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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

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2022-CP-42-02595
Appellate Case No. 2023-001371

Steven McCarson,
as Personal Representative of the Estate of Louie Arches,

Respondent,

v.

THI of South Carolina at Magnolia Manor-Inman, LLC
d/b/a Magnolia Manor-Inman, THI of South Carolina at Inman, LLC,
THI of South Carolina, LLC, Hunt Valley Holdings, LLC,
Fundamental Administrative Services, LLC,
Fundamental Clinical and Operational Services, LLC,
THI of Baltimore, LLC, and James H. Mack,

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 against it to arbitration and, in turn, the Other Defendants'[3] motions to stay this litigation pending the outcome of arbitration between Plaintiff and the Facility?[4]

A. Did the circuit court err in rejecting the Facility's merger/equitable estoppel argument? More specifically, should the circuit court have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Arches effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith—and, thus, granted the Facility's motion to compel arbitration and, in turn, the Other Defendants' motions to stay?

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

(a) Did the circuit court err in relying on *Solesbee v. Fundamental Clinical and Operational Services,*

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[1] The "Facility" refers to Defendant/Appellant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, which is a skilled nursing facility in Spartanburg County.

[2] "Plaintiff" refers to Plaintiff/Appellant, Steven McCarson ("Mr. McCarson"), as Personal Representative of the Estate of Louie Arches. "Mr. Arches" refers to the decedent, Louie Arches.

[3] The "Other Defendants" refers to Defendants/Appellants THI of South Carolina, LLC ("THISC"); Hunt Valley Holdings, LLC ("HVH"); Fundamental Administrative Services, LLC ("FAS"); Fundamental Clinical and Operational Services, LLC ("FCOS"); THI of Baltimore, Inc., misidentified in this action as "THI of Baltimore, LLC" ("THIB"); and James H. Mack ("Mack"), collectively. "Appellants" refers to the Facility and the Other Defendants, collectively.

[4] To be clear, out of an abundance of caution, this issue, and the corresponding argument, covers circuit court error in terms of both the denial of Appellants' principal motions and the denial of Appellants' motion to alter, amend, and/or reconsider the denial of their principal motions.

LLC[5]**—indeed, is the *Solesbee* Court's merger analysis itself erroneous—and should *Solesbee* control the disposition of this case?**

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

B. Where this matter is governed by the FAA[6]**, did the circuit court err in relying on S.C. Code Ann. § 15-48-20?**

C. Does the Facility's merger/equitable estoppel argument apply with equal force to require arbitration of the wrongful death claim?

D. At a minimum, should the circuit court have granted the Facility's alternative request for permission to conduct limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability under principles relating to the law of agency?

II. Out of an abundance of caution, to the extent that Appellants might somehow be prejudiced if this is not challenged on appeal, where the Facility admits that it operates Magnolia Manor-Inman[7] **and Mack admits that he was the administrator of Magnolia Manor-Inman while Mr. Arches was a resident**[8] **but FAS, FCOS, HVH, THIB, and THISC deny that they have ever operated any skilled nursing facility or provided care or treatment to Mr. Arches or had any interaction or relationship with Mr. Arches of any kind,**[9] **did the circuit court err in using the plural noun "Defendants" in referring to Magnolia Manor-Inman as**

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[5] 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023).

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

[7] (R. p. 23 ¶ 3 ("This Defendant admits it is organized pursuant to the laws of the State of Delaware and operates the skilled nursing facility at issue in Plaintiff's Complaint located in Spartanburg County, South Carolina").)

[8] (R. p. 59 ¶ 4 ("[T]his Defendant admits he was the administrator of Magnolia Manor-Inman while Mr. Arches was a resident").)

[9] (R. p. 35 ¶ 6 ("This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Mr. Arches. This Defendant further denies any interaction or relationship with Mr. Arches of any kind."); R. p. 41 ¶ 6 (same); R. p. 47 ¶ 6 (same); R. p. 53 ¶ 6 (same); R. p. 29 ¶ 6 (same).)

"Defendants' assisted living facility,"[10] or in any way otherwise that it might be said to have blurred distinctions between Appellants?[11]

STATEMENT OF THE CASE

With the help of Mr. McCarson, his grandson, Mr. Arches was admitted as a resident of the Facility on May 6, 2019. (R. pp. 200-211; R. pp. 214-215 ¶¶ 3, 8-12.) Mr. McCarson handled the paperwork in conjunction with Mr. Arches's admission and, in doing so, signed an Admission Agreement[12] and an Arbitration Agreement[13] on Mr. Arches's behalf. (R. pp. 214-215 ¶¶ 3, 8-12.)

Plaintiff commenced this wrongful death and survival action against Appellants in the Spartanburg County Court of Common Pleas on July 14, 2022, based on allegedly deficient care/treatment Mr. Arches received during his

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[10] (R. p. 2.)

