RECEIVED

Mar 18 2025

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2022-CP-42-02595
Appellate Case No. 2025-000090

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..... Petitioners.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

PARKER LAW GROUP, LLP
Lee D. Cope
John E. Parker, Jr.
101 Mulberry Street East
Post Office Box 487
Hampton, South Carolina 29924
(803) 903-1738

AND

KOON, COOK & WALTERS, LLC
Jamie Walters
2016 Gadsden St.
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the Petition presents special and important reasons for the Court to grant a writ of certiorari as required by Rule 242(b), SCACR.

II. Whether the Court of Appeals erred in affirming the Circuit Court's finding that the subject admission and arbitration agreements did not merge.

COUNTERSTATEMENT OF THE CASE

On April 26, 2019, the Decedent, Mr. Louie Arches, was admitted to Petitioners 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's ("the Facility") Facility, Magnolia Manor-Inman. (R. pp. 16, 20). At the time of his admission, Arches had short- and long-term memory loss, impaired decision making, an inability to communicate, and a documented history of Alzheimer's disease and dementia. (R. pp. 20-21, 256-264). Upon admission, Arches also suffered from balance deficits and an unsteady gait. (*Id.*). While in the Facility's care, Arches fell at least six times in a seven-month period, resulting in injuries to his eye and forehead, amongst other unknown, undocumented injuries. (R. pp. 17, 21). Arches passed away on May 18, 2020. (R. pp. 17, 21).

Arches executed a South Carolina health care power of attorney designating Respondent Steven McCarson as his health care agent on April 24, 2019, but it was never recorded.[1] (R. pp. 249-255). A general durable financial power of attorney designating McCarson as his agent for the purposes of financial decisions was executed by Arches on April 24, 2019 as well, but it was not recorded until July 29, 2019, over two months after McCarson signed the Facility's arbitration agreement in his individual capacity. (R. pp. 212, 244-248). The health care power of attorney

[1] McCarson is Arches' grandson. (R. p. 217).

grants McCarson the authority to consent to medical care on Arches' behalf, to authorize his admission to a medical facility, and to take other actions *necessary* to making decisions concerning Arches' health care. (*Id.*). It does not contain a broad grant of authority empowering McCarson to do anything Arches may have done in situations concerning the provision of health care to Arches.[2] The Facility has not appealed the Circuit Court's implicit finding that there was no evidence of any actual or apparent agency relationship between McCarson and Arches, it has not appealed the Circuit Court's implicit finding that the health care power of attorney and general durable financial power of attorney were insufficient or ineffective to grant authority to McCarson to enter an arbitration agreement on behalf of Arches, and it has not appealed the Circuit Court's implicit finding that McCarson had no authority to execute the arbitration agreement, so these finding are the law of the case.[3]

McCarson signed the Facility's arbitration agreement and admission agreement on May 6, 2019. (R. pp. 200-212). The admission agreement contains provisions regarding the Facility's obligations, Arches' obligations, and a financial agreement, as well as provisions regarding the termination of the admission agreement, governing law, and an entirety of agreement provision. (*Id.*). The admission agreement has its own signature page, is separately entitled "Admission

[2] The Facility has never contested the Estate's position that the health care power of attorney was ineffective as a grant of authority to waive the Estate's right to a jury trial.

[3] The authority conveyed by a principal to an agent to make health care decisions or handle finances does not encompass executing an agreement to arbitrate. *Hodge v. Uni-Health Post-Acute Care of Bamberg*, 422 S.C. 544, 572, 813 S.E.2d 292, 307 (Ct. App. 2018).

Agreement – South Carolina", and is separately paginated as pages one through 12. (*Id.*).

The arbitration agreement sets forth that all claims arising out of or relating to the Facility's admission agreement are to be resolved by arbitration and provides the governing law for the arbitration agreement. The arbitration agreement has its own separate signature page, is entitled "Facility – Resident/Representative Arbitration Agreement", and is paginated as "Page 1 of 1". (*Id.*). The Facility has acknowledged that the arbitration agreement is optional, and it contains no provision for medical, nursing, or health care services to be provided to residents, nor does it require any financial commitment to pay for such services. Since it is undisputed that McCarson did not have authority to enter the arbitration agreement, the Court's analysis is confined to whether the Estate should have been precluded from denying the validity of the arbitration agreement under a merger/estoppel theory.

