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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

William C. McMaster, III, Circuit Court Judge

Appellate Case No. 2025-002259

Ashanti Sullivan, as Personal Representative of the
Estate of Harold Rice,..Respondent,

v.

Simpsonville Community Healthcare, LLC, d/b/a
Simpsonville Post Acute, ...Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES ii

INTRODUCTION 1

COUNTERSTATEMENT OF ISSUES ON APPEAL 3

COUNTERSTATEMENT OF THE CASE 5

STANDARD OF REVIEW 7

ARGUMENT 7

I. Statement of Facts 8

II. The circuit court was required to determine issues of arbitrability because the Facility failed to introduce clear and unmistakable evidence that Rice or his Estate agreed to arbitrate such issues. 11

III. The Estate is not estopped from denying the validity of the arbitration agreement because it is not seeking to enforce any provisions of the arbitration agreement or admission agreement. 19

IV. The arbitration agreement and admission agreement did not merge. 23

CONCLUSION 28

TABLE OF AUTHORITIES

Page:

Cases

Ahlstrom v. DHI Mortg. Co., L.P.,
21 F.4th 631 (9th Cir. 2021) 16

Arthur Andersen LLP v. Carlisle,
556 U.S. 624, 129 S. Ct. 1896, 173 L. Ed. 2d 832 (2009) 12

Atlantic Coast Builders and Contractors, LLC v. Lewis,
398 S.C. 323, 730 S.E.2d 282 (2012) 8

Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.,
944 F.3d 225 (4th Cir. 2019) 18

Coleman v. Mariner Health Care, Inc.,
407 S.C. 346, 755 S.E.2d 450 (2014) 24, 26-28

Doe v. TCSC, LLC,
430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020) 17

Dr.'s Assocs., Inc. v. Alemayehu,
934 F.3d 245 (2d Cir. 2019) 15

Est. of Hammond v. Fuchs,
No. 21-cv-1121 (RA), 2025 U.S. Dist. LEXIS 185079 (S.D.N.Y. Sep. 19, 2025) 14

Est. of Solesbee by Bayne v. Fundamental Clinical and Operational Services, LLC,
438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023) 1, 2, 20, 23, 27-28

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) 11, 12

GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC,
590 U.S. 432, 140 S. Ct. 1637, 207 L. Ed. 2d 1 (2020) 12

Granite Rock Co. v. Int'l Brotherhood of Teamsters,
561 U.S. 287, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010) 14-15

Hitachi Constr. Mach. Co., Ltd. v. Weld Holdco, LLC,
23 Civ. 490 (NRB), 23 Civ. 1396 (NRB), 2023 U.S. Dist. LEXIS 217295

(S.D.N.Y. Dec. 6, 2023) 18

Hodge v. UniHealth Post Acute Care of Bamberg, LLC,
422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018) .... passim

Howsam v. Dean Witter Reynolds, Inc.,
537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) 18

Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,
206 F.3d 411 (4th Cir. 2000) 20

Jody James Farms, JV v. Altman Grp., Inc.,
547 S.W.3d 624 (Tex. 2018) 21

Johnson v. Sonoco Prods. Co.,
381 S.C. 172, 672 S.E.2d 567 (2009).. 17

Kindred Nursing Ctrs. Ltd. P'ship v. Clark,
581 U.S. 246, 137 S. Ct. 1421, 197 L. Ed. 2d 806 (2017) 16

McGill v. Moore,
381 S.C. 179, 672 S.E.2d 571 (2009) 13

Naganuma v. Windsor Oakridge Healthcare Ctr.,
No. A162113, 2022 Cal. App. Unpub. LEXIS 939 (Cal. Ct. App. Feb. 16, 2022) .. 13

Nicosia v. Amazon.com, Inc.,
834 F.3d 220 (2d Cir. 2016) 15

Oehme, van Sweden & Assocs., Inc. v. Maypaul Trading & Servs., Ltd.,
902 F. Supp. 2d 87 (D.D.C. 2012) 18

Pearson v. Hilton Head Hosp.,
400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012) 20

Rodarte v. Univ. of S.C.,
419 S.C. 592, 799 S.E.2d 912 (2017) 19

Saket Singh v. Anesthesia Assocs. of Rock Hill, P.A.,
No. 0:25-cv-0696, 2025 U.S. Dist. LEXIS 90806 (D.S.C. May 13, 2025) 15-16

Santiago v. Neno Rsch., Inc.,
No. 24-cv-01330, 2024 U.S. Dist. LEXIS 196892 (M.D. Fla. Oct. 30, 2024) 18

Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.,
198 F.3d 88 (2d Cir. 1999) 16

Sweden & Assocs., Inc. v. Maypaul Trading & Servs., Ltd.,
902 F. Supp. 2d 87, (D.D.C. 2012) 18

Theresa D. v. MBK Senior Living LLC,
73 Cal. App. 5th 18, 288 Cal. Rptr. 3d 87 (Cal. Ct. App. 2021) 16

Thompson v. Pruitt Corp.,
416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016) 13, 20, 22, 24, 26-28

Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.,
489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989) 15

Weaver v. Brookdale Senior Living, Inc.,
431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020) 5, 7, 11, 20, 21

Wilson v. Willis,
426 S.C. 326, 827 S.E.2d 167 (2019) 7, 19, 20, 21, 23

Statutes

9 U.S.C. § 4 15

S.C. Code Ann. § 15-36-100 5

S.C. Code Ann. § 15-79-125 5

Rules

Rule 208(b)(1)(B), SCACR 8

INTRODUCTION

This appeal presents an issue that has already been repeatedly and conclusively resolved by this Court: whether a skilled nursing facility may compel arbitration against a resident, or the resident's estate, based on an arbitration agreement executed by a third party who lacked legal authority to bind the resident or his estate at the time of admission. In recent years, this Court has addressed that question at least 23 times and has reached the same result each time. Most prominently, in *Estate of Solesbee by Bayne v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023), the Court examined the substantive arguments Appellant advances here and rejected them. The Court held that in wrongful death and survival actions grounded in the common law, a personal representative of the estate is not estopped from denying the validity of an arbitration agreement where the agreement was not executed by the decedent or a person possessing lawful authority to act on the decedent's behalf.