[11] (*See, e.g.,* R. p. 2 ("Decedent fell numerous times between May and December of 2019 after being assessed as a high fall risk by *Defendants*.") (emphasis added).)

[12] (R. pp. 200-211.)

[13] (R. p. 212.) Without question, the FAA applies to the Arbitration Agreement. The FAA applies "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress's power under the Commerce Clause); *id.* at 273-77 (1995) (explaining that, unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce). And our Supreme Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381-82, 759 S.E.2d 727, 732-33 (2014).

residency at the Facility. (R. pp. 13-21.)[14] The Facility timely answered Plaintiff's complaint on August 22, 2022, denying the alleged liability, raising numerous affirmative defenses, and expressly reserving its right to compel arbitration, which it also raised as an affirmative defense. (R. pp. 22-27.) The Other Defendants also timely answered Plaintiff's complaint (THISC on August 22, 2022, the rest of them on August 24, 2022), denying the alleged liability and raising numerous affirmative defenses. (R. pp. 28-62.)

On February 3, 2023, the Facility moved to compel Plaintiff's claims against it to arbitration based on the Arbitration Agreement Mr. McCarson signed on behalf of Mr. Arches in conjunction with his admission (the "Motion to Compel Arbitration"). (R. pp. 121-122; R. pp. 164-215.)[15] At the same time, the Other Defendants moved

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[14] As reflected in the above caption, in addition to Appellants, Plaintiff's complaint also names THI of South Carolina at Inman, LLC, as a defendant; however, although the case caption has not been formally amended to reflect it, THI of South Carolina at Inman, LLC, is not a party to the case, having been dismissed, without prejudice, by stipulation filed September 28, 2022. (R. pp. 119-120.)

[15] Without question, Plaintiff's claims against the Facility are within the scope of the Arbitration Agreement, the plain language of which calls for arbitration of "any controversy or dispute between the parties arising out of or relating to [the] Facility's Admission Agreement, or breach thereof, or relating in any way to [Mr. Arches's] stay at [the] Facility, or to the provisions of care or services to [Mr. Arches] . . . ." (R. p. 212.) 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.").

to stay the litigation pending the outcome of the Motion to Compel Arbitration and any resulting arbitration between Plaintiff and the Facility (collectively, the "Motions to Stay"). (R. pp. 123-163.) Collectively, the Motion to Compel Arbitration and the Motions to Stay are referred to as the "Underlying Motions."

Following a hearing on June 1, 2023,[16] the circuit court, the Honorable Grace Gilchrist Knie presiding, denied the Underlying Motions by order filed July 10, 2023. (R. pp. 1-9.) Pursuant to Rule 59(e), SCRCP, on July 20, 2023, Appellants timely moved the circuit court to alter, amend, and/or reconsider its decision. (R. pp. 266-296.) The circuit court denied the motion by order filed July 27, 2023. (R. pp. 11-12; *see also* R. p. 10.)

By notice served and filed Monday, August 28, 2023, this appeal timely follows. (R. pp. 321-327.)

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

[16] (R. pp. 63-118.)

findings." *Id.* Issues of law, however, are reviewed without deference to the circuit court. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016). Even where a ruling is on a matter within circuit court's discretion, if the ruling is based on a misunderstanding of the law, rather than upon the exercise of discretion, the question presented on appeal is one of law. *See Bain v. Self Mem'l Hosp.*, 281 S.C. 138, 152, 314 S.E.2d 603, 611 (Ct. App. 1984).

ARGUMENT

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

A. The circuit court erred in rejecting the Facility's merger/equitable estoppel argument. The circuit court should have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Arches effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith—and, thus, granted the Motion to Compel Arbitration and, in turn, the Motions to Stay.

The relationship between the Motion to Compel Arbitration and the Motions to Stay is such that, as indeed reflected by the circuit court's focus on the Motion to Compel Arbitration,[17] the denial of the Motion to Compel Arbitration dictated the denial (as moot) of the Motions to Stay. Accordingly, to show why the circuit court should have granted the Motion to Compel Arbitration is, in turn, to show why it should have granted the Motions to Stay. *See* 9 U.S.C. § 3 ("If any suit or

[17] (*See generally* R. pp. 1-9.)

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.").

