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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 REPLY BRIEF OF APPELLANTS

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Appellants make the following points in reply to Plaintiff's brief.[1]

ARGUMENT

1. This appeal should not be dismissed for lack of jurisdiction, as indeed this Court has already determined.

(a) Plaintiff's attempt to re-raise this issue in his brief is improper.

This issue has already been raised to and finally ruled on by this Court, which unequivocally denied Plaintiff's motion to dismiss by order filed November 8, 2022. (Order filed November 8, 2022; *see also* Br. of Respondent p. 5 ("The jurisdiction of this Court was raised by [Plaintiff] . . . in a Motion to Dismiss the Appeal filed with the Court on August 1, 2022.").) In describing the Court's order as "unequivocally" denying Plaintiff's motion, Appellants mean that the order does not leave room (neither expressly nor by any reasonable implication) for any

[1] Shorthand references already defined in Appellants' principal brief are continued in this reply brief (e.g., the "Facility" refers to the Defendant/Appellant identified as Lake Emory Post Acute Care and Defendant/Appellant THI of South Carolina at Camp Care, LLC, collectively; 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; "Appellants" refers to the Facility and the Other Appellants, collectively; "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; and "Mr. Hill" refers to Mr. Pace's DSS caseworker, Calvin Hill).

further consideration of the issue in this Court.[2] In other words, the plain language of the order is to the effect that it is the Court's final word on the matter. Consequently, Plaintiff's attempt to re-raise the issue in his brief is effectively an improper petition for rehearing with respect to the Court's order of November 8, 2022. *See* 221(c), SCACR ("The appellate court will not entertain petitions for rehearing on a motion or petition *unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal*.") (emphasis added).[3]

(b) Moreover, and in any event, Plaintiff's argument here is without merit, as previously explained (in opposition to Plaintiff's motion to dismiss), and, out of an abundance of caution, reiterated below.

(i) Procedural History

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. (R. p. 40 ¶ 11, 49 ¶ 11; Br. of Respondent p. 1 ("At the time Mr. Pace was admitted to [the Facility], he was under custody of DSS.").) Mr. Hill, Mr. Pace's DSS caseworker, handled the paperwork in conjunction with the admission and, in so doing, signed an

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[2] For instance, the undersigned recalls other cases where, in its order denying a motion to dismiss an appeal, the Court expressly granted the movant leave to raise the issue again in its brief, but the Court's order in the instant case does not do so.

[3] Obviously, the Court's order of November 8, 2022, did not have the effect of dismissing or finally deciding this appeal.

Admission Agreement and an Arbitration Agreement on Mr. Pace's behalf. (R. pp. 216, 271–282.)

On October 21, 2019, Plaintiff filed two lawsuits in the Spartanburg County Court of Common Pleas styled *Kenneth Pace, Individually and as Personal Representative of the Estate of Earl E. Pace 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*, one of which was docketed as Case No. 2019-CP-42-03708 ("Case 3708"), the other as Case No. 2019-CP-42-03709 ("Case 3709"). (R. pp. 39–45, 48–54.) Plaintiff's summons and complaint in Case 3708 identify it as a survival action. (R. pp. 37, 39–45.) Plaintiff's summons and complaint in Case 3709 identify it as an action for wrongful death. (R. pp. 46, 48–54.) In both cases, Plaintiff asserts Appellants are liable for money damages because of alleged deficiencies in the care/treatment Mr. Pace received as a resident of the Facility. (R. pp. 39–48, 48–54.)

Based on the Arbitration Agreement that Mr. Hill signed for Mr. Pace, the Facility filed the Motion to Compel Arbitration. (R. pp. 213–215, 227–229.) Contemporaneously, the Other Appellants filed the Motions to Stay. (R. pp. 217–226, 230–239.) For the purpose of discussing the instant issue, the Motion to

Compel Arbitration and the Motions to Stay (which are elsewhere in Appellants' briefing collectively referred to as the Underlying Motions) are collectively referred to as the "Principal Motions."

