THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County
Court of Common Pleas

Maité Murphy, Circuit Court Judge

Case No. 2022-CP-38-00525
Appellate Case No. 2025-000296

Beverly Vaughn,
as Personal Representative of the Estate of Loris Paris,

Respondent,

v.

Saint Matthews Healthcare, LLC; Melissa Kizer;
Melissa Davis; and Angela Smith Teliha,

Defendants,

Of which Saint Matthews Healthcare, LLC;
Melissa Kizer; and Melissa Davis, are the

Appellants.

FINAL BRIEF OF APPELLANTS

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis Jr. (SC Bar No. 12084)
James D. Gandy III (SC Bar No. 11925)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellants

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STATEMENT OF ISSUES ON APPEAL

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

A. Should the circuit court have found that the Arbitration Agreement was valid because Mr. Paris had authority to sign it for Ms. Paris under principles of agency law?

1. Did the circuit court err in finding the Arbitration Agreement unconscionable?

2. Did the circuit court err in finding that the Arbitration Agreement lacked consideration or benefit to Plaintiff?

B. 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 Ms. Paris 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 Appellants' motions to stay?

1. Should the circuit court have found that the Admission Agreement and the Arbitration Agreement merged?

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[1] The "Facility" refers to Defendant/Appellant Saint Matthews Healthcare, LLC, which is the sole licensee and operator of the skilled nursing facility known as Calhoun Convalescent Center.

[2] "Plaintiff" refers to Plaintiff/Respondent, Beverly Vaughn ("Ms. Vaughn"), as Personal Representative of the Estate of Loris Paris ("Ms. Paris"). "Mr. Paris" refers to George Paris, Ms. Paris's son, who executed the Admission Agreement and Arbitration Agreement on Ms. Paris's behalf.

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

[4] To be clear, out of an abundance of caution, this issue and the corresponding argument includes not only Appellants' challenge to the circuit court's denial of their respective principal motions but also their challenge to the circuit court's denial of reconsideration with respect to their respective principal motions.

(a) Should the merger analysis in *Solesbee v. Fundamental Clinical and Operational Services, LLC*[5] control the disposition of this case?

2. Should the circuit court have found that equitable estoppel applies to prohibit Plaintiff from denying the enforceability of the Arbitration Agreement?

STATEMENT OF THE CASE

A. Procedural History

Plaintiff filed this action in the Orangeburg County Court of Common Pleas on April 8, 2022, based on allegedly deficient care/treatment Ms. Paris received at the Facility. (R. pp. 23-30.) The Facility timely answered on May 16, 2022, denying liability, raising numerous affirmative defenses, and reserving the right to compel arbitration, which it also raised as an affirmative defense. (R. pp. 31-38.) The Other Appellants likewise timely answered on May 16, 2022. (R. pp. 39-48.)

On August 9, 2022, the Facility moved to compel Plaintiff's claims to arbitration based on an Arbitration Agreement that Mr. Paris had signed on behalf of Ms. Paris in conjunction with her admission to the Facility (the "Motion to Compel Arbitration"). (R. pp. 81-82; R. pp. 111-311, 83.)[6] At the same time, the Other Appellants moved to stay the litigation against them pending the outcome of the Motion to Compel Arbitration and any resulting arbitration between Plaintiff and the

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

[6] 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 [Ms. Braggs'] stay at [the] Facility, or to the provisions of care or services to [Ms. Braggs] . . . ." (R. p. 83.) 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.").

Facility (collectively, the "Motions to Stay"). (R. pp. 84-95.) Collectively, the Motion to Compel Arbitration and the Motions to Stay are referred to as the "Underlying Motions."

By order filed January 17, 2023, the circuit court, the Honorable Maité Murphy presiding, continued the hearing of the Underlying Motions to allow for limited discovery (without the Facility risking any waiver of any arbitration rights it may have by engaging in such discovery), specifically, the depositions of Ms. Vaughn, Mr. Paris, and the Facility's former Admissions Director Cindy Reck ("Ms. Reck"), with the scope of such depositions being limited to matters relevant to the question of arbitrability. (R. pp. 1-4.)

