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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Cases No. 2019-CP-42-03708 and 2019-CP-42-03709

Court of Appeals Case No. 2022-001059

Supreme Court Case No. 2024-001764

Kenneth Pace,
Individually and as Personal Representative of the Estate of Earl E. Pace,

Respondent,

v.

Lake Emory Post Acute Care; THI of South Carolina at Camp Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; Fundamental Clinical Consulting, LLC; Fundamental Long Term Care Holdings, LLC; and Kerry L. Wheeler, DO,

Defendants,

Of which Lake Emory Post Acute Care; THI of South Carolina at Camp Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; and Fundamental Long Term Care Holdings, LLC, are the

Petitioners.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

By and through their undersigned counsel, pursuant to Rule 242(d)(1), SCACR, the Facility[1] and the Other Defendants[2] (collectively, "Petitioners"), certify that the Court of Appeals filed its opinion in this matter on July 17, 2024 (the "Subject Opinion"), affirming the circuit court's denial of the Facility's motions to compel arbitration of Plaintiff's[3] claims (the "Motions to Compel Arbitration") and the Other Defendants' corresponding motions for a stay (the "Motions to Stay") (collectively, the "Underlying Motions"); that Petitioners timely petitioned for rehearing; and that the Court of Appeals denied rehearing by order filed September 18, 2024.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in affirming the circuit court's denial of the Motions to Compel Arbitration and, in turn, the Motions to Stay?

A. Did the Court of Appeals err in not finding that the circuit court erred in not granting the Underlying Motions based on the Facility's argument that Mr. Pace's DSS caseworker had authority to sign the Arbitration Agreement for Mr. Pace under the Protection Act[4]?

B. Did the Court of Appeals err in not finding that the circuit court erred in not granting the Underlying Motions based on the Facility's merger/equitable

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[1] The "Facility" refers to the Defendant/Appellant/Petitioner identified as Lake Emory Post Acute Care ("LEPAC") and Defendant/Appellant/Petitioner THI of South Carolina at Camp Care, LLC ("Camp Care LLC"), collectively. In point of fact, LEPAC and Camp Care LLC are misidentified in the caption as separate entities, which they are not. Rather, LEPAC, or, more precisely, "Lake Emory Post-Acute Care," is the name under which Camp Care LLC does business as a skilled nursing facility in Spartanburg County.

[2] The "Other Defendants" refers to Defendants/Appellants/Petitioners THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; and Fundamental Long Term Care Holdings, LLC, n/k/a Hunt Valley Holdings, LLC, collectively.

[3] "Plaintiff" refers to Plaintiff/Respondent, Kenneth Pace, individually and as personal representative of the Estate of Earl E. Pace. "Mr. Pace" refers to the decedent, Earl E. Pace.

[4] The "Protection Act" refers to the Omnibus Adult Protection Act, S.C. Code Ann. §§ 43-35-5 to -595.

estoppel argument? More specifically, did the Court of Appeals err in not finding that the circuit court should have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Pace effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Arbitration Agreement merged therewith?

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

2. **Did the Court of Appeals err in not reaching the equitable estoppel argument?**

3. **Had the Court of Appeals reached the equitable estoppel argument, as, respectfully, it should have, should the Court of Appeals have found that the circuit court erred in not finding Plaintiff equitably estopped to deny the enforceability of the Arbitration Agreement and that the circuit court should have granted the Motions to Compel Arbitration?**

C. **Did the Court of Appeals err in affirming the circuit court's denial of the Motions to Stay?**

STATEMENT OF THE CASE

When Mr. Pace was admitted to the Facility on or about January 30, 2015, he was a vulnerable adult in the protective custody of the South Carolina Department of Social Services ("DSS"). (*See* R. pp. 40 ¶ 11, 49 ¶ 11, 259–270.) Mr. Pace's DSS caseworker, Calvin Hill ("Mr. Hill"), handled the paperwork in conjunction with his admission and, in so doing, signed an Admission Agreement and an Arbitration Agreement on Mr. Pace's behalf. (*See* R. pp. 216, 271–282.)

