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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marion County
Court of Common Pleas
H. Steven DeBerry IV, Circuit Court Judge

Case No. 2022-CP-33-00183
Appellate Case No. 2023-001712

Rebecca C. Hagood
as Personal Representative of the Estate of Frank D. Chavis, Sr.,

Respondent,

v.

Palmetto Faith Operating, LLC
d/b/a Faith Healthcare Center and
Brooks Arnette,

Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in denying Appellants'[1] motions to compel Plaintiff's[2] claims to arbitration?[3]

A. Did the circuit court err in rejecting Appellants' merger/equitable estoppel argument? More specifically, should the circuit court have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Chavis 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—and, thus, granted Appellants' motions to compel arbitration?

1. Is the circuit court's merger analysis erroneous?

(a) Did the circuit court err in relying on *Solesbee v. Fundamental Clinical and Operational Services, LLC*[4]—indeed, is the *Solesbee* Court's merger analysis itself erroneous—and should *Solesbee* control the disposition of this case?

(b) Did the circuit court misstate the burden on Appellants with respect to their merger/equitable estoppel argument when it stated "[Appellants] must prove a

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[1] "Appellants" refers, collectively, to Defendants/Appellants, Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center (the "Facility") and Brooks Arnette ("Arnette"). The Facility is a skilled nursing facility.

[2] "Plaintiff" refers to Rebecca C. Hagood as Personal Representative of the Estate of Frank D. Chavis, Sr. Rebecca C. Hagood is the daughter of the decedent Frank D. Chavis, Sr. ("Mr. Chavis"), and in her individual capacity, she is referred to as "Mrs. Hagood" or, as she is also known, "Becky Stokes" or "Rebecca C. Stokes," which is the name under which she signed (on behalf of Mr. Chavis) the Admission Agreement, Arbitration Agreement, and Readmission Agreement at issue.

[3] To be clear, out of an abundance of caution, this issue and the corresponding argument includes not only Appellants' challenge to the circuit court's denial of their respective principal motions but also their challenge to the circuit court's denial of reconsideration with respect to their respective principal motions.

[4] 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023).

valid and enforceable arbitration agreement was signed in a 'knowing, voluntary and intentional' capacity"?

(c) Given that the FAA[5] requires arbitration agreements to be placed on equal footing with all other contracts under South Carolina law:

(i) Do the propositions cited by the circuit court about "interpreting a jury trial waiver narrowly" and giving the party opposing arbitration "the benefit of all reasonable doubts and inferences that may arise" violate the FAA?

(ii) Is the purported rule, cited by the circuit court, that "[w]hen a facility knows a resident is competent at the time of admission and is allowed to sign other forms, the resident should sign the arbitration agreement" in fact a rule? And even assuming, *arguendo*, it is, does it violate the FAA?

2. Is the circuit court's equitable estoppel analysis erroneous?

B. Out of an abundance of caution, to the extent that the circuit court ruled that the Arbitration Agreement is not enforceable as to wrongful death beneficiaries, did it err?

STATEMENT OF THE CASE

With the help of Mrs. Hagood, his daughter, Mr. Chavis was admitted as a resident of the Facility on March 14, 2019. (R. pp. 153–164.) Mrs. Hagood handled the paperwork in conjunction with the admission, and in so doing, she signed an Admission Agreement[6] and an Arbitration Agreement[7] on Mr. Chavis's behalf.

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

[6] (R. pp. 153–164.)

When Mr. Chavis was briefly discharged and then readmitted to the Facility in April 2019,[8] Mrs. Hagood signed a Readmission Agreement on his behalf. (R. pp. 183–184.) By its express terms, the Readmission Agreement "reaffirm[s] the terms of the original Admission Agreement" and "acknowledge[s] that [it] does not replace or supercede the original Admission Agreement." (R. pp. 183–184.)

