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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Marion County
Court of Common Pleas
H. Steven DeBerry IV, Circuit Court Judge

Case No. 2022-CP-33-00183

Court of Appeals Case No. 2023-001712
Unpublished Opinion No. 2024-UP-401 (S.C. Ct. App. filed November 27, 2024)

Supreme Court Case No. Case No. 2025-000400

Rebecca C. Hagood
as Personal Representative of the Estate of Frank D. Chavis, Sr.,

Respondent,

v.

Palmetto Faith Operating, LLC
d/b/a Faith Healthcare Center and
Brooks Arnette,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, Petitioners[1], by and through their undersigned counsel, certify that the Court of Appeals filed its opinion in this matter on November 27, 2024 (the "Subject Opinion"), affirming the circuit court's denial of Petitioners' motions to compel arbitration of Plaintiff's[2] claims; that Petitioners timely petitioned for rehearing; and that the Court of Appeals denied rehearing by order filed January 31, 2025.

QUESTIONS PRESENTED

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

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

B. Did the Court of Appeals err in not reaching Petitioners' remaining arguments, including especially, but not limited to, the equitable estoppel argument?

C. Had the Court of Appeals reached Petitioners' remaining arguments, including especially, but not limited to, the equitable estoppel argument, as, respectfully, it should have, should the Court of Appeals have found that the circuit court erred in not finding Plaintiff equitably estopped to deny the enforceability of the Arbitration Agreement and that it (the circuit court) should have granted the Motion to Compel Arbitration?

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[1] "Petitioners" refers, collectively, to Defendants/Appellants/Petitioners, Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center (the "Facility") and Brooks Arnette ("Arnette"). The Facility is a skilled nursing facility.

[2] "Plaintiff" refers to Rebecca C. Hagood as Personal Representative of the Estate of Frank D. Chavis, Sr. Rebecca C. Hagood is the daughter of the decedent Frank D. Chavis, Sr. ("Mr. Chavis"), and in her individual capacity, she is referred to as "Mrs. Hagood" or, as she is also known, "Becky Stokes" or "Rebecca C. Stokes," which is the name under which she signed (on behalf of Mr. Chavis) the Admission Agreement, Arbitration Agreement, Readmission Agreement at issue.

STATEMENT OF THE CASE

With the help of Mrs. Hagood, his daughter, Mr. Chavis was admitted as a resident of the Facility on March 14, 2019. (R. pp. 153–164.) Mrs. Hagood handled the paperwork in conjunction with the admission, and in so doing, she signed an Admission Agreement[3] and an Arbitration Agreement[4] on Mr. Chavis's behalf. When Mr. Chavis was briefly discharged and then readmitted to the Facility in April 2019,[5] Mrs. Hagood signed a Readmission Agreement on his behalf. (R. pp. 183–184.) By its express terms, the Readmission Agreement "reaffirm[s] the terms of the original Admission Agreement" and "acknowledge[s] that [it] does not replace or supercede the original Admission Agreement." (R. pp. 183–184.)

Plaintiff filed this wrongful death and survival action against Petitioners in the Marion County Court of Common Pleas on April 4, 2022. (R. pp. 16–56.) Petitioners timely answered Plaintiff's operative complaint on June 8, 2022, denying the alleged liability, raising numerous affirmative defenses, and expressly reserving the right to compel arbitration, which they also raised as an affirmative defense. (R. pp. 57–79.)

On July 13, 2022, Petitioners moved to compel Plaintiff's claims to arbitration based on the Arbitration Agreement Mrs. Hagood signed on behalf of Mr. Chavis in conjunction with his admission to the Facility (collectively, the "Motions to Compel Arbitration"). (R. pp. 127–128, 130–131, 288–328.)[6]

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[3] (R. pp. 153–164.)

[4] (R. p. 129.)

[5] Specifically, Mr. Chavis was discharged on April 5th and readmitted on April 17th, 2019. (R. p. 133.)

[6] Without question, Plaintiff's claims against Petitioners 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. Chavis's] stay at [the] Facility, or to the provisions of care or services to [Mr. Chavis] . . . ." (R. p. 129.) But even if there were "any doubts concerning

Following a hearing on August 21, 2023,[7] the circuit court, the Honorable H. Steven DeBerry IV, presiding, denied the Motions to Compel Arbitration by order filed September 8, 2023. (R. pp. 1–13.) Pursuant to Rule 59(e), SCRCP, on September 18, 2023, Petitioners timely moved the circuit court to alter, amend, and/or reconsider its decision,[8] and the circuit court denied that motion by order filed October 2, 2023. (R. pp. 14–15.)