This action was commenced on July 14, 2022, by filing a Summons and Complaint in the Spartanburg County Court of Common Pleas. (R. pp. 13-19). McCarson, as Personal Representative of the Estate of Arches ("the Estate"), alleged wrongful death and survival claims against the Facility as a result of the care and treatment provided Arches while he was a resident at the Facility. (*Id.*). The Estate properly complied with the Notice of Intent and affidavit requirements of S.C. Code Ann. §§ 15-79-125 and 15-36-100 prior to filing suit.[4] The Facility Defendants individually answered the Complaint on August 22, 2022, and August 24, 2022, and

[4] *McCarson v. THI of South Carolina at Magnolia Manor-Inman LLC et al*, Case No. 2022-NI-42-00005.

generally denied all allegations pertaining to any liability for the decedent's treatment while he was in the Facility's care. (R. pp. 22-62). The Facility Defendants raised as an affirmative defense the potential arbitrability of this action and reserved the right to file a motion to dismiss and compel arbitration.[5] (R. p. 24).

On February 3, 2023, Appellant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman ("THISC") filed a Motion to Compel Arbitration, arguing that a valid and binding arbitration agreement had been entered between the parties. (R. pp. 121-122). THISC contended that the Federal Arbitration Act ("FAA"), as opposed to the South Carolina Uniform Arbitration Act, applied to the arbitration agreement.[6] (*Id.*). THISC also requested that the Circuit Court stay all discovery, pretrial motions practice, and any requirements to file any responsive pleadings until its Motion could be resolved. (*Id.*). The remaining Facility Defendants filed Motions to Stay the proceedings pending THISC's Motion to Compel Arbitration the same day.

The Facility's Motions were set for hearing by the Circuit Court on June 1, 2023. The Facility Defendants filed supporting memoranda, with the arbitration agreement and admission agreement attached as exhibits to the Motion to Compel Arbitration, further arguing that the FAA governed the arbitration agreement, that

[5] Appellant THI of Baltimore, Inc. did not raise the arbitrability of this action as an affirmative defense and instead denied that it has ever been a licensed operator of a skilled nursing facility. (R. p. 53).

[6] The Circuit Court did not specifically find in its July 10, 2023 Order that the agreements involve or affect interstate commerce and are thus governed by the FAA. (R. pp. 1-9). Regardless, even if the FAA did govern the agreement, it does not give "the party seeking arbitration a leg up" in determining whether arbitration should be compelled. *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 229, 847 S.E.2d 268, 271 (Ct. App. 2020).

arbitration agreements are favored and under state law are required to be placed on equal footing with all other contracts, that the arbitration agreement was not facially invalid or unconscionable, that the Estate's claims were within the scope of the arbitration agreement, and that the proceedings were subject to a stay pending the outcome of the Motion to Compel. (R. pp. 123-134, 167-173). In the alternative, THISC argued that even if the arbitration agreement was not valid, that the arbitration agreement and admission agreement merged such that it would be inequitable for the Estate to be permitted to argue that the arbitration agreement was not valid. (R. pp. 174-195). Lastly, THISC requested that the Circuit Court permit it to conduct limited discovery on the issue of agency if the Court were inclined to deny its Motion on the issue of agency. (R. pp. 195-198).

The Estate submitted a memorandum in opposition to THISC's Motion, arguing in particular that in McCarson's individual capacity he did not have authority under any agency theory or other source of authority to enter the arbitration agreement at the time it was signed, that an executed durable financial power of attorney was not effective at the time the arbitration agreement was signed, that an executed health care power did not grant him authority to enter the arbitration agreement, that the arbitration agreement and admission agreements were separate agreements that did not merge, that the Estate was not estopped from denying the validity of the arbitration agreement under any theory of estoppel, that the arbitration agreement did not reach the wrongful death claims of the wrongful death beneficiaries, and that additional discovery was not necessary as the power of

attorney was facially invalid, no other source of authority existed, and S.C. Code Ann. § 15-48-20 mandated that the Circuit Court was required to summarily proceed to the determination of whether arbitration was appropriate. (R. pp. 216-243).

