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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

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

Appellate Case No. 2022-001059

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

Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

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

A. Did the circuit court err in not granting Appellants' motions based on the Facility's argument that Mr. Pace's DSS[5] caseworker had authority to sign the Arbitration Agreement for him under the Protection Act[6]?

B. Did the circuit court err in not granting Appellants' motions based on the Facility's merger/equitable estoppel argument?

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[1] The "Facility" refers to the Defendant/Appellant identified as Lake Emory Post Acute Care ("LEPAC") and Defendant/Appellant 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] "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.

[3] The "Other Appellants" refers to Defendants/Appellants 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. Together, the Facility and the Other Appellants are referred to collectively as "Appellants."

[4] 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.

[5] "DSS" refers to the South Carolina Department of Social Services.

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

More specifically, should it 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 equitably estopped to deny the enforceability of the Arbitration Agreement merged therewith?

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 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 Appellants 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

(the "Motion to Compel Arbitration"),[7] and the Other Appellants moved in both cases for a stay until the arbitrability issue, i.e., the issue raised by the Motion to Compel Arbitration, was finally decided and any arbitration proceedings were concluded (the "Motions to Stay"). (*See* R. pp. 217–226, 230–239, 355–379, 411–435.) Collectively, the Motion to Compel Arbitration and the Motions to Stay are referred to as the "Underlying Motions."[8]

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[7] (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.").

[8] Prior to making the Motion 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 Appellants likewise timely answered Plaintiff's complaints before making the Motions to Stay. (R. pp. 65–114, 124–173.)

The circuit court heard the Underlying Motions on January 20, 2021, the Honorable R. Keith Kelly presiding,[9] and denied them by orders filed April 8, 2021. (*See* R. pp. 1–14.) Pursuant to Rule 59(e), SCRCP, on April 19, 2021, Appellants timely moved in both cases for reconsideration,[10] which the circuit court denied by orders filed June 23 and 27, 2022. (*See* R. pp. 15–24, 27–36.)

This appeal timely follows. (*See* R. pp. 485–524.)[11]

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

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[9] (*See* R. pp. 174–212.)

[10] (*See* R. pp. 444–477.)

[11] Again, as noted above, Appellants' challenge to the circuit court's denial of the Underlying Motions includes their challenge to the circuit court's corresponding denial of reconsideration.

of the law, rather than upon the exercise of discretion, the question presented on appeal is one of law. *See Bain v. Self Mem'l Hosp.*, 281 S.C. 138, 152, 314 S.E.2d 603, 611 (Ct. App. 1984).

ARGUMENT

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

The relationship between the Motion to Compel Arbitration and the Motions to Stay is such that, insofar as the circuit court was concerned, the denial of the former mooted the latter. (*See* R. pp. 23, 35.) The fates of these motions are similarly intertwined in this Court: If the Motion to Compel Arbitration was properly denied, so too were the Motions to Stay, but if the Motion to Compel Arbitration should have been granted—and, respectfully, it should have—so too should have the Motions to Stay. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, *upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.") (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d

711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties."); *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."). Accordingly, the within argument not only shows that the circuit court erred in denying the Motion to Compel Arbitration but also shows that the circuit court erred in denying the Motions to Stay, which are not properly viewed as moot but rather should have been granted along with the Motion to Compel Arbitration.

A. The circuit court should have granted the Underlying Motions based on the Facility's argument that Mr. Hill had authority to sign the Arbitration Agreement for Mr. Pace under the Protection Act.

The circuit court's 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.

The circuit court's analysis of DSS's authority to sign the Arbitration Agreement on Mr. Pace's behalf turns on its interpretation of the statutorily defined term "protective services" under § 43-35-10(9) of the Protection Act. Although the circuit court acknowledges that, "[a]t the time Mr. Pace was admitted

to [the Facility], *he was under the custody of DSS*"[12] pursuant to the Protection Act, and thus DSS was authorized to provide "protective services" to Mr. Pace, according to the court, "protective services" includes "arrang[ing] for living quarters, secur[ing] medical care, and hir[ing] an attorney for [Mr. Pace]" but not "provid[ing] legal services to Mr. Pace or waiv[ing] his constitutional right to a jury trial . . . ." (R. pp. 5, 12, 20, 32.)

"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). The Court 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).

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[12] (R. pp. 1 & 8 (emphasis added), 16 & 28 (emphasis added).) The Court likewise acknowledges that it was at this time, i.e., when Mr. Pace was admitted to the Facility, that Mr. Hill signed the Admission Agreement and the Arbitration Agreement on Mr. Pace's behalf. (*See* R. pp. 1–2, 8–9, 16, 28.)

"'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).

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).