The governing law is therefore settled. Both this Court and the Supreme Court of South Carolina have made clear that equitable estoppel may bind a nonsignatory resident or estate to an arbitration provision contained within an admission agreement only when the nonsignatory seeks to enforce other provisions of the same contract within the litigation. When a plaintiff's claims arise independently under the common law, as in wrongful death and survival actions, direct benefits estoppel does not apply merely because a facility included an arbitration agreement with a merger provision in its admission paperwork. The rule announced in *Solesbee* did not

create a new doctrine specific to the arbitration context; it applied long-standing principles of contract and estoppel to the precise circumstances presented here.

Notwithstanding this settled precedent, Appellant asks this Court to reverse the trial court, overrule numerous binding decisions, and compel arbitration based on arguments that have already been presented to, and rejected by, this Court numerous times. Appellant does not identify any intervening authority, change in law, or factual distinction that would justify revisiting the Court's prior decisions. Instead, Appellant asks the Court to disregard controlling precedent and adopt a rule that would allow skilled nursing facilities to bind residents to arbitration regardless of whether the individual who executed the admission documents possessed any legal authority to do so. Appellant's position is not merely inconsistent with existing precedent; it is foreclosed by it. As such, Appellant could not reasonably expect this Court to reach a different outcome.

This appeal must also be viewed in the broader procedural context in which it arises. Under South Carolina law, orders denying motions to compel arbitration are immediately appealable. Skilled nursing facilities have increasingly exploited and abused that procedural mechanism by filing interlocutory appeals raising arguments that have already been rejected by this Court time and again. The predictable effect is to halt proceedings in the circuit court and delay the adjudication of wrongful death and survival claims for years while the appellate process unfolds, all to the facilities' advantage. Counsel for Respondent has now defended against numerous such appeals presenting the same arguments rejected in *Solesbee* and other decisions of

this Court. In each instance, the appeal has resulted in substantial delay while the appellate process runs its course, only for the circuit court's order to be affirmed under controlling precedent. The pattern is unmistakable: interlocutory arbitration appeals are being used not as a legitimate vehicle for resolving unsettled legal questions or unusual circumstances of fact, but as a mechanism to postpone the litigation of claims brought by the families of deceased residents in an effort to exhaust them into submission.

When an appellant pursues an appeal that is directly contrary to settled law and offers no good-faith basis for modification or reversal of that law, the appeal is frivolous. Continued tolerance of such appeals invites the routine misuse of the appellate process, burdens the courts with issues already conclusively resolved, and imposes unnecessary delay on litigants seeking resolution of claims arising from the deaths of their mothers, fathers, and siblings. For these reasons, and as further addressed below, Respondent respectfully submits that the Court should affirm the circuit court's orders.

COUNTERSTATEMENT OF ISSUES ON APPEAL

Respondent is the Estate of Harold Rice, a 69-year old man who was suffering from diabetes and dementia when he was admitted to Appellant Simpsonville Community Healthcare, LLC, d/b/a Simpsonville Post Acute's skilled nursing facility ("the Facility") following a fall he experienced at home.[1] Rice's personal

[1] To avoid confusion, the party to this lawsuit will be referred to as "the Estate", while Ashanti Sullivan, the personal representative of Rice's Estate, will be referred to by her personal name when referencing acts she undertook in her individual capacity.

representative, Ashanti Sullivan, is not present as a party to this lawsuit in her individual capacity, nor was she ever acting within a representative capacity on behalf of Rice, his Estate, or his wrongful death beneficiaries at the time of the events giving rise to this appeal.

At the time of Rice's admission to the Facility, Sullivan was not authorized by his financial and health care powers of attorney to act as Rice's agent for the purpose of arbitrating claims or waiving his rights to a jury trial. Despite this, during intake the Facility had Sullivan sign an arbitration agreement purporting to waive Rice's and his Estate's rights to a jury trial for any causes of action arising from or related to the Facility's care for and treatment of him. After the commencement of this action seeking to recover damages for injuries he suffered in the Facility's care, the Facility moved to compel arbitration of the wrongful death claim and survival claim. The circuit court properly denied the Facility's motion primarily because there was no evidence that Sullivan had actual or apparent authority to sign the arbitration agreement, and there was no evidence to support the Facility's legally flawed estoppel argument.

The issues presented are:

1. Delegation Clause: Whether it was proper for the circuit court to determine any threshold questions as to the arbitration agreement's formation.

2.a. Direct Benefits Estoppel – Enforcement of Contract Provisions: Whether direct benefits estoppel is inapplicable to the Estate's common law tort claims.

2.b. Direct Benefits Estoppel – Merger: Whether the subject arbitration and admission agreements merged.