The Circuit Court denied the Facility's Motions by way of a formal Order filed July 10, 2023.[7] (R. pp. 1-9). The Order finds that arbitration agreements are unenforceable when a family member signs an arbitration agreement near the time of admission to a health care facility and does not have authority to do so, that estoppel and merger do not apply against a non-signatory when the admission and arbitration agreements contain language recognizing the separateness of the agreements, that McCarson would not have had authority to enter the arbitration agreement through the health care power of attorney, that the wrongful death claims did not belong to the Estate, and that the Court was required to summarily procced to a determination on the issue of arbitration under South Carolina law. (R. pp. 1-9).

Notably, the Circuit Court did not rule on whether the FAA actually applied to the subject arbitration agreement. The Facility filed a Motion for Reconsideration on July 20, 2023. (R. pp. 266-296). In its Motion, the Facility argued that the agreements merged, that a theory of direct benefits estoppel would preclude the Estate from denying that McCarson had authority to enter the arbitration agreement, that the July 10, 2023 Order violated the FAA's "equal footing" rule, that the arbitration agreement would be enforceable against the wrongful death claims, that discovery into the nature of the Arches and McCarson's relationship should have been

[7] The Motions to Stay were technically mooted once the Circuit Court correctly denied the Motion to Compel Arbitration.

permitted to determine if there was any evidence supporting an actual or apparent agency theory, and that the FAA, and not S.C. Code § 15-48-20, governed the arbitration agreement. (R. pp. 269-295). The Facility did not argue that McCarson did in fact have authority to execute the arbitration agreement under any theory and solely based its arguments on the issues of merger, estoppel, whether the wrongful death claims were precluded from arbitration, and whether further discovery was necessary prior to a ruling on its Motion.

On July 24, 2023, the Estate filed a memorandum in opposition to the Facility's Motion for Reconsideration, arguing that the agreements did not merge, that even if they did merge the Estate would still not be precluded from arguing that McCarson did not have authority under a direct benefits theory, that the wrongful death claim does not belong to the Estate, that discovery was not warranted given the circumstances, and that the Circuit Court was free to apply S.C. Code Ann. § 15-48-20 to the arbitration agreement because the FAA did not apply. (R. pp. 297-320). On July 27, 2023, the Circuit Court denied the Facility's Motion for Reconsideration. (R. pp. 11-12).

The Facility filed its Notice of Appeal on August 28, 2023. (R. pp. 321-323). The Facility's Appeal asserted that the Circuit Court erred on essentially three grounds: (1) the Circuit Court's finding on merger was erroneous, (2) the Circuit Court's equitable estoppel analysis was erroneous, and (3) the Circuit Court erred in relying on a provision of the South Carolina Uniform Arbitration Act ("UAA"), (4) the Circuit Court erred in finding that in this case there was no consent to arbitrate the wrongful

death claim, and (5) the Circuit Court should have granted the Facility's request for limited discovery instead of denying the motion outright. (Final Br. of Appellants i-ii). In an unpublished decision, the Court of Appeals affirmed the Circuit Court's finding that the admission agreement and arbitration agreement did not merge, affirmed the Circuit Court's finding that further discovery was not warranted, and stated that it did not reach the issues of estoppel, the UAA, or the arbitrability of wrongful death claims because the merger issue was dispositive of the Appeal. (Opinion, Sep. 25, 2024).

ARGUMENT

I. The Facility has made no effort to identify any special or important reasons justifying this Court's review of the Court of Appeals' Opinion.

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. The South Carolina Appellate Court Rules present five scenarios encompassing the characteristics of cases that will be considered by the Court on review, including:

(1) Where there are novel questions of law.

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), SCACR.

The Facility's Petition presents no questions or issues justifying review of the Court of Appeals in this instance. There are no novel questions of law presented by the Petition. The Facility has essentially put a single question before the Court, whether the Court of Appeals erred in affirming the Circuit Court's finding of no merger. The issue of merger within the context of health care facility admission and arbitration agreements has already been adequately addressed by this Court in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014), and that decision is dispositive of the issues that have been raised by the Facility on appeal and in its Petition. Additionally, to the best of the undersigned's knowledge, the Facility's questions on merger and estoppel concerning this exact same arbitration and admission agreement have already been presented to the Court at least *fourteen* times for review, and the Court has denied certiorari in each case.[8]