Following the aforementioned depositions and a hearing on June 6, 2024,[7] the circuit court, the Honorable Maité Murphy again presiding, denied the Underlying Motions by order filed November 13, 2024. (R. pp. 5-19.) Pursuant to Rule 59(e), SCRCP, on Monday, November 25, 2024, Appellants timely moved the circuit court to alter, amend, and/or reconsider its decision. (R. pp. 313-346.) The circuit court denied the motion by order filed January 23, 2025,[8] which order was preceded by a hearing on January 22, 2025. (R. pp. 71-80.)

By notice served and filed February 18, 2025, this appeal timely follows. (R. pp. 351-356.)

B. Factual Background

With the help of both Ms. Vaughn and Mr. Paris, Ms. Paris was admitted as a resident of the Facility in April of 2019. In conjunction with Ms. Paris's admission, Mr. Paris signed an Admission Agreement[9] and an Arbitration Agreement[10] on Ms. Paris's behalf.

At the time of her admission, Ms. Paris was no longer able to care for herself. (R. pp. 175:22–176:15.) According to Mr. Paris, by the time Ms. Paris went to the Facility, he was no

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7 (R. pp. 49-70.)
8 (R. pp. 20-22.)
9 (R. pp. 243-254.)
10 (R. p. 83.)

longer able to have a conversation with her: "it was no more speaking or talking or anything like that." (R. pp. 270:18–271:6; *see also* R. p. 188:4–11 (referring to Ms. Paris's status with respect to communication at the time of her admission to the Facility: "She would not. She wasn't talking.").) Medical records from the time reflect that Ms. Paris was suffering from dementia; an inability to recall the current season, staff names/faces, the location of her room, or that she was in a nursing home; impaired mental status; disorganized thinking; altered level of consciousness; difficulty speaking, and an inability to provide consent regarding health care decisions as defined by the South Carolina Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80 (the "AHCCA"). (R. p. 305) (regarding diagnosis of dementia, lack of recall, and limited ability to understand and be understood); (R. p. 310) (regarding impaired decision making, disorganized thinking, altered level of consciousness, and difficulty speaking); (R. p. 311) (regarding dementia and inability to provide consent to health care decisions).

Years earlier, on February 6, 2015, Ms. Paris had executed a Durable Power of Attorney (the "power of attorney"), naming Ms. Vaughn as her attorney-in-fact. (R. pp. 153-159.) In broad and unlimited terms, the power of attorney granted Ms. Vaughn authority "to do and perform all acts, deeds, matters, and necessary and advisable . . . as fully and effectual for all intents and purposes as [Ms. Paris] could do if personally present and acting" and expressly granted Ms. Vaughn authority to "arbitrate" on behalf of Ms. Paris. (R. pp. 153, 157) Ms. Vaughn herself understood that the power of attorney allowed her to "handle whatever needed to be handled" on her mother's behalf as if she "acted as Loris Paris." (R. p. 168:12–22.) Specifically, she understood that the power of attorney gave her the authority to execute legally binding documents on behalf of her mother. (R. p. 199:4–8.)

When Ms. Paris was admitted to the Facility, Ms. Vaughn was living out of state and could not be present. Ms. Vaughn contacted the Facility and spoke with Ms. Reck concerning her mother's admission. (R. p. 217:11–18.) Ms. Reck offered to send Ms. Vaughn the admission paperwork, but Ms. Vaughn declined to sign the documents herself. (R. p. 217:9–21.) Instead, Ms. Vaughn had Mr. Paris complete the paperwork. (R. p. 217:9–21.) Ms. Vaughn told Ms. Reck specifically that Mr. Paris could complete the admissions paperwork. (R. p. 235:12–16, p. 236:1–14.) She also told Ms. Reck that she was her mother's "power of attorney" and that Mr. Paris had permission to sign paperwork for Ms. Paris to be admitted to the Facility. (R. p. 186:1-15; Rr. p. 236:1–15). When she was deposed, Ms. Vaughn was unable to recall telling Ms. Reck that there was any limitation on the type of paperwork that Mr. Paris was authorized to sign for Mr. Paris. (R. pp. 186:17–188:8.)

