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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2024-CP-10-03732
Appellate Case No. 2025-000237

Joe Bryan,

Respondent,

v.

THI of South Carolina at Charleston, LLC
d/b/a Riverside Health and Rehab,

Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in denying the Facility's[1] motion to compel Mr. Bryan's[2] claims to arbitration?[3]

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

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

(a) Did the circuit court err in relying on *Solesbee v. Fundamental Clinical and Operational Services, LLC*[4]—indeed, is the *Solesbee* Court's merger analysis itself erroneous—and should *Solesbee* control the disposition of this case?

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

3. Did the circuit court err in stating that the Facility "had" Michael[5] sign the Admission Agreement and/or the Arbitration Agreement?[6]

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[1] The "Facility" refers to Defendant/Appellant, THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab. It is a skilled nursing facility.

[2] "Mr. Bryan" refers to Plaintiff/Respondent, Joe Bryan.

[3] To be clear, out of an abundance of caution, this issue and the corresponding argument includes not only the Facility's challenge to the circuit court's denial of its principal motion but also the Facility's challenge to the circuit court's denial of reconsideration with respect thereto.

[4] 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023).

[5] "Michael" refers to Michael Bryan, Mr. Bryan's son.

STATEMENT OF THE CASE

With Michael's help, Mr. Bryan was admitted as a resident of the Facility in June of 2021. (R. p. 84; R. pp. 85-96.) Michael handled the admissions paperwork and, in so doing, signed an Admission Agreement[7] and an Arbitration Agreement[8] on Mr. Bryan's behalf.

Mr. Bryan commenced this action in the Charleston County Court of Common Pleas on July 24, 2024, claiming the Facility is liable for deficient care/treatment he received during his residency. (R. pp. 11-17.) The Facility timely answered on August 22, 2024, denying liability, raising numerous affirmative defenses, and reserving the right to compel arbitration, which they also raised as an affirmative defense. (R. pp. 18-24.)

On August 30, 2024, the Facility moved to compel Mr. Bryan's claims to arbitration based on the Arbitration Agreement Michael signed on behalf of Mr. Bryan in conjunction with his admission to the Facility (the "Motion to Compel Arbitration"). (R. pp. 47-48; R. pp. 56-96, 49.)[9]

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[6] This issue and the corresponding argument is raised out of an abundance of caution.

[7] (R. p. 84; R. pp. 85-96.)

[8] (R. p. 49.)

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

Following a hearing on November 13, 2024,[10] the circuit court, the Honorable Jennifer B. McCoy presiding, denied the Motion to Compel Arbitration by order filed December 13, 2024. (R. pp. 1-7.) Pursuant to Rule 59(e), SCRCP, on December 23, 2024, the Facility timely moved the circuit court to alter, amend, and/or reconsider its decision. (R. pp. 97-120.) The circuit court denied that motion by order filed January 9, 2025. (R. pp. 8-10.)

By notice served and filed February 7, 2025, this appeal timely follows. (R. pp. 121-127.)

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

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services to [Mr. Bryan] . . . ." (R. p. 49.) 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.").

[10] (R. pp. 25-46.)

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.

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

The core question here is this: Is the Arbitration Agreement (which Michael signed for Mr. Bryan) enforceable against Mr. Bryan even though it was not signed by Mr. Bryan himself? The answer is yes. The Arbitration Agreement is enforceable against Mr. Bryan—or, more precisely, Mr. Bryan is estopped to deny that the Arbitration Agreement (and, for that matter, the Admission Agreement) is enforceable.