Further, the merger/estoppel question with regards to the exact same arbitration and admission agreements at issue here has been presented numerous times to the Court of Appeals for review and has been the subject of a recently published decision, *Estate of Solesbee by Bayne v. Fundamental Clinical and Operational Servs., LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023), in which the Court of Appeals unanimously found that the subject arbitration and admission

[8] *E.g., Ladson v. THI of S.C. at Charleston*, Case No. 2022-001286; *Daniels v. THI of S.C.*, Case No. 2022-001503; *The Estate of Solesbee v. Fundamental Clinical and Operational Services, LLC*, Case No. 2023-000777; *Estate of Barbara Owens v. Fundamental Clinical and Operational Services, LLC*, Case No. 2023-001605.

agreements did not merge and that a nonsignatory estate would not be precluded from denying the validity of the arbitration agreement. The Court of Appeals' reasoning in *Solesbee* is in accord with this Court's reasoning in *Coleman* and carefully follows *Coleman*'s logic.

And to the contrary of the Facility's arguments, *Solesbee* is not contrary to this Court's prior decisions because there is no presumption of merger when a party is attempting to enforce an arbitration agreement against a nonsignatory, regardless of whether the arbitration agreement and admission documents are signed at the same time. *See Wilson v. Willis*, 426 S.C. 326, 337-38, 827 S.E.2d 167, 173 (2019) ("[A] presumption *against* arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate."). Again, this Court has *never* held that there is a presumption in favor of merger when admission and arbitration agreements are entered in the same transaction that would shift the burden of proof to the party seeking to deny the validity of an arbitration agreement.

There are no substantial constitutional issues directly involved in the questions presented to the Court by the Petition. Nor are there any federal questions involved; the only issue arguably encompassing a federal question, whether the Federal Arbitration Act governs the subject arbitration agreement, is completely irrelevant to the questions presented to the Court by the Facility. Given this, it is unsurprising that the Facility has made no effort to convince the Court there is anything special or important inherent in its Appeal, because it has no such arguments to make, necessitating a denial from this Court. *See S.C. Dep't of Social*

Servs. v. Benjamin, 430 S.C. 235, 236, 430 S.E.2d 373 (2020) ("This Court has held it will grant certiorari to the court of appeals only where special reasons justify the exercise of that discretion.").

II. The Court of Appeals correctly affirmed the Circuit Court's finding that the arbitration agreement and admission agreement did not merge.

Because arbitration exists solely by agreement of the parties, a presumption against arbitration arises where the party resisting arbitration (the Estate) is a nonsignatory to the written agreement to arbitrate.[9] *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173. State law provides when an arbitration agreement may be enforced against a nonsignatory, and South Carolina permits a nonsignatory to be bound by an arbitration agreement under several theories: incorporation by reference, assumption, agency, veil piercing/alter ego, and estoppel. *Solesbee*, 438 S.C. at 647, 885 S.E.2d at 148. Only the issue of estoppel was preserved for review by the Court of Appeals. Therefore, the Facility could only prevail if it could show there was no evidence reasonably supporting the Circuit Court's finding that the Estate was not estopped from denying the validity of the arbitration agreement.

A nonsignatory may be estopped from denying the validity of an arbitration agreement when it receives a direct benefit from a contract containing an arbitration clause. *Solesbee*, 438 S.C. at 647, 885 S.E.2d at 148. It is undisputed in this case that the Facility's arbitration agreement was not a clause in its admission agreement, and

[9] McCarson was acting in his individual capacity, and not in his capacity as personal representative of the Estate, at the time he entered the arbitration agreement. *See Thompson v. Pruitt Corp.*, 416 S.C. 43, 61, 784 S.E.2d 679, 689 (Ct. App. 2016) (recognizing the concept that a person may act separately in individual and representative capacities).

neither McCarson nor the Estate have received any direct benefit from the arbitration agreement itself. The Facility thus argues that under a theory of merger, the arbitration agreement and the admission agreement became a unified contract once they were executed, and since Arches benefited from the terms of the admission agreement, his Estate is precluded from denying the validity of the arbitration agreement. However, the language and formatting of the agreements serve as evidence that the two agreements were intended to be separate documents, and at minimum, create an ambiguity as to merger that must be construed against the Facility.