Plaintiff filed this wrongful death and survival action against Appellants in the Marion County Court of Common Pleas on April 4, 2022. (R. pp. 16–56.) Appellants timely answered Plaintiff's operative complaint on June 8, 2022, denying the alleged liability, raising numerous affirmative defenses, and expressly reserving the right to compel arbitration, which they also raised as an affirmative defense. (R. pp. 57–79.)

On July 13, 2022, Appellants moved to compel Plaintiff's claims to arbitration based on the Arbitration Agreement Mrs. Hagood signed on behalf of Mr. Chavis in conjunction with his admission to the Facility (collectively, the "Motions to Compel Arbitration"). (R. pp. 127–128, 130–131, 288–328.)[9]

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[7] (R. p. 129.)

[8] Specifically, Mr. Chavis was discharged on April 5th and readmitted on April 17th, 2019. (R. p. 133.)

[9] Without question, Plaintiff's claims against Appellants are within the scope of the Arbitration Agreement, the plain language of which calls for arbitration of "any controversy or dispute between the parties arising out of or relating to [the] Facility's Admission Agreement, or breach thereof, or relating in any way to [Mr. Chavis's] stay at [the] Facility, or to the provisions of care or services to [Mr. Chavis] . . . ." (R. p. 129.) But even if there were "any doubts concerning the scope

Following a hearing on August 21, 2023,[10] the circuit court, the Honorable H. Steven DeBerry IV, presiding, denied the Motions to Compel Arbitration by order filed September 8, 2023. (R. pp. 1–13.) Pursuant to Rule 59(e), SCRCP, on September 18, 2023, Appellants timely moved the circuit court to alter, amend, and/or reconsider its decision,[11] and the circuit court denied that motion by order filed October 2, 2023. (R. pp. 14–15.)

By notice served and filed November 1, 2023, this appeal timely follows. (R. pp. 359–365.)

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

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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."). There is likewise no question that the Arbitration Agreement covers Arnette as it does the Facility. Besides the Facility itself, the Arbitration Agreement also covers "its agents, employee and servants" (R. p. 129), and Plaintiff's operative complaint expressly alleges that Arnette "was at all material times the Administrator of the Facility." (R. p. 42 ¶ 4.)

[10] (R. pp. 80–126.)

[11] (R. pp. 329–358.)

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 Motions to Compel Arbitration.

A. The circuit court erred in rejecting Appellants' merger/equitable estoppel argument. The circuit court should have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Chavis 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—and, thus, granted the Motions to Compel Arbitration.

The core question here is this: Is the Arbitration Agreement (which Mrs. Hagood signed for Mr. Chavis) enforceable against Mr. Chavis—or, more precisely, against Plaintiff, i.e., Mr. Chavis's estate—even though it was not signed by Mr. Chavis himself? The answer is yes. The Arbitration Agreement is enforceable against Plaintiff—or, more precisely, Plaintiff is estopped to deny that the Arbitration Agreement (and, for that matter, the Admission Agreement) is enforceable.

1. The circuit court's merger analysis is erroneous.

In *Coleman v. Mariner Health Care, Inc.*, 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 [South Carolina 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. 346, 354–55, 755 S.E.2d 450, 455 (2014) (emphasis added).

Here, the circuit court erred in rejecting Appellants' 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).[12]

The circuit court wrongly concluded that the Admission Agreement and the Arbitration Agreement are separate contracts that do not merge. (R. pp. 9–11.) 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,"[13] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[14] there is evidence to upset the *presumption in favor of*

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[12] The circuit court also erred in its reliance on the more recent case of *Solesbee*, 438 S.C. 638, 885 S.E.2d 144, which is separately addressed below.

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

[14] To be clear, *Coleman* unequivocally answers the question of whether the instant Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly observed regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), "the documents *were* executed at *the same time, by the same parties, for the same purposes, and in the course of the same transaction*." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

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

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

Unlike the arbitration agreements at issue in *Coleman*, *Thompson*, and *Hodge*, all of which contained a provision allowing them to be disclaimed or

revoked within 30 days of signing while the corresponding admission agreements did not, the instant Arbitration Agreement has no disclaimer/revocation provision. (R. p. 129.) 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. 164.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[15]), 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. 164.) Without question, the plain and ordinary meaning of the language "other Admissions materials" is such as to embrace the Arbitration Agreement. *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*

[15] 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).