The circuit court heard the Principal Motions on January 20, 2021, the Honorable R. Keith Kelly presiding. (R. pp. 1, 8.) On February 1, 2021, Judge Kelly's law clerk emailed all counsel advising of the court's decision to deny the Principal Motions and requesting Plaintiff's counsel to submit a proposed order to that effect. (R. pp. 436–437.) On February 16, 2021, Plaintiff's counsel e-filed the same proposed order in both cases. (R. pp. 438–443.) The caption of the order included both case numbers, and it was filed by the court in both cases on April 8, 2021. (R. pp. 1–14.)

Pursuant to Rule 59(e), SCRCP, on April 19, 2021, Appellants timely moved in both cases for reconsideration (the "Motion to Reconsider"). (R. pp. 444–477.) On June 6, 2022, Judge Kelly's law clerk emailed all counsel advising of the court's decision to deny the Motion to Reconsider and requesting Plaintiff's counsel to submit a proposed order to that effect. (R. pp. 478–479.) On June 17, 2022, Plaintiff's counsel e-filed the same proposed order in both cases. (R. pp. 480–484.) The caption of the order included both case numbers, and it was filed by the court in Case 3708 on June 23, 2022, and in Case 3709 four days later, on June 27, 2022. (R. pp. 15–24, 27–36.)

By notice served and filed July 26, 2022,[4] and amended notice served and filed July 27, 2022,[5] this appeal follows.

According to Plaintiff, the time for Appellants to appeal began to run as to both Case 3708 and Case 3709 on June 23, 2022, when Appellants' counsel received the NEF for the circuit court's order denying the Motion to Reconsider in Case 3708; therefore, Appellants' notice of appeal, which was "filed" more than 30 days thereafter on "July 27, 2022," is untimely as to both cases—even though, without question, it was within 30 days after Appellants' counsel received the NEF for the circuit court's order denying the Motion to Reconsider in Case 3709 on June 27, 2022. (*See* Br. of Respondent pp. 4–6.)[6] Plaintiff's argument is without merit—as, of course, this Court has already (correctly) determined.

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[4] (R. pp. 485–504.)

[5] (R. pp. 505–524.)

[6] To be clear, although it was not stamped "received" by the Court until July 27, 2022, Appellants' original notice of appeal (R. pp. 485–504) was in fact served and filed via email on July 26, 2022. *See* Rule 262, SCACR (regarding filing and service); Order No. 2022-05-06-03 (S.C. Sup. Ct. filed May 6, 2022) (regarding Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules). And Appellants' amended notice of appeal (R. pp. 505–524) was then served and filed, as well as stamped "received" by the Court, on July 27, 2022. Appellants do, however, acknowledge that, while they were both within 30 days of June 27, 2022, July 26 and 27, 2022, were both more than 30 days after June 23, 2022.

(ii) First off, without question, Appellants' notice of appeal is timely as to Case 3709.

The time to serve a notice of appeal from the Court of Common Pleas is addressed in Rule 203(b)(1), SCACR, which, in pertinent part, provides as follows[7]:

> A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely . . . motion to alter or amend the judgment (Rule[] . . . 59, SCRCP) has been made, . . . the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.

See also Rule 59(f), SCRCP ("The time for appeal for all parties shall be stayed by a timely motion under this Rule and shall run from the receipt of written notice of entry of the order granting or denying such motions.").

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[7] *Service* and *filing* are materially different concepts under the South Carolina Appellate Court Rules. *See* Rules 203 and 262, SCACR. Although this distinction is somewhat muddled by Plaintiff (*e.g.* Br. of Respondent p. 4 (citing Rule 203(b)(1) regarding the time for *service* of the notice of appeal but then asserting that Appellants' notice of appeal is untimely because it was "*filed* . . . on July 27, 2022 – four days after the deadline for *filing* a Notice of Appeal") (emphasis added)), it is clear enough that Plaintiff's point is to challenge this appeal as untimely *served*, not as untimely *filed*. Accordingly, Appellants focus on *service*, not *filing*. Out of an abundance of caution, however, Appellants would note that the time for *filing* a notice of appeal is "within ten (10) days after the notice of appeal is *served*," Rule 203(d)(2)(B), SCACR (emphasis added), and without question, Appellants' original (R. pp. 485–504) and amended (R. pp. 505–524) notices of appeal were timely *filed*, because they were both *filed* the same day they were *served*.