By notice served and filed November 1, 2023, this appeal timely followed. (R. pp. 359–365.) In due course, the appeal was briefed and made ready for decision and decided without oral argument via the Subject Opinion, filed November 27, 2024.

As certified above, Petitioners timely petitioned for rehearing, and the Court of Appeals denied rehearing by order filed January 31, 2025.

This petition for a writ of certiorari timely follows.

STANDARD OF REVIEW

A circuit court's determination of whether a claim is subject to arbitration is reviewed de novo on appeal. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). This includes de novo review of the determination of whether an arbitration agreement is enforceable against a nonsignatory. *Wilson v. Willis*, 426 S.C. 326, 334, 827 S.E.2d 167, 172 (2019). "Under de novo review, a circuit court's factual findings will not be reversed on appeal if any evidence

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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."). There is likewise no question that the Arbitration Agreement covers Arnette as it does the Facility. Besides the Facility itself, the Arbitration Agreement also covers "its agents, employee and servants" (R. p. 129), and Plaintiff's operative complaint expressly alleges that Arnette "was at all material times the Administrator of the Facility." (R. p. 42 ¶ 4.)

[7] (R. pp. 80–126.)

[8] (R. pp. 329–358.)

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

ARGUMENT

I. The Court of Appeals erred in affirming the circuit court's denial of the Motions to Compel Arbitration. [9]

A. The Court of Appeals erred in affirming the circuit court on the basis that the Admission Agreement and the Arbitration Agreement did not merge.[10]

Petitioners' merger/equitable estoppel argument is a standalone argument that does not depend on any showing of authority (actual or apparent or otherwise) on the part of Mrs. Hagood or otherwise on the existence of any per se valid and enforceable agreement between the parties. *See Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (observing that South Carolina has recognized numerous theories that can bind nonsignatories to arbitration agreements, including estoppel); *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–55, 755 S.E.2d 450, 455 (2014) (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel); *id.* (explaining "Appellants' equitable estoppel argument," which "[wa]s premised on [Appellants'] contention that, under state law, the admission agreements and

[9] To be clear, out of an abundance of caution, this argument, covers circuit court error—and subsequent appellate court error in affirming the same—in terms of both the denial of Petitioners' principal motions and the denial of Petitioners' motion to alter, amend, and/or reconsider the denial of their principal motions.

[10] (Subject Opinion ("[W]e hold the circuit court did not err in denying Appellants' motions to compel arbitration because the Admission Agreement and the Arbitration Agreement did not merge.").)

the [arbitration agreements] merged," as follows: "Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] . . . , she is nevertheless *equitably estopped to deny the [arbitration agreement's] enforceability*.") (emphasis added).

Conceptually, the merger/equitable estoppel argument is not an argument for the *enforceability* of the Arbitration Agreement per se but rather for Plaintiff to be *estopped to deny the enforceability* of the Arbitration Agreement. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and because Mr. Chavis effectively embraced and directly benefitted from the Admission Agreement, Mr. Chavis, and, therefore, Plaintiff, who stands in Mr. Chavis' shoes, is estopped to deny the enforceability of the Arbitration Agreement merged therewith. Accordingly, any lack of authority on the part of Mrs. Hagood is beside the point and unavailing to refute the merger/equitable estoppel argument, which, again, turns not on the question of whether the Arbitration Agreement is enforceable per se but whether Mr. Chavis, and, in turn, Plaintiff, should be estopped to deny that the Arbitration Agreement is enforceable—and, most respectfully, the answer is yes.

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

> Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] under the [Adult Health Care Consent] Act, she is nevertheless equitably estopped to deny the [arbitration agreement's] enforceability. The circuit court held there was no estoppel here, and we agree.
>
> 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 354–355, 755 S.E.2d at 455 (emphasis added).

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

> Here, as in *Solesbee*[11] and *Hodge*[12], (1) the two agreements were governed by different bodies of law because the Admission

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[11] In affirming the circuit court's denial of the motion to compel arbitration at issue in *Solesbee*, the *Solesbee* 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 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.").) While Petitioners concede that the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*, most respectfully, as addressed below, the merger analysis in *Solesbee* is erroneous and incomplete and should not control the disposition of this case.