On October 21, 2019, Plaintiff filed these two lawsuits in the Spartanburg County Court of Common Pleas, one, Case No. 2019-CP-42-03708, identified as a survival action, the other, Case No. 2019-CP-42-03709, identified as an action for wrongful death, both premised on Plaintiff's contention that Petitioners are liable for money damages because of alleged

deficiencies in the care/treatment Mr. Pace received as a resident of the Facility. (*See* R. pp. 37–54.)

Based on the Arbitration Agreement that Mr. Hill signed for Mr. Pace, the Facility moved in both cases to compel Plaintiff's claims against it to arbitration (i.e., it made the Motions to Compel Arbitration),[5] and the Other Defendants moved in both cases for a stay until the arbitrability issue, i.e., the issue raised by the Motions to Compel Arbitration, was finally decided and any arbitration proceedings were concluded (i.e., they made the Motions to Stay). (*See* R. pp. 217–226, 230–239, 355–379, 411–435.) Again, the Motions to Compel Arbitration and the Motions to Stay are collectively referred to as the "Underlying Motions."[6]

The circuit court heard the Underlying Motions on January 20, 2021, the Honorable R. Keith Kelly presiding,[7] and denied them by orders filed April 8, 2021. (*See* R. pp. 1–14.) Pursuant to Rule 59(e), SCRCP, on April 19, 2021, Petitioners timely moved in both cases for

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[5] (R. pp. 213–215, 227–239, 324–354, 380–410.) Without question, Plaintiff's claims against the Facility are within the scope of the Arbitration Agreement. (*See* R. p. 216 ("[A]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. Pace's] stay at [the] Facility, or to the provisions of care or services to [Mr. Pace], including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively 'Disputes'), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration . . . .").) This plain language clearly embraces the subject matter of Plaintiff's claims against the Facility, but 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.").

[6] Prior to making the Motions to Compel Arbitration, the Facility timely answered Plaintiff's complaints, denying the alleged liability, raising a number of affirmative defenses, and expressly reserving its right to compel arbitration. (R. pp. 55–64, 115–123.) The Other Defendants likewise timely answered Plaintiff's complaints before making the Motions to Stay. (R. pp. 65–114, 124–173.)

[7] (*See* R. pp. 174–212.)

reconsideration,[8] which the circuit court denied by orders filed June 23 and 27, 2022. (*See* R. pp. 15–24, 27–36.)

This appeal timely followed,[9] and in due course, it was briefed and made ready for decision and decided without oral argument via the Subject Opinion, filed July 17, 2024.

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

This petition for a writ of certiorari timely follows.

STANDARD OF REVIEW

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

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[8] (*See* R. pp. 444–477.)

[9] (*See* R. pp. 485–524.)

ARGUMENT

I. The Court of Appeals erred in affirming the circuit court's denial of the Motions to Compel Arbitration and, in turn, the Motions to Stay.[10]

A. The Court of Appeals erred in not finding that the circuit court erred in not granting the Underlying Motions based on the Facility's argument that Mr. Pace's DSS caseworker had authority to sign the Arbitration Agreement for Mr. Pace under the Protection Act.

Like the circuit court's, the Court of Appeals' analysis of DSS's authority under the Protection Act is erroneous. It should have found that Mr. Hill was duly authorized to execute the Arbitration Agreement on Mr. Pace's behalf.

Analysis of DSS's authority to sign the Arbitration Agreement on Mr. Pace's behalf turns on interpretation of the statutorily defined term "protective services" under § 43-35-10(9) of the Protection Act. The Protection Act defines "protective services" as:

> [t]hose services whose objective is to protect a vulnerable adult from harm caused by the vulnerable adult or another. These services include, but are not limited to, evaluating the need for protective services, securing and coordinating existing services, arranging for living quarters, obtaining financial benefits to which a vulnerable adult is entitled, and securing medical services, supplies, and legal services.