"An order is not final until it is entered by the clerk of court; and until the order or judgment is entered by the clerk of the court, the judge retains control of the case." *Upchurch v. Upchurch*, 367 S.C. 16, 22, 624 S.E.2d 643, 646 (2006), *overruled on other grounds by Miles v. Miles*, 393 S.C. 111, 711 S.E.2d 880 (2011). The time to appeal an order does not begin to run until "written notice that the order has been entered into the record by the clerk of court has been received." *Id.* at 24, 624 S.E.2d at 647.

As Plaintiff admits, the order denying the Motion to Reconsider was not entered in Case 3709 until June 27, 2022. (Br. of Respondent p. 3 ("A subsequent Order Denying the Motion to Alter, Amend and/or Reconsider was filed on June 27, 2022 in case number 2019CP4203709.").) Nonetheless, Plaintiff's position is premised on the notion, previously expressed in his motion to dismiss this appeal as to Case 3709, that, by virtue of the entry of the order denying the Motion to Reconsider in Case 3708 on June 23, 2022, "the Order *was entered* in both cases on June 23, 2022" and Appellants were "aware that the Order *was being entered* in both cases." (R. p. 529 (emphasis added).) This is just not so. As a matter of logic and law[8] (and, for that matter, equity[9]), the most that can be said of

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[8] *Upchurch*, 367 S.C. at 22, 624 S.E.2d at 646.

[9] *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004) ("[C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party . . . ."); Rule 1, SCRCP

Appellants' awareness upon the entry of the order denying the Motion to Reconsider in Case 3708 on June 23, 2022, is that Appellants were aware the order *was entered* in Case 3708 but *was not yet entered* in Case 3709. Obviously, Appellants were not aware that the order denying the Motion to Reconsider *was entered* in Case 3709 until in fact the order *was entered* in Case 3709, which was not until June 27, 2022.

Without question, Appellants' original notice of appeal, served July 26, 2022, and Appellants' amended notice of appeal, served on July 27, 2022, were both served within 30 days of June 27, 2022. *See* Rule 263(a), SCACR (regarding computation of time).[10] Thus, without question, Appellants' notice of appeal is timely as to Case 3709.

(civil procedure rules "shall be construed to secure the just, speedy, and inexpensive determination of every action").

[10] June is a 30-day month. Respectively, July 26 and 27, 2022, were the 29th and 30th days after June 27, 2022.

(iii) Moreover, rather than showing why this appeal should be dismissed as to both cases, Plaintiff's position shows why Appellants' notice of appeal is timely as to both cases.

To be sure, Case 3708 and Case 3709 are inherently linked by their subject matter, and indeed, the circuit court took up both cases together in deciding the Principal Motions and the Motion to Reconsider. Appellants agree with Plaintiff that the time for appeal should begin to run at the same time for both cases—but this means that the time for appeal cannot begin to run until the receipt of notice of the last entry of the last appealed order in both cases.

Again, Plaintiff's position is premised on the notion that the time for appeal began to run as to both of these companion cases at a time before the last appealed order in the cases, i.e., the order denying the Motion to Reconsider, was even entered in one of the cases. (*See* Br. of Respondent pp. 4–6; R. pp. 525–530.) Besides its reliance on the sort of procedural trap our law disfavors,[11] Plaintiff's position contravenes established law that "[a]n order is not final until it is entered by the clerk of court; and until the order or judgment is entered by the clerk of the court, the judge retains control of the case." *Upchurch*, 367 S.C. at 22, 624 S.E.2d at 646.

Baked into Plaintiff's position, as previously expressed in his motion to dismiss this appeal as to Case 3709, is the idea that the order denying the Motion to

[11] *See Elam*, 361 S.C. at 25, 602 S.E.2d at 780; Rule 1, SCRCP.

Reconsider "was entered in both cases on June 23, 2022" because it "bore both case numbers" in its caption. (R. p. 529.) But this, of course, completely ignores the plain fact that the very same order was filed on June 27, 2022, too. Because it was expressly drafted so as to be filed in both of these two companion cases, Appellants submit that the order denying the Motion to Reconsider is analogous to a check made out to both of two payees, and that it is neither logical nor lawful[12] nor equitable[13] for the time to appeal to begin to run before the order is in fact filed in both cases.