> In South Carolina, "[t]he 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.

Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). Here, the terms of the agreements indicate an intent that the doctrine of merger would not apply to the agreements, and at minimum create an ambiguity as to merger. *See id.* at 355-56, 755 S.E.2d at 455 (stating that ambiguity as to merger must be construed against the drafter).

In determining whether a health care facility's admission and arbitration agreements merge, the Court of Appeals, relying in part on *Coleman*, has looked to the following factors: (1) whether the two agreements are governed by separate bodies of law, (2) whether the language of the agreements recognizes the two agreements as separate, (3) whether the agreements contain different terms regarding revocation

and termination, (4) whether the agreements are separately paginated and have their own signature pages, and (5) whether both agreements are required for the execution of the other, or whether one agreement is optional. *Hodge*, 422 S.C. at 562-63, 813 S.E.2d at 302. The Court of Appeals has previously analyzed the subject admission and arbitration agreements in *Solesbee* and found the agreements do not merge.

In *Solesbee*, the Court of Appeals found that the admission agreement is governed by South Carolina law, while the arbitration agreement is governed by federal law. *Solesbee*, 438 S.C. at 648, 885 S.E.2d at 149. To be precise, the admission agreement is governed by "applicable Federal regulations" and South Carolina law. (R. p. 209). The arbitration agreement, on the other hand, purports to be governed by the FAA's statutes and specifically not by South Carolina law.[10] (R. p. 212). Therefore, the two agreements are not governed by identical spheres of law: one is subject to state law and the federal code of regulations, while the other claims to only be subject to the statutes contained within the FAA.

Second, the Court of Appeals has previously found that the language of the agreements recognizes that they are separate: "The 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.'" *Solesbee*, 438 S.C. at 648-49, 885 S.E.2d at 149. This language mirrors

[10] The Facility argues that both agreements are broadly governed by South Carolina and federal law; however, the arbitration agreement specifically states it will only be enforced under the FAA. To the extent that the arbitration agreement provides that the arbitration *proceedings* will be governed by the South Carolina Alternate Dispute Resolution/Mediation Rules, these Rules only govern the proceedings and are irrelevant to the enforcement of the arbitration agreement and the Court's determination of merger.

that addressed in *Coleman* and *Thompson*, in which this Court and the Court of Appeals found such language to be proof that an admission agreement was separate and did not merge with an arbitration agreement:

> The court then explained the evidence of the parties' intent to keep the two agreements separate by highlighting the admission agreement's recognition of the arbitration agreement as a separate document, i.e., "This Agreement, including all Exhibits hereto, and the Arbitration Agreement . . . ."

Thompson, 416 S.C. at 52, 784 S.E.2d at 685.

The Facility argues that the admission agreement's "Entire Agreement" clause contains language indicating that the agreements merged, specifically the statement that "[t]he undersigned further acknowledges that he/she has received and read the *Admission Handbook* and other Admissions materials and understand that these documents are made a part of this Agreement by reference *herein*." (R. p. 211) (emphasis added). The Facility wholly relies on dicta from prior decisions of this Court discussing that arbitration agreements can be part of admissions documentation to support that its arbitration agreement was an "Admissions material" that was incorporated into its admission agreement, but those decisions have no evidentiary value to this Petition. Additionally, the "Entire Agreement" provision purports to incorporate the Admissions materials by reference within the admission agreement itself, but nowhere within the admission agreement, including the "Entire Agreement" provision, does it ever refer to the arbitration agreement. At best, this creates an ambiguity as to merger that must be construed against the drafter, i.e., the Facility.

Third, the Court of Appeals has found that the arbitration agreement contains no language indicating that it may be revoked or terminated, but the admission agreement provides that a resident may terminate the admission agreement at any time. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149. Fourth, the Court of Appeals has found that the agreements at issue are separately paginated and have their own signature pages. *Id.* Since the arbitration and admission contracts have different pagination with different signature pages, and the arbitration contract is entitled "Arbitration Agreement" at the top of its first page, these factors further indicate the drafter's intent for the arbitration agreement to stand by itself as an independent contract, at least when it suits the Facility for it to do so. *See Thompson*, 416 S.C. at 53 n.1, 784 S.E.2d at 685 n.1 (noting that a separately labeled arbitration agreement indicates the drafter's intent for the agreement to stand by itself as an independent contract). Lastly, the Court of Appeals has found that the arbitration agreement is optional and voluntary, while the admission agreement is required for admission. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149. The Facility does not dispute in this case that the arbitration agreement is voluntary and optional.