§ 43-35-10(9). In ruling against the Facility, the Court of Appeals stated that "the plain reading of this provision provides that DSS is expected to arrange for living quarters, secure medical care, and hire an attorney for the vulnerable adult if one is needed" and that it "d[id] not believe that the statute grants authority for any person employed by DSS to waive a constitutional right of a vulnerable adult." (Subject Opinion p. 6.) Accordingly, the Court of Appeals found that "Mr. Hill did not have the authority to sign on behalf of Mr. Pace." (Subject Opinion p. 7.)

[10] Again, as noted in their principal brief, Petitioners' challenge to the circuit court's denial of the Underlying Motions includes their challenge to the circuit court's corresponding denial of reconsideration.

Respectfully, like the circuit court's, the Court of Appeals' analysis of the Protection Act is erroneous.

"Questions of statutory interpretation are questions of law . . . ." *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Brock*, 410 S.C. 361, 365, 764 S.E.2d 920, 922 (2014) (quotation marks and citation omitted). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). Courts should give words "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006), *overruled on other grounds by Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 790 S.E.2d 763 (2016).

"'Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers.'" *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 599, 654 S.E.2d 284, 289 (Ct. App. 2007) (quoting *Collins Music Co., Inc. v. IGT*, 365 S.C. 544, 550, 619 S.E.2d 1, 3 (Ct. App. 2005)). The statutory language must be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "[N]o word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citation omitted). "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Bennett v. Sullivan's Island Bd. of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993). Courts will reject a statutory interpretation that would lead to a result so plainly absurd

that it could not have been intended by the legislature or would defeat the plain legislative intention. *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

Again, the Protection Act defines "protective services" to mean "those services whose objective is to protect a vulnerable adult from harm caused by the vulnerable adult or another. These services include, *but are not limited to*, evaluating the need for protective services, securing and coordinating existing services, arranging for living quarters, *obtaining financial benefits to which a vulnerable adult is entitled*, and *securing* medical services, supplies, and *legal services*." § 43-35-10(d) (emphasis added). And again, in interpreting a statute, "no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *In re Decker*, 322 S.C. at 219, 471 S.E.2d at 463.

Like the circuit court, the Court of Appeals did not adequately account for the presence of the language "include, but are not limited to" in the Protection Act's definition of "protective services." The legislature's deliberate use of this expansive and open-ended language necessarily reflects its intent to leave the scope of "protective services" unrestricted and to broadly empower DSS to exercise its discretion to act for the protection of persons in its custody.

Moreover, the view of the statutory language "securing . . . legal services" endorsed by the Court of Appeals is itself unduly restrictive. The Court of Appeals agreed with the circuit court's view that this only allowed DSS to "hire an attorney to provide legal services for Mr. Pace but . . . did not give DSS authority to perform legal services for Mr. Pace nor execute an arbitration agreement that waived the constitutional right to a jury trial" and that "the provision of 'legal services' did not encompass executing an arbitration agreement or waiving constitutional rights." (Subject Opinion p. 6.) But limiting DSS in this way would leave open an obviously unacceptable gap in DSS's ability to protect vulnerable adults like Mr. Pace.

As the circuit court acknowledged, "It is undisputed that Mr. Pace was diagnosed with dementia, was incompetent, and unable to provide consent or acquiesce to Mr. Hill's actions." (R. pp. 4, 11, 19, 31.) Just as Mr. Pace was not able to consent or acquiesce to Mr. Hill's actions, he was not able to make the kinds of client decisions needed to determine the purposes to be served by legal representation. *See* Rule 1.2, RPC, Rule 407, SCACR (addressing the allocation of authority between client and lawyer and requiring, among other things, a lawyer to "abide by a client's decision whether to make or accept an offer of settlement of a matter"). Unless DSS—the party to whom Mr. Pace's custody was entrusted at the time of his admission the Facility—had the authority to make such decisions for Mr. Pace, there would be no one to make them. Obviously, there has to be someone to make such decisions in order to fully protect Mr. Pace's interests.