Agreement.") (emphasis added)).[16] And any notion that there is ambiguity in this regard is unsupported and erroneous.

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

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[16] 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" plainly includes the Arbitration Agreement. *See Beaufort Cnty. Sch. Dist. v. United Nat'l Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) ("If the contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect."). Moreover, this connection between the Admission Agreement and the Arbitration Agreement (with the Arbitration Agreement being understood in the plain, ordinary, and popular sense as included in the term "Admissions materials") is underscored by the *Coleman* Court's recognition that an admission agreement and arbitration agreement signed in conjunction with resident's admission to a nursing facility are indeed "executed at the same time, by the same parties, *for the same purposes, and in the course of the same transaction*." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

Moreover, while it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement's) sole reason for being. (R. p. 129 (providing for arbitration of "any controversy or dispute between the parties arising out of or relating to [the] Facility's Admission Agreement, or breach thereof, or relating in any way to [Mr. Chavis's] stay at [the] Facility, or to the provisions of care or services to [Mr. Chavis] . . . ."); R. p. 129. ("This [Arbitration] Agreement shall remain in effect for all care rendered at [the] Facility . . . .").)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission, whereupon it was intended to be considered and construed together with the Admission Agreement, such that the

two were effectively one instrument governing various interrelated aspects of Mr. Chavis's relationship with the Facility, the Admission Agreement setting forth the terms of his admission, the Arbitration Agreement providing for arbitration of disputes arising out of his admission. (*Compare* R. pp. 153–164 (setting forth the terms of Mr. Chavis's admission to the Facility) *with* R. p. 129 (providing for arbitration of disputes arising out of Mr. Chavis's admission in the Facility).)

Also absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* R. p. 162 ("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. 129 (providing that, "because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action," but also providing that arbitration shall be "as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules").) Essentially, both instruments provide that South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, the survival of the Arbitration Agreement is no evidence of "separatedness." Again, the only reason for the Arbitration Agreement is the

Admission Agreement, as the point of the Arbitration Agreement is to cover disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intention contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about whether they are intended to be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of

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

And—besides the fact that there is indeed 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, (a) it did so in dicta[17] and (b) it never addressed the logical

[17] *Id.* at 407 S.C. at 355–56, 755 S.E.2d at 455 ("By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply. *Even if* the 'Entirety' clause creates an ambiguity as to merger, the

inconsistency—which thus remains fair game as an argument in this case[18]—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., evidence 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 improper speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding intent. It must be remembered that the presumption of merger arises from the concurrence of the four elements of time, parties, purpose, and transaction. *Coleman*, 407 S.C. at 354–55, 755 S.E.2d at 455. This is why for the merger

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law is clear that any ambiguity in such a clause is construed against the drafter, in this case, appellants.") (emphasis added) (internal citation omitted); *see Nash v. Tindall Corp.*, 375 S.C. 36, 40–41, 650 S.E.2d 81, 83 (Ct. App. 2007) ("Judicial dicta is not essential to the decision. Dicta . . . is a statement on a matter not necessarily involved in the case, and is not binding as authority.") (internal citations and quotations marks omitted).

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

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.

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 Mr. Chavis's admission to the Facility and would not have been done at all but for his admission to the Facility.

And this result is unchanged by the fact that, following his initial admission to the Facility, Mr. Chavis was discharged and readmitted.

At the conclusion of Section 2 of the circuit court's analysis (setting forth the circuit court's reasoning that "[t]he Admission and Arbitration Agreements Do Not Merge"[19]), the circuit court includes the following footnote:

> Evidence also shows the underlying Admission Agreement was terminated, and Mr. Chavis was discharged from the Facility. He later returned to the Facility, and his daughter signed a Readmission Agreement. It also contained a separate title, different pagination, and different signature block. It did not reference arbitration or any such agreement. Despite his readmission, Mrs. Hagood was not presented any additional arbitration agreement for signature. Likewise, this Readmission Agreement does not merge.