Mr. Paris met with Ms. Reck at Facility and signed the Admission Agreement on April 12, 2019. (R. p. 254.) According to Ms. Reck, Mr. Paris said he could not stay to complete the remaining paperwork and left the Facility after signing the Admission Agreement, but at the request of Ms. Reck and Ms. Vaughn, Mr. Paris returned to complete the remaining paperwork, including the Arbitration Agreement and certain authorization, consents, and acknowledgements, relating to his mother's care on April 15, 2019. (R. pp. 226:19–232:2; R. p. 83; R. pp. 255-260.)

Ms. Reck explained to Mr. Paris what the Arbitration Agreement was and told him it was optional. (R. p. 231:21–22, p. 232:3–10.) She also asked him to read the Arbitration Agreement before signing it. (R. p. 233:8–10.) During their meeting, Mr. Paris had the opportunity to read any of the documents, including the Arbitration Agreement, he was signing. Ms. Reck was also there to answer any questions he may have had. (R p. 283:17–20, p. 284:15–17.)

As with the Admission Agreement, Mr. Paris signed the Arbitration Agreement on behalf of Ms. Paris as her responsible party and representative. The Arbitration Agreement specifically provides:

> It is further understood that in the event 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, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

(R. p. 83.) The Arbitration Agreement further provides:

> 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. 83.) Regarding Mr. Paris's authority to sign, the Arbitration Agreement states:

> By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident…

(R. p. 83.)

Through her conversations with Ms. Vaughn, Ms. Reck understood that Mr. Paris had the authority to sign the admission paperwork, including the Arbitration Agreement. (R. p. 238:6–10.) Neither Mr. Paris nor Ms. Vaughn ever explained to her that Mr. Paris was only authorized to sign the Admission Agreement and not the Arbitration Agreement. (R. p. 238:11–16.) In fact, Ms.

Reck testified she would not have presented Mr. Paris with the Arbitration Agreement, had she known he was not authorized to sign. (R. p. 238:17–21.)

STANDARD OF REVIEW

A circuit court's determination of whether a claim is subject to arbitration is reviewed de novo on appeal. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). This includes de novo review of the determination of whether an arbitration agreement is enforceable against a nonsignatory. *Wilson v. Willis*, 426 S.C. 326, 334, 827 S.E.2d 167, 172 (2019). "Under de novo review, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Id.* Issues of law, however, are reviewed without any particular deference to the circuit court. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016). Even where a ruling is on a matter within circuit court's discretion, if the ruling is based on a misunderstanding 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.

The relationship between the Motion to Compel Arbitration and the Motions to Stay is such that the denial of the former mooted the latter. Accordingly, to show, as, most respectfully, the Facility has, that the circuit court erred in denying the Motion to Compel Arbitration is also to show that the circuit court erred in denying the corresponding Motions to Stay, which should have been granted. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or

proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.") (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties."); *see also Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) ("The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement.").

A. The circuit court should have found that the Arbitration Agreement was valid because Mr. Paris had authority to sign it for Ms. Paris under principles of agency law.

"A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal." *Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014) (quoting *In re Thames*, 344 S.C. 564, 569, 544 S.E.2d 854, 856 (Ct. App. 2001)) (internal quotation marks omitted). "[T]he holder of [the] power of attorney steps into the shoes of the grantor and is basically the alter ego of the grantor." *Bennett v. Carter*, 421 S.C. 374, 382, 807 S.E.2d 197, 201 (2017).