The Protection Act grants DSS the authority to make such decisions, and these decisions include the authority to waive Mr. Pace's right to a jury trial and agree to arbitration. By granting DSS the authority to hire an attorney for Mr. Pace (authority the Court of Appeals itself, like the circuit court, agreed DSS had), the Protection Act necessarily entrusted DSS with the discretion to determine *when, if at all,* an attorney was needed for Mr. Pace. This necessarily granted DSS the authority to determine whether and how Mr. Pace's legal rights were to be advanced, exercised, or otherwise protected, to include, necessarily, whether and how to compromise or even waive such rights when in Mr. Pace's best interests to do so.

It should be remembered that even to settle a lawsuit—or, for that matter, to simply refrain from suing in the first place—is to forego the constitutional right to a jury trial. Obviously, the protection of Mr. Pace's interests required his custodian to be able to make a decision about whether accepting a settlement—or pursuing legal action to begin with—was in

his best interests. Indeed, the Protection Act expressly includes within the definition of "protective services" "obtaining financial benefits to which a vulnerable adult is entitled." It is only logical, and in keeping with the purpose and the plain, intentionally expansive and open-ended language of the Protection Act, that DSS was duly authorized to address forum selection via the Arbitration Agreement. The exercise of such authority is not "performing legal services" for Mr. Pace. It is simply making necessary decisions about legal matters that a protected person like Mr. Pace is not capable of making for himself, matters which must be entrusted to some decision maker for Mr. Pace's protection. At the operative time here—the time of Mr. Pace's admission to the Facility—DSS was that decision maker per the Protection Act, and the Court of Appeals erred in not finding that the circuit court should have found that Mr. Hill duly exercised DSS's decision-making authority to sign the Arbitration Agreement on behalf of Mr. Pace.

B. The Court of Appeals erred in not finding that the circuit court erred in not granting the Underlying Motions based on the Facility's merger/equitable estoppel argument. More specifically, the Court of Appeals erred in not finding that the circuit court should have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Pace effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Arbitration Agreement merged therewith.

1. The Court of Appeals erred in affirming the circuit court on the basis that the Admission Agreement and the Arbitration Agreement did not merge.[11]

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

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[11] (Subject Opinion pp. 8–9 ("The Facility argues the circuit court should have found the Arbitration Agreement merged with the Admission Agreement and, given Mr. Pace's receipt of direct benefits under the Admission Agreement, Kenneth should be equitably estopped from denying the enforceability of the Arbitration Agreement. For equitable estoppel to apply to the case at hand, there must have been a merger of the Admission Agreement and the Arbitration Agreement. . . . *We find there was no merger of the Admission Agreement and the Arbitration agreement; therefore, Respondents are not estopped from denying enforcement of the Arbitration Agreement*.") (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 Mr. Pace effectively embraced and directly benefitted from the Admission Agreement, Mr. Pace, and, therefore, Plaintiff, who stands in Mr. Pace's shoes, is estopped to deny the enforceability of the Arbitration Agreement merged therewith. Accordingly, any lack of authority on the part of DSS 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 Mr. Pace, and, in turn, Plaintiff, should be estopped to deny that the Arbitration Agreement is enforceable—and, most respectfully, the answer is yes.[12]

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

> Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] under the [Adult Health Care Consent] Act, she is nevertheless equitably estopped to deny the [arbitration agreement's] enforceability. The circuit court held there was no estoppel here, and we agree.