(R. p. 11 n.2.)

This is demonstrably incorrect and provides no basis whatsoever for rejecting Appellants' merger/equitable estoppel argument. The Readmission Agreement expressly refutes the notion that "the underling Admission Agreement was terminated," providing:

> 1. By execution of this Readmission Agreement, the parties acknowledge and reaffirm the terms of the original Admission Agreement between the parties and acknowledge that this Readmission Agreement does not replace or supercede the original Admission Agreement.
>
> 2. The terms, conditions, and obligations of the parties as stated in the original Admission Agreement, along with each of its attachments, are incorporated in

[19] (R. p. 9 (underline and bold print in original omitted).)

> this Readmission Agreement by reference thereto and shall be effective as if rewritten fully herein.

(R. p. 183.) The Admission Agreement and the Arbitration Agreement merged at the time of Mr. Chavis's original admission—when, as explained, they were executed at the same time, by the same parties, for the same purpose, in the course of the same transaction—and the Readmission Agreement expressly states that it does not replace or supercede the Admission Agreement and that the Admission Agreement is fully incorporated into the Readmission Agreement by reference.

(a) The circuit court erred in relying on *Solesbee*, 438 S.C. 638, 885 S.E.2d 144—indeed, most respectfully, the *Solesbee* Court's merger analysis is itself erroneous—and *Solesbee* should not control the disposition of this case.

During the pendency of this case, this Court decided *Solesbee*, wherein it affirmed the denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as Appellants' here. Indeed, the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*.

In affirming the denial of the motion to compel arbitration in *Solesbee*, this Court likened that case to *Coleman* and *Hodge* and found that the circuit court had correctly determined that there was no merger of the Admission Agreement and the Arbitration Agreement and, in turn, had properly denied the Facility's equitable estoppel argument. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149 ("Thus, like the

Coleman and *Hodge* courts, we find there was no merger in this case and [the Facility's] equitable estoppel argument was properly denied.").)[20] Most respectfully, the circuit court erred in its reliance on *Solesbee*—indeed, the *Solesbee* Court's merger analysis is itself erroneous—and *Solesbee* should not control the disposition of this case.[21]

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

Regarding governing law, what the Admission Agreement actually states is this: "This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which the Facility is located." (R. p. 162.) 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

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[20] To be clear, this 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/equitable estoppel argument.

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

> 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. 129.)

Without question, the FAA applies to the Arbitration Agreement,[22] as it does "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction"[23]—and this is so 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

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[22] 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). 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).

[23] *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363.

remainder of the contract."). Moreover, even under the FAA, the general state law of contracts continues to apply. *Allied-Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted). Further still, the Arbitration Agreement expressly calls for the arbitration proceedings to be conducted pursuant to the South Carolina ADR Rules. (R. p. 129.)

Essentially, the provisions of the Admission Agreement and the Arbitration Agreement regarding governing law are to the effect that South Carolina law applies except where displaced by federal law, and indeed, even if the Arbitration Agreement had been included as a provision within the Admission Agreement itself, the FAA would still apply separately to the Arbitration Agreement. In other words, any difference between the governing law as to the Arbitration Agreement and the governing law as to the Admission Agreement would still exist even if the Arbitration Agreement had been included as a provision within the Admission

Agreement itself. Accordingly, the supposed difference in the governing law cannot support any reasonable inference of an intent contrary to merger.