COUNTERSTATEMENT OF THE CASE

This action was commenced on March 31, 2025, by filing a summons and complaint in the Greenville County Court of Common Pleas. (*See generally* Compl.). The Estate alleged wrongful death and survival claims for negligence/gross negligence against the Facility as a result of the care and treatment provided to Rice while he was a resident at the Facility. (*Id.*). The Estate properly complied with the Notice of Intent and affidavit requirements of S.C. Code Ann. §§ 15-79-125 and 15-36-100 prior to filing suit.[2]

On May 8, 2025, the Facility filed a motion to dismiss, stay litigation, and compel arbitration, arguing that a valid and binding arbitration agreement had been entered between the parties. (May 8, 2025 Mot. to Compel 1-2). The Facility contended that the Federal Arbitration Act ("FAA"), as opposed to the South Carolina Uniform Arbitration Act, applied to the arbitration agreement.[3] (*Id.*). The Facility's motion was set for hearing by the circuit court on September 16, 2025. The Facility filed a supporting memorandum further arguing that the FAA governed the arbitration agreement, that the FAA mandated compelling the suit into arbitration,

[2] *Sullivan v. Simpsonville Cmty. Healthcare, LLC*, Case Number: 2024-NI-23-00069.

[3] The circuit court did not specifically find in its September 26, 2025 or October 24, 2025 orders that the agreements involve or affect interstate commerce and are thus governed by the FAA. (Sep. 26, 2025 Order; Oct. 24, 2025 Order). Regardless, even if the FAA did govern the agreement, it does not give "the party seeking arbitration a leg up" in determining whether arbitration should be compelled. *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 229, 847 S.E.2d 268, 271 (Ct. App. 2020).

that a valid delegation provision was agreed to by Sullivan as Rice's agent requiring any issues of arbitrability to be determined by an arbitrator, and that the Estate's claims were within the scope of the arbitration agreement. (Sep. 9, 2025 Mem. in Supp. of Mot. to Compel 4-6). In the alternative, the Facility argued that the arbitration agreement and admission agreement merged such that it would be inequitable for the Estate to be permitted to argue that it had never assented to arbitrate its claims. (*Id.* at 7-12). Lastly, the Facility argued that Sullivan had authority to enter the arbitration agreement on Rice's behalf under three different theories of agency, and that it should have been permitted to conduct limited discovery to the extent that a question of fact remained as to agency. (*Id.* at 12-16).

The circuit court denied the Facility's motion without prejudice in an order filed September 26, 2025. (Sep. 26, 2025 Order). The order allowed 30 days for the Facility to conduct limited discovery on the validity of the arbitration agreement, after which the Facility could refile its motion if appropriate. (*See generally id.*). The Facility did not engage in any discovery on the issue of agency or any other topics related to the arbitration agreement within the allotted period. Instead, the Facility filed a motion for reconsideration on October 6, 2025. (Oct. 6, 2025 Mot. for Recons. 3-14). In its motion, the Facility reiterated all of the arguments it previously raised to the circuit court, with the exception of its baseless argument that Sullivan had actual authority to act on behalf of Mr. Rice. (*Id.*). The circuit court entered an order on October 24, 2025, denying the motion for reconsideration. (Oct. 24, 2025 Order). The Facility appealed the orders on November 7, 2025. (Not. of Appeal).

STANDARD OF REVIEW

"Whether an arbitration agreement may be enforced against a nonsignatory to the agreement is a matter subject to de novo review by an appellate court" with a presumption against arbitrability. *Wilson v. Willis*, 426 S.C. 326, 335, 337, 827 S.E.2d 167, 172-73 (2019). Under de novo review, a circuit court's underlying factual findings will not be reversed on appeal if any evidence reasonably supports those findings. *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 228, 847 S.E.2d 268, 271 (Ct. App. 2020).

ARGUMENT

The circuit court's September 26, 2025, and October 24, 2025 orders should be affirmed by the Court because they do not contain any clear legal errors, and any factual conclusions necessary to the circuit court's orders are reasonably supported by the evidence in the record. It is beyond cavil that issues concerning the formation of an arbitration agreement must be determined by a court and not an arbitrator, even if the arbitration agreement contains a delegation clause purporting to leave such decisions to an arbitrator. Direct benefits estoppel would not work to preclude the Estate from denying the formation of a valid arbitration agreement between it and the Facility because the Estate is not seeking to enforce any provisions of the admission agreement or recover damages in contract. And even if direct benefits estoppel were applicable to the Estate's claims, under this Court's prior rulings, arbitration and admission agreements similar to those at issue in this appeal have been found by this Court not to merge.

Since the Facility has not contested the circuit court's implicit finding that Sullivan did not have authority to enter the arbitration agreement on Rice's or the Estate's behalf, either by way of the Adult Health Care Consent Act, a valid power of attorney whose scope authorized Sullivan to waive jury trial rights, or any discernible common law agency principles, that finding, which was necessary to the circuit court's reconsideration order, is now the law of the case, and the Facility can only argue that the agreements merge such that Respondent should have been estopped from opposing arbitration, or that the arbitration agreement's delegation clause mandated that an arbitrator should have decided any questions of contract formation. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); *Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."). For these and the following reasons, the circuit court's orders denying the Facility's motions should be affirmed.

I. Statement of Facts.

On December 22, 2021, Harold Rice was admitted to Simpsonville Post Acute after being hospitalized when he was found on the floor at his home with multiple pressure injuries. (Compl. ¶¶ 3-4). During his stay at the Facility, Rice had multiple falls over a seven-month period, culminating in an acute fracture of his lumbar spine after falling from his wheelchair in July of 2022. (*Id.* at ¶¶ 5-10). Mr. Rice passed away three weeks later. (*Id.* at ¶ 12). The Estate commenced this action on March 31,

2025, alleging negligence and gross negligence in Rice's care and treatment while a resident at the Facility. (*See generally* Compl.).