Mr. Paris possessed the *actual* authority to execute the Arbitration Agreement in addition to the other admissions paperwork he signed for his mother. The power of attorney permitted Ms. Vaughn as attorney-in-fact to "do and perform all acts, deeds, matters…as [Ms. Paris] could do if personally present and acting." (R. p. 153.) Commensurate with this broad authority, Ms.

Vaughn was expressly permitted to "appoint agents…upon such terms and conditions and at such compensation as [Ms. Vaughn] shall deem proper in the exercise of the powers herein granted." (R. p. 157.) Ms. Vaughn also possessed the authority arbitrate disputes on her mother's behalf. (R. p. 157. ("On my behalf and in my name or the name of my Attorney, to institute, prosecute, appear in, defend, compromise, *arbitrate* . . . any legal, equitable, or administrative hearings actions, suits…to which I am or may become a party or in which I have any interest.") (emphasis added).) There can be no dispute that Ms. Vaughn, acting as her mother's attorney in fact, appointed Mr. Paris as her representative to execute admission paperwork. The record contains no indication that Ms. Paris ever expressly limited Mr. Paris's authority to specifically exclude the authority to sign arbitration agreements.

And while the power of attorney was a springing power, i.e., it did not become effective until Ms. Paris was mentally incompetent or incapacitated, the record shows that Ms. Paris was indeed mentally incompetent/incapacitated when she was admitted to the Facility. Moreover, in response to questioning from Plaintiff's own counsel about whether she "w[as] the person that should be signing documents for [Ms. Paris]" at the time of her admission, Plaintiff herself testified, "Absolutely." (R. pp. 191:18–192:1.) In other words, Plaintiff herself clearly takes the position that any conditions precedent to her ability to act as Ms. Paris's attorney-in-fact had come to pass by the time Ms. Paris was admitted to the Facility. Further still, the power of attorney does not define incompetent/incapacitated or establish any particular procedure for determining when this has occurred. This reflects an intent to prioritize flexibility and functionality so that Ms. Vaughn was able to seamlessly step in to protect Ms. Paris's interests when Ms. Vaughn believes such action is warranted—and clearly, given all of her admitted actions as attorney-in-fact at the relevant time, Ms. Vaughn believed such action was warranted when Ms. Paris was admitted to the Facility.

Indeed, the power of attorney expressly gives third parties, like the Facility, the right to rely on the actions Ms. Vaughn took as attorney-in-fact "without inquiring" as to their propriety. (R. p. 158 ("Without limiting in any way the right of third parties to rely on actions by my Attorney-in-Fact without inquiring as to the property [sic] of such actions, I do hereby declare as between me and my Attorney-in-Fact a fiduciary relationship exist . . . .").)

Mr. Paris also possessed the *apparent* authority to execute the Arbitration Agreement. Ms. Vaughn clearly held Mr. Paris out as her agent to sign admission paperwork for their mother, with no indication to the contrary. Based on Ms. Vaughn's (and Mr. Paris's) conduct and representations during the admissions process, Ms. Reck believed Mr. Paris possessed the authority to execute *all admissions documents* on Ms. Paris's behalf, including the Arbitration Agreement. Neither of the siblings ever communicated to Ms. Reck that Mr. Paris specifically did not have the authority to sign the Arbitration Agreement. Ms. Reck understood Mr. Paris had the authority to sign any admissions paperwork, including the Arbitration Agreement. She presented him with Arbitration Agreement based on the understanding he was in a position to accept or decline arbitration. She would not have presented the agreement to him, had she known he lacked the ability to make such a decision. *See R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000) (If a principal holds another out as having the authority to act on his behalf or knowingly permits another to act as 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") (emphasis added).

