THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2019-CP-40-02295

Vermell Daniels
as Personal Representative of the Estate of Annie Porter,

Respondent,

v.

THI of South Carolina at Columbia, LLC
d/b/a Midlands Health & Rehabilitation Center,

Appellant.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

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

A. Did the circuit court err in finding that the Admission Agreement and the Arbitration Agreement that Ms. Daniels signed on behalf of Ms. Porter in conjunction with Ms. Porter's admission to the Facility are separate contracts (i.e., in not finding the instruments merged) and in rejecting the Facility's argument that Plaintiff should be equitably estopped to deny the enforceability of the Arbitration Agreement?

B. Did the circuit court err in finding that the Arbitration Agreement is not enforceable because of a lack of consideration and mutuality?

II. At a minimum, did the circuit court err in denying the Facility's alternative request for limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability?

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[1] The "Facility" is Defendant-Appellant, THI of South Carolina at Columbia, LLC d/b/a Midlands Health & Rehabilitation Center. It is a skilled nursing facility in Richland County. (*See* Compl. ¶¶ 2, 4; Answer ¶¶ 3, 5.)

[2] "Plaintiff" is Plaintiff-Respondent, Vermell Daniels ("Ms. Daniels") as personal representative of the estate of her late mother, Annie Porter ("Ms. Porter"). (*See* Summons; Compl.; Aff. of Vermell Daniels ¶ 3.)

[3] Out of an abundance of caution, the Facility would make clear that this issue, and the corresponding argument, goes to the denial of its motion to compel arbitration and the denial of its subsequent motion to alter, amend, and/or reconsider the denial of its motion to compel arbitration.

STATEMENT OF THE CASE

With the help of Ms. Daniels, Ms. Porter was admitted to the Facility on December 22, 2017. (*See* Admission Agreement [Ex. 1 to Def.'s Mem. in Supp. of Mot. to Compel Arbitration].) In conjunction with Ms. Porter's admission, Ms. Daniels signed an Admission Agreement[4] and an Arbitration Agreement[5] on Ms. Porter's behalf. By her signature on the Arbitration Agreement, Ms. Daniels "represent[ed] that . . . she ha[d] the authority to sign on [Ms. Porter's] behalf so as to bind [Ms. Porter] as well as [herself]." (*Id.*)

Ms. Porter passed away on March 28, 2018. (Pl.'s Mem. in Opp'n to Def.'s Mot. to Compel Arbitration p. 1.) On April 25, 2019, Plaintiff commenced this wrongful death and survival action against the Facility in the Court of Common Pleas, Richland County. (*See* Summons; Compl.) Plaintiff alleges the Facility's deficient care/treatment of Ms. Porter during her residency allowed her to develop pressure sores, which resulted in her decline and eventual death. (Pl.'s Mem. in Opp'n to Def.'s Mot. to Compel Arbitration p. 1; *see also* Compl.)[6]

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[4] (Admission Agreement.)

[5] (Arbitration Agreement.)

[6] Without question, Plaintiff's claims against the Facility are within the scope of the Arbitration Agreement. (*See* Arbitration Agreement ("[A]any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there

On June 5, 2019, the Facility moved to compel Plaintiff's claims to arbitration, based on the above-referenced Arbitration Agreement. (Def.'s Mot. to Compel Arbitration.)[7] Following the parties' submission of briefs[8] and a hearing on August 26, 2019,[9] the circuit court, the Honorable L. Casey Manning presiding, denied the Facility's motion by order filed November 6, 2019. (Order [Denying Mot. to Compel Arbitration], filed November 6, 2019.)

Pursuant to Rule 59(e), SCRCP, on November 18, 2019, the Facility timely moved the circuit court to alter, amend, and/or reconsider its decision. (Def.'s Mot. to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration.) Following additional written submissions by the parties[10] and a hearing on February 13, 2020,[11] the court denied the Facility's Rule 59(e) motion

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has been a violation of any right or rights granted under State law (collectively 'Disputes'), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration . . . .").) This plain language clearly embraces the subject matter of Plaintiff's claims against the Facility. And even were there "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).

[7] The Facility also timely answered Plaintiff's complaint, subject to and without waiving its arbitration rights. (Facility Answer.)