At bottom, the question here is this: Is the Arbitration Agreement (which Mr. McCarson signed for Mr. Arches[18]) enforceable against Mr. Arches—or, more

[18] The Background section of the circuit court's principal order refers to the Arbitration Agreement as having been "signed *individually* by [Mr. McCarson]." (R. p. 2 (emphasis added).) Even though the order does not actually purport to determine any factual issue in this regard, out of an abundance of caution, to the extent that the order's use of the word "individually" here might be said to constitute a finding by the circuit court that Mr. McCarson did not sign the Arbitration Agreement on behalf of Mr. Arches, such a finding is clearly erroneous. It was, of course, Mr. Arches, not Mr. McCarson, who was admitted as a resident of the Facility, and as Mr. McCarson was not being admitted as a resident of the Facility, Mr. McCarson did not (nor could he) sign the Admission Agreement and the Arbitration Agreement for himself as the resident. Rather, he signed (and only could have signed) as the representative of the resident, Mr. Arches. (*See* R. pp. 200-212; *see also* R. pp. 213-215 ¶¶ 2-12 (attesting to the admissions process for Mr. Arches

precisely, against Plaintiff, who stands in Mr. Arches's shoes as the personal representative of his estate—even though it was not signed by Mr. Arches himself? The answer is yes. The Arbitration Agreement is enforceable against Plaintiff—or, more precisely, Plaintiff is estopped to deny that the Arbitration Agreement (and, for that matter, the Admission Agreement) is enforceable.

And to be clear, the Facility's merger/equitable estoppel argument is a standalone argument. It does not depend on any showing of authority (actual or apparent or otherwise) on the part of Mr. McCarson or otherwise on the existence of any valid agreement per se. *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 . . . estoppel."); *see also 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 that "Appellants' equitable estoppel argument," which "[wa]s premised on [Appellants'] contention that, under state law, the admission agreements and the [arbitration agreements] merged," as follows: "Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] . .

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and Mr. McCarson's signing of the Admission Agreement and the Arbitration Agreement on behalf of Mr. Arches in conjunction therewith).)

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

Conceptually, the Facility's merger/equitable estoppel argument is *not* an argument *for the enforceability* of the Admission Agreement/Arbitration Agreement *but rather* an argument *for Mr. Arches, and, in turn, Plaintiff (the personal representative of his estate), to be estopped to deny the enforceability* of the Admission Agreement/Arbitration Agreement. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Mr. Arches having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff (who stands in Mr. Arches's shoes as the personal representative of his estate) is now estopped to deny the enforceability not only of the Admission Agreement but also the Arbitration Agreement merged therewith. And by its very nature, i.e., because the Facility's argument in favor of direct benefits estoppel is based on the direct benefits Mr. Arches received under the Admission Agreement (with which the Arbitration Agreement merged), this argument applies with equal force to estop Plaintiff from denying the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.

Accordingly, as to the Facility's merger/equitable estoppel argument, any contrary analysis regarding the Admission Agreement/Arbitration Agreement's supposed lack of validity—e.g., that Mr. McCarson lacked authority to sign the

Admission Agreement/Arbitration Agreement on behalf of Mr. Arches under the law of agency and/or under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80 (the "AHCCA"), and/or because Mr. McCarson lacked power of attorney over Mr. Arches—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 Admission Agreement/Arbitration Agreement is enforceable per se but whether Mr. Arches, and, in turn, Plaintiff (the personal representative of his estate), is estopped to deny its enforceability.

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

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

> Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] under the [AHCCA], she is nevertheless equitably estopped to deny the [arbitration agreement's] enforceability. The circuit court held there was no estoppel here, and we agree.
>
> Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. In South Carolina,
>
> > The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same

> time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
>
> *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 354-55, 755 S.E.2d at 455 (emphasis added).

Here, the circuit court 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).[19]

The circuit court wrongly concluded 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,"[20] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[21] there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the instruments were intended to be construed together as effectively one contract. This is a question of intention. *Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a contrary *intention* . . .") (emphasis added). And "in attempting to ascertain th[e] [parties'] intention," our courts "endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into." *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

It must be remembered that, where, as here, the instruments in question were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For the merger presumption to mean anything in practice it cannot be upset based on mere conjecture, but only by actual evidence that—notwithstanding the concurrence of all the particular

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

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

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

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."). No such inference can be drawn here. Indeed, under the circumstances, the very idea that there would have been an intention contrary to merger does not make sense.

Unlike the arbitration agreements at issue in *Coleman*, *Thompson*, and *Hodge*, all of which contained a provision allowing them to be disclaimed or revoked within 30 days of signing while the corresponding admission agreements did not, the instant Arbitration Agreement has no disclaimer/revocation provision. (R. pp. 212.) 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. 211.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[22]), 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

[22] 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).

supposed "separatedness." (R. p. 211.) Without question, the plain and ordinary meaning of the language "other Admissions materials" is such as to embrace the Arbitration Agreement. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571-72, 828 S.E.2d 82, 84 (Ct. App. 2019) ("The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's *admission documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 ("Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement*.") (emphasis added)).[23] And any notion that there is ambiguity in this regard is unsupported and erroneous.