A holding to the contrary contradicts the fundamental concept of apparent agency: *an agency relationship is based on a third party's understanding of a principal's manifestations and a reasonable belief that the agent has been authorized to act*. By telling Ms. Reck that Mr. Paris

was authorized to sign admissions paperwork, Ms. Vaughn cloaked Mr. Paris with the authority to execute the admissions paperwork, including the Arbitration Agreement. Further, no family member ever repudiated or invalidated Mr. Paris's actions. Instead, Ms. Vaughn allowed her mother to remain at the Facility and receive skilled nursing care and services, thereby ratifying her brother's actions. Because no one attempted to repudiate the Arbitration Agreement or even question it, Ms. Reck and the Facility were further justified in believing Mr. Paris had been authorized to execute it. It is clear that an apparent agency relationship existed such that the Arbitration Agreement should be deemed enforceable.

Accordingly, the circuit court should have found that the Arbitration Agreement was valid because Mr. Paris had authority to sign it for Ms. Paris under principles of agency law.

1. The circuit court erred in finding the Arbitration Agreement unconscionable.

The circuit court's unconscionability analysis is erroneous and does not apply the applicable test, under which the Arbitration Agreement clearly is not unconscionable. For an agreement to be deemed unconscionable, there must be both (1) an absence of meaningful choice on the part of one party due to one-sided contract provisions and (2) terms that are so oppressive no reasonable person would make them and no fair and honest person would accept them. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). Neither is the case here.

The party alleging that the enforcement of a contract would be unconscionable bears the burden of proving both prongs of the definition. *Green Tree Fin. Corp.-Ala. v. Randolph*, 53 l U.S. 79, 91–92 (2000). In this case, Plaintiff bears that burden. "Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Simpson*, 373 S.C. 14, 25, 644 S.E.2d 663, 669. "Meaningful choice" refers specifically to the bargaining process involved in entering into the Arbitration Agreement. The

Arbitration Agreement clearly articulates that the resident entering into the Agreement is fully aware of his or her healthcare options and other potential providers of nursing home facilities. The Agreement states:

> It is understood by Resident/Representative that he/she is not required to use the aforesaid Health Care Center for Resident's healthcare needs and that there are numerous other health care providers in the State where Health Care Center is located that are qualified to provide such care to Resident.

(R. p. 83.) Furthermore, on that same signature page, the Arbitration Agreement states clearly in bold lettering in a separate heading: "**I understand and agree that I am giving up and waiving my right to a jury trial.**" (R. p. 83.)

By signing the Arbitration Agreement and Admission Agreement, Mr. Paris, acting on behalf of Ms. Paris, with express authority effectively from Ms. Paris herself via her attorney-in-fact Ms. Vaughn (who, again, according to the plain language of the power of attorney, was authorized "to do and perform all acts, deeds, matters, and necessary and advisable . . . as fully and effectual for all intents and purposes as [Ms. Paris] could do if personally present and acting"[11] and was expressly authorized to "arbitrate" on behalf of Ms. Paris[12]), represented that he understood and assented to their terms. Indeed, he was given the option of entering into the Arbitration Agreement—or not—and he freely and voluntarily made the decision to proceed. The Arbitration Agreement by its plain language was not a precondition of admission to the Facility and simply could not have been an adhesion or "take it or leave it" contract. Mr. Paris had the option not to enter into the Arbitration Agreement on behalf of his mother, yet he voluntarily did so, voluntarily did not retract his agreement thereto, and his mother stayed at the Facility and received skilled nursing care after admission.

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[11] (*See* R. p. 153.)
[12] (*See* R. p. 157.)

Ms. Reck gave Mr. Paris the option of entering into the Arbitration Agreement after explaining it to him and he made the decision to proceed. In addition, although her personal experience with arbitration is beside the point, Ms. Reck was available to answer any questions he may have had about any of the paperwork he signed.[13] Mr. Paris did not have to accept this offer nor has there been any allegation or evidence that he was coerced into signing anything. In fact, he agreed he was not "forced" into signing anything at the facility. (R. p. 285:2–4.) Any notion of Mr. Paris having been made or otherwise required or forced to sign the Arbitration Agreement is erroneous. And as for the circuit court's reliance on the fact that "Plaintiff was not given a copy of the South Carolina Alternative Dispute Resolution Rules with the agreement,"[14] the Facility is not aware of any legal authority requiring such a copy to be given, and the circuit court cited none.