[8] (Def.'s Mem. in Supp. of Mot. to Compel Arbitration; Pl.'s Mem. in Opp'n to Mot. to Compel Arbitration.)

[9] (Tr. of Mot. Hr'g held August 26, 2019.)

[10] (Pl.'s Response to Def.'s Mot. to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration; Def.'s Supp. Filing in Supp. of Mot. to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration.)

[11] (Tr. of Mot. Hr'g held February 13, 2020.)

by order filed February 24, 2020. (Order [Denying Mot. to Alter, Amend, and/or Reconsider], filed February 24, 2020.)

By notice served March 16, 2020, this appeal timely follows. (*See* Notice of Appeal/Proof of Service.)

STANDARD OF REVIEW

A circuit court's determination of whether a claim is subject to arbitration is reviewed de novo on appeal. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). This includes de novo review of the determination of whether an arbitration agreement is enforceable against a nonsignatory. *Wilson v. Willis*, 426 S.C. 326, 334, 827 S.E.2d 167, 172 (2019). "Under de novo review, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Id.* Issues of law, however, are reviewed without any particular deference to the lower 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 trial 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 Facility's motion to compel Plaintiff's claims to arbitration.

A. The circuit court erred in finding that the Admission Agreement and the Arbitration Agreement that Ms. Daniels signed on behalf of Ms. Porter in conjunction with Ms. Porter's admission to the Facility are separate contracts (i.e., in not finding the instruments merged) and in rejecting the Facility's argument that Plaintiff should be equitably estopped to deny the enforceability of the Arbitration Agreement.

The circuit court's analysis touches on issues relating to agency (not only of true agency but also of agency by estoppel, as well as the concept of ratification); third-party beneficiaries; the Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80; and the Bill of Rights for Residents of Long-Term Care Facilities, S.C. Code Ann. §§ 44-81-10 to -70. (*See* Order Denying Motion to Compel Arbitration pp. 3–4; Order Denying Motion to Reconsider pp. 3–7, 11–13.) To be clear, however, these issues have no bearing on the Facility's merger/equitable estoppel argument.

Re: Merger

South Carolina recognizes numerous potentially viable theories under which a nonsignatory can be bound to an arbitration agreement. *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) ("South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2)

assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel."). In *Coleman v. Mariner Health Care, Inc.*, even though our Supreme Court found against merger on the *particular facts* before it, the Court 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 AA under the Act, she is nevertheless equitably estopped to deny the AA'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 AAs 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.
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> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.*

407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (emphasis added). Here, the circuit court failed to recognize material distinctions between the facts of the instant case and those that controlled *Coleman* and its progeny, *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

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 indeed 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 contracting parties intended the instruments to be construed together as effectively one contract. This is a question of the parties' intention. *Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a contrary *intention* . . ."") (emphasis added). "[I]n attempting to ascertain th[e] [parties'] intention," the Court "endeavor[s] 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.

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

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

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

Unlike the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (*See* Arbitration Agreement.) Moreover, while the instant Admission Agreement does contain an "Entire Agreement" clause, it does not reference the Arbitration Agreement as a separate contract. (Admission Agreement p. 12.) Indeed, the "Entire Agreement" clause in the instant Admission Agreement expressly states that other admissions materials are deemed a part of the Admission Agreement. (*Id.*) Without question, the Arbitration Agreement is among the admissions materials.

As the circuit court points out, the Arbitration Agreement was optional, i.e., "agreeing to arbitration is not required to gain admission to the [Facility]." (Order Denying Motion to Reconsider p. 9.) But all this means is that it did not have to be agreed to for Ms. Porter 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 in fact agreed to.

Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only*

makes sense together with the Admission Agreement, which is its (the Arbitration Agreement's) sole reason for being. (*See* Arbitration Agreement (providing for arbitration of "any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident . . . ."); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at Facility . . . .").)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Ms. Porter's relationship with the Facility: the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission. (*Compare* Admission Agreement (setting forth the terms of Ms. Porter's admission to the Facility) *with* Arbitration Agreement (providing for arbitration of disputes arising out of Ms. Porter's admission in the Facility).)

Also absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare*

Admission Agreement p. 10 (providing "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* Arbitration Agreement (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 fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of

the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

Moreover, 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. To allow the merger presumption to be upset based on evidence that is merely ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention, but at most might (or might not) reflect a contrary intention—is to allow the exception to devour the rule.