Upon admission, the Facility's admission and arbitration agreements were signed by Sullivan. (Sep. 16, 2025 Mem. in Supp. of Mot. to Compel, Exs. A, C). The Facility has not appealed and did not ask for reconsideration of the circuit court's implicit finding that there was no evidence of any "inherent" or apparent agency relationship between Sullivan and Rice, it has not appealed and did not ask for reconsideration of the circuit court's implicit finding that the Adult Health Care Consent Act would not have granted authority to Sullivan to enter an arbitration agreement on behalf of Rice, and it has not appealed or asked for reconsideration of the circuit court's implicit finding that Sullivan did not have actual authority to execute the arbitration agreement under the financial power of attorney or healthcare power of attorney, so these finding are the law of the case.[4]

Thus, Sullivan signed the Facility's arbitration agreement and admission agreement on December 23, 2021, in her individual capacity. (Sep. 16, 2025 Mem. in Supp. of Mot. to Compel, Exs. A, C). The admission agreement contains provisions regarding the Facility's obligations, the resident's obligations, and a financial agreement, as well as provisions regarding the termination of the admission agreement, governing law, and an entirety of agreement provision. (*Id.*). The admission agreement has its own signature page, is separately entitled "Simpsonville

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

Post Acute NURSING HOME ADMISSION AGREEMENT" and is separately paginated as pages one through 11. (*Id.*). The admission agreement makes no reference to the arbitration agreement.

The arbitration agreement sets forth that all claims arising out of or relating to the resident's stay at the Facility, the Facility's care and treatment of the resident, and Facility's admission agreement are to be resolved by arbitration and provides the governing law for the arbitration agreement. (*Id.*). The arbitration agreement has its own separate signature page, is entitled "Confidential Voluntary Arbitration Agreement", and is paginated as pages one through nine. (*Id.*). The arbitration agreement contains no provision for medical, nursing, or health care services to be provided to residents, it does not require any financial commitment to pay for such services, and it makes no mention of or reference to the Estate.

Prior to admission, on July 29, 2013, a financial power of attorney and healthcare power of attorney were executed by Rice naming Sullivan as his attorney-in-fact. (FPOA; HCPOA). However, neither of these documents contain any language bestowing authority on Sullivan to waive Rice's rights to a jury trial or to arbitrate claims on his behalf. The Facility has not raised these issues on appeal, although it does attempt to set forth in its background facts that the two documents granted such authority to Sullivan. (Appellant's Br. 4). A cursory review of the pertinent language cited by the Facility in its brief reveals that this is wholly untrue. Since it is undisputed that Sullivan did not have authority to enter the arbitration agreement, the Court's analysis is confined to whether the delegation clause required the circuit

court to compel any questions concerning the formation and existence of the arbitration agreement to an arbitrator, and whether the Estate should have been precluded from denying the formation of the arbitration agreement under a merger/direct benefits estoppel theory.

II. The circuit court was required to determine issues of arbitrability because the Facility failed to introduce clear and unmistakable evidence that Rice or his Estate agreed to arbitrate such issues.

The Facility argues the circuit court lacked jurisdiction to determine threshold questions regarding the arbitration agreement because the agreement contains a delegation clause. That argument fails because delegation presupposes the existence of an arbitration agreement between the parties. Here, the central dispute is whether any agreement to arbitrate was ever formed between the Facility and Rice or his Estate. That issue is for a court to decide, not an arbitrator.

Arbitration is a matter of consent, not coercion. Courts do not presume that parties agreed to arbitrate arbitrability and will find that they did only if there is "clear and unmistakable evidence" of such an agreement. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985 (1995). "In fact, if the party resisting arbitration is a nonsignatory, a presumption against arbitration arises." *Weaver*, 431 S.C. at 230, 847 S.E.2d at 272. To determine whether "clear and unmistakable evidence" exists, courts apply principles of ordinary state-law contract formation. *First Options*, 514 U.S. at 944, 115 S. Ct. at 1924. Specifically, "[t]he 'traditional principles of state law' that apply under [the FAA]" include doctrines such as estoppel used to enforce contracts in favor of or against

nonsignatories. *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 590 U.S. 432, 437, 140 S. Ct. 1637, 1643-44, 207 L. Ed. 2d 1 (2020) (quoting *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631, 129 S. Ct. 1896, 173 L. Ed. 2d 832 (2009)). In short, federal law controls whether a judge or an arbitrator decides the contested issue of arbitrability, but state law controls the relevant analysis.

The Facility's arguments as to whether the circuit court should have delegated the issue of contract formation to the arbitrator are all fundamentally flawed because they improperly assume the conclusion the Facility must first prove. The Facility cannot distinguish the difference between (1) the delegation of contract formation issues to an arbitrator in disputes between two parties to a contract, and (2) the delegation of contract formation issues in instances where the party resisting arbitration was not a party to the arbitration agreement and its delegation clause. The Facility's logic in arguing that arbitrability should be delegated in this instance is incoherent because if the Estate never agreed to arbitrate with the Facility, which it did not do, then it never agreed to the arbitration agreement's delegation clause either. Forcing the Estate to arbitrate arbitrability would violate general contract principles regarding mutual assent:

> [A]lthough California has a strong policy favoring arbitration, there is no public policy favoring the arbitration of disputes the parties did not agree to arbitrate. When a party seeks to compel arbitration, the *trial court* – not the arbitrator – must initially determine in a summary proceeding whether an agreement to arbitrate exists. "To presume arbitrability without first establishing, independently, consent to arbitration is to place the proverbial cart before the horse."

Naganuma v. Windsor Oakridge Healthcare Ctr., Case No. A162113, 2022 Cal. App. Unpub. LEXIS 939, at *5 (Cal. Ct. App. Feb. 16, 2022) (citations omitted).