In this case, the text of the agreements constitutes "actual evidence" and at minimum creates ambiguity as to whether the agreements merged. The Facility misconstrues that there is a legal presumption of merger, and that the above-discussed factors are not sufficient to overcome this presumption. However, the language of *Coleman* never states that there is a presumption of merger in the context of health care facility arbitration agreements, or that one interpretation as to merger

or the other is favored in any way, and in fact the Court's precedents, including *Wilson*, state that there is a presumption *against* merger when attempting to enforce an arbitration agreement against a nonsignatory. *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173. Instead, *Coleman* dictates that the Court can construe separately signed contracts together only if the agreements were made at the same time, by the same parties, for the same purpose, and in the course of the same transaction, so long as there is no language or other indications within the agreements of a contrary intent.

The Facility has not demonstrated through evidence that the agreements were made at the same time and within the course of the same transaction, so the Court of Appeals and Circuit Court had no obligation to construe the agreements as one. The fact that there is ample evidence that the agreements were drafted in such a manner that they could, if necessary, be construed as separate contracts only strengthens the Court of Appeals' and Circuit Court's reasoning and cautions against a finding of merger. The language, pagination, and formatting of the admission agreement and arbitration agreement evince an intent for the agreements to be considered separate, presumably when such a position would best work to the advantage of the Facility.

The Facility argues that this evidence is not "actual evidence", and that the Circuit Court's and Court of Appeals' former decisions were based on speculation. This begs the question of what else courts are supposed to rely on to determine if there is an intent contrary to merger that can be gleaned from admission and arbitration agreements. Additionally, if the above-discussed evidence is not indicative

of a contrary intent, and the Facility intended the documents to merge, then why hasn't it made the arbitration agreement a provision of the admission agreement, or merged the two documents with an explicit merger provision? Why make separate documents to begin with? More importantly, after six years of having these arguments rejected by the appellate courts of this State, why hasn't the Facility amended its admission and arbitration agreements to more clearly demonstrate an intent contrary to merger?

The answer to these questions is that for certain purposes, the Facility and other skilled nursing facilities want the agreements to be separate. The language of the agreements purposefully creates an ambiguity that must be construed against the drafter and required the Circuit Court and Court of Appeals to find that in this instance there was no merger of the documents. The Court of Appeals had previously reached the same conclusion numerous times based on the same language and agreements. The Court should not disturb the Court of Appeals' recent decision in *Solesbee* and the unpublished Opinion at issue in this case and should deny the Facility's Petition for a Writ of Certiorari.

The Court need not reach the additional issues of estoppel, the UAA, and the arbitrability of wrongful death claims that were before the Court of Appeals, as the merger issue is dispositive. However, the Court of Appeals did correctly affirm the Circuit Court's finding that further discovery on the issue of authority was not warranted, most importantly the Circuit Court's ruling that McCarson did not have authority is now the law of the case. To the extent that the Court does grant the

Facility's Petition, McCarson incorporates, asserts, and preserves all arguments concerning these issues as described in his Respondent's Brief before the Court of Appeals, including his arguments that a direct benefits theory of estoppel, as well as the traditional equitable estoppel test, do not preclude him from denying the arbitration agreement's validity, that the wrongful death claim is not arbitrable, and that further discovery on the issue of agency would be futile.

CONCLUSION

For the foregoing reasons, the Court should affirm the Court of Appeals Opinion affirming the Circuit Court's Orders denying the Facility's Motion to Compel Arbitration.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

By: _s/John E. Parker, Jr._____

Lee D. Cope
John E. Parker, Jr
PARKER LAW GROUP, LLP
101 Mulberry Street East
Post Office Box 487
Hampton, South Carolina, 29924
(803) 903-1781

AND

KOON, COOK & WALTERS, LLC
Jamie Walters
2016 Gadsden St.
Columbia, SC 29201
ATTORNEYS FOR RESPONDENT

March 18, 2025
Hampton, South Carolina