Respectfully, the circuit court should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were

executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Ms. Porter's admission to the Facility and would not have been done at all but for her admission to the Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent.

Re: Equitable Estoppel

The circuit court's discussion of equitable estoppel misapprehends or overlooks South Carolina's favorable view of the applicability of the direct benefits test for equitable estoppel in arbitration cases.

The circuit court cites only the "traditional" six-factor test for equitable estoppel analyzed in *non*-arbitration cases. (Order Denying Motion to Compel Arbitration pp. 4–5; Order Denying Reconsideration pp. 7.) South Carolina law recognizes, however, the potential for equitable estoppel to be successfully invoked to enforce an arbitration agreement against a nonsignatory under the direct benefits test. *See Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel); *id.* at 340–345, 827 S.E.2d at 175–177 (favorably discussing the framework of the so-called direct benefits test—which was the test that the Court of Appeals had applied in the decision then before the

Wilson Court on writ of certiorari, following its (the Court of Appeals') prior decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which test the Facility contends Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Ms. Porter received direct benefits (in the form of her admission and care/treatment at the Facility, to include, without limitation, room and board) from the Admission Agreement with which the Arbitration Agreement was merged); *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). In other words, *Wilson*—as well as logic itself—supports the use of the direct benefit test to answer the question of equitable estoppel in an arbitration case like this.

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Ms. Porter received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment she received therein. To deny her receipt of such benefits is illogical. It would require wholly discounting every single aspect of her residency (every meal, every instance of

care/treatment delivered, essentially every moment at the Facility). Not even Plaintiff has alleged this. (*See* Compl.)

Respectfully, the circuit court should have found that the Arbitration Agreement merged with the Admission Agreement and that Plaintiff is estopped to deny the Arbitration Agreement's enforceability, Ms. Porter having effectively embraced/directly benefitted from the Admission Agreement for the purpose of her admission only to later, via Plaintiff, attempt to repudiate the Arbitration Agreement with which the Admission Agreement was merged.[14]

Lastly, out of an abundance of caution, to the extent it may be relevant in regard to the circuit court's treatment of the Facility's equitable estoppel argument, the court's analysis improperly includes the assertion that "a review of the admissions and arbitration documents by the [Facility] would have informed them that [Ms.] Daniels did not have actual authority by way of a Power of Attorney, nor Court Appointed Guardianship to bind her mother, nor did she ever indicate that she had any apparent authority to enter in to contracts on behalf of her mother." (Order Denying Motion to Compel Arbitration p. 4; Order Denying Motion to Reconsider p. 4.) This is an incorrect statement of fact, unsupported by any evidence in the record. Indeed, it is directly contradicted by the Arbitration

[14] 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 for to the Admission Agreement.

Agreement's express language that "[i]t is the intention of the parties . . . to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident" and that "[b]y his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative." (Arbitration Agreement.)

Likewise, by improperly including in its analysis the assertion that "[the Facility] had the capacity to determine whether Ms. Daniels had authority to sign an arbitration agreement on Ms. Porter's behalf,"[15] the circuit court overlooks or misapprehends (a) the duty of good faith and fair dealing implied in every contract, (b) that one who has signed a contract is presumed to have read, understood, and assented to its terms, and (c) the fact that, by way of the Arbitration Agreement itself, the Facility did in fact inquire of Ms. Daniels as to her authority to bind her mother, Ms. Porter, and Ms. Daniels expressly represented to the Facility that she had such authority.

There is, of course, an implied covenant of good faith and fair dealing in every contract. *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995). Moreover, "one who has signed a contract is presumed to have read, understood, and assented to its terms." *Gibson v. Epting*, 426 S.C. 346, 352,

[15] (Order Denying Motion to Compel Arbitration p. 5; Order Denying Motion for Reconsideration p. 8.)

827 S.E.2d 178, 181 (Ct. App. 2019). And, again, when she signed the Arbitration Agreement, Ms. Daniels expressly represented that she had authority to sign on Ms. Porter's behalf. The circuit court wrongfully overlooked all this, unjustly rewarding Ms. Daniels for her false representations, while at the same time punishing the Facility for supposedly failing to meet some unspecified duty to investigate them. No such duty is in fact recognized under South Carolina law—and, indeed, no legal authority is cited by the circuit court. Moreover, because the Arbitration Agreement is covered by the FAA,[16] it "must [be] place[d] . . . on equal footing with other contracts . . . and enforce[d] . . . according to [its] terms[.]" *AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333, 339 (2011). By holding the Facility to an elevated standard of determining Ms. Daniels's authority to contract, the circuit court fails to place the Arbitration Agreement on equal footing with other contracts and, thus, violates the FAA.