Second, the *Solesbee* Court erroneously found against merger on the basis that "[t]he Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement 'shall survive any termination or breach of this Agreement or the Admission Agreement.'" 438 S.C. at 648–49, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger here. Unlike in *Coleman* and *Hodge*, the supposed textual recognition of the Admission Agreement as being separate from the Arbitration Agreement is not included in any "Entire Agreement" provision. Rather, the "Entire Agreement" provision of the Admission Agreement expressly states, "other Admissions materials . . . are made a part of this Agreement by reference." (R. p. 164.) And as in the instant case, the Arbitration Agreement that was signed in conjunction with the admission is clearly among these "other Admissions materials." Moreover, that the Arbitration Agreement "shall survive any termination or breach of this Agreement or the Admission Agreement" just means that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. Again, this is simply how arbitration

agreements work—and it would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. 2d at 612–13 ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

Third, the *Solesbee* Court erroneously found against merger on the basis that "[t]he Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, 'Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.'" 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. The absence of a "revocation" provision is one way in which the Arbitration Agreement is materially different from those at issue in *Coleman* and *Hodge*, and, for that matter, *Thompson*. Moreover, the *Solesbee* Court drew a false equivalency between the concepts of "revocation" and "termination." A "revocation" is an annulment (i.e., making something a nullity),[24] whereas "termination" is putting or bringing something that properly exists to an end—which is materially different from making something a nullity, i.e., void and never having properly existed in the first place. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and it would be so even were the

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

agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. at 612–13.

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

Finally, the *Solesbee* Court erroneously found against the Facility on merger on the basis that Arbitration Agreement was voluntary. 438 S.C. at 648, 885 S.E.2d at 149. While, again, it is certainly true that the Arbitration Agreement was

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

To say that the Arbitration Agreement was not required for admission, which it was not, is not to say that it was not intended to be part of the admissions materials in the event it was agreed to, which it was, by Mr. Dover on Ms. Solesbee's behalf in *Solesbee* and by Mrs. Hagood on Mr. Chavis's behalf in the instant case. While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact

executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitrations Agreement's) sole reason for being. (*See* R. p. 129 (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 . . . ."); R. p. 129. ("This [Arbitration] Agreement shall remain in effect for all care rendered at Facility . . . .").)

Again, even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission, whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of the resident's relationship with the Facility: the Admission Agreement setting forth the terms of the admission, the Arbitration Agreement providing for arbitration of disputes arising out of the admission. (*Compare* R. pp. 153–164 (setting forth the terms of the admission) *with* R. p. 129 (providing for arbitration of disputes arising out of the admission).)

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

(b) The circuit court misstated the burden on Appellants with respect to their merger/equitable estoppel argument when it stated "[Appellants] must prove a valid and enforceable arbitration agreement was signed in a 'knowing, voluntary and intentional' capacity."[25]

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).

To be clear, Appellants' merger/equitable estoppel argument is a standalone argument. Conceptually, Appellants' 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. *See 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

[25] (R. p. 3.)

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). In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and because Mr. Chavis effectively embraced and directly benefitted from the Admission Agreement, Plaintiff, as personal representative of Mr. Chavis's estate, is estopped to deny the enforceability of the Arbitration Agreement merged therewith.

Accordingly, any contrary analysis/argument regarding the Arbitration Agreement's, or, for that matter, the Admission Agreement's,[26] supposed lack of validity (whether because of Mrs. Hagood's lack of common law agency authority, actual[27] or apparent[28], or the lack of power of attorney[29] or because of the inapplicability of the South Carolina Adult Health Care Consent Act or of Mrs.

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[26] By its very nature, i.e., because Appellants' argument in favor of direct benefits estoppel is based on the direct benefits Mr. Chavis received under the Admission Agreement (with which the Arbitration Agreement merged), this argument applies with equal force to estop Plaintiff from denying the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.

[27] (*See* R. pp. 5–6.)

[28] (*See* R. pp. 7–8.)

[29] (*See* R. pp. 2, 5–6.)

Hagood's lack of authority thereunder[30]or because of another alleged defect in contract formation) is beside the point and unavailing to refute Appellants' merger/equitable estoppel argument, which, again, turns not on the question of whether the Admission Agreement/Arbitration Agreement is enforceable per se but whether Mr. Chavis and, in turn, Plaintiff, as personal representative of his estate, should be estopped to deny its enforceability.