And in any event, as explained above, without question, Appellants' notice of appeal is timely as to Case 3709, because, without question, Appellants' original notice of appeal, served July 26, 2022, and Appellants' amended notice of appeal, served on July 27, 2022, were both served within 30 days of June 27, 2022. Thus, without question, the appealed orders, i.e., the order denying the Principal Motions and the order denying the Motion to Reconsider, which are in fact the same orders in both cases, are properly before this Court for review.

Moreover, even assuming, *arguendo*, this appeal only proceeds as to Case 3709, the underlying right of arbitration which the Facility seeks to vindicate is the same and covers the entirety of Plaintiff's claims against it in both cases, such that if the Facility is successful in obtaining reversal of the circuit court's denial of the

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12 *Upchurch*, 367 S.C. at 22, 624 S.E.2d at 646.

13 *See Elam*, 361 S.C. at 25, 602 S.E.2d at 780; Rule 1, SCRCP.

Motion to Compel Arbitration in Case 3709, and Plaintiff is therefore compelled to arbitration with the Facility, it will preclude Plaintiff's prosecution of Case 3708 against the Facility by virtue of the doctrine of election of remedies. *See Save Charleston Found. v. Murray*, 286 S.C. 170, 176–77, 333 S.E.2d 60, 64 (1985) ("The invocation of one remedy constitutes an election of remedies that will bar another remedy consistent therewith where the suit upon the remedy first invoked reached the stage of final adjudication. . . . The [plaintiff] clearly [obtained a recovery arising out of its dispute with the defendants] as a result of the arbitration proceeding. . . . [H]aving obtained through arbitration a recovery on its claim against [the defendants], [the plaintiffs] can no longer sue [the defendants] for fraud, notwithstanding the [plaintiff's] attempt to preserve its fraud cause of action by agreeing to its dismissal 'without prejudice.' . . . A party cannot agree to submit a claim to arbitration, receive a final and conclusive arbitration award, and then relitigate the claim employing a different theory of recovery.").

Accordingly, even assuming, *arguendo*, it is proper for Plaintiff to re-raise this issue in his brief, for the foregoing reasons, as well as any other or further reasons that in the Court's view underlie its already correct determination of this issue against Plaintiff, or that might in the Court's view support its adherence to

such determination,[14] the Court should again decline to dismiss this appeal and proceed to decide it on the merits.

2. Regarding Plaintiff's reference to Mr. Hill as "an arbitrary employee of DSS"[15]

Of course, by referring to Mr. Hill as "an arbitrary employee of DSS," Plaintiff implicitly admits that Mr. Hill was indeed an employee of DSS. Indeed, Plaintiff never denies that Mr. Hill was Mr. Pace's DSS caseworker; nor, in fact, does Plaintiff ever suggest any impropriety on the part of Mr. Hill in acting as DSS's representative. In other words, the substance of Plaintiff's argument against Mr. Hill's authority to sign for Mr. Pace as the representative of DSS is a challenge to DSS's statutory authority and not a challenge to anything that Mr. Hill himself is supposed to have done wrong in exercising DSS's authority.

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[14] Again, assuming, *arguendo*, it is even proper for Plaintiff to re-raise this issue in the first place, Plaintiff is effectively asking the Court to reverse itself; thus, the Court should have broad latitude to affirm itself. *Cf.* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment.").

[15] (Br. of Respondent p. 8.)

3. Regarding Plaintiff's contention that there is not "a statute that would authorize" DSS (by way of Mr. Hill) to execute the Arbitration Agreement for Mr. Pace[16]

This statutory authority is indeed addressed and analyzed in Appellants' principal brief. (*See* Br. of Appellants pp. 6–12.)

4. Regarding Plaintiff's citation to the portion of the hearing transcript where Appellants' counsel acknowledged that the Arbitration Agreement was a separate instrument that stands alone from the Admission Agreement[17]

Out of an abundance of caution, Appellants would make clear that the Court should not misconstrue this context-fee excerpt that Plaintiff has clipped from the transcript below as an admission by Appellants that the Admission Agreement and the Arbitration Agreement do not merge. It is merely an acknowledgement of the obvious fact that the Admission Agreement and the Arbitration Agreement are indeed separate instruments—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 Appellants' 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

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16 (Br. of Respondent p. 8.)