[12] To be clear, the Court of Appeals' citation to the law of agency is misplaced and unavailing to undermine the merger/equitable estoppel argument. (*See* Subject Opinion pp. 8–9 ("As the *Thompson* and *Hodge* courts noted, there was no evidence the resident being admitted to the nursing home took any action to create an agency relationship for the person who signed the arbitration agreement. *See Thompson*, 416 S.C. at 55, 784 S.E.2d at 686 ('[T]he authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial.'); *Hodge*, 422 S.C. at 572, 813 S.E.2d at 307 (quoting *Thompson*).").)

> 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, the Court of Appeals erred in rejecting the Facility's merger argument, failing to recognize material differences between the facts and arguments involved in the instant case and those that controlled (or were simply not addressed in) *Coleman* and its progeny *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), or the Court of Appeals' more recent decision in *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E. 2d 144 (Ct. App. 2023), concluding:

> This case is similar to this court's recent case of *Solesbee*.
>
> ***
>
> Here, the Arbitration Agreement is a completely separate contract under which Mr. Pace derived no benefits. At a hearing on the matter, counsel for Appellants admitted the following before the circuit court, "There was an arbitration agreement. Well there's two documents that are essential to our argument. One is an

> admission agreement where [Mr. Pace] was admitted to our facility in January of 2015. The other is an arbitration agreement. It's a separate document that was signed in conjunction with his admission." Further, there is no mention of arbitration in the Admission Agreement, and admission to the Facility was not contingent upon execution of the Arbitration Agreement. Additionally, the Admission Agreement provides it is governed by South Carolina law, while the Arbitration Agreement is governed by federal law. The Admission Agreement and Arbitration Agreement were separately paginated and had their own signature pages. Like the *Coleman* and *Hodge* courts held, we find there was no merger in this case and the Facility's equitable estoppel argument was properly denied

(Subject Opinion pp. 7, 9.)

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,"[13] as indeed the Admission Agreement and the Arbitration Agreement were here,[14] 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.

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

[14] 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).

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

Unlike the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (*See* R. p. 216.) Moreover, the Court of Appeals' reliance on the fact that "there is no mention of arbitration in the Admission Agreement"[15] is misplaced. While the instant Admission Agreement does contain an "Entire Agreement" clause, what matters is that it does not reference the Arbitration Agreement as a separate contract. (R. p. 282.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[16]), 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.

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[15] (Subject Opinion p. 9.)

[16] 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).

p. 282.) 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)).[17]

Like the *Solesbee* Court (and, for that matter, the *Hodge* Court, even though, again, different admission and arbitration agreements were at issue in *Hodge*), the Court of Appeals erred in finding against merger on the basis that the Admission Agreement and the Arbitration Agreement were governed by different bodies of law because "the Admission Agreement provides it is governed by South Carolina law, while the Arbitration Agreement is governed by federal law." (Subject Opinion p. 9.)

As an initial matter, the Court of Appeals' assertion about state law governing one instrument (the Admission Agreement) and federal law the other (the Arbitration Agreement) is

[17] To be clear, the 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 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).

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. 280.) And the Arbitration Agreement states:

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

(R. p. 216.) 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 this Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

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. 216.)

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

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

Like the *Hodge* and *Solesbee* Courts, the Court of Appeals erred in finding against merger on the basis that "[t]he Admission Agreement and Arbitration Agreement were separately paginated and had their own signature pages." (Subject Opinion p. 9.) 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. The very nature of *merger* is to *merge* separate documents.

Likewise, the language the Court of Appeals quotes from Petitioners' counsel's oral argument to the circuit court[18] is in no way an "admi[ssion]" that, or otherwise supportive of the conclusion that, the Admission Agreement and the Arbitration Agreement do not merge. Petitioners' counsel merely acknowledged the obvious fact that the Admission Agreement and the Arbitration Agreement are indeed separate instruments in the sense that they are not the same

[18] (Subject Opinion p. 9 ("Here, the Arbitration Agreement is a completely separate contract under which Mr. Pace derived no benefits. At a hearing on the matter, counsel for Appellants admitted the following before the circuit court, 'There was an arbitration agreement. Well there's two documents that are essential to our argument. One is an admission agreement where [Mr. Pace] was admitted to our facility in January of 2015. The other is an arbitration agreement. It's a separate document that was signed in conjunction with his admission.").)

