's motion to compel arbitration because the Admission Agreement and the Arbitration Agreement did not merge.").)

nevertheless *equitably estopped to deny the [arbitration agreement's] enforceability*.") (emphasis added).

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

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

> Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] under the [Adult

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

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

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

Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), and the Court's more recent decision in *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E. 2d 144 (Ct. App. 2023), concluding:

> Here, as in *Solesbee*[9] and *Hodge*[10], (1) the two agreements were governed by different bodies of law because the Admission Agreement was governed by state law and the Arbitration Agreement was governed by federal law; (2) each document was separately labeled, numbered, and contained its own signature page; (3) the Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement "shall survive any termination or breach of this Agreement or the Admission Agreement"; and (4) the Facility acknowledged that signing the Arbitration Agreement was not a prerequisite to admission to the Facility.

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

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

(Subject Opinion.)

The Subject Opinion erroneously concludes that the Admission Agreement and the Arbitration Agreement are separate contracts that do not merge. The merger question examines whether, "where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,"[11] as indeed the Admission Agreement and the Arbitration Agreement were here,[12] there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the instruments should be construed together as effectively one contract. This is a question of intention. *Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a contrary *intention* . . .") (emphasis added). And "in attempting to ascertain th[e] [parties'] intention," our courts "endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into." *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

For the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the

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

[12] 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).

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

Unlike the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (*See* R. p. 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[13]), the "Entire Agreement" clause in the instant Admission Agreement

[13] 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

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.) And without question, the Arbitration Agreement is among these other Admissions materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) ("The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's *admission documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 ("Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement*.") (emphasis added)).[14]

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

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

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

As an initial matter, the Court's assertion about state law governing one instrument (the Admission Agreement) while federal law governs the other (the Arbitration Agreement) is simply incorrect. Regarding governing law, the Admission Agreement states, "This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which the Facility is located." (R. p. 173.) And the Arbitration Agreement states:

> The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law.

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and arbitration agreement signed in conjunction with resident's admission to a nursing facility are indeed "executed at the same time, by the same parties, *for the same purposes, and in the course of the same transaction*." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

(R. p. 133.) Accordingly, the provisions of the Admission Agreement and the Arbitration Agreement regarding governing law are not to the effect that state law governs one instrument and federal law the other, but rather that South Carolina law applies to both except where displaced by federal law.

Moreover, the FAA applies to the Arbitration Agreement, as it does to "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress's power under the Commerce Clause); *Allied-Bruce*, 513 U.S. at 273–77 (explaining that, unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce). And 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).

The rule that the FAA applies whenever an arbitration agreement involves interstate commerce of course applies even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law. *See*

Southland Corp. v. Keating, 465 U.S. 1, 12 (1984) (The FAA "create[d] a body of federal substantive law," which is "applicable in state and federal courts."); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) ("[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."); *see also Allied-Bruce*, 513 U.S. 265, 270–77. 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 to both except where displaced by federal law, and indeed,

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

Like the *Hodge* and *Solesbee* Courts, the Court erred in finding against merger on the basis that "each document was separately labeled, numbered, and contained its own signature page." (Subject Opinion.) The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to

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

Like the *Solesbee* Court (and, for that matter, the *Hodge* Court, even though, again, different admission and arbitration agreements were at issue in *Hodge*), the Court erred in finding against merger on the basis that "the Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement 'shall survive any termination or breach of this Agreement or the Admission Agreement.'" (Subject Opinion.) Unlike in *Hodge*, and, for that matter, *Coleman*, and unaddressed by the *Solesbee* Court, the supposed textual recognition of the Admission Agreement as being separate from the Arbitration Agreement is not included in the "Entire Agreement" provision. Rather, the "Entire Agreement" provision of the Admission Agreement expressly states, "other Admissions materials . . . are made a part of this Agreement by reference." (R. p. 175.) And again, the Arbitration Agreement was signed in conjunction with Ms. Rice's admission and is clearly among these "other Admissions materials." Moreover, that the Arbitration Agreement "shall survive any termination or breach of this Agreement or the Admission Agreement" just means that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement

even after the termination of the Admission Agreement. This is simply how arbitration agreements work—and would be the same *even were the agreement to arbitrate in the form of a clause included within a single instrument*—so this cannot logically provide probative evidence of an intent contrary to merger. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