17 (Br. of Respondent p. 16.)

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.)

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

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

In affirming the denial of the motion to compel arbitration in *Solesbee*, the Court likened that case to *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), and found that the circuit court had correctly determined that there was no merger of the Admission Agreement and the Arbitration Agreement and, in turn, had properly denied the Facility's equitable estoppel argument. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149 ("Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and [the Facility's] equitable estoppel argument was properly denied.").)[18]

[18] To be clear, the Court's decision in *Solesbee* turned on its affirmance of the circuit court's ruling against *merger* of the Arbitration Agreement and the

Most respectfully, the *Solesbee* Court's merger analysis is erroneous, and *Solesbee* should not control the disposition of the Underlying Motions.[19]

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

Regarding governing law, what the Admission Agreement actually states is this: "This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which the Facility is located." (R. p. 280.) And what the Arbitration Agreement actually states is this:

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

(R. p. 216.)

Admission Agreement. Consequently, the *Solesbee* Court did not address the substance of the *equitable estoppel* prong of the merger/estoppel argument.

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

Again, without question, the FAA applies to the Arbitration Agreement, and again, the FAA applies whenever an arbitration agreement involves interstate commerce—and this is so even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law. *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 Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270–77 (1995). 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 except where displaced by federal law, and they do not support any reasonable inference of any intent contrary to merger.

Second, the *Solesbee* Court erroneously found against merger on the basis that "[t]he Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement 'shall survive any termination or breach of this Agreement or the Admission Agreement.'" 438 S.C. at 648–49, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger here. Unlike in *Coleman* and *Hodge*, the supposed textual recognition of the Admission Agreement as being separate from the Arbitration Agreement is not included in any "Entire Agreement" provision. Rather, the "Entire Agreement" provision of the Admission Agreement expressly states, "other Admissions materials . . . are made a part of this Agreement by reference." (R. p. 282.) And as in the instant case, the Arbitration Agreement that was signed in conjunction with the admission is clearly among these "other Admissions materials." Moreover, that the Arbitration Agreement "shall survive any termination or breach of this Agreement or the Admission Agreement" just means that any claims relating to/arising out of

the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See 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.").

Third, the *Solesbee* Court erroneously found against merger on the basis that "[t]he Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, 'Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.'" 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. The absence of a "revocation" provision is one way in which the Arbitration Agreement is materially different from those at issue in *Coleman* and *Hodge*, and, for that matter, *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016). Moreover, the *Solesbee* Court drew a false equivalency between the concepts of "revocation" and "termination." A "revocation" is an

annulment (i.e., making something a nullity),[20] whereas "termination" is putting or bringing something that properly exists to an end—which is materially different from making something a nullity, i.e., void and never having properly existed in the first place. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. at 612–13.

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

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

mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. Again, the very nature of *merger* is to *merge* multiple things together as one.

Finally, the *Solesbee* Court erroneously found against the Facility on merger on the basis that Arbitration Agreement was voluntary. 438 S.C. at 648, 885 S.E.2d at 149. While, again, it is certainly true that the Arbitration Agreement was voluntary, this fact provides no reasonable inference of an intent contrary to merger. Again, to be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. But all this means is that it did not have to be agreed to for the resident to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was signed. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. Again, the two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

To say that the Arbitration Agreement was not required for admission, which it was not, is not to say that it was not intended to be part of the admissions materials in the event it was agreed to, which it was, by Mr. Dover on Ms. Solesbee's behalf in *Solesbee* and by Mr. Hill on Mr. Pace's behalf in the instant

case. While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitrations Agreement's) sole reason for being. (*See* R. p. 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 . . . .").)

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

such that the two were effectively one instrument governing various interrelated aspects of the resident's relationship with the Facility: the Admission Agreement setting forth the terms of the admission, the Arbitration Agreement providing for arbitration of disputes arising out of the admission. (*Compare* R. pp. 271–282 (setting forth the terms of the admission) *with* p. 216 (providing for arbitration of disputes arising out of the admission).)

CONCLUSION

For the foregoing reasons, together with those already set forth in their principal brief, 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).

<SIGNED ON THE FOLLOWING PAGE>

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 REPLY BRIEF

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I, Russell G. Hines, do hereby certify that the Final Reply 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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August 1, 2023