[12] To be clear, as explained in Petitioners' prior briefing and herein, the admission agreement and arbitration agreement in *Hodge* were materially different from the instant

> Agreement was governed by state law and the Arbitration Agreement was governed by federal law; (2) each document was separately labeled, numbered, and contained its own signature page; (3) 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"; and (4) the Facility acknowledged that signing the Arbitration Agreement was not a prerequisite to admission to the Facility.

(Subject Opinion.)

The Subject Opinion erroneously concludes that the Admission Agreement and the Arbitration Agreement are separate contracts that do not merge. The merger question examines whether, "where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,"[13] as indeed the Admission Agreement and the Arbitration Agreement were here,[14] there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the instruments should be construed together as effectively one contract. This is a question of intention. *Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a contrary *intention* . . .") (emphasis added). And "in attempting to ascertain th[e] [parties'] intention," our courts "endeavor to determine the situation of the parties, as well

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Admission Agreement and Arbitration Agreement. Moreover, the plain language of *Hodge* makes clear that its finding against merger is based on its assessment of a multitude of particular factors taken together, 422 S.C. at 563, 813 S.E.2d at 302 ("*Based on all of this*, we find the Admissions Agreement and Arbitration Agreement did not merge.") (emphasis added)), and does not support the view that any of the cited factors standing alone—without regard to their context or the impact of other factors—can support a reasonable, non-speculative finding against merger.

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

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

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

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

Unlike the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (*See* R. p. 129.) 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. 164.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[15]), the "Entire Agreement" clause in the instant Admission Agreement expressly states that "other Admissions materials" are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed "separatedness." (R. p. 164.) And without question, the Arbitration Agreement is among these

[15] 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike the instant case—the "Entire Agreement" clause expressly referred to a separate arbitration agreement and, thus, "recognize[d] the '*separatedness*' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.") (emphasis added).

other Admissions materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) ("The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's *admission documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 ("Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement*.") (emphasis added)).[16]

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

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

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

Agreement) is simply incorrect. Regarding governing law, the Admission Agreement states, "This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which the Facility is located." (R. p. 162.) And the Arbitration Agreement states:

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

(R. p. 129.) Accordingly, the provisions of the Admission Agreement and the Arbitration Agreement regarding governing law are not to the effect that state law governs one instrument and federal law the other, but rather that South Carolina law applies to both except where displaced by federal law.

Moreover, the FAA applies to the Arbitration Agreement, as it does to "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress's power under the Commerce Clause); *Allied-Bruce*, 513 U.S. at 273–77 (explaining that, unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce). And this Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean*, 408 S.C. at 381–82, 759 S.E.2d at 732–33.

The rule that the FAA applies whenever an arbitration agreement involves interstate commerce of course applies even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law. *See Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (The FAA "create[d] a body of federal substantive law," which is "applicable in state and federal courts."); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) ("[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."); *see also Allied-Bruce*, 513 U.S. 265, 270–77. Moreover, even under the FAA, the general state law of contracts continues to apply. *Allied-Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted). Further still, the Arbitration Agreement expressly calls for the arbitration proceedings to be conducted pursuant to the South Carolina ADR Rules. (R. p. 129.)

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

would still exist even if the Arbitration Agreement had been included as a provision within the Admission Agreement itself. Thus, the supposed difference in the governing law cannot support any reasonable inference of an intent contrary to merger. Neither *Solesbee* nor any other South Carolina precedent addresses this.

Like the *Hodge* and *Solesbee* Courts, the Court of Appeals erred in finding against merger on the basis that "each document was separately labeled, numbered, and contained its own signature page." (Subject Opinion.) The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. The very nature of *merger* is to *merge* separate documents. Neither *Solesbee* nor any other South Carolina precedent addresses this.

Like the *Solesbee* Court (and, for that matter, the *Hodge* Court, even though, again, different admission and arbitration agreements were at issue in *Hodge*), the Court of Appeals erred in finding against merger on the basis that "the 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.'" (Subject Opinion.) Unlike in *Hodge*, and, for that matter, *Coleman*, and unaddressed by the *Solesbee* Court, the supposed textual

recognition of the Admission Agreement as being separate from the Arbitration Agreement is not included in the "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. 164.) And again, the Arbitration Agreement was signed in conjunction with Mr. Chavis' admission and is clearly among these "other Admissions materials." Moreover, that the Arbitration Agreement "shall survive any termination or breach of this Agreement or the Admission Agreement" just means that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work—and would be the same *even were the agreement to arbitrate in the form of a clause included within a single instrument*—so this cannot logically provide probative evidence of an intent contrary to merger. *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."). Neither *Solesbee* nor any other South Carolina precedent addresses this.