Nonetheless, even if Plaintiff could demonstrate that there was an absence of meaningful choice, a finding of unconscionability would still not be warranted in the present case, as Plaintiff must still show that the "terms [of the agreement] are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669. When determining this aspect of unconscionability, the court must focus on "whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision maker." *Id.* at 25, 644 S.E.2d at 668. Under the terms of the Arbitration Agreement, the parties are to select a third-party arbitrator *jointly* "from a panel having experience and knowledge of the health care industry." (R. p. 83.) If the parties are unable to agree upon such an arbitrator, the agreement vests the court with authority to make a selection. The selected neutral arbitrator is

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[13] Again, by virtue of his signature, Mr. Paris himself is "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement, *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.")

[14] (R. p. 13.)

vested with authority to hear the case and make a decision which is "binding on all parties." As a result, it can only be said that the Arbitration Agreement allows for complete mutuality of remedies. Neither party is given an advantage by its terms.

The Arbitration Agreement simply binds the parties (both sides) to resolve disputes via arbitration. And there is nothing about the Arbitration Agreement—which calls for arbitration conducted pursuant to the South Carolina ADR Rules—that would suggest it is not geared towards achieving an unbiased decision by a neutral decision-maker. Indeed, Rule 1 of the South Carolina ADR Rules expressly states, "These rules shall be construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply." Moreover, the rules empower the panel of arbitrators to conduct the arbitrator so as to achieve these ends, including addressing the matters regarding the locations of the proceedings, costs, and the availability of discovery. *See* Rules 12 (regarding the arbitration hearing and award[15]) and 13 (authority and duties of arbitrators), SCRADR. To say that terms of the Arbitration Agreement are unconscionable is to say that the terms of the South Carolina ADR Rules are unconscionable, which, of course, they are not.

Accordingly, the circuit court erred in finding the Arbitration Agreement unconscionable.

2. The circuit court erred in finding that the Arbitration Agreement lacked consideration or benefit to Plaintiff.

Without question, mutual promises to arbitrate, like those set forth in the Arbitration Agreement, constitute sufficient consideration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997) ("A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement.") (citing *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 304, 468 S.E.2d 292, 300 (1996) ("[T]he exchange of promises qualified as consideration."); *see also Evatt v.*

[15] Although arbitrations under the South Carolina ADR Rules are "non-binding . . . unless otherwise expressly agreed," here, the Arbitration Agreement expressly calls for binding arbitration.

Campbell, 234 S.C. 1, 8, 106 S.E.2d 447, 451 (1959) ("Mutual promises also constitute a good consideration."). The circuit court's view that the Arbitration Agreement is invalid for lack of consideration or a benefit to Plaintiff is erroneous. The mutual promises to arbitrate are sufficient consideration insofar as the Facility's agency argument is concerned. And as far as the Facility's equitable estoppel argument (below) is concerned, the merger of the Arbitration Agreement and the Admission Agreement means that the direct benefits Ms. Paris received under the Admission Agreement are sufficient to estop Plaintiff from denying the validity of the Arbitration Agreement, because the Arbitration Agreement (by virtue of merger) is part and parcel of the Admission Agreement.

Accordingly, the circuit court erred in finding that the Arbitration Agreement lacked consideration or benefit to Plaintiff

B. The circuit court erred in rejecting Defendant'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 Ms. Paris 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 denied Plaintiff's Motion to Compel Discovery.

The core question here is this: Is the Arbitration Agreement (which Mr. Paris signed for Ms. Paris) enforceable against Ms. Paris—or, more precisely, against Plaintiff, who brings this action standing in Ms. Paris's shoes as the personal representative of her estate—even though it was not signed by Ms. Paris herself? 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.

To be clear, Defendant'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.