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 Appellants 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 Mrs. Hagood's signing of the Admission Agreement/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.").

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[30] (*See* R. pp. 8–9.)

(c) Because the FAA requires arbitration agreements to be placed on equal footing with all other contracts under South Carolina law:

(i) The propositions cited by the circuit court about "interpreting a jury trial waiver narrowly"[31] and giving the party opposing arbitration "the benefit of all reasonable doubts and inferences that may arise"[32] violate the FAA.

Again, as the circuit court itself recognized,[33] the FAA applies here. "[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate"[34] 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

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[31] (R. p. 3.)

[32] (R. p. 3.)

[33] (R. p. 4 ("Here, the Arbitration Agreement states it shall be governed by and enforced under Federal law, specifically, the [FAA], as opposed to state arbitration law, unless 'contrary to state law'.").) Out of an abundance of caution, Appellants would note, however, that the Arbitration Agreement does not include the "unless 'contrary to state law'" language quoted by the circuit court. Rather, the Arbitration Agreement provides as follows: "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 [FAA], notwithstanding any contrary provision of this Agreement or contrary state law."

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

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 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 with approval authorities in favor of "interpreting a jury trial waiver narrowly"[35] and giving the party opposing arbitration "the benefit of all reasonable doubts and inferences that may arise." (R. p. 3.) But the FAA requires arbitration agreements to be placed on equal footing with all other contracts under state law and prohibits courts from singling them out for disparate treatment 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, arbitration agreements cannot be subjected to state-law rules that call for their narrow interpretation or otherwise tilt the scales against their enforcement unless the same rules also apply to all other contracts. Appellants are aware of no such general rules under South Carolina law,[36] and accordingly, to apply them in this case violates the FAA.

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[35] (R. p. 3.)

[36] Moreover, Appellants would note the following South Carolina rules that are particularly favorable to the proponent of arbitration: 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

(ii) The purported rule, cited by the circuit court, that "[w]hen a facility knows a resident is competent at the time of admission and is allowed to sign other forms, the resident should sign the arbitration agreement"[37] is not in fact a rule to begin with and even assuming, *arguendo*, it is, it violates the FAA.

The circuit court cites *Hodge*, 422 S.C. at 574, 813 S.E.2d at 308, for the proposition that, that "[w]hen a facility knows a resident is competent at the time of admission and is allowed to sign other forms, the resident should sign the arbitration agreement."[38] This is erroneous for two reasons. First off, *Hodge* does not actually endorse such a rule. What *Hodge* actually says is this: "[The resident] did not have a health care power of attorney. Additionally, the Facility knew she was competent at the time of admission as indicated by the doctor's examination and allowed her to sign other forms." *Id.* at 574, 813 S.E.2d at 308. The point that the *Hodge* Court was making in this regard had only to do with the resident's husband's lack of authority to sign an arbitration agreement for the resident under a health care power of attorney, as (a) there was none and (b) even if there were, the husband's springing power to act thereunder would not have sprung into existence

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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." *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118–19.

[37] (R. p. 5 ("When a facility knows a resident is competent at the time of admission and is allowed to sign other forms, the resident should sign the arbitration agreement. *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 574, 813 S.E.2d 292, 308 (Ct. App. 2018).").)

[38] (R. p. 5.)

because the resident was competent at the time of admission.[39] And in any event, even assuming, *arguendo*, that *Hodge* does endorse a rule of law that "[w]hen a facility knows a resident is competent at the time of admission and is allowed to sign other forms, the resident should sign the arbitration agreement," it violates the FAA's equal footing rule by singling arbitration agreements out for disparate treatment based on a state-law defense that is applicable "only to arbitration or derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339.