Like the *Hodge* and *Solesbee* Courts, the Court of Appeals erred in finding against merger on the basis of the voluntariness of the Arbitration Agreement, i.e., in relying on the fact "that signing the Arbitration Agreement was not a prerequisite to admission to the Facility"[17] as evidence of intention contrary to merger. To be sure, the Arbitration Agreement was indeed optional, i.e., agreeing to arbitration is not required to gain admission to the Facility. But all that this means is that it did not have to be agreed to for Mr. Chavis to be admitted, i.e., the

[17] (Subject Opinion.)

Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact executed. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement's) sole reason for being. (*See* R. p. 129 (providing for arbitration of "any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident . . . ."); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at Facility . . . .").)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission, whereupon it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Mr. Chavis' 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. 153–164 (setting forth the terms of Mr. Chavis' admission to the Facility) *with* p. 129 (providing for arbitration of disputes arising out of Mr. Chavis' admission to the Facility).) Neither *Solesbee* nor any other South Carolina precedent addresses this.

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

The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." 407 S.C. at 355, 755 S.E.2d at 455. While it is true that the *Coleman* Court also cited the rule that ambiguity is construed against the drafter,[18] (a) it did so in dicta and (b) it never addressed the logical inconsistency—which thus remains fair game as an argument in this case[19]—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

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

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

transaction) as sufficiently probative to affirmatively tip the scales in favor of merger) while at the same time allowing that presumption to be completely overturned by evidence that is merely ambiguous, i.e., that does not even go so far as to clearly indicate a contrary intention and, indeed, is actually still susceptible to a reasonable conclusion in favor of merger. *See S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are *reasonably* susceptible of more than one interpretation.") (emphasis added).

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

Respectfully, like the circuit court, the Court of Appeals should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Mr. Chavis' admission to the Facility and would not have been done at all but for his admission to the Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent.

B. The Court of Appeals erred in not reaching Petitioners' remaining arguments, including especially, but not limited to, the equitable estoppel argument.

As explained in the Subject Opinion, the Court of Appeals did not reach Petitioners' remaining arguments, including especially, but not limited to, the equitable estoppel argument, because of its finding that the Arbitration Agreement and the Admission Agreement did not merge. (Subject Opinion ("Thus, the Admission Agreement and Arbitration Agreement did not merge. Because we find the documents did not merge, a controlling consideration of whether the Arbitration Agreement bound Frank D. Chavis, Sr., we decline to reach Appellants' remaining arguments.").) Therefore, for the same reasons that the Court of Appeals erred in affirming the circuit court's finding that these instruments did not merge, it likewise erred in not reaching Petitioners' remaining arguments, including especially, but not limited to, the equitable estoppel argument.

C. Had the Court of Appeals reached Petitioners' remaining arguments, including especially, but not limited to, the equitable estoppel argument, as, respectfully, it should have, the Court of Appeals should have found that the circuit court erred in not finding Plaintiff equitably estopped to deny the enforceability of the Arbitration Agreement and that it (the circuit court) should have granted the Motions to Compel Arbitration.

All of these issues/arguments are already addressed in Petitioners' briefs to the Court of Appeals, the entirety of which are adopted and incorporated herein by reference.

CONCLUSION

For the foregoing reasons, along with any other or further reason(s) set forth in their appellate briefs already on file, the entirety of which they hereby adopt and incorporate herein by reference and reiterate/reassert in support hereof, Petitioners ask this Honorable Court to grant the instant petition, reverse the Subject Opinion, and decide this appeal anew via an opinion that reverses the Court of Appeals and the circuit court and stays Plaintiff's claims against the Facility in favor of arbitration (or, alternatively, that reverses the Court of Appeals and the circuit court and remands the case to the circuit court with instructions that it stay Plaintiff's claims against the Facility in favor of arbitration, or, alternatively, that reverses the Court of Appeals on the issue of merger and remands the case to the Court of Appeals to address the arguments that it did not reach previously to determine whether the circuit court's denial of the Motions to Compel Arbitration should be reversed).

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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