document but rather two different documents—the existence of separate instruments being a necessary component of any merger analysis, or else there would be no question of the doctrine of merger (i.e., the merging of those separate instruments) in the first place. Moreover, the context in which Petitioners' counsel referred to the Arbitration Agreement as a standalone agreement was clearly only to underscore the point that the Arbitration Agreement was voluntary (i.e., not required as a condition precedent to Mr. Pace's admission) and by no means to suggest that the doctrine of merger did not apply to merge the Arbitration Agreement with the Admission Agreement once the Arbitration Agreement was voluntarily executed during the admissions process. (R. p. 205:4–22.)

Like the *Hodge* and *Solesbee* Courts, the Court of Appeals erred in finding against merger on the basis of the voluntariness of the Arbitration Agreement, i.e., in relying on the fact that "admission to the Facility was not contingent upon execution of the Arbitration Agreement"[19] 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 this just means it did not have to be agreed to for Mr. Pace to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact executed. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

[19] (Subject Opinion p. 9.)

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. 216 (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 Mr. Pace'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. 271–282 (setting forth the terms of Mr. Pace's admission to the Facility) *with* p. 216 (providing for arbitration of disputes arising out of Mr. Pace'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,[20] (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[21]—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)

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

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

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

Respectfully, like the circuit court, the Court of Appeals should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Mr. Pace's admission to the Facility and would not have been done at all but for his 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.

2. The Court of Appeals erred in not reaching the equitable estoppel argument.

As explained in the Subject Opinion, the Court of Appeals did not reach the equitable estoppel argument because of its finding that the Arbitration Agreement and the Admission Agreement did not merge. (Subject Opinion p. 9 ("We find there was *no merger* of the Admission Agreement and the Arbitration agreement; *therefore*, Respondents are not estopped from denying enforcement of the Arbitration Agreement.") (emphasis added).) Therefore, for the same reasons that the Court of Appeals erred in affirming the circuit court's finding that these instruments did not merge, it likewise erred in not reaching the equitable estoppel argument.

3. Had the Court of Appeals reached the equitable estoppel argument, as, respectfully, it should have, the Court of Appeals should have found that the circuit court erred in not finding Plaintiff equitably estopped to deny the enforceability of the Arbitration Agreement and that the circuit court should have granted the Motions to Compel Arbitration.

This issue/argument is already addressed in Petitioners' appellate briefs, the entirety of which are adopted and incorporated herein by reference.

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

As explained in the Subject Opinion, the Court of Appeals 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 Motions to Compel Arbitration. (Subject Opinion p. 9 ("Because we find the circuit court did not err in denying Appellants' motions to compel arbitration, the underlying motions to stay are moot and we need not address this issue.").)

As the Subject Opinion recognizes, the relationship between the Motions to Compel Arbitration and the Motions to Stay is such that the denial of the former mooted the latter. Accordingly, to show, as the Facility has, that the circuit court erred in denying the Motions 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.").

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, Petitioners ask this Honorable Court to grant

the instant petition, reverse the Subject Opinion, and decide this appeal anew via an opinion that reverses the Court of Appeals and the circuit court, stays Plaintiff's claims against the Facility in favor of arbitration, and stays Plaintiff's claims against the Other Defendants pending the outcome of arbitration between Plaintiff and the Facility (or, alternatively, that reverses the Court of Appeals and 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 Defendants pending the outcome of arbitration between Plaintiff and the Facility, or, alternatively, that reverses the Court of Appeals on the issue of merger and remands the case to the Court of Appeals to address the arguments it did not reach previously to determine whether the circuit court's denial of the Motions to Compel Arbitration and the Motions to Stay Should be reversed).

Respectfully submitted,

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