[23] To be clear, the Facility's point here is not that the holding of either *Stott* or *Hodge* established a legal standard for what counts as admission paperwork, but rather that the very fact that the language that the *Stott* and *Hodge* Courts used in discussing the facts of the cases so readily made the natural and logical connection between arbitration agreements signed in conjunction with admission and "admission documentation" / "documents related to . . . admission" that it illustrates that, in its plain, ordinary, and popular sense, "Admissions materials" plainly includes the Arbitration Agreement. *See Beaufort Cnty. Sch. Dist. v. United Nat'l Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) ("If the contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect."). Moreover, this connection between the Admission Agreement and the Arbitration Agreement (with the Arbitration Agreement being understood in the plain, ordinary, and popular sense as included in the term "Admissions materials") is underscored by the *Coleman* Court's recognition that an admission agreement and arbitration agreement signed in conjunction with resident's admission to a nursing facility are indeed "executed at the same time, by the same parties, *for the same purposes, and in the course of the same transaction*." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

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

Moreover, while it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement's) sole reason for being. (R. p. 212 (providing for arbitration of "any

controversy or dispute between the parties arising out of or relating to [the] Facility's Admission Agreement, or breach thereof, or relating in any way to [Mr. Arches's] stay at [the] Facility, or to the provisions of care or services to [Mr. Arches] . . . ."); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at [the] Facility . . . .").)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission, whereupon it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Mr. Arches'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. 200-211 (setting forth the terms of Mr. Arches's admission to the Facility) *with* R. p. 212 (providing for arbitration of disputes arising out of Mr. Arches'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. 209 ("This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located.") *with* R. p. 212 (providing that, "because the services and reimbursement

thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action," but also providing that arbitration shall be "as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules").) Essentially, both instruments provide that South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, the survival of the Arbitration Agreement is no evidence of "separatedness." Again, the only reason for the Arbitration Agreement is the Admission Agreement, as the point of the Arbitration Agreement is to cover disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612-13 (D.S.C. 1998) ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

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

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

purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention.

The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." 407 S.C. at 355, 755 S.E.2d at 455. While it is true that the *Coleman* Court also cited the rule that ambiguity is construed against the drafter, (a) it did so in dicta[24] and (b) it never addressed the logical inconsistency—which thus remains fair game as an argument in this case[25]—in recognizing a rule of law creating a presumption in favor of merger (i.e., in recognizing the occurrence of a set of circumstances (same time, parties, purpose, and transaction) as sufficiently probative to affirmatively tip the scales in favor of merger) while at the same time allowing that presumption to be completely overturned by evidence that is merely ambiguous, i.e., evidence that does not even go so far as to clearly indicate a contrary intention and, indeed, is actually still susceptible to a reasonable conclusion in favor of merger. *See S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550

[24] *Id.* at 407 S.C. at 355-56, 755 S.E.2d at 455 ("By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply. *Even if* the 'Entirety' clause creates an ambiguity as to merger, the law is clear that any ambiguity in such a clause is construed against the drafter, in this case, appellants.") (emphasis added) (internal citation omitted); *see Nash v. Tindall Corp.*, 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007) ("Judicial dicta is not essential to the decision. Dicta . . . is a statement on a matter not necessarily involved in the case, and is not binding as authority.") (internal citations and quotations marks omitted).

S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are *reasonably* susceptible of more than one interpretation.") (emphasis added).

Respectfully, the circuit court's finding against merger relies on improper speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding intent. It must be remembered that the presumption of merger arises from the concurrence of the four elements of time, parties, purpose, and transaction. *Coleman*, 407 S.C. at 354-55, 755 S.E.2d at 455. This is why for the merger 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.

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

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

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

During the pendency of this case, this Court decided *Solesbee*, wherein it affirmed the denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as 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*, this Court likened that case to *Coleman* and *Hodge* and found that the circuit court had correctly determined that there was no merger of the Admission Agreement and the Arbitration Agreement and, in turn, had properly denied the Facility's equitable estoppel argument. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149 ("Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and [the

Facility's] equitable estoppel argument was properly denied.").)[26] Most respectfully, the circuit court erred in its reliance on *Solesbee*—indeed, the *Solesbee* Court's merger analysis is itself erroneous—and *Solesbee* should not control the disposition of the Underlying Motions.[27]

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. 209.) 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

[26] To be clear, this Court' decision in *Solesbee* turned on its affirmance of the circuit court's ruling against *merger* of the Arbitration Agreement and the Admission Agreement. Consequently, the *Solesbee* Court did not address the substance of the *equitable estoppel* prong of the merger/equitable estoppel argument.

[27] 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.

> 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. 212.)

Again, without question, the FAA applies to the Arbitration Agreement, as it does "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction"[28]—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."). 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

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

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. 212.)

Essentially, the provisions of the Admission Agreement and the Arbitration Agreement regarding governing law are to the effect that South Carolina law applies except where displaced by federal law, and indeed, even if the Arbitration Agreement had been included as a provision within the Admission Agreement itself, the FAA would still apply separately to the Arbitration Agreement. In other words, any difference between the governing law as to the Arbitration Agreement and the governing law as to the Admission Agreement would still exist even if the Arbitration Agreement had been included as a provision within the Admission Agreement itself. Accordingly, the supposed difference in the governing law cannot support any reasonable inference of an intent contrary to merger.