To be clear, the Facility's merger/equitable estoppel argument is a standalone argument. It does not depend on any showing of authority (actual or

apparent or otherwise) on the part of Michael 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, the Facility's merger/equitable estoppel argument is *not* an argument *for the enforceability* of the Admission Agreement/Arbitration Agreement *but rather* an argument *for Mr. Bryan 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, having effectively embraced and directly benefitted from the Admission Agreement, Mr. Bryan 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 Mr. Bryan received under the Admission Agreement (with which the Arbitration Agreement merged), this argument applies with equal force to estop Mr. Bryan 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 Michael lacked authority to sign the Admission Agreement/Arbitration Agreement on behalf of Mr. Bryan under the law of agency and/or under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80 (the "AHCCA"), and/or because Michael lacked power of attorney over Mr. Bryan—is beside the point and unavailing to refute the Facility's merger/equitable estoppel argument, which, again, turns not on the question of whether the Admission Agreement/Arbitration Agreement is enforceable per se but whether Mr. Bryan is estopped to deny its enforceability.

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

In *Coleman*, even though our Supreme Court found against merger on the particular *facts* of the case, it nonetheless confirmed the validity of the general

proposition of *law* on which the *Coleman* appellants based their merger/equitable estoppel argument:

> Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] under the [AHCCA], she is nevertheless equitably estopped to deny the [arbitration agreement's] enforceability. The circuit court held there was no estoppel here, and we agree.
>
> Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. In South Carolina,
>
> > The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
>
> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction*. *Unless there is a contrary intention, appellants are correct that there was a merger*.

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

Here, the circuit court erred in rejecting the Facility's merger argument, failing to recognize material differences between the facts and arguments involved in the instant case and those that controlled (or were simply not addressed in) *Coleman* and

its progeny *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), *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.[11]

The circuit court wrongly concluded that the Admission Agreement and the Arbitration Agreement are separate contracts that do not merge. (R. pp. 5-6.) 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,"[12] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[13] 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

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

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

[13] 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).

courts "endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into." *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

It must be remembered that, where, as here, the instruments in question were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For the merger presumption to mean anything in practice it cannot be upset based on mere conjecture, but only by actual evidence that—notwithstanding the concurrence of all the particular 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. 49.) 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. 84; R. p. 96.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[14]), the "Entire Agreement" clause in the instant Admission Agreement expressly states that "other Admissions materials" are part of the Admission Agreement, thereby expressly disclaiming any "separatedness." (R. p. 84; R. p. 96.) 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)).[15] And any notion that there is ambiguity in this regard is unsupported and erroneous.

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[14] 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).

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

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required as a precondition of Mr. Bryan's residency at the Facility. 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, 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*

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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).

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. 49 (providing for arbitration of "any controversy or dispute between the parties arising out of or relating to [the] Facility's Admission Agreement, or breach thereof, or relating in any way to [Mr. Bryan's] stay at [the] Facility, or to the provisions of care or services to [Mr. Bryan] . . . ."); R. p. 49 ("This [Arbitration] Agreement shall remain in effect for all care rendered at [the] Facility . . . .").)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission, whereupon it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Mr. Bryan's relationship with the Facility, the Admission Agreement setting forth the

terms of his admission, the Arbitration Agreement providing for arbitration of disputes arising out of his admission. (*Compare* R. p. 85 (setting forth the terms of Mr. Bryan's admission to the Facility) *with* R. p. 49 (providing for arbitration of disputes arising out of Mr. Bryan's admission to 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. 94 ("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. 49 (providing that, "because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action," but also providing that arbitration shall be "as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules").) Essentially, both instruments provide that South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, the survival of the Arbitration Agreement is no evidence of "separatedness." Again, the only reason for the Arbitration Agreement is the Admission Agreement, as the point of the Arbitration Agreement is to cover disputes relating to/arising out of the Admission Agreement. So, yes, the

Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

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

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

The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." 407 S.C. at 355, 755 S.E.2d at 455. While it is true that the *Coleman* Court also cited the rule that ambiguity is construed against the drafter, (a) it did so in dicta[16] and (b) it never addressed the logical

[16] *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

inconsistency—which thus remains fair game as an argument in this case[17]—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, the circuit court's finding against merger relies on improper speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding intent. It must be remembered that the presumption of merger arises from the concurrence of the four elements of time, parties, purpose, and transaction. *Coleman*, 407 S.C. at 354–355, 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

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necessarily involved in the case, and is not binding as authority.") (internal citations and quotations marks omitted).