Paris or otherwise on the existence of any valid agreement per se. *See Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 ("South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including . . . 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] . . . , she is nevertheless *equitably estopped to deny the [arbitration agreement's] enforceability*.") (emphasis added).

Conceptually, Defendant's merger/equitable estoppel argument is *not* an argument *for the enforceability* of the Admission Agreement/Arbitration Agreement *but rather* an argument *for Ms. Paris, and, in turn, Plaintiff (Ms. Paris's 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 Ms. Paris having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff (who stands in her shoes) is now estopped to deny the enforceability of not only 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 Ms. Paris received under the Admission Agreement (with which the Arbitration Agreement merged), this argument applies with equal force to estop Plaintiff, i.e., Ms. Paris' estate, 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. Paris lacked authority to sign the Admission Agreement/Arbitration Agreement on behalf of Ms. Paris under the law of agency and/or under the AHCCA, and/or because Mr. Paris lacked power of attorney over Ms. Paris—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 Ms. Paris, and, in turn, Plaintiff (her estate), is estopped to deny its enforceability.

1. The circuit court should have found that the Admission Agreement and the Arbitration Agreement merged.

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,
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> > The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
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> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).

> Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction*. *Unless there is a contrary intention, appellants are correct that there was a merger.*

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

Here, the circuit court should have found in favor of the Facility's merger argument, because there are 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 (which likewise found against merger) *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), and *Solesbee*, 438 S.C. 638, 885 S.E.2d 144.[16]

The circuit court should have concluded that the Admission Agreement and the Arbitration Agreement merged. 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,"[17] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[18] 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

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[16] The circuit court's erroneous reliance on *Solesbee*, 438 S.C. 638, 885 S.E.2d 144, is addressed separately below.

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

[18] To be clear, *Coleman* confirms that 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. 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).

"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 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 126, 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, 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. p. 83.) 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. 254.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[19]), the "Entire Agreement" clause in the instant Admission Agreement expressly states that "other Admissions materials" are part of the Admission Agreement,

[19] 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).

thereby expressly disclaiming any "separatedness." (R. p. 254.) 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)).[20] And any notion that there is ambiguity in this regard is unsupported and erroneous.

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required as a precondition of Ms. Paris's residency at the Facility.[21] But this just means 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,

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[20] To be clear, the point here is not that the holding of either *Stott* or *Hodge* established a legal standard for what counts as admissions 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).

[21] The circuit court's statement that "the Defendant's staff *made* [Mr. Paris] sign the facility's arbitration agreement" (R. p. 9 (emphasis added)) is erroneous. Ms. Reck expressly testified that the Arbitration Agreement was optional, i.e., that Mr. Paris was not required to sign it, and that she told Mr. Paris so. (R. p. 231:6–22.) In fact, Mr. Paris agreed he was not "forced" into signing anything at the facility. (R. p. 285:2-4.)

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. 83 (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 [Ms. Paris's] stay at [the] Facility, or to the provisions of care or services to [Ms. Paris] . . . ."); R. p. 83. ("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 Ms. Paris's relationship with the Facility, the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission. (*Compare* R. pp. 243-254

(setting forth the terms of Ms. Paris's admission to the Facility) *with* R. p. 83 (providing for arbitration of disputes arising out of Ms. Paris'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. 252 ("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. 83 (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 Defendant 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[22] and (b) it never addressed the logical inconsistency—which thus remains fair game as an argument in this case[23]—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 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, any 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 354–355, 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

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[22] *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).

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

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.

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 Ms. Paris's admission to the Facility and would not have been done at all but for her admission to the Facility.

(a) Most respectfully, the merger analysis in *Solesbee* is erroneous and incomplete, and it should not control the disposition of this case.

In *Solesbee*, 438 S.C. 638, 885 S.E.2d 144, this Court affirmed the circuit court's denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as at present. Indeed, the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*. Most respectfully, however, the *Solesbee* Court (a) erred as to those aspects of the argument that it addressed[24] and (b), in any event, did not actually address all material aspects of the argument, leaving gaps in the *Solesbee* decision through which the Facility's position still fits.