Like the *Hodge* and *Solesbee* Courts, the Court erred in finding against merger on the basis of the voluntariness of the Arbitration Agreement, i.e., in relying on the fact "that signing the Arbitration Agreement was not a prerequisite to admission to the Facility"[15] as evidence of intention contrary to merger. To be sure, the Arbitration Agreement was indeed optional, i.e., agreeing to arbitration is not required to gain admission to the Facility. But all that this means is that it did not have to be agreed to for Ms. 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 executed. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go

[15] (Subject Opinion.)

together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would 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* p. 133 (providing for arbitration of disputes arising out of Ms. Rice's admission to the Facility).)

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

The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." 407 S.C. at 355, 755 S.E.2d at 455. While it is true that the *Coleman* Court also cited the rule that ambiguity is construed against the drafter,[16] (a) it did so in dicta and (b) it never addressed the logical inconsistency—which thus remains fair game as an argument in this case[17]—in recognizing a rule of law creating a presumption in favor of merger (i.e., in recognizing the occurrence of a set of circumstances (same time, parties, purpose, and transaction) as sufficiently probative to affirmatively tip the scales in favor of merger) while at the same time allowing that presumption to be completely overturned by evidence that is merely ambiguous, i.e., that does not even go so far as to clearly indicate a contrary intention and, indeed, is actually still susceptible to a reasonable conclusion in favor of merger. *See S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are *reasonably* susceptible of more than one interpretation.") (emphasis added).

Respectfully, like the circuit court's, this Court'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

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

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

remembered that the presumption of merger arises only where the four elements of time, parties, purpose, and transaction coincide—as the all do here. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. If one of these is lacking there is no merger. This is why, for the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). The merger presumption is "earned," so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

Respectfully, like the circuit court, this Court should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to 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.

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

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

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

All of these issues/arguments are already addressed in Appellants' briefs, the entirety of which are adopted and incorporated herein by reference.

D. The Court erred in affirming the circuit court's denial of the Motions to Stay.

As explained in the Subject Opinion, the Court affirmed the circuit court's denial of the Motions to Stay on the basis of its affirmance of the circuit court's denial of the Motion to Compel Arbitration. (Subject Opinion ("Because we hold the circuit court did not err by denying the Facility's motion to compel arbitration, it also did not err by denying Fundamental Clinical and Operational Services, LLC, and Fundamental Administrative Services, LLC's motions to stay.").)

As the Subject Opinion recognizes, the relationship between the Motion to Compel Arbitration and the Motions to Stay is such that, insofar as the circuit court was concerned, the denial of the former mooted the latter, and the fates of the appeals taken from the circuit court's rulings on these motions are likewise intertwined in this Court: whether the Motions to Stay are properly viewed as moot depends on whether the Motion to Compel Arbitration was properly denied—which, most respectfully, Appellants contend it was not.

Accordingly, to show, as Appellants have, that the circuit court erred in denying the Motion to Compel Arbitration, is also to show that circuit court erred in denying the corresponding Motions to Stay, which were not properly viewed as moot and should have been (or, alternatively, on remand should be) granted. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.") (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties."); *see also Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) ("The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement. However, the Circuit Court included in its order the requirement that all parties be included

in one arbitration proceeding. Federal has signed no arbitration agreement and cannot be forced into compulsory arbitration. We feel it was erroneous to condition the relief to which respondents are plainly entitled upon the voluntary submission of Federal to arbitration proceedings. This provision has been deleted from the foregoing Order of the lower court.").

CONCLUSION

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

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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Charleston, South Carolina

May 6, 2024

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May 06 2024
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,

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

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May 6, 2024

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Subject:	Rice v. Fundamental (2023-000432) -- Petition for Rehearing
Date:	Monday, May 6, 2024 4:37:08 PM
Attachments:	image001.png Rice v. Fundamental (2023-000432) -- Petition for Rehearing.pdf

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

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