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

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.

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

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

In *Solesbee*, this Court affirmed the denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as

here[18]—although, most respectfully, the *Solesbee* Court (a) erred as to those aspects of the argument that it addressed[19] 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. In affirming the denial of the motion to compel arbitration in *Solesbee*, this Court likened that case to *Coleman* and *Hodge* and found that the circuit court had correctly determined that there was no merger of the Admission Agreement and the Arbitration Agreement and, in turn, had properly denied the 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 appellant's equitable estoppel argument was properly denied.").)[20] Most respectfully, the circuit court erred in its reliance on

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[18] Indeed, the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*.

[19] 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 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.

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

Solesbee—indeed, the *Solesbee* Court's merger analysis is itself erroneous—and *Solesbee* 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." 438 S.C. at 648, 885 S.E.2d at 149. It is simply not true that "the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law."

Regarding governing law, what the Admission Agreement actually states is this: "This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which the Facility is located." (R. p. 94.) And what the Arbitration Agreement actually states is this:

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

(R. p. 49.)

Without question, the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (the "FAA"), applies to the Arbitration Agreement,[21] as it does "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction"[22]—and this is so even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law. *See Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (The FAA "create[d] a body of federal substantive law," which is "applicable in state and federal courts."); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) ("[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."). Moreover, even under the FAA, the general state law of contracts continues to apply. *Allied-Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause

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[21] The FAA applies "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress's power under the Commerce Clause); *id.* at 273–77 (1995) (explaining that unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce). And our Supreme Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

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

'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. 49.)

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

Second, the *Solesbee* Court erroneously found against merger on the basis that "[t]he Arbitration Agreement recognized the two documents were separate,

stating the Arbitration Agreement 'shall survive any termination or breach of this Agreement or the Admission Agreement.'" 438 S.C. at 648–49, 885 S.E.2d at 149. This provides no reasonable inference of 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. 96.) And as in the instant case, the Arbitration Agreement that was signed in conjunction with the admission is clearly among these "other Admissions materials." Moreover, that the Arbitration Agreement "shall survive any termination or breach of this Agreement or the Admission Agreement" just means that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. Again, this is simply how arbitration agreements work—and it would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. 2d at 612–13 ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

Third, the *Solesbee* Court erroneously found against merger on the basis that "[t]he Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, 'Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.'" 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of intent contrary to merger. The absence of a "revocation" provision is one way in which the Arbitration Agreement is materially different from those at issue in *Coleman* and *Hodge*, and, for that matter, *Thompson*. Moreover, the *Solesbee* Court drew a false equivalency between the concepts of "revocation" and "termination." A "revocation" is an annulment (i.e., making something a nullity),[23] whereas "termination" is putting or bringing something that properly exists to an end—which is materially different from making something a nullity, i.e., void and never having properly existed in the first place. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and it would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. at 612–13.

Fourth, the *Solesbee* Court erroneously found against merger on the basis that "the Admission Agreement and Arbitration Agreement were separately

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

paginated and had their own signature pages." 438 S.C. at 648, 885 S.E.2d at 149. This provides no reasonable inference of intent contrary to merger. Again, the fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about whether they were intended to be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows intention contrary to merger. Again, the very nature of *merger* is to *merge* multiple things together as one.

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

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

To say that the Arbitration Agreement was not required for admission, which it was not, is not to say that it was not intended to be part of the admissions materials in the event it was agreed to, which it was, by Mr. Dover on Ms. Solesbee's behalf in *Solesbee* and by Michael on Mr. Bryan'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. 49 (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. 49. ("This [Arbitration] Agreement shall remain in effect for all care rendered at Facility . . . .").)