2. The circuit court's equitable estoppel analysis is erroneous.

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 this Court had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the

[39] Under South Carolina law, all health care powers of attorney executed on or after January 1, 2007, must be in substantially the same form as the statutory form set forth in S.C. Code Ann. § 62-5-504. *Stott*, 426 S.C. at 576, 828 S.E.2d at 86. "The statutory form is a springing durable power of attorney." *Id.* at 426 S.C. at 577, 828 S.E.2d at 87. Although a durable power of attorney is traditionally effective upon execution, under South Carolina's statutory springing health care power of attorney, the attorney-in-fact's authority does not "spring" into effect until it is activated by the principal's incapacity. *Id.* at 426 S.C. at 576–78, 828 S.E.2d at 86–87.

Court's earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which Appellants contend Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Mr. Chavis received direct benefits (in the form of his admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement 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.

The key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability but whether benefits to the nonsignatory are direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 ("Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause. In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his

signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. Stated another way, [u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement . . . .") (internal citations and quotation marks omitted); *id.* at 343, 827 S.E.2d at 176 ("It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.") (internal citations omitted). Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration clause (which is the case here because the Admission Agreement and the Arbitration Agreement merge) while at the same time denying that the arbitration clause is enforceable.

As set forth in our Supreme Court's controlling decision in *Wilson*, and consistent with this Court's decision in *Pearson*, which the *Wilson* Court favorably cited, 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 *Pearson* nor general notions of equity countenance,[40] much less call for, such a result.

Here, Mr. Chavis was a direct beneficiary. Indeed, to deny his receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of his residency: every night's stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even Plaintiff's complaint does not go nearly so far as that. (*See* R. pp. 41–56.) And to the extent that the circuit court ruled that Plaintiff herself, the wrongful death beneficiaries, or the beneficiaries of Mr. Chavis's estate must have directly benefitted,[41] it did so erroneously. It is Mr. Chavis's receipt of direct benefits that matters, and as explained, he clearly did so.

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[40] *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.").

[41] (*See* R. p. 11 ("[T]he Plaintiff, a third-party who represents the wrongful death beneficiaries and estate, is not suing under the Arbitration Agreement or attempting to invoke the Arbitration Agreement itself.").)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Mr. Chavis received the benefit of his admission to the Facility, including, without limitation, the room, board, care, and treatment he 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, Mr. Chavis having effectively embraced the contract with the Facility for the purpose of his admission and receipt of the benefits thereof.

B. Out of an abundance of caution, to the extent that the circuit court ruled that the Arbitration Agreement is not enforceable as to wrongful death beneficiaries, it erred.

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,[42] 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).

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

"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 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].");[43] *Glenn*, 254 S.C. at 134, 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,

[43] 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 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.*

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 to the extent that the circuit court concluded otherwise, it did so erroneously.

CONCLUSION

For the foregoing reasons, Appellants ask that the Court reverse the circuit court's denial of the Motions to Compel Arbitration and compel Plaintiff's claims to arbitration (or to remand this matter to the circuit court with instructions that it do so).

Respectfully submitted,
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September 24, 2024

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marion County
Court of Common Pleas
H. Steven DeBerry IV, Circuit Court Judge

Case No. 2022-CP-33-00183
Appellate Case No. 2023-001712

Rebecca C. Hagood
as Personal Representative of the Estate of Frank D. Chavis, Sr.,

Respondent,

v.

Palmetto Faith Operating, LLC
d/b/a Faith Healthcare Center and
Brooks Arnette,

Appellants.

APPELLANTS' CERTIFICATION FOR FINAL BRIEF

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I, Russell G. Hines, do hereby certify that the **Final Brief of Appellants** complies with Rule 211(b), SCACR, and the Supreme Court's order of April 15, 2014.

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I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellants, hereby certify that the **FINAL BRIEF OF APPELLANTS** and **APPELLANTS' CERTIFICATION FOR FINAL BRIEF** were served on Respondent on September 24, 2024, by emailing (see attached email) a copy of the same to Respondent's counsel of record:

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Enclosed please find Appellants' Final Brief, Final Reply Brief, and Certifications for service upon you in the above-referenced matter.

Thank you,

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