B. The circuit court erred in finding that the Arbitration Agreement is not enforceable because of a lack of consideration and mutuality.

Though nowhere actually analyzed in either its order denying the Facility's motion to compel arbitration or its order denying the Facility's Rule 59(e) motion,

[16] The Arbitration Agreement expressly states that the FAA applies. (Arbitration Agreement.) Moreover, our Supreme Court has 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).

in the conclusion section of the latter order, the circuit court indicates that its ruling includes a finding that the Arbitration Agreement is unenforceable because "there was a lack of consideration and mutuality under the circumstances." (Order Denying Motion to Reconsider p. 13.) This point would seem immaterial in the context of this appeal, because (1) it improperly views the Arbitration Agreement as separate from (i.e., not merged with the Admission Agreement), as explained above, and (2) it is incongruent with the equitable nature of the Facility's estoppel argument, which, strictly speaking, is not about the Arbitration Agreement's enforceability but about Plaintiff being estopped to deny its enforceability. To the extent it may be material, however, it is erroneous.

The Arbitration Agreement clearly reflects the parties' mutual and concurrent promises to forfeit their respective rights to a jury trial in favor of arbitration. Without question, this is adequate consideration. *See Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 304, 468 S.E.2d 292, 300 (1996) ("Valuable consideration for a contract may consist of some forbearance given or detriment suffered."); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274–75 (4th Cir. 1997) ("O'Neil first argues the contract to arbitrate was not supported by adequate consideration because the agreement was not binding on the hospital. O'Neil's argument fails because its premise is mistaken. . . . It is true that courts have refused to enforce arbitration agreements where the agreement specifically allows

the employer to ignore the results of arbitration. That is not the case here, however. There is no such clause in the arbitration agreement signed by O'Neil, and we decline to read such a clause into the contract. *A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement*.") (citing *Rickborn*, *supra*) (internal citation omitted) (emphasis added); *id.* at 275 ("O'Neil's argument is especially misplaced in the circumstances of this case. Not only has the hospital consistently argued that it is bound by the arbitration agreement, it has, by virtue of this suit, shown its commitment to the arbitration process. Indeed, the only party to this case who has shown a desire to avoid binding arbitration is O'Neil herself.") (applying South Carolina law); *Towles*, 388 S.C. at 40, 524 S.E.2d at 846 n.4 (favorably citing *O'Neil* for the proposition that "a mutual promise to arbitrate constituted sufficient consideration to enforce an arbitration agreement where the employer proffered, and the employee signed, an employee handbook and acknowledgment form over three and one-half years after employment began."). Moreover, to require additional consideration for the Arbitration Agreement beyond the parties' mutual promises to arbitrate violates the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *See Concepcion*, 563 U.S. at 339.

II. At a minimum, the circuit court erred in denying the Facility's alternative request for limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability.

The Arbitration Agreement is valid on its face, containing Ms. Daniels's express representation of her authority to bind her mother, Ms. Porter. (*See* Arbitration Agreement.) The only evidence that Ms. Daniels lacked authority to bind Ms. Porter is her own affidavit (filed August 23, 2019, just three days before the hearing on Defendant's motion to compel arbitration (*See* Aff. of Vermell Daniels)) contradicting her prior representation that she had authority to sign the Arbitration Agreement on her mother's behalf. Without this affidavit, Plaintiff would have no evidence to upset the facial validity of the Arbitration Agreement. In other words, the testimony presented via this affidavit constitutes the only evidentiary basis for the trial court's denial of the Facility's motion to compel arbitration, and the Facility has thus far been forced to take it at face value, without any opportunity to examine the affiants.