Second, the *Solesbee* Court erroneously found against merger on the basis that "[t]he Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement 'shall survive any termination or breach of this Agreement or the Admission Agreement.'" 438 S.C. at 648-49, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger here. Unlike

in *Coleman* and *Hodge*, the supposed textual recognition of the Admission Agreement as being separate from the Arbitration Agreement is not included in any "Entire Agreement" provision. Rather, the "Entire Agreement" provision of the Admission Agreement expressly states, "other Admissions materials . . . are made a part of this Agreement by reference." (R. p. 211.) And as in the instant case, the Arbitration Agreement that was signed in conjunction with the admission is clearly among these "other Admissions materials." Moreover, that the Arbitration Agreement "shall survive any termination or breach of this Agreement or the Admission Agreement" just means that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. Again, this is simply how arbitration agreements work—and it would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. 2d at 612-13 ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

Third, the *Solesbee* Court erroneously found against merger on the basis that "[t]he Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, 'Resident and/or his/her legal representative may

terminate this Agreement at any time, upon written notice to Facility.'" 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. The absence of a "revocation" provision is one way in which the Arbitration Agreement is materially different from those at issue in *Coleman* and *Hodge*, and, for that matter, *Thompson*. Moreover, the *Solesbee* Court drew a false equivalency between the concepts of "revocation" and "termination." A "revocation" is an annulment (i.e., making something a nullity),[29] whereas "termination" is putting or bringing something that properly exists to an end—which is materially different from making something a nullity, i.e., void and never having properly existed in the first place. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and it would be so even were the 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

[29] *Black's Law Dictionary* p. 1321 revocation (7th ed. 1999); *id.* at 89

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

Finally, the *Solesbee* Court erroneously found against the Facility on merger on the basis that Arbitration Agreement was voluntary. 438 S.C. at 648, 885 S.E.2d at 149. While, again, it is certainly true that the Arbitration Agreement was voluntary, this fact provides no reasonable inference of an intent contrary to merger. Again, to be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. But all this means is that it did not have to be agreed to for the resident to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it

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annulment ("The act of nullifying or making void.").

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. McCarson on Mr. Arches'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. 212 (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. 200-211 (setting forth the terms of the admission) *with* R. p. 212 (providing for arbitration of disputes arising out of the admission).)

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

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

The circuit court's view of equitable estoppel misapprehends our Supreme Court's decision in *Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel). The *Wilson* Court favorably discussed

the direct benefits test—which test this Court had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed this Court' 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. Arches received direct benefits (in the form of his admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement merged. *Wilson*, 426 S.C. at 34-45, 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).

Wilson supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration case like this, and it instructs that the key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability but whether benefits to the nonsignatory are direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 ("Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract

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

As set forth in our Supreme Court's controlling decision in *Wilson*, and consistent with this Court's decision in *Pearson*, which the *Wilson* Court favorably cites, the essence of the test for direct benefits estoppel is simply whether the nonsignatory has exploited other parts of the contract by reaping its benefits. Indeed, to require more than this—or, in other words, to limit the applicability of direct benefits estoppel to only instances where the nonsignatory's claim relies solely on the contract terms to impose liability—is to invite the very sort of have-your-cake-and-eat-it-too inequity that the doctrine aims to prevent in the first place. Neither *Wilson* nor this Court's decision in *Pearson* nor general notions of equity countenance,[30] much less call for, such a result.

Here, Mr. Arches was a direct beneficiary. Indeed, to deny his receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of his residency: every night's stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even Plaintiff's complaint does not go nearly so far as that. (*See* R. p. 15-19.)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Mr. Arches received the benefit of his admission to the Facility,

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[30] *See Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) ("Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible.").

including, without limitation, the room, board, care, and treatment he received therein. Respectfully, the circuit court should have found that the Arbitration Agreement merged with the Admission Agreement and that Plaintiff is estopped to deny the Admission Agreement/Arbitration Agreement's enforceability, Mr. Arches having effectively embraced the contract with the Facility for the purpose of his admission and receipt of the benefits thereof.

B. Because this matter is governed by the FAA, the circuit court erred in relying on § 15-48-20.

The circuit court cites the South Carolina Arbitration Act at § 15-48-20 for the proposition that it "permits a court to 'summarily' proceed to the determination of whether arbitration is appropriate when an agreement to arbitrate has been contested." (R. p. 7.) As explained, however, this matter is governed by the FAA, not the South Carolina Arbitration Act. Moreover, the use of a state law of particular applicability to arbitration agreements as a means to deny the Facility the ability to conduct discovery in an attempt to vindicate its arbitration rights violates the FAA's commandment that arbitration agreements must be placed on equal footing with all other contracts under state law. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017); *Allied-Bruce*, 513 U.S. at 281.