If any valid arbitration agreement was entered, it was between Sullivan in her individual capacity and the Facility, and not between the Estate and the Facility[5]:

> Respondent is attempting to use equitable estoppel against the patient's estate based on actions that patient's [daughter] took *in her individual capacity*. The fact that the patient's [daughter] is *now the personal representative for the patient's estate* is of no moment; we will not hold this circumstance against the patient's estate. Simply put, the patient's estate is the plaintiff in this case, and Respondent has alleged no conduct on the part of the patient's estate, or by the patient's [daughter] in *her capacity as Personal Representative* of the patient's estate, that has affected Respondent's position.

Thompson v. Pruitt Corp., 416 S.C. 43, 61, 784 S.E.2d 679, 689 (Ct. App. 2016). Therefore, the parties' arguments implicate whether a contract was ever formed between the Estate and the Facility.[6] Those issues go to whether any enforceable

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[5] The majority of the Facility's argument in this respect is that a valid agreement was formed between Sullivan in her individual capacity and the Facility. The Facility ignores that there is no evidence a valid agreement was ever formed between the Estate and the Facility. The Estate and Rice never accepted any offer to arbitrate from the Facility because Sullivan had no authority to accept any offers on their behalf.

[6] To be clear, the circuit court did not have to rely on parol evidence, as argued by the Facility, to find that Sullivan had no authority to enter the arbitration agreement, and it was the Facility's burden on its motion to establish that Sullivan had authority. The parol evidence rule is irrelevant here and has no bearing on issues of contract formation, as it is used to ascertain the intent and meaning of the parties when a contract is ambiguous. *McGill v. Moore*, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009). The Facility's entire argument regarding authority focused solely on the representations purportedly made by Sullivan in signing the arbitration and admission agreements, particularly the language inserted into the agreements by the Facility itself claiming that Sullivan had authority to enter the arbitration agreement on Rice's behalf. (Appellant's Br. 16). However, "[a]n agency may not be established solely by the declarations and conduct of an alleged agent." *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 566, 813 S.E.2d 292, 304 (Ct. App. 2018). Regardless, the Facility never argued to the circuit court that it improperly relied on "parol evidence", so this argument is not preserved for the Court's review.

agreement exists between the relevant parties at all, and not merely to the interpretation or scope of an arbitration clause. The circuit court therefore acted properly in deciding them.

The precise question for the circuit court was whether it was clear and unmistakable that the Facility and *the Estate* agreed to submit questions of contract enforceability to arbitration, regardless of whether *Sullivan* agreed individually to arbitrate claims. Sullivan could not bind the Estate or herself as its future personal representative to any agreement to arbitrate or delegate contract formation and validity questions to an arbitrator, any more so than a stranger to the Estate could act on its behalf, because there is no evidence she had authority to do so. *See Est. of Hammond v. Fuchs*, No. 21-cv-1121 (RA), 2025 U.S. Dist. LEXIS 185079, at *35 (S.D.N.Y. Sep. 19, 2025) (explaining that actions taken by a person in their individual capacity cannot bind an estate).

Under the FAA, contract formation issues are always reserved to the courts for decision, even in the presence of a delegation clause. The Supreme Court of the United States has explained that while the parties may delegate issues of the enforceability and scope of an arbitration agreement to an arbitrator, the formation of an arbitration agreement is always for a court to decide. *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 296-97, 130 S. Ct. 2847, 2855-56, 177 L. Ed. 2d 567 (2010).

> Arbitration is strictly "a matter of consent, and thus is a way to resolve those disputes – *but only those disputes* – that the *parties* have agreed to submit to arbitration." Applying this principle, our precedents hold that courts should order arbitration of a dispute only where the court is

> satisfied that neither the formation of the *parties*' arbitration agreement nor (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue.

Id. at 299, 130 S. Ct. at 2857. The principle follows from the fundamental premise that arbitration is "strictly a matter of consent." *Id.* (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)). "[T]he FAA does not require parties to arbitrate when they have not agreed to do so." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 228 (2d Cir. 2016).

"To take the question of contract formation away from the courts would essentially force parties into arbitration when the parties dispute whether they ever consented to arbitrate anything in the first place." *Dr.'s Assocs., Inc. v. Alemayehu*, 934 F.3d 245, 251 (2d Cir. 2019). Rice and his Estate never consented to arbitrate or delegate anything to an arbitrator, and regardless of whether the Estate is estopped from denying the validity or enforceability of the arbitration agreement, the Facility could not meet its burden of demonstrating to the circuit court through clear and unmistakable evidence that the Estate had assented to such procedures.

Preserving for the courts the contract formation question comports with the requirement in section 4 of the FAA that courts enforce arbitration agreements only "upon being satisfied that the making of the agreement for arbitration . . . is not in issue." 9 U.S.C. § 4. The question of contract formation is always one for a court, and here, the Estate asserts that the Estate and Sullivan in her capacity as its personal representative never consented to the arbitration agreement or its terms. *See Saket Singh v. Anesthesia Assocs. of Rock Hill, P.A.*, C/A. No. 0:25-cv-0696-CMC-SVH, 2025

U.S. Dist. LEXIS 90806, at *17 n.9 (D.S.C. May 13, 2025) (stating that issues of contract formation cannot be delegated to an arbitrator).[7]

Contrary to the Facility's argument, determining whether Sullivan had authority to enter the arbitration agreement on the Estate's behalf is an issue of contract formation, and not enforceability. "[W]hether an entity is a party to the arbitration agreement also is included within the broader issue of whether the parties agreed to arbitrate." *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 95 (2d Cir. 1999). Enforceability, on the other hand, asks whether "agreements once properly made" by the parties may be enforced. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 255, 137 S. Ct. 1421, 1428, 197 L. Ed. 2d 806 (2017). Because the Estate challenges that a valid arbitration agreement was ever formed between the real parties to this dispute in the first place, this gateway issue had to be determined by the circuit court prior to determining whether any remaining issues such as enforceability and scope could be delegated to an arbitrator.