Assuming, *arguendo*, the trial court did not err in denying the Facility's primary request for relief (as argued above), the interests of justice required that it allow the Facility to conduct targeted discovery on the Arbitration Agreement's enforceability based on agency or related concepts. Otherwise, the Facility is left in the impossible Catch-22 of, on the one hand, being vulnerable to Plaintiff's argument that it has not presented sufficient evidence to prove the Arbitration

Agreement is enforceable (whether by true agency,[17] estoppel,[18] or ratification,[19] each a fact-intensive inquiry), while, on the other hand, being vulnerable to

[17] A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). "An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145–46, 425 S.E.2d 764, 773 (Ct. App. 1992). The doctrine of apparent authority provides that a principal may be bound by the acts of it agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

[18] "When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances." *R & G Const.*, 343 S.C. at 433, 540 S.E.2d at 118 (Ct. App. 2000).

[19] Authority can be supplied to an agent retroactively by express or implied ratification. *See Brazell Bros. Contractors v. Hill*, 245 S. C. 69, 74, 138 S.E.2d 835, 837 (1964) ("Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent."). "Ratification, as it relates to the law of agency, may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into on his behalf by another who at the time assumed to act as his agent." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S. C. 75, 89, 124 S.E.2d 602, 608 (1962). It is not necessary for a principal to be present at the time of the commission of his agent's act in order for him to ratify that act. *See State v. Waldrop*, 73 S. C. 60, 52 S.E. 793, 795 (1905) ("The presiding judge ruled that he

Plaintiff's argument that it waived its arbitration rights by making use of the tools of litigation (i.e., discovery) to prove them.

It is manifestly unfair and unjust for the circuit court to rely on Ms. Daniel's unchecked affidavit without allowing the Facility any opportunity to question her about it or otherwise follow pertinent evidentiary leads. The circuit court itself makes much of the validity of a disputed arbitration agreement being a matter for judicial determination and of it being the Facility's burden to establish the validity of the Arbitration Agreement. It cannot be the case that the proponent of arbitration (who, it must be remembered, may well be attempting to vindicate a valid right to arbitrate that the arbitration opponent has wrongfully denied) has the burden to establish that right in a fact-based judicial proceeding in which it is disallowed use of the fact-finding tools (discovery procedures) available in other judicial proceedings. Obviously, if this were an action to determine the validity of a contract other than an arbitration agreement there would be no question about the Facility's ability to conduct discovery relevant to the facts/circumstances bearing on the contract's validity. To force the Facility into a situation where its arbitration rights are at the mercy of an unchecked affidavit (filed by an affiant directly contradicting her own prior representations) and where it cannot otherwise conduct relevant discovery to vindicate those rights without risking waiving them at the

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could ratify the act of the agent, whether he was present or not, and in this we see no error.").

same time as it proves them is not only patently unjust but also a violation of the FAA's requirement that arbitration agreements must be placed on equal footing with other contracts.

CONCLUSION

For the foregoing reasons, the Facility asks this Honorable Court to reverse the circuit court and stay this lawsuit in favor of arbitration (or remand the case to the trial court with instructions for it to do so) or, alternatively, remand the case to the trial court for it to engage in or allow any such other proceedings (including, without limitation, discovery) as may be necessary to properly determine and/or enforce the Facility's rights under the Arbitration Agreement.

Respectfully submitted,

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Dated: _____

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2019-CP-40-02295

Vermell Daniels
as Personal Representative of the Estate of Annie Porter,

Respondent,

v.

THI of South Carolina at Columbia, LLC
d/b/a Midlands Health & Rehabilitation Center,

Appellant.

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I, Russell G. Hines, of Young Clement Rivers, LLP, attorneys for Appellant, hereby certify that the **INITIAL BRIEF OF APPELLANT** and **APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** were served on all other parties to this matter by emailing the same (*see* attached copy of said email) to their counsel of record (identified below) on August 19, 2020:

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Subject:	Daniels v. THI (Appellate Case No. 2020-000501) -- Initial Brief of Appellant and Appellant"s Designation of Matter to be Included in the Record on Appeal
Date:	Wednesday, August 19, 2020 6:38:00 PM
Attachments:	Daniels v. THI (App. Case No. 2020-000501) -- Appellant"s Designation of Matter d. 8-19-20.pdf Daniels v. THI (App. Case No. 2020-000501) -- Initial Brief of Appellant d. 8-19-20.pdf image001.png

Attached please find the Initial Brief of Appellant and Appellant's Designation of Matter in the above-referenced appeal. They will be filed with the Court of Appeals via separate email.

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