C. The Facility's merger/equitable estoppel argument applies with equal force to require arbitration of the wrongful death claim.

In the circuit court's view, even if the Facility's merger/equitable estoppel argument prevailed as to the survival component of this case, it would not prevail as to the wrongful death claim. This is incorrect. The Facility's merger/equitable estoppel argument applies with equal force to require arbitration of the wrongful death claim.

The only way it could be true (i.e., legally correct) for the Arbitration Agreement not to apply with equal force to the wrongful death claim is if the claim of wrongful death (i.e., the substantive right of action) belongs to the wrongful death beneficiaries themselves. If this were the case, then general principles of contract law would indeed apply to prevent wrongful death beneficiaries from having to arbitrate "their" claims if they themselves had not agreed to do so.

A wrongful death claim, however, does not belong to the wrongful death beneficiaries. It belongs to the decedent's personal representative, and a specific rule prohibiting enforcement of otherwise valid agreements to arbitrate wrongful death claims would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts,[31] as indeed our Supreme Court has already recognized in *Dean*, 408 S.C. at 389, 759 S.E. at737 n.3 ("[C]ourts *may not*

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

refuse to compel arbitration simply because a wrongful death claim is involved.") (emphasis added).

"The right of action for wrongful death is purely statutory and did not exist at common law . . . ." *Glenn v. E. I. DuPont Nemours & Co.*, 254 S.C. 128, 133, 174 S.E.2d 155, 157 (1970). A wrongful death claim must be a claim that, had the decedent lived, they could have maintained themselves. S.C. Code Ann. § 15-51-10 ("Whenever the death of a person shall be caused by the wrongful act, neglect or default of another *and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof*, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.") (emphasis added); *see also Maxey v. Sauls*, 242 S.C. 247, 250, 130 S.E.2d 570, 572 (1963) ("[T]he right to maintain the [wrongful death] action is based upon the condition that 'the act, neglect or default' must be 'such as would, if death had not ensued, have entitled the person injured to maintain an action and recover damage in respect thereof.' In other words, '*if the deceased never had a cause of action, none accrues under the wrongful death statute*.'") (discussing prior statutory language that is identical to that in present § 15-51-10) (quoting *Scott v. Greenville Pharmacy*, 212 S.C. 485, 489, 48 S.E. 324, 326 (1948) (emphasis added)).

Accordingly, a claim of wrongful death is derivative in nature, in that it derives from (and does not arise without) a cause of action arising in favor of the *decedent*. *See Id.*; *see also* 26 S.C. Jur. Limitation of Actions § 32 ("A wrongful death action is derivative in nature . . . ."); *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 942 (D.S.C. 1988) ("If the decedent never had a cause of action, none accrues under the wrongful death statute. Furthermore, anything that would have defeated the decedent's recovery had he survived the accident, such as contributory negligence, a valid release, or similar acts on his part, would defeat the right of recovery in behalf of his family in case of his death. It follows logically that the decedent's failure to file a timely claim . . . is an act, or omission, on his part which should defeat the right of recovery of his personal representative.") (internal citations and quotation marks omitted); *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010) ("*Quattlebaum* was correctly decided and adheres to the principle that a decedent's estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived.'").

"[T]he substantive right to bring . . . a wrongful death action . . . is determined by the Probate Code." *Fisher on behalf of estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 240, 811 S.E.2d 739, 742 (2018); *see also id.* at 242, 811 S.E.2d at 743 ("The Probate Code defines who may act on behalf of the estate of a

deceased person. The Probate Code, therefore, is the substantive law by which the identity of the *'real party in interest'* is determined for all civil actions *brought on behalf of the estate of a deceased person*.") (emphasis added). "Under the Probate Code . . . *wrongful death actions must be brought by the personal representative* . . ." *Id.* (emphasis added); *see also* S.C. Code Ann. § 15-51-20 ("Every [wrongful death] action shall be brought by or in the name of the executor or administrator of [the] person [whose death was wrongfully caused].");[32] *Glenn*, 254 S.C. at 134, 174 S.E.2d at 158 ("If an action for wrongful death is instituted by one other than the personal representative of a decedent, duly appointed by the Probate Court, it should be dismissed.").

Even though it is for their "benefit," a wrongful death claim does not belong to the wrongful death beneficiaries themselves. It is a claim that is brought on behalf of the estate of the deceased person. The substantive right to bring the claim belongs to decedent's personal representative, who must bring the claim and is the real party in interest under South Carolina law. And consistent with Judge

[32] As explained by the *Fisher* Court, "Under the Probate Code . . . the terms 'executor' and 'administrator' do not have separate meaning, but are included within the defined term 'personal representative.'" 422 S.C. at 240, 811 S.E.2d at 742 (citing S.C. Code Ann. § 62-1-201(33) (defining "Personal representative" to "include[] executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.")). "Therefore, wrongful death actions must be brought by the personal representative, despite the language 'shall

Anderson's "correct[]"[33] analysis in *Quattlebaum* (which explains that anything that would have defeated the decedent's recovery had he survived, such as, for instance, a valid release, will apply to the wrongful death claim), it necessarily follows that an enforceable arbitration agreement (or an arbitration agreement the enforceability of which the decedent, and, in turn, his personal representative, is estopped to deny) must be enforced as to a claim for wrongful death.