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[7] Additionally, under the *Prima Paint* and *Rent-A-Center* doctrines, the Estate did not have to make a discrete challenge to the delegation clause to make it an issue for the circuit court. The Estate broadly challenges the formation of both the arbitration agreement and the delegation provision. *See e.g., Ahlstrom v. DHI Mortg. Co., L.P.*, 21 F.4th 631, 635 (9th Cir. 2021) ("We agree with our sister circuits and hold that parties cannot delegate issues of formation to the arbitrator."); *Theresa D. v. MBK Senior Living LLC*, 73 Cal. App. 5th 18, 26, 288 Cal. Rptr. 3d 87, 92 (Cal. Ct. App. 2021) ("*Rent-A-Center* does not support defendants' position because it does not suggest that a party may be forced to submit to an arbitrator the existence, validity, or enforceability of an arbitration agreement if the party *has not agreed to do so*, either personally or through someone authorized to agree to arbitration on her behalf.").

The Facility argues that the Estate's challenge to the arbitration agreement goes to its enforceability as opposed to its formation, and contrasts the instant facts with those of *Doe v. TCSC, LLC*, 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020), to support that any issues regarding authority and estoppel should have been delegated to an arbitrator. However, *Doe* is distinguishable from the facts of this case and unhelpful because it does not address scenarios in which a party to an arbitration agreement is attempting to enforce the agreement and its delegation clause against an entity who did not sign the agreement. *Doe* does not speak to the arguments being made by the Estate, does not involve issues of contract formation, and does not even consider whether an arbitration agreement's delegation provision should be enforced against a nonsignatory when there is no evidence the nonsignatory ever assented to anything.

Even if it had some merit, the Facility's enforceability/contract formation argument is unpreserved. The Facility never raised this argument to the circuit court until its motion for reconsideration. (*See generally* Mem. in Supp. of Mot. to Compel; Sep. 16, 2025 Hr'g Tr.; Reply Mem. in Supp. of Mot. to Compel; Mot. for Recons. 5). "An issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009). Prior to reconsideration, the Facility had only argued that an arbitration agreement containing a delegation provision had been formed between the Estate and the Facility because Sullivan had authority to execute the arbitration agreement and it was supported by consideration, or that the Estate was estopped from denying its

preclusive effect on the litigation. (Mem. in Supp. of Mot. to Compel 5-6). Prior to the circuit court's September 26, 2025 order, the Facility never rebutted the Estate's argument that the arbitrability issue was a question of contract formation between the Estate, not Sullivan, and the Facility. (Mem. in Opp. to Mot. to Compel 5-6). The Facility never drew a distinction between enforceability and contract formation until its belated attempt to have the circuit court reconsider its first order denying the Facility's motion.

Regardless, virtually every jurisdiction to have ruled on this issue has unanimously found that under the FAA, questions of contract formation cannot be delegated to an arbitrator. *E.g., Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 234 (4th Cir. 2019) ("Section 4 thus requires that the district court – rather than an arbitrator – decide whether the parties have formed an agreement to arbitrate."); *Santiago v. Neno Rsch., Inc.*, No. 24-cv-01330, 2024 U.S. Dist. LEXIS 196892, at *6 (M.D. Fla. Oct. 30, 2024) ("*Parties* to an arbitration agreement my send threshold questions of arbitrability to an arbitrator when they have agreed to do so.").

This is especially true in instances where a signatory is attempting to enforce a delegation clause against a nonsignatory. *See Hitachi Constr. Mach. Co., Ltd. v. Weld Holdco, LLC*, 23 Civ. 490 (NRB), 23 Civ. 1396 (NRB); 2023 U.S. Dist. LEXIS 217295, at *15-23 (S.D.N.Y. Dec. 6, 2023) (holding that a delegation provision could not be enforced against a nonsignatory even under an estoppel theory and collecting cases); *Oehme, van Sweden & Assocs., Inc. v. Maypaul Trading & Servs., Ltd.*, 902 F. Supp. 2d 87, 97 (D.D.C. 2012) ("A signatory to a contract has clearly and

unmistakably agreed to its terms, but that is not necessarily true of a nonsignatory."). This is because the question of arbitrability is an issue for judicial determination unless all parties clearly and unmistakably provide otherwise. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 591, 154 L. Ed. 2d 491 (2002). There is no evidence that the Estate, a nonsignatory, intended to arbitrate arbitrability with the Facility. The Court was correct not to delegate the resolution of the Facility's motion to an arbitrator.

III. The Estate is not estopped from denying the validity of the arbitration agreement because it is not seeking to enforce any provisions of the arbitration agreement or admission agreement.

Equitable estoppel is "a theory designed to prevent injustice, and it should be used sparingly." *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177. Equitable estoppel is only available when the party seeking to invoke the doctrine "was misled to his injury". *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916 (2017). The Estate would have been estopped from denying the arbitration agreement's validity if the Facility could have proven the elements of estoppel to the circuit court and demonstrated that Rice or the Estate misled the Facility. The Facility failed to do so and cannot do so. The evidence is undisputed that Mr. Rice was suffering from dementia at the time of his admission to the Facility and did not possess legal capacity to make health care decisions or representations of any sort. (Sep. 16, 2025 Mem. in Opp'n to Mot. to Compel, Ex. C).

A nonsignatory is estopped from refusing to comply with an arbitration clause "when [he] receives a direct benefit from a contract containing an arbitration clause."

Pearson v. Hilton Head Hosp., 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000)). The direct benefits test is frequently used to determine whether a theory of estoppel is applicable within the arbitration context. *Solesbee*, 438 S.C. at 647, 885 S.E.2d at 148.