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. The circuit court, however, does not adequately account for the presence of the language "include, but are not limited to" in the Protection Act's definition of "protective services." (*See* R. pp. 1–14 (not addressing this at all), 20 & 32 (addressing this only in conclusory fashion).) The legislature's deliberate use of this expansive and open-ended language 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, even putting aside the circuit court's interpretative error in not adequately accounting for the presence of the language "include, but are not limited to" in the Protection Act's definition of "protective services," the court's view of the statutory language "securing . . . legal services" is itself unduly restrictive. In the Court's view, this only allowed DSS to "hire an attorney" for Mr. Pace, not to "provide legal services to Mr. Pace or waive his constitutional right to a jury trial . . . ." (R. pp. 5, 12, 20, 32.) But if DSS were only able to hire

an attorney and no more, this would leave open an obviously unacceptable gap in DSS's ability to protect vulnerable adults like Mr. Pace.

As the circuit court states, "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 would not be 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 such decisions. 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 circuit court itself agrees it 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 is to forego the legal 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 was to his advantage. 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, as the circuit court called it, "provid[ing] legal services to Mr. Pace . . . ." (R. pp. 5, 12, 20, 32.) 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 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 circuit court should have granted the Underlying Motions based on the Facility's merger/equitable estoppel argument. More specifically, it 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.

South Carolina recognizes numerous theories under which a nonsignatory can be bound to an arbitration agreement. *See Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 ("South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel."); *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel: "Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. . . . 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.").

To be clear, the Facility's merger/equitable estoppel argument is not an argument for the enforceability of the Arbitration Agreement but rather an

argument for Plaintiff—as personal representative of Mr. Pace's estate—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 Mr. Pace having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Arbitration Agreement merged therewith. Accordingly, any contention about the Arbitration Agreement's supposed lack of enforceability is beside the point and unavailing to refute the Facility's merger/equitable estoppel argument, which, again, turns not on the question of whether the Facility can show that the Arbitration Agreement is enforceable but whether it can show that Plaintiff should be estopped to deny that the Arbitration Agreement is enforceable—and, most respectfully, the Facility has done so.

Merger

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

> Appellants contend that even if Sister lacked capacity to execute the AA under the Act, she is nevertheless equitably estopped to deny the AA'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 AAs merged. In South Carolina,
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> > The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
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> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.*

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

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

The circuit court wrongfully concludes that the Admission Agreement and the Arbitration Agreement are separate contacts that do not merge. (*See* R. pp. 5–

6, 12–13 ("In this case, the admission agreement and the arbitration agreement were wholly independent and shall not be construed together. *See Hodge v. Unihealth Post-Acute Care of Bamberg, LLC*., 422 SC 544, 813 S.E.2d 292 (Ct. App. 2018). Because the admission agreement is not merged with the arbitration agreement, this argument is without merit."), pp. 22, 34 (same).)

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 contracting parties intended the instruments to be construed together as effectively one contract. This is a question of the parties' intention. *Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a contrary *intention* . . .") (emphasis added). "[I]n attempting to ascertain th[e] [parties'] intention," the Court must "endeavor to determine the

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[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 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).

situation of the parties, as well as their purposes, at the time the contract was entered into." *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

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

Unlike the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (*See* R. p. 216.) 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. 282.) 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. 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).

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 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 agreed to. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go

[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).

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

Moreover, while it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement's) sole reason for being. (*See* R. p. 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 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. 280 (providing "This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located.") *with* p. 216 (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 termination provisions provide no evidence of "separatedness." The only reason for the Arbitration Agreement is the Admission Agreement, i.e., the Arbitration Agreement covers disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually

suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

And 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. To allow the merger presumption to be upset based on evidence that is merely ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention, but at most might

(or might not) reflect a contrary intention—is to allow the exception to devour the rule.

Respectfully, the Court's finding against merger relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130. It 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.

Equitable Estoppel

In *Wilson*, our Supreme Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals' earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which the Facility contends Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Mr. Pace received direct benefits (in the form of his admission and care/treatment at the

Facility) from the Admission Agreement with which the Arbitration Agreement was merged. *Wilson*, 426 S.C. at 340–45, 827 S.E.2d at 175–77; *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).

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Mr. Pace received the benefit of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein. Not even Plaintiff himself alleges that every single aspect of the residency (every meal, every instance of care/treatment delivered, essentially every moment at the Facility) was deficient.

Respectfully, the Court should have found that the Arbitration Agreement merged with the Admission Agreement (the validity of which Plaintiff does not challenge[16]) and that Plaintiff is estopped to deny the Arbitration Agreement's enforceability, Mr. Pace having effectively embraced the contract with the Facility

[16] Although the dispute here is about the Arbitration Agreement, as opposed to the Admission Agreement, to the extent there were any question about the enforceability of the Admission Agreement, the Facility's equitable estoppel argument applies with equal force to the Admission Agreement.

for the purpose of his admission and receipt of the benefits thereof only to later, via his estate, attempt to repudiate the Arbitration Agreement with which his Admission Agreement merged.

CONCLUSION

For the foregoing reasons, Appellants ask this Honorable Court to reverse the circuit court's denial of the Underlying Motions and to stay this lawsuit in favor of arbitration between Plaintiff and the Facility (or to remand this matter to the circuit court with instructions that it stay the lawsuit in favor of arbitration between Plaintiff and the Facility).

Respectfully submitted,

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August 1, 2023

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

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

Appellate Case No. 2022-001059

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

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. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

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