Accordingly, the circuit court erred in finding that arbitration of the wrongful death claim cannot be compelled under the Facility's merger/equitable estoppel theory.

D. At a minimum, the circuit court should have granted the Facility's alternative request for permission to conduct limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability under principles relating to the law of agency.

At a minimum, the circuit court should have allowed the Facility to engage in some appropriately limited discovery to investigate fairly the Arbitration Agreement's enforceability under principles relating to the law of agency.[34] [35] [36]

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be brought by . . . the executor or administrator' that still appears in section 15-51-20." *Id.*

[33] *Stokes*, 389 S.C. at 349, 699 S.E.2d at 146.

[34] A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App.

This would entail, at the least, allowing the Facility to depose Mr. McCarson and to follow up on any pertinent evidentiary leads revealed by his deposition. Otherwise, the Facility is in a Catch-22: vulnerable on the one hand to the argument that it has not presented sufficient evidence to prove the Arbitration Agreement is enforceable based on Mr. McCarson's agency (or related principles, such as agency by estoppel

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2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). "An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145-46, 425 S.E.2d 764, 773 (Ct. App. 1992). The doctrine of apparent authority provides that a principal may be bound by the acts of it agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

[35] "When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances." *R & G Const.*, 343 S.C. at 433, 540 S.E.2d at 118 (Ct. App. 2000).

[36] Moreover, authority can be supplied to an agent retroactively by express or implied ratification. *See Brazell Bros. Contractors v. Hill*, 245 S. C. 69, 74, 138 S.E.2d 835, 837 (1964) ("Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent."). "Ratification, as it relates to the law of agency, may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into on his behalf by another who at the time assumed to act as his agent." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S. C. 75, 89, 124 S.E.2d 602, 608 (1962). It is not necessary for a principal to be present at the time of the commission of his agent's act in order for him to ratify that act. *See State v. Waldrop*, 73 S. C. 60, 52 S.E. 793, 795 (1905)

or ratification), which is a fact-intensive question, while at the same time vulnerable on the other hand to the argument that it waived its arbitration rights by making use of the tools of litigation (i.e., discovery) to prove them.

It must be remembered that the Arbitration Agreement is valid on its face, bearing, as it does, Mr. McCarson's express representation of authority to bind Mr. Arches. (R. p. 212 ("By his . . . signature below, the executing party [(i.e., Mr. McCarson)] represents that he . . . has the authority to sign on [Mr. Arches's] behalf so as to bind [Mr. Arches] as well as [himself].").)[37] It cannot be the case that the proponent of arbitration (who, it must be remembered, may well be attempting to vindicate a valid right to arbitrate that the arbitration opponent has wrongfully denied) has the burden to establish that right in a fact-based judicial proceeding in which it is disallowed use of the fact-finding tools (discovery procedures) available in other judicial proceedings.

Obviously, if this were an action to determine the validity of a contract other than an arbitration agreement there would be no question about the Facility's

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("The presiding judge ruled that he could ratify the act of the agent, whether he was present or not, and in this we see no error.").

[37] The Facility would note here that, having signed the Arbitration Agreement, Mr. McCarson "is presumed to have, read, understood, and assented to its terms." *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms."); *see also Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995) (South Carolina law implies a covenant of good faith and fair dealing in every contract).

ability to conduct discovery relevant to the facts/circumstances bearing on the contract's validity. To force the Facility into a situation where it cannot conduct relevant discovery to vindicate its arbitration rights without risking a waiver of those rights by the very act of attempting to vindicate them is not only patently unjust but also a violation of the FAA's requirement that arbitration agreements must be placed on equal footing with other contracts. *See Concepcion*, 563 U.S. at 339 (Under the FAA, "courts *must* place arbitration agreements on *equal footing with other contracts* . . . ."); *Kindred Nursing Centers*, 137 S. Ct. at 1423 (While a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not do so based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.") (citing *Concepcion*, 563 U.S. at 339); *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)).

Principles relating to the law of agency may potentially provide an additional, independent basis on which to grant the Motion to Compel Arbitration and, in turn, the Motions to Stay. Their application is fact dependent, and the allowance of discovery—without the threat of waiver—into Mr. Arches and Mr. McCarson's course of dealing and the potential creation of an agency relationship between them (or other potential bases for enforcement of the Arbitration Agreement under related principles) is only reasonable.