Direct benefits estoppel precludes a nonsignatory from denying the validity of an arbitration *provision* of a contract if "(1) the nonsigner's claim arises from the contractual relationship, (2) the nonsigner has "exploited" other parts of the contract by reaping its benefits, and (3) *the claim relies solely on the contract terms to impose liability*. *Weaver*, 431 S.C. at 230, 847 S.E.2d at 272 (emphasis added). Thus, the Facility would have to demonstrate that the Estate's tort claim relies solely on the terms of the admission agreement to impose liability in order to prevail under a direct benefits estoppel theory.

The Estate has not asserted a breach of contract claim, or a violation of contractual duties, and instead has brought its lawsuit under a negligence theory arising from common law duties. *See Wilson*, 426 S.C. at 342, 827 S.E.2d at 176 (noting that a claim may rely on general principles of South Carolina law in addition to or to the exclusion of contractual rights). This distinction is dispositive. The Estate does not claim that the Facility breached a contractual duty created by the admission agreement and instead claims that the Facility breached a common law duty owed by all healthcare practitioners, regardless of any contractual agreements, not to negligently care for their patients. Any contractual duties between Rice and the

Facility are irrelevant as to whether the Facility breached common law tort duties owed to him. Because the Estate's claims rely on common law tort duties owed by the Facility to anyone in its care and not solely on any provision of a valid admission agreement, the Estate is not precluded by direct benefits estoppel from denying the validity of the arbitration agreement. *Weaver*, 431 S.C. at 232-33, 847 S.E.2d at 273-74.

Simply because the alleged conduct would not have arisen in the absence of the admission agreement (and Rice's admission to the Facility) does not mean that direct benefits estoppel is implicated.

> When a claim depends on the contract's existence *and cannot stand independently* – that is, the alleged liability "arises solely from the contract or must be determined by reference to it" – equity prevents a person from avoiding the arbitration clause that was part of that agreement. But "when the substance of the claim arises from general obligations imposed by state law, including statutes, torts, and other common law duties, or federal law," direct benefits estoppel is not implicated even if the claim refers to or relates to the contract *or would not have arisen "but for" the contract's existence*.

Wilson, 426 S.C. at 343, 827 S.E.2d at 176 (quoting *Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 637 (Tex. 2018)). Therefore, just because Rice benefited from the admission agreement by receiving care, as argued by the Facility, it does not mean that the Estate's tort claims against the Facility depend on the agreement's existence. The Facility's argument oversimplifies the doctrine and ignores controlling precedent. This lawsuit is predicated on the breach of common law duties owed by the Facility to Rice and is justiciable even if there was never a valid admissions agreement to begin with.

The fact of the matter is that Rice and his Estate ultimately did not benefit from his admission because the Facility caused his injuries. *See Hodge*, 422 S.C. at 563, 813 S.E.2d at 302 ("However, because the Facility allegedly caused Mable's injuries that later led to her death, we find it difficult to find she benefited even from being admitted."). The Estate did not ask the circuit court to enforce certain provisions of the admission agreement to its benefit while attempting to repudiate the arbitration agreement. Despite the Facility's contentions, the analysis does not stop and start with whether Rice received any "benefits" from an admission agreement,

There are other requirements that must be met before direct benefits estoppel is implicated. Here, direct benefits estoppel is not applicable because the Estate's claim derives from common law duties and is not solely derived from contractual obligations or a contractual provision. Therefore, even if the circuit court erred in refusing to delegate any issues regarding the subject arbitration agreement to the arbitrator, such error would be harmless because the Facility's estoppel argument is futile. The Court should affirm the circuit court's implicit finding that direct benefits estoppel is inapplicable under the facts of this case.[8]

[8] The Facility argues that the orders violate the FAA's equal footing principle. The Facility bases this argument on the fact that the circuit court discerned an intent contrary to merger from the language of the arbitration agreement and admission agreement. To the contrary of the Facility's argument, this finding does not place any heightened duty on the Facility that is specific to the arbitration context. The dicta merely points out that there were language and other elements in the agreements indicative of an intent contrary to merger, which would be relevant to a merger analysis within any context.

IV. The arbitration agreement and admission agreement did not merge.

The Facility argues the arbitration agreement merged into the admission agreement. Therefore, the Estate should be treated as if it accepted the arbitration provision by accepting the benefits of admission. However, even if direct benefits estoppel were applicable within this context, which it is not, the merger argument fails at the threshold because the documents evince an intent contrary to merger.

Because arbitration exists solely by agreement of the parties, a presumption against arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate. *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173. State law provides when an arbitration agreement may encompass claims brought by a nonsignatory to the agreement, and South Carolina permits a nonsignatory to be bound by an arbitration agreement under several theories: incorporation by reference, assumption, agency, veil piercing/alter ego, and estoppel. *Solesbee*, 438 S.C. at 647, 885 S.E.2d at 148. Only two of these theories, agency and estoppel, were at play before the circuit court, and the Facility has declined to appeal any issues concerning agency.

It is undisputed in this case that the Facility's arbitration agreement was not a clause in its admission agreement and Sullivan did not have authority to execute the arbitration agreement on Rice's and his Estate's behalf. The Facility thus argues that under a theory of merger, the arbitration agreement and the admission agreement became a unified contract once they were executed. However, the language and formatting of the agreements serve as evidence that the two agreements were

intended to be separate documents, and at minimum, create an ambiguity as to merger that must be construed against the Facility.

> In South Carolina, "[t]he general rule is that, *in the absence of anything indicating a contrary intention,* where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (emphasis added). Here, the terms of the agreements indicate an intent that the doctrine of merger would in some instances not apply to the agreements, and at minimum create an ambiguity as to merger. *See id.* at 355-56, 755 S.E.2d at 455 (stating that ambiguity as to merger must be construed against the drafter).