Again, even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission, whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of the resident's relationship with the Facility: the Admission Agreement setting forth the terms of the admission, the Arbitration Agreement providing for arbitration of disputes arising out of the admission. (*Compare* R. pp. 85-96 (setting forth the terms of the admission) *with* R. p. 49 (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 Mr. Bryan 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 the Facility contends Mr. Bryan is estopped from refusing to comply with the Arbitration Agreement here, where Mr. Bryan received direct benefits (in the form of his 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,[24] much less call for, such a result.

Here, Mr. Bryan was a direct beneficiary. To deny his receipt of such benefits is illogical and objectively unreasonable, as it would require wholly

[24] *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.").

discrediting the entirety of his residency: every night's stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even his complaint does not go nearly so far as that. (*See* R. pp. 12-17.)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged—and properly applying the correct test, i.e., the direct benefits test, which, most respectfully, the circuit court did not—Mr. Bryan received the benefit of his 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 Mr. Bryan is estopped to deny the Admission Agreement/Arbitration Agreement's enforceability, Mr. Bryan having effectively embraced the contract with the Facility for the purpose of his admission and receipt of the benefits thereof.[25]

[25] 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 enforceability of the Admission Agreement, the Facility's equitable estoppel argument applies with equal force to the Admission Agreement.

3. The circuit court erred in stating that the Facility "had"[26] Michael sign the Admission Agreement and/or the Arbitration Agreement.

Even though the circuit court did not actually state that this is material to its reasoning, out of an abundance of caution, to the extent that it might potentially be prejudicial to the Facility, any notion that Michael was in any way required to sign the Admission Agreement and/or the Arbitration Agreement is erroneous. Indeed, the Arbitration Agreement expressly states, "It is understood by Resident/Representative that he/she is not required to use the aforesaid Facility for Resident's healthcare needs and that there are numerous other health care providers in the State where the Facility is located that are qualified to provide such care to Resident;"[27] contains Michaels' express representation that he "has the authority to sign [it] on [Mr. Bryan's] behalf;"[28] and, by virtue of his signature thereon, Michael "is presumed to have read, understood, and assented to" the same. *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."). Again, the Arbitration Agreement was optional and was not required as a condition of Mr. Bryan's admission to the Facility, and there is no evidence

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[26] (R. p. 1 ("Defendant's staff *had* Plaintiff's son, Michael . . . , sign the admission paperwork upon Plaintiff's admission to the Facility.") (emphasis added); R. p. 3 ("Defendant's employees *had* Plaintiff's son, Michael, sign all of Plaintiff's admissions paperwork . . . .") (emphasis added).)

[27] (R. p. 49.)

[28] (R. p. 49.)

whatsoever in the record to the contrary. *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."). Lastly, to the extent that the circuit court's language ("had") might suggest any duress, which is, of course, denied, duress is an affirmative defense to contract enforceability[29] that Mr. Bryan would have to have raised and proved, neither of which he did. (*See generally* R. pp. 50-55.)

CONCLUSION

For the foregoing reasons, the Facility asks that the Court reverse the circuit court's denial of the Motion to Compel Arbitration and compel Mr. Bryan's claims against the Facility to arbitration (or to remand this matter to the circuit court with instructions that it do so).

[*signature on next page*]

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[29] (*See* Rule 8(c), SCRCP ("[A] party shall set forth affirmatively the defense[] [of] . . . duress . . . and any other matter constituting an avoidance or affirmative defense."); *Gainey v. Gainey*, 382 S.C. 414, 428, 675 S.E.2d 792, 799 (Ct. App. 2009) ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."); *id.* ("Three factors must be proved in order to establish that a contract was procured through duress: (1) that the person was coerced to enter into the contract; (2) that the person was put in such fear that he was bereft of the quality of mind essential to the making of a contract; and (3) that the contract was thereby obtained as a result of this state of mind."); *id.* ("Wife contends that she was forced to enter the property and separation agreement and as such, the court erred in refusing to vacate the judgment. We disagree. Wife's argument was properly rejected because Wife failed to present sufficient evidence that she was under duress when she entered into the agreement.").

Respectfully submitted,

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