II. Out of an abundance of caution, to the extent that Appellants might somehow be prejudiced if this is not challenged on appeal, where the Facility admits that it operates Magnolia Manor-Inman[38] and Mack admits that he was the administrator of Magnolia Manor-Inman while Mr. Arches was a resident[39] but FAS, FCOS, HVH, THIB, and THISC deny that they have ever operated any skilled nursing facility or provided care or treatment to Mr. Arches or had any interaction or relationship with Mr. Arches of any kind,[40] the circuit court erred in using the plural noun "Defendants" in referring to Magnolia Manor-Inman as "Defendants' assisted living facility,"[41] and in any way otherwise that it might be said to have blurred distinctions between Appellants.[42]

The alleged relationship between FAS, FCOS, HVH, THIB, and THISC and Mr. Arches is very much in dispute, and to the extent that the circuit court might be said to have done so, it is improper, both procedurally[43] and evidentiarily,[44] for the circuit court to weigh in on the dispute at this time. Accordingly, even though the circuit court does not actually purport to determine any factual issue in this regard,

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[38] (R. p. 23 ¶ 3 ("This Defendant admits it is organized pursuant to the laws of the State of Delaware and operates the skilled nursing facility at issue in Plaintiff's Complaint located in Spartanburg County, South Carolina").)

[39] (R. p. 59 ¶ 4 ("[T]his Defendant admits he was the administrator of Magnolia Manor-Inman while Mr. Arches was a resident").)

[40] (R. p. 35 ¶ 6 ("This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Mr. Arches. This Defendant further denies any interaction or relationship with Mr. Arches of any kind."); R. p. 41 ¶ 6 (same); R. p. 47 ¶ 6 (same); R. p. 53 ¶ 6 (same); R. p. 29 ¶ 6 (same).)

[41] (R. p. 2.)

[42] (*See, e.g.,* R. p. 2 ("Decedent fell numerous times between May and December of 2019 after being assessed as a high fall risk by *Defendants*.") (emphasis added).)

[43] *See Worsley Companies, Inc. v. Town of Mount Pleasant*, 339 S.C. 51, 528 S.E.2d 657 (2000) ("If triable issues exist, those issues must go to the jury.").

out of an abundance of caution, to the extent that it might potentially expose Appellants to any threat of prejudice going forward, Appellants object to the inclusion of any language in the circuit court's principal order that is inconsistent with the Facility's admission that it operates Magnolia Manor-Inman,[45] Mack's admission that he was the administrator of Magnolia Manor-Inman while Mr. Arches was a resident,[46] and FAS, FCOS, HVH, THIB, and THISC's denials that they have ever operated any skilled nursing facility or provided care or treatment to Mr. Arches or had any interaction or relationship with Mr. Arches of any kind. (R. p. 35 ¶ 6; R. p. 41 ¶ 6; R. p. 47 ¶ 6; R. p. 53 ¶ 6; R. p. 29 ¶ 6.)

CONCLUSION

For the foregoing reasons, Appellants ask that the Court reverse the circuit court's denial of the Underlying Motions and compel Plaintiff's claims against the Facility to arbitration and stay this lawsuit as to the Other Defendants pending the outcome of arbitration between Plaintiff and the Facility (or to remand this matter to the circuit court with instructions that it do so); or, alternatively, reverse the circuit court's denial of the Underlying Motions and remand this matter to the circuit court for the additional discovery requested by the Facility to be conducted, for additional briefing to be submitted to the circuit court in light of such

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[44] *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.").

[45] (R. p. 23 ¶ 3.)

discovery, and for the circuit court to hear and decide the Underlying Motions anew with the benefit of the same; and, to the extent that it may be necessary to protect Appellants against any threat of prejudice going forward, reverse the circuit court so as to eliminate any language in its principal order that is inconsistent with the Facility's admission that it operates Magnolia Manor-Inman, Mack's admission that he was the administrator of Magnolia Manor-Inman while Mr. Arches was a resident, and FAS, FCOS, HVH, THIB, and THISC's denials that they have ever operated any skilled nursing facility or provided care or treatment to Mr. Arches or had any interaction or relationship with Mr. Arches of any kind.

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[46] (R. p. 59 ¶ 4.)

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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

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2022-CP-42-02595
Appellate Case No. 2023-001371

Steven McCarson,
as Personal Representative of the Estate of Louie Arches,

Respondent,

v.

THI of South Carolina at Magnolia Manor-Inman, LLC
d/b/a Magnolia Manor-Inman, THI of South Carolina at Inman, LLC,
THI of South Carolina, LLC, Hunt Valley Holdings, LLC,
Fundamental Administrative Services, LLC,
Fundamental Clinical and Operational Services, LLC,
THI of Baltimore, LLC, and James H. Mack,

Appellants.

APPELLANTS' CERTIFICATION FOR FINAL BRIEF

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

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