The admission agreement and arbitration agreement are separate contracts that do not merge due to the ambiguous nature in which they were drafted by the Facility. *See Hodge*, 422 S.C. at 561-63, 813 S.E.2d at 308 (describing aspects of an arbitration agreement and admission agreement that created ambiguity as to merger); *Thompson*, 416 S.C. at 52-54, 784 S.E.2d at 684 (same); *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (same). *Coleman* refused to apply the doctrine of merger to skilled nursing facility admission and arbitration agreements when the language of the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." *Id. Thompson* and *Hodge* applied *Coleman* and provided further examples of factors demonstrating "separateness and preventing merger." *Thompson*, 416 S.C. at 52, 784 S.E.2d at 684; *Hodge*, 422 S.C. at 563, 813 S.E.2d at 302. It is important to note that admission agreements and arbitration agreements for skilled

nursing facilities serve two wholly distinct purposes: the first is to provide for the mutual obligations of the parties and the terms of residency, the second is solely to establish arbitration procedures that by federal law cannot be necessary to or a requirement for admission.

In determining whether a health care facility's admission and arbitration agreements merge, the Court has looked to the following factors: (1) whether the two agreements are governed by separate bodies of law, (2) whether the language of the agreements recognizes the two agreements as separate, (3) whether the agreements contain different terms regarding revocation and termination, (4) whether the agreements are separately paginated and have their own signature pages, and (5) whether both agreements are required for the execution of the other, or whether one agreement is optional. *Hodge*, 422 S.C. at 562-63, 813 S.E.2d at 302. The Court has previously analyzed similar admission and arbitration agreements and found the agreements do not merge.

The arbitration agreement is separately titled "Confidential Voluntary Arbitration Agreement", is paginated separately as nine pages, and contains its own signature lines. Further, the arbitration agreement by its very language distinguishes between itself and the admission agreement, stating that the arbitration agreement represents "the Parties' entire agreement regarding disputes and supersedes all prior agreement . . . and constitutes a complete and exclusive statement of the terms of the Agreement between the Parties with respect to its subject matter" while referring to the admission agreement as its own separate

document: "The Parties agree that the Facility bills Medicare . . . and thus the Admission Agreement is connected to interstate commerce." While the arbitration agreement provides that it becomes a part of the admission agreement once executed, when viewed alongside the other details of the agreements, it creates an ambiguity as to merger when taken in context of the totality of the circumstances, and "the law is clear that any ambiguity in such a clause is construed against the drafter", i.e., the Facility. *See Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

As in *Hodge*, the separate contracts here have separate signature pages and separate pagination. *Hodge*, 422 S.C. at 562, 813 S.E.2d at 302. The arbitration agreement is a separate document designated with its own pagination. As in *Thompson*, the arbitration agreement announces its independence with its "Arbitration Agreement" title. *Thompson*, 416 S.C. at 52, 784 S.E.2d at 685. The text of the arbitration agreement refers to the Facility's admission agreement as a separate, standalone document. This language mirrors that addressed in *Coleman* and *Thompson*, in which the Supreme Court and Court of Appeals found such language to be proof that an admission agreement was separate and did not merge with an arbitration agreement:

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

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

Since the arbitration and admission contracts have different pagination with different signature pages, and the arbitration contract is entitled "Confidential Voluntary Arbitration Agreement" at the top of its first page, these factors further indicate the Facility's intent for the arbitration agreement to stand by itself as an independent contract, at least when it serves its purposes to do so. *Thompson*, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n.1; *Hodge*, 422 S.C. at 562-63, 813 S.E.2d at 302. The arbitration agreement was not a precondition to admission.

Most importantly, the arbitration agreement provides that it will survive the termination of the admission agreement, which begs the question of how the agreements have merged such that they are legally one and the same. The arbitration agreement can only be revoked by written notice within thirty days of it being signed and provides that it is binding on a resident in perpetuity if not cancelled. The admission agreement, on the other hand, can be terminated unilaterally by the resident or Facility at any time with notice. *See Solesbee*, 438 S.C. at 648, 885 S.E.2d at 149 (noting that different revocation procedures for different agreements is a factor indicating an intent contrary to merger).

The Facility urges the Court to ignore *Coleman*, *Thompson*, *Solesbee*, and *Hodge* because they are "erroneous" and "make the rule of merger itself useless and impossible to satisfy in any circumstance." Much like the remainder of the Facility's arguments, it collapses when subjected to a minimal amount of scrutiny. For example, under the cited authorities the Facility could have included express language in the admission agreement indicating that the arbitration agreement

would merge with it upon execution, the agreements could have expressly provided that they were governed by identical bodies of law, and the agreements could have incorporated identical terms regarding revocation and termination. If the Facility had made such changes to its agreements, then more likely than not a court would find that there was no significant evidence of an intent contrary to merger. The problem with the Facility's agreements as drafted is that it wants the arbitration agreement to exist in perpetuity while retaining the right to revoke and terminate the admission agreement at-will.

The details of the Facility's admission agreement and arbitration agreement are nearly identical to those addressed by our Supreme Court and the Court in *Coleman*, *Hodge*, *Solesbee*, and *Thompson*. Because the terms of the agreements indicate an intent by the Facility to treat them as legally separate documents, the Facility cannot meet its burden to prove merger. The merger of the admission agreement and arbitration agreement is at best ambiguous such that they should not be construed as a unit, and any equitable estoppel argument was therefore properly rejected by the circuit court.

CONCLUSION

For the foregoing reasons, the Court should affirm the circuit court's orders denying the Appellant's motion to compel arbitration.

[SIGNTURE PAGE TO FOLLOW]

Respectfully submitted,

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