[24] While the Facility acknowledges that our Supreme Court denied certiorari in *Solesbee*, it would note that a writ of certiorari is not a matter of right but solely a matter of the Supreme Court's discretion. Rule 242(b), SCACR ("A writ of certiorari is not a matter of right, but

In affirming the circuit court's denial of the motion to compel arbitration, 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.").) Most respectfully, the merger analysis in *Solesbee* is erroneous and incomplete, and it should not control the disposition of this case.

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." It is 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. pp. 243-254.) And what the Arbitration Agreement actually states is this:

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

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of sound judicial discretion, and will be granted only where there are special and important reasons."). In other words, by denying certiorari, the Supreme Court has only expressed its decision to exercise its discretion to not review the case. It has not implicitly blessed the *Solesbee* Court's analysis as correct.

(R. p. 83.)

Without question, the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (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); *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 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).

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. 83.)

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 does not support any reasonable inference of any intent contrary to merger.

Second, the *Solesbee* Court erroneously found against merger on the basis that "[t]he Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement 'shall survive any termination or breach of this Agreement or the Admission Agreement.'" 438 S.C. at 649, 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. 254.) 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 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 concept of "revocation" and that of "termination." A "revocation" is an annulment (i.e., to make something a nullity),[25] whereas "termination" is to put or bring something to an end. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is

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

simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. at 612–13.

Fourth, the *Solesbee* Court erroneously found against merger on the basis that "the Admission Agreement and Arbitration Agreement were separately paginated and had their own signature pages." 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. Again, the fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about 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.

Finally, the *Solesbee* Court erroneously found against the Facility on merger on the basis that Arbitration Agreement was voluntary. 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. Again, to be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. But all this means is that it did not have to be agreed to for the resident to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was signed. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its

connectedness to the Admission Agreement. 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. Paris on Ms. Paris'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. 83 (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 . . . ."); R. p. 83. ("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 the resident's relationship with the Facility: the

Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission. (*Compare* R. pp. 243-254 (setting forth the terms of the admission) *with* R. p. 83 (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 should have found that equitable estoppel applies to prohibit Plaintiff from denying the enforceability of the Arbitration Agreement.

In *Wilson*, our Supreme Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals' earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which Defendant contends Ms. Paris and, in turn, Plaintiff (her estate) is estopped from refusing to comply with the Arbitration Agreement here, where Ms. Paris received direct benefits (in the form of her admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement was merged. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *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. *See Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.") (citation and internal quotation marks omitted). 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,[26] much less call for, such a result.

Here, Ms. Paris was a direct beneficiary. To deny her receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of her residency: every night's stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even her complaint does not go nearly so far as that. (*See* R. pp. 25-30.)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged Ms. Paris received the benefit of her admission to the Facility, 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 Ms. Paris and, in turn, Plaintiff (her estate) is estopped to deny the Admission Agreement/Arbitration Agreement's enforceability, Ms. Paris having effectively embraced the contract with the Facility for the purpose of her admission and receipt of the benefits thereof.[27]

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[26] *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.").

[27] To be clear, although the dispute here is about the Arbitration Agreement, as opposed to the Admission Agreement, to the extent there were any question about the

CONCLUSION

For the foregoing reasons, Appellants ask that the Court reverse the circuit court's denial of Underlying Motions and compel Plaintiff's claims against the Facility to arbitration while staying this litigation as to the Other Appellants pending the outcome of arbitration between Plaintiff and the Facility (or, alternatively, to remand this matter to the circuit court with instructions that it do so).

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines

Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
James D. Gandy III (SC Bar No. 11925)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellants

Charleston, South Carolina

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enforceability of the Admission Agreement, Defendant's equitable estoppel argument applies with equal